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EDITORS' FOREWORD

On January 18, 2013, the *Villanova Law Review* hosted its annual Norman J. Shachoy Symposium. The title of the symposium was *Assessing the CISG and Other International Endeavors to Unify International Contract Law: Has the Time Come for a New Global Initiative to Harmonize and Unify International Trade?* The event brought together many of the world's leading experts on international contract law, and their contributions have been recorded in the pages that follow.

This Issue is organized in the same way as the symposium itself. Accordingly, the articles are presented as a series of "panels." For additional information about the symposium, including videos and presentation slides, please visit www.law.villanova.edu/lawreview.

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Introduction

AN OVERVIEW OF THE CISG AND AN INTRODUCTION TO THE
DEBATE ABOUT THE FUTURE CONVENTION

MICHAEL BRIDGE*

Ladies, Gentlemen, and Colleagues,

THE organizers of this Villanova conference have invited me to address to you a few remarks under the heading of “An Overview of the CISG and an Introduction to the Debate About the Future Convention.” It is a privilege to be asked to do this, but it is a matter of some regret that I cannot be with you. I am not sure whether I should say “Good Morning,” “Good Afternoon,” or “Good Evening,” as, while I am recording these remarks in rainy London, you will be hearing them in a rather colder Pennsylvania town where it may even be snowing. I shall at that time be in the rather warmer confines of Singapore. Let’s proceed to the introduction.

The CISG has now been in force for just over a quarter of a century, and has been adopted by nearly eighty states. Its progress has been described by some as slow, but I do not see it that way. By the standards of international uniform commercial law, that is a highly impressive achievement. It is bested only by the New York Convention on International Arbitral Awards. There is of course the case of marine carriage liability, but there you are looking at four different uniform models of liability: the Hague Rules, the Hague-Visby Rules, the Hamburg Rules, and the recent Rotterdam Rules. We of course are looking at only one uniform instrument. UNCITRAL will not rest on its laurels, I know this, and will continue to promote the adoption of the CISG and may even, in time, attract the adherence of the most intractable states, including my own country.

It is more than just a case of creating uniformity; the real challenge, I think, lies in maintaining uniformity. This is because a uniform law does not exist as inert matter on a printed page—it is, instead, a living thing in a stream of continuing legal development. One reason for the success of the CISG, apart from the commitment shown by UNCITRAL to promote it and to maintain it as a uniform instrument by means of a CLOUT system of reported cases and a digest of cited cases, has been the immense effort

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put in by the so-called “private sector” into the process of maintaining uniformity. Now, it is always invidious to set up particular cases, but obvious examples that spring to mind are the various websites dedicated to the task (of which the Pace website is perhaps the best known). Mention should also be made of the CISG Advisory Council, which seeks to give practical assistance to courts and tribunals in the form of measured and authoritative opinions on particularly important aspects of the CISG. I should here declare an interest as a member of that Council, but then go on to say that its process of monitoring developments and scrutinizing texts are exacting.

Turning now to case law and scholarship, it can hardly be doubted that the private programs of rendering national cases available in full-text form, particularly when the cases are translated into English (here I think Pace and Queen Mary University of London should take a bow), is proving to have a striking impact on the maintenance of uniformity. The cross-citation of authority, though not as fully developed as one would want it to be, is much more pronounced than in the early stages of development of the CISG. My impression is that decided cases are becoming both more predictable and more settled.

Let us contrast that with the case of legal scholarship. It is not clear to me how any tribunal can hope to deal with the deluge of material, in varying degrees of quality, that comes out and is published, often in full-text form, on websites. Article-by-article commentaries in the German tradition seem to me to have the best prospects of commending themselves to courts and tribunals. For all the rest, it seems to me, at any rate, to be as a matter of accident whether those adjudicating cases have accessed the material in law reviews and printed collections. Now, it would be pompous and ahistorical to seek a return to the Emperor Augustus’s *ius respondendi* (which of us would be Ulpian, Paulus, Papinian, and so on?), but there is an itch that prompts the thought.

We turn now to substantive law: sale and contract. In my opinion, the greatest handicap the CISG has to face as it promotes international uniformity lies in its isolation. It is not tethered to any other body of uniform private law. There is no true hinterland for international sales of the type that exists for national sales instruments. The problem is acute, because, to a very substantial extent, the separation of special sales law and general contract law is an artificial exercise. In national systems, the division only can be made in matters concerning property; this is one of the two areas, along with validity, that is actually excluded from the CISG, which otherwise deals in a plenary way with the rights and duties of seller and buyer arising out of a contract of sale. Enormous difficulties therefore arise in determining the scope within the CISG of doctrines such as mistake or misrepresentation. All this is before we even begin to survey the boundary between sale and tort law. This means that constructing a link to a body of

general contract law, as a minimum measure, is essential to the future welfare of the CISG.

Now, let us take a look at the UNIDROIT Principles of International Commercial Contracts. These, in my opinion, amount to a highly impressive achievement in promoting international uniform contract law. They nevertheless have their limitations. They suffer from the fact that they are avowedly not a contract code as such, though how this status is compatible with mandatory standards of good faith and cooperation in the Principles, as well as rules concerning contract formation and vitiated consent, is not something I have ever been able to determine. What is clear to me is that they cannot be shoehorned into the CISG as a supplementary source under Article 7(2), or as a usage under Article 9. They do not constitute the basis on which the CISG was devised (though they are somewhat compatible with CISG), and they do not proclaim themselves to be established usage, though some provisions, such as those dealing with payments, might individually in fact prove to be usage.

So there is further work that UNCITRAL can carry out. The case for taking up the reins and promoting a uniform contract law instrument is a compelling one. The Swiss Proposal seems to be timely. I do realize that there are political forces at work in this area, and that in a world of limited financial resources the decision to take this matter forward would represent a hard choice at the expense of other initiatives. If such an initiative were nevertheless to be taken, the gains arising out of its success would be very great. A venture into general contract law is the next logical step in the development of a uniform private commercial law. UNCITRAL would not and should not start with a clean slate; it does have the UNIDROIT Principles themselves, just as earlier it had the two Uniform Sales Laws of 1964. Moreover, and I cannot speak to the political feasibility of this proposal, a measure of joint action on the part of UNCITRAL and UNIDROIT might yield very impressive results.

The full measure of this initiative needs to be considered. There are various formats that might be used. The most modest possibility would be to have a legislative guide, akin to the one developed by UNCITRAL for secured transactions. Modest and quick, nevertheless, might not amount to the same thing. If an agreement could be reached on the general principles of contract law at a level of detail that was not merely bland, such as "let there be freedom of contract," it would be better to take the extra step by moving either to a model law or a uniform law convention. In my view, the latter approach, the uniform law convention, would have the greater chance of producing tangible results at the national level. The internal political will in a nation state to work on a model law would in many cases be rather weak, especially in the case of contract, whose familiar contents might not give many nation states an incentive to take action. As for the formulation of the UNIDROIT Principles themselves, with rule, comment,

and case illustration, this would not lie well with the current shape of the CISG and would probably not be suited to the treaty-making process.

There is a danger in delaying any such movement forward. The obvious danger comes from various and varying regional initiatives which may or will not be suited for integration with the CISG, and may even (as is the case with the Common European Sales Law) entail a departure from the basic rules of the CISG. This process is likely to continue, and to undermine the present uniformity achieved in sales law unless UNCITRAL intervenes. The Common European Sales Law seems to me to have acquired traction, or at least some traction, for two reasons. First, because it avoids the awkward exclusion of validity that at present has happened with the CISG. This is a good reason for intervening, but it does not justify rewriting the rules for some commercial sales as though these were quasi-consumer transactions. Second, the Common European Sales Law is presented as modern while the CISG is described as showing its age. Now, I do not agree with the second reason at all. The whole point of a convention treated as a living instrument is that it is more than just the words written on a diplomatic page. It develops and adapts. The process of arriving at international agreement is painful and arduous, and cannot be regarded as something to be done at quite regular intervals. This process gives rise to a new instrument that must go through the pains of clarification in litigation. A succession of new uniform sales laws attracting different groupings of adopting states, as is now the case for marine carriage liability, is plainly undesirable.

Let us finally turn to other possibilities. To start with, the New Year is a time for optimism, but calls for an international commercial code do seem to me to be premature, unless they are to be furthered by means of an instrument that is incremental and part of a long-sighted road map, coming in, as it were, in installments over a lengthy period. That apart, there is much to be said for beginning with issues concerning the transfer of ownership from seller to buyer. Property issues are frequently represented to be issues where securing international uniformity is profoundly difficult. As true as this might be in cases dealing with land and succession, it is in my belief far from true about the passing of property rights under a sale of goods transaction. Intention-based national systems move in the direction of exceptions based upon delivery. Delivery-based national systems move in the direction of exceptions based upon intention. In this area above all, we can draw considerable comfort from the comparative law adage that "profound difficulties of national approach are heavily outnumbered by the numbers of identical national solutions."

Now I think that is a proper point with which to conclude these remarks. May I wish you the best for the coming conference and the series of discussions that will be carried out in the next day or so. Thank you.

Articles

POSSIBLE FUTURE WORK BY UNCITRAL IN THE FIELD OF CONTRACT LAW: PRELIMINARY THOUGHTS FROM THE SECRETARIAT

RENAUD SORIEUL, EMMA HATCHER, & CYRIL EMERY*

IT is with pleasure that I have the opportunity to address the topic: *Assessing the CISG and Other International Endeavors to Unify International Contract Law*. My contribution to this issue will briefly consider the various standards relevant to international contract law today, together with the numerous proposals that have been made to further harmonize this important area of law. When considering opportunities for the future, we are often prompted to reflect upon our past achievements. In this regard I will examine the practical steps that UNCITRAL has undertaken to support the implementation of the CISG, and in particular the obligation created by Article 7 for the uniform interpretation of its provisions. I will close by introducing a proposal recently made by UNCITRAL to further efforts in this area. This discussion will, I hope, remind us that the creation of a harmonizing instrument is one possible first step toward actual harmonization which, in practice, requires effective implementation to be truly realized.

In 2013, we anticipate that membership of the CISG will surpass eighty states.¹ This is a remarkable achievement when we consider the history leading to its development. States from every geographical region, every stage of economic development and every major legal, social, and economic system are Parties to the CISG. Looking back in time, when we celebrated the twenty-fifth anniversary of the Convention in 2005, membership of the Convention was approaching seventy states.² Together,

* The authors hold official positions as international civil servants at the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL). The views expressed in this paper are those of the authors and do not necessarily reflect the views of the United Nations. The text is based on a presentation made by Renaud Sorieul on January 18, 2013. The oral style of the presentation has been kept.

1. At the time of writing this paper in January 2013, the number of state parties to the CISG stood at seventy-eight. See *Status 1980—United Nations Convention on Contracts for the International Sale of Goods*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Apr. 9, 2013).

2. See Yernej Sekolec, *Welcome Address, in CELEBRATING SUCCESS: 25 YEARS UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 18, 19 (2006), available at <http://www.cisg.law.pace.edu/cisg/biblio/sekolec.html>.

these seventy states were said to represent over two-thirds of the total volume of international trade. Since that anniversary, with the inclusion of Japan as a state party,³ and Brazil advanced in its domestic procedures to become a state party,⁴ the total volume of international trade represented is likely to be even greater still. These adoptions combined with the continued withdrawal of limiting declarations in Europe⁵ make it evident that the CISG remains highly relevant for states and the international sale of goods more broadly. We have to be careful not to upset such dynamics.

However, the CISG is not the only instrument that may provide rules for international contracts for the sale of goods. Indeed, a diverse range of instruments have developed since the birth of the CISG in 1980. These instruments include both binding and soft law texts, as well as global and regional initiatives. Depending on the location of contracting parties, and their choice of instrument, a range of rules—including domestic rules—potentially govern international contracts in today's modern commercial world. The CISG is complemented by its "sister" instrument—the United Nations Convention on the Limitation Period in the International Sales of Goods,⁶ regulating the period of time within which a party under a contract for the international sale of goods must commence legal proceedings against another party to assert a claim arising from that contract. There are, of course, a range of other international conventions, covering issues such as transport, finance, and e-commerce, to name a few that are relevant in determining legal rights and obligations in international transactions.

Further, the Unidroit Principles of International Commercial Contracts (Unidroit Principles), which were heavily influenced by the CISG and first released in 1994, recently went through a third revision.⁷ While assessing their actual influence is difficult, we are told that they are increasingly being used by contracting parties as the basis of contracts, not

3. See Press Release, United Nations Information Service, Japan Accedes to the United Nations Convention on Contracts for the International Sale of Goods (CISG), UNIS/L/120 (July 4, 2008), available at <http://www.unis.unvienna.org/unis/pressrels/2008/unis120.html>.

4. For information on the Brazilian Senate's approval of the Convention, see *Projecto de Decreto Legislativo, Nº 73, de 2012*, SENADO FEDERAL (Oct. 24, 2012), http://www.senado.gov.br/atividade/materia/detalhes.asp?p_cod_mate=104615.

5. For example, Latvia's withdrawal of its "written form" declaration in November 2012. See Press Release, United Nations Information Service, Latvia Withdraws "Written Form" Declaration Under the United Nations Convention on Contracts for the International Sale of Goods (CISG), UNIS/L/177 (Nov. 15, 2012), available at <http://www.unis.unvienna.org/unis/pressrels/2012/unis177.html>.

6. See United Nations Convention on the Limitation Period in the International Sales of Goods, as amended by the Protocol of 11 April 1980, Apr. 11, 1980, 1511 U.N.T.S. 99, available at http://www.uncitral.org/pdf/english/texts/sales/limit/limit_conv_E_Ebook.pdf.

7. See INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2010), available at <http://www.unidroit.org/english/principles/contracts/main.htm>.

just for the international sale of goods, but for a broad range of international commercial transactions. Much like the CISG, the Unidroit Principles have provided a source of inspiration for the reform of domestic contract laws in a diverse range of countries. However, reflecting their soft law status, the way the Unidroit Principles have been incorporated into domestic legislation has varied, somewhat limiting the potential unifying effect.

Finally, and of no less importance, are the range of regional initiatives currently being taken with respect to contract law approaches. Examples of work being done in this area include: the Draft Common European Sales Law (CESL), embodying contemporary efforts to harmonize contract laws in Europe; the Preliminary Draft Uniform Act on Contract Law developed in OHADA; and of course the Principles of Asian Contract Law (PACL), on which Professor Shiyuan Han is providing an update today.

My focus in this presentation does not include a detailed analysis of how these various instruments work together in providing a legal framework for international contracts. Needless to say, however, it is the simple existence of these numerous instruments which, at the very least, creates the impression of a complex web of international standards interacting with domestic and regional contract law. This has no doubt contributed to calls for further harmonization, and indeed unification, of international contract law.

The idea of further harmonization in the area of international contracts is not new. Indeed, even at the time of the diplomatic conference in 1980 that led to the finalization of the text of the CISG, when agreed positions could not be reached on certain elements even at that late stage, there were concerns about the scope of the CISG and the fact that it did not provide rules for the entire life-cycle of an international sales contract. The so-called “gaps” in the CISG have, of themselves, been the catalyst for calls for further work in this area. To some extent, through the work of Unidroit, that call has been answered in the form of the Unidroit Principles. In this sense, the Unidroit Principles can be considered a complementary instrument to the CISG. UNCITRAL acknowledged this relationship as part of its 2012 endorsement of the “use of the 2010 edition of the Unidroit Principles of International Commercial Contracts, as appropriate, for their intended purposes.”⁸

Professor Joachim Bonnell has written extensively on ideas to integrate and formalize the relationship between the CISG and the Unidroit Principles. His ideas include having UNCITRAL recommend use of the Unidroit Principles to interpret and supplement the CISG.⁹ As part of this recommendation, the Unidroit Principles would only be used where the

8. Rep. of the U.N. Comm’n on Int’l Trade Law, 45th Sess., June 25–July 6, 2012, ¶¶ 137–40, U.N. Doc. A/67/17; GAOR, 67th Sess., Supp. No. 17 (2012).

9. See Michael Joachim Bonnell, *The CISG, European Contract Law and the Development of a World Contract Law*, 56 AM. J. COMP. L. 1, 27 (2008).

issue at stake falls within the scope of the CISG and where the individual provisions of the Unidroit Principles referred to can be considered an expression of a general principle underlying both instruments. Professor Bonnell has suggested that such a formal recommendation would help to promote uniformity in the application of the CISG and at the same time ensure that, in practice, recourse to the Unidroit Principles is made only within the limits of, and on the conditions provided by, Article 7 of the CISG.¹⁰

UNCITRAL, however, has not embraced a solution of this type. It considered the issue of integration of the CISG and the Unidroit Principles in 2007, as part of its endorsement of the 2004 Principles.¹¹ It, however, observed that the CISG already contains comprehensive rules on contracts for the international sale of goods that, when properly applied, exclude application of the Unidroit Principles. The Commission further noted that questions concerning matters governed by the CISG not expressly settled in it were to be settled, as provided in Article 7 of the Convention, in conformity with the general principles on which the Convention was based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. Thus, the optional use of the Principles was subordinate to the rules governing the applicability of the CISG.

Professor Bonnell has also suggested reproducing the Unidroit Principles in the form of a model law to be applicable unless the parties have excluded its application.¹² Bonnell considers that the direct involvement of governments in preparing such a model law would enhance the authority of the Unidroit Principles. He also considers that, given the non-binding nature of a model law, such an approach would minimize the risk of the Unidroit Principles losing their innovative characteristics and being reduced to the lowest common denominator. This concept of a practical link between the CISG and the Unidroit Principles, in the form of a model law, which has proven to be a type of harmonizing instrument that is popular with states, is a suggestion worthy of further consideration in the current discussion.

With respect to Bonnell's proposed elevation of the Unidroit Principles to a model law, he considers that this could be a stand alone undertaking or alternatively undertaken in the context of a broader and even

10. *See id.*

11. *See Rep. of the U.N. Comm'n on Int'l Trade Law, 40th Sess., ¶ 211, U.N. Doc. A/62/17; GAOR, 62nd Sess., Supp. No. 17 (2007).*

12. *See Michael Joachim Bonnell, Towards a Legislative Codification of the Unidroit Principles?, in MODERN LAW FOR GLOBAL COMMERCE: PROCEEDINGS OF THE CONGRESS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW HELD ON THE OCCASION OF THE FORTIETH SESSION OF THE COMMISSION 230, 238 (2007), available at http://www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf.*

more ambitious project, such as the preparation of a “Global Commercial Code.”¹³

The idea of a Global Commercial Code re-entered the spotlight in 2000 through comments made by former Secretary of UNCITRAL Gerold Herrmann.¹⁴ He suggested that a Global Commercial Code would, through a single binding global reference law, provide a coherent and consistent body of commercial law and therefore certainty in the rights and obligations of parties to commercial transactions.

The development of a Global Commercial Code would involve review and consolidation of the alternative “competing” texts in the light of modern trends and usage. The broad acceptance and success of the CISG in so many countries is considered by a number of commentators to indicate a need for a Global Commercial Code. It is felt that the need for such an instrument has continued to grow with expansion in communications and cross-border commerce. It has been suggested that a Global Commercial Code could be prepared by UNCITRAL in cooperation with other interested international organizations.

While Professor Bonnell envisages the incorporation of the Unidroit Principles into a Global Commercial Code in the form of a model law or similar non-binding representation, an alternative view has been expressed by Professor Ole Lando. Professor Lando considers that, as part of a Global Commercial Code, the Unidroit Principles should be mandatorily applied to international contracts.¹⁵ To achieve maximum uniformity, in Lando’s view, a global market requires one law—including general principles of contract law—with the Unidroit Principles, to be elevated as binding upon courts and tribunals, an integral inclusion in that Code.

There will no doubt be continued debate about whether such harmonization is a worthy and achievable objective. As Professor Henry Gabriel has written,¹⁶ because uniform laws reduce transaction costs by providing known default rules, this is often reason enough to choose a uniform legal regime and justify the time-consuming and expensive efforts of undertaking uniform law projects at both the domestic and international levels.

Many commentators believe that the proliferation of diverse legal rules that have developed, and continue to be drafted today, imposes serious costs on enterprises doing business in more than one jurisdiction. At

13. Bonnell, *supra* note 9, at 27.

14. See Gerold Herrmann, *The Future of Harmonisation and Formulating Agencies: The Role of UNCITRAL*, in FOUNDATIONS AND PERSPECTIVES OF INTERNATIONAL TRADE LAW 28, 36 (Ian Fletcher, Loukas Mistelis & Marise Cremona eds., 2001).

15. See Ole Lando, *Tradition Versus Harmonization in the Recent Reforms of Contract Law*, 3 COLLECTED COURSES XIAMEN ACAD. INT’L L. 87, 95 (2010).

16. See Henry Gabriel, *Choice of Law, Contract Terms and Uniform Law in Practice*, in MODERN LAW FOR GLOBAL COMMERCE: PROCEEDINGS OF THE CONGRESS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW HELD ON THE OCCASION OF THE FORTIETH SESSION OF THE COMMISSION 224, 228 (2007), available at http://www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf.

the same time concerns have been expressed, for example by Gerhard Wagner,¹⁷ that harmonization efforts while of considerable merit, can remove the benefits of experimentation, learning, and adaptation facilitated by the range of diverse instruments that currently exist.

Along with varied views on the costs and benefits of harmonization efforts, there will also be continued debate about what form harmonization efforts should take and if the idea of a Global Commercial Code is a desirable and feasible objective.

The merits and drawbacks of international harmonization through hard and soft law have been discussed extensively in academia. The benefits of a soft law approach, with more open and flexible rules, able to be developed, updated, and amended without a formalized codification procedure are well articulated. When compared with a formal law-making process, known to be slow, expensive, and full of compromise, including concerns that legal certainty and foreseeability of outcomes may actually be sacrificed in order to achieve the harmonization goal, a soft law option may appear, *prima facie*, very appealing. There are, of course, persuasive counter-views that soft law rules, which do not go through a formalized codification procedure, with the broad participation of states with different legal traditions and expectations, lack the authority, security, and predictability that an internationally developed codification of black letter rules offers—and therefore do not ultimately achieve harmonization. These conflicting views will no doubt continue to be expressed and challenged—both within the academic communities and between states.

Recognizing these issues, even strong advocates of a Global Commercial Code such as Ole Lando have recognized that an iterative approach towards a Global Commercial Code may be necessary. Professor Lando suggests that the development of a set of core principles for international contract law would be a useful first step, and would lay the groundwork for a Global Commercial Code to be developed in due course.¹⁸

Lando has identified eight basic principles addressing: freedom of contract; *pacta sunt servanda*; informality; unilateral promises; good faith and fair dealing; reliance; reasonable foreseeability; and proportionality that could be introduced to “penetrate” the law of contracts of the world.¹⁹ If widely accepted, Lando suggests that these principles would be taken into account by national and international legislators when they reform their contract laws, and might even be applied by the courts to inter-

17. See Gerhard Wagner, *Transaction Costs, Choice of Law and Uniform Contract Law*, in MODERN LAW FOR GLOBAL COMMERCE: PROCEEDINGS OF THE CONGRESS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW HELD ON THE OCCASION OF THE FORTIETH SESSION OF THE COMMISSION 39, 40 (2007), available at http://www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf.

18. See Lando, *supra* note 15, at 95.

19. See Ole Lando, *CISG and its Followers: A Proposal to Adopt Some International Principles of Contract Law*, 53 AM. J. COMP. L. 379, 401 (2005).

pret or supplement international uniform law instruments and their domestic law.²⁰

Jan Smits has similarly advocated a step-by-step approach towards achieving uniformity. He considers that a model should be adopted which allows for amendment and correction at an early stage, allowing businesses to get acquainted with a new contract law regime before it is mandatorily applied.²¹ In this sense an optional contract code is suggested, which Smits considers would allow harmonization to take place from the “bottom up.”

My contribution to this discussion is not to promote a particular course of action or outcome in favour of another. What I will say, however, is that there are clearly a multitude of worthy ideas in circulation—and it is a legitimate and worthwhile exercise to examine and debate these ideas to determine what further work, if any, should be done in the area of international contract law. What I can add to this discussion is some comments on the process and elements that will be fundamental to successful work in this area and perhaps, more importantly, emphasize that the creation of a text or instrument is only one (possibly small) element in achieving harmonization. The implementation and creation of unified “laws in action” is a crucial element which is unfortunately often overlooked in such discussions.

If it was ultimately determined that a harmonization effort in some form or another would be of benefit, there are several ways in which UNCITRAL could uniquely contribute to the development of such a text.

With the benefit of a clear and established commitment and leadership from member states, where scarce resources are efficiently and effectively directed towards identified and agreed priorities, UNCITRAL is undoubtedly a competent forum to develop modern harmonizing instruments in this area. I am not going to recite a list of our achievements. I do note, however, that some instruments have, for a variety of reasons, enjoyed smoother paths to creation than others. UNCITRAL takes these experiences, learns from the various challenges and successes, and applies the knowledge gained in developing the approaches to the creation of new instruments.

Enjoying universal participation, UNCITRAL allows member states with varied expertise and experience to share with others, to express their aspirations or concerns, and to state the conditions under which they could accept certain texts. In doing so, UNCITRAL can ensure that any instrument developed reflects a fair balance between the competing do-

20. *See id.* at 384.

21. *See* Jan Smits, *Economic Arguments in the Harmonization Debate: The Practical Importance of Harmonization of Commercial Contract Law*, in *MODERN LAW FOR GLOBAL COMMERCE: PROCEEDINGS OF THE CONGRESS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW HELD ON THE OCCASION OF THE FORTIETH SESSION OF THE COMMISSION* 46, 52 (2007), available at http://www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf.

mestic legal traditions to ensure the use of these instruments facilitates international trade and provides predictable and fair outcomes for commercial entities.

The value of having the preparatory work being undertaken in the six official languages of the United Nations should not be underestimated. Such a process, while expensive and time consuming, aids understanding and interpretation of complex legal issues. This is clearly a better process than having a final text produced in a single language then later translated, with limited opportunities to ensure that concepts are accurately represented and understood.

A further element that will be crucial to the success of the development of any further harmonizing instrument on international contract law will involve effective engagement and coordination with the other private law formulating agencies. This is an area where UNCITRAL has worked successfully in the past in terms of drawing on the experience and expertise of other agencies, and making sure that we make the best use of our limited resources. I am confident that further work on contract law would allow us to build upon these established relationships, in particular with Unidroit, in the development of the desired instrument.

Of equal importance will be outreach to the regional integration and economic cooperation organizations and law reform bodies who are undertaking efforts in contract law reforms. We must recognize that these bodies have contemporary perspectives to bring to bear on the issues that require examination and we would be short-sighted not to avail ourselves of opportunities to engage with them and become informed of their experiences in these areas.

The combination of these processes may not, of themselves, ensure the development of the very “best” law (however such an assessment might be made) that might otherwise be produced in a purely academic exercise. However, I believe that UNCITRAL’s processes and work methods are capable of producing texts that can achieve harmonization, and that can facilitate international trade. That, of course, is the core business of UNCITRAL.

Formulating a harmonizing instrument, of itself, is only part of the story. Harmonization is only truly achieved through implementation—being the adoption of such laws, their consistent interpretation, and practical application to commercial transactions.

Promoting the adoption of texts is an increasingly important focus of UNCITRAL, including educating stakeholders on the existence and benefits of the respective harmonizing instruments produced under our auspices. A large part of this education process includes facilitating an understanding of the processes and costs of the effective realization of implementation and the actual adaptation requirements of the reforms (which can differ markedly from the perceived adaptation requirements). This process commonly happens through conducting and participating in

seminars (regional and national), briefing missions, and training courses, and often is delivered in conjunction with other organizations. The unfortunate fact is that, increasingly, the scarcity of resources sometimes prevent the secretariat from meeting the demand for these services, thereby undermining our ability to effectively promote texts.

As has been widely acknowledged, the preparation of a substantive uniform text is a time consuming and costly undertaking. As an example, I recall Gerold Herrmann stating that the estimated cost of preparation of the CISG to the United Nations alone was in the realm of 6 million U.S. dollars.²² In 1980, that was probably regarded as a considerable amount. In retrospect, it may also illustrate the cost-effectiveness of the process. In any event, we must ensure that adequate resources are available for promotion of the end product to relevant stakeholders after a significant investment—to not do so would be wasteful, and would jeopardize the ultimate success of the entire undertaking. This is a matter that we need to be mindful of, even in these early exploratory discussions considering harmonization opportunities.

Of course, without effective implementation, the adoption of any harmonizing instrument amounts simply to harmonization “on paper,” and may not have any practical positive impact on legal predictability sought by commercial parties to international transactions. Some commentators will suggest that only the existence of a competent court, binding on all states’ parties, to interpret an international instrument such as the CISG would achieve legal certainty and predictability of outcomes for commercial parties. Without such a court, they say that the application of laws will invariably differ between jurisdictions—reflecting not only the different legal traditions, and varied rules of procedure and evidence, but also the varied capacity of courts, resulting in different interpretations and solutions.²³

I would not agree that a single review court is necessary, but I think it is true to say that the CISG will, in the long run, only be successful in harmonizing the law of international sale of goods if courts in adopting states are consistent in interpreting its provisions.²⁴ If, instead, they insist on looking at the Convention through the lenses of their differing domes-

22. See Herrmann, *supra* note 14, at 33.

23. For a brief list of proponents of a review court, see Camilla Baasch Andersen, *Applied Uniformity of a Uniform Commercial Law: Ensuring Functional Harmonisation of Uniform Texts Through a Global Jurisconsultorium of the CISG*, in *THEORY AND PRACTICE OF HARMONISATION* 30, 39 n.36 (Mads Andenas & Camilla Baasch Andersen eds., 2011).

24. See, e.g., John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, in *PAGE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 115, 147 (2002), cited in Alexander S. Komorov, *Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: Some Remarks on Article 7(1)*, 25 *J.L. & COM.* 75, 75 (2006).

tic laws, thus creating divergent precedents, uniform law will not be achieved and the benefits of a harmonized regime will not be realized.²⁵

This is, of course, not a new observation, and the drafters of the CISG addressed this issue through Article 7, which, as you know, states that, in interpreting the Convention, “regard is to be had to its international character and to the need to promote uniformity in its application.”²⁶ While most of the CISG concerns the actions of contractual parties, this article imposes a public international law obligation on states, through their courts, to properly interpret the Convention. Unfortunately, many states appear to forget or fail to realize that they have a treaty obligation in this area, giving no further thought to the Convention after its adoption and leaving questions of interpretation entirely to courts with no guidance or instruction.

There is general agreement that the Article 7 obligation requires interpretation that is autonomous, without regard to national law, and that takes into account foreign case law.²⁷ So, are courts interpreting CISG cases in line with this standard? When looking at this question, scholars tend to take two approaches.

The first method is primarily quantitative, basically counting the number of cases that cite foreign authorities. The idea here is that if a court cites foreign case law, it is obviously meeting part of the Article 7 requirement. Under this test, there is little evidence that states and their courts are achieving great success. While the total number of CISG cases identified as citing foreign case law has risen, this number as a percentage of all identified CISG cases appears to have remained static from the late 90s until today.²⁸ Thus, in relative terms, foreign case law is not being cited any more today in CISG cases than it was in the last millennium.

A second common method to examine whether courts are interpreting the CISG in line with Article 7 is to track the persistence of homeward bias in significant case law. This is, obviously, a more qualitative approach. I probably don’t have to tell this audience, but courts are not faring much

25. See, e.g., John O. Honnold, *The Sales Convention in Action—Uniform International Words: Uniform Application?*, 8 J.L. & COM. 207, 208 (1988).

26. U.N. Comm’n on Int’l Trade Law, United Nations Convention on Contracts for the International Sale of Goods art. 7, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG], available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.

27. See, e.g., Spiros V. Bazinas, *Uniformity in the Interpretation and the Application of the CISG: The Role of CLOUT and the Digest*, in CELEBRATING SUCCESS: 25 YEARS UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 18, 19 (2006), available at <http://www.cisg.law.pace.edu/cisg/biblio/bazinas.html>; JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 92 (Harry M. Flechtner ed., 4th ed. 2009); Ingeborg Schwenzer & Pascal Hachem, *Article 7*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 120, 124 (Ingeborg Schwenzer ed., 3rd ed. 2010).

28. See Larry A. DiMatteo, *Case Law Precedent and Legal Writing*, in CISG METHODOLOGY 113, 130 (André Janssen & Olaf Meyer eds., 2009).

better under this test. Even in states with highly developed legal systems, there is still a significant amount of case law exhibiting a startling level of homeward bias.²⁹

I don't mean to paint too grim of a picture. The CISG is widely used and well applied in many jurisdictions. Furthermore, as mentioned, the total number of cases citing the CISG and citing foreign case law is rising, and there is very promising anecdotal and statistical evidence that legal practitioners are becoming more familiar with the CISG and more amenable to its use.³⁰ That said, lack of visible progress in implementation is disturbing and, what is more, neither of the scholarly approaches I have mentioned take into account the even less-visible situation where courts apply national law in cases where the CISG clearly should apply, a practice that unfortunately persists.³¹

While the CISG can be considered a success when measured by the number of adopting states, its huge impact on domestic law reform, or the total number of cases citing its provisions, there is less certainty and great room for improvement if we are to consider the quality of the cases implementing the Convention. UNCITRAL and the UNCITRAL secretariat have long been aware of the potential problems caused by poor implementation of the CISG and have pursued multiple strategies in attempting to aid states and courts in implementation. The two most significant are the Case Law on UNCITRAL Texts (CLOUT) system and the UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (CISG Digest).

The CLOUT system is a publicly accessible collection of case abstracts on UNCITRAL texts, in particular the CISG.³² The theory behind the CLOUT system is simple enough. By making abstracts of cases interpreting UNCITRAL texts, in this case the CISG, available in the six UN languages, it makes it possible for courts and legal practitioners around the globe to take those decisions into account, thus facilitating autonomous and uniform interpretation. There are now several other admirable sys-

29. See, e.g., Franco Ferrari, *Homeward Trend: What, Why and Why Not*, in CISG METHODOLOGY 171, 185–92 (André Janssen & Olaf Meyer eds., 2009) (detailing example of homeward trend in U.S. case law).

30. See Lisa Spagnolo, *Green Eggs and Ham: The CISG, Path Dependence, and the Behavioural Economics of Lawyers' Choice of Law in International Sales Contracts*, 6 J. PRIVATE INT'L L. 417, 424 n.35 (listing studies showing increased exposure in American law schools); *id.* at 427–28 (noting decreases in opting-out rates in United States and Europe).

31. While evidence of this sort is difficult to gather, practitioners and judges at UNCITRAL-sponsored trainings often anecdotally recount instances where courts should have applied the CISG, but it was not plead, or it was ignored by the court. This type of anecdotal evidence is also found in academic literature, where it is asserted that the CISG is little-known in some contracting states. See Spagnolo, *supra* note 30, at 421–23 (citing various academic papers).

32. See *Case Law on UNCITRAL Texts*, UNCITRAL, http://www.uncitral.org/uncitral/en/case_law.html (last visited Apr. 9, 2013).

tems that complement CLOUT and also make consideration and application of foreign case law on the CISG possible.

In general, these case databases have been very successful in compiling case information. The CLOUT system, which relies on a network of national correspondents for case abstracts, currently has over 700 CISG cases. The Pace CISG database has over 2,500.³³ Despite these numbers, there are obvious limits on what these databases can accomplish in terms of harmonizing interpretation.

First, there are now so many cases in these databases that courts attempting to evaluate the foreign case law found in them may suffer from information overload, making the task of interpreting the CISG more difficult while it should be easier. Secondly, and I will say more on this in a moment, the availability of more cases by definition also means the availability of more divergent views, all of which should be considered by a court when rendering a decision, once again increasing the difficulty of interpretation.

In addition, with regards to CLOUT specifically, there is always the issue of the timeliness of reported abstracts. This delay is not only due to dependence on national correspondents but also the significant resources required for translation and publication. The existence of sufficient resources is a significant issue for the CLOUT system, and I imagine for the other databases as well. Over time, lack of resources has meant that it is difficult to keep CLOUT's interface up to date, a deficiency which hinders usability. This problem has become so significant of late that the UNCITRAL secretariat has redirected a small portion of its limited resources to an update of CLOUT's user interface. While we hope that this update invigorates CLOUT in the short term, the system's long-term viability will be dependent on increased financial support from states and the commitment and energy of national correspondents.

Some of the CLOUT system's limitations have been addressed by UNCITRAL's other major effort in this area, namely the CISG Digest, a project with which many of the speakers at this conference have assisted over the years.³⁴

The Digest is a significant contribution to uniform interpretation in that it significantly reduces the burden on courts and legal practitioners to search and analyze all CISG jurisprudence. On an article-by-article basis it concisely digests cases, highlighting divergences and identifying interpretive trends. In this way, the CISG Digest certainly helps address the problem of information overload and, at the very least, enables courts to quickly identify and assess interpretative divergences. The latest version of

33. See Albert Kritzer, *CISG Database*, INST. INT'L COM. L., <http://www.cisg.law.pace.edu> (last updated Apr. 3, 2013).

34. See United Nations, UNCITRAL DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (2012), available at http://www.uncitral.org/uncitral/en/case_law/digests.html.

the Digest was published electronically last year and is now also available in print thanks to the University of Pittsburgh Journal of Law and Commerce.

Nonetheless, while both the CLOUT system and the Digest are important strategic tools to assist in uniform interpretation, the lack of substantive progress I mentioned earlier can only be an indication that additional efforts are required. Certainly, interpretive divergences remain. Consider, for example, the impact of differing approaches on key concepts and issues such as burden of proof, estoppel, and whether computer software is a “good” covered by the Convention.³⁵ The fundamental hurdle seems to exist in moving from a situation where foreign case law is available and cited to one in which courts in practice always refer to the CISG when it is applicable and are effectively guided in interpreting its provisions in a uniform manner.

Neither the CLOUT system nor the CISG Digest can assist a court if it simply does not know the CISG is the applicable law in a certain case. If a court fails to apply the CISG in this scenario, it is not only a problem of an incorrect legal outcome and a blow to harmonization, but it is a scenario placing the state in violation of its treaty obligations. Furthermore, even if a court does apply the CISG, simply having notice of foreign case law and divergent approaches does not necessarily arm it to choose the approach which is likely to be more harmonizing in the long run.

The accepted wisdom is that foreign CISG case law should be evaluated by courts on a qualitative basis and that better reasoned and more commercially sound approaches should prevail over time.³⁶ This assertion is necessary because it is simply not possible that foreign CISG case law precedent could be assessed and weighed in the manner used by common law courts considering domestic decisions. If this assertion were conclusively true in practice, it would be a superlative method for unifying interpretation.

In fact, however, given the time and resource constraints felt by most courts, one cannot help but wonder if in many cases the wide availability of foreign case law and knowledge of divergent approaches simply serves as a mechanism for a court to pick and choose an approach with which it is most comfortable. If that is the case, I am afraid that choice will likely be the one that reflects the largest degree of homeward bias and not the one that is most well-reasoned.

Even if courts are more responsive to the goal of unification than I have suggested, it is difficult to imagine that judges from various legal systems find it equally easy to weigh the reasoning of foreign courts.

35. See Bazinas, *supra* note 27, at 25.

36. See, e.g., Francesco G. Mazzotta & Camilla Baasch Andersen, *Introduction: The Nature of CISG Case Law: The Key to Uniformity and Many Persuasive Examples for Counsel to Draw From*, in A PRACTITIONER'S GUIDE TO THE CISG xvii, xx (Camilla Baasch Andersen et al. eds., 2010).

Even if courts are capable of undertaking a qualitative review of foreign cases, relying solely on that case law without further investigation or guidance will mean the failure to take into account legal reasoning from jurisdictions whose courts do not produce very detailed legal opinions. Courts in many civil law jurisdictions, including France, produce very brief opinions that may not stand up to more detailed common law opinions even if the legal reasoning behind them is quite sound.³⁷ Less sophisticated reviews of the case law may also give undue weight to the legal reasoning of courts that hear numerous disputes and, correspondingly, produce numerous opinions.

UNCITRAL has long considered the potential value for promoting the uniform interpretation of the CISG and other texts with something beyond a simple and neutral case reporting system. In 1988, it considered a proposal to establish a permanent editorial board that would have compared and analyzed decisions. More recently, when approving the CISG Digest it considered a proposal that the Digest should provide more detailed guidance as to the interpretation of the CISG. Neither of these proposals was adopted.³⁸ In both cases, the Commission was concerned that any evaluation might lead to criticism of national court decisions. It also noted that an editorial board would be difficult to organize in a way assuring viewpoints from all Convention state parties.³⁹ In sum, since the CISG is incorporated into national law, it is easy to understand how the notion of an outside body weighing national court decisions might raise sovereignty concerns, especially if that body does not include a representative from every state party.⁴⁰

The idea of developing an interpretive guide on how provisions of the CISG should be construed (possibly in a similar form to the UNCITRAL legislative guides relating to insolvency and security interests, or recommendations regarding arbitration rules and particular aspects of the New York Convention) is a suggestion that may warrant consideration. However, at this point in the maturity of the instrument and its jurisprudence, this idea would likely raise similar concerns about the need to evaluate national court decisions. It is further recognized that, even in the form of a declaration by the United Nations General Assembly itself, such guidance would at best be persuasive, but not binding, on courts. Nevertheless, there may be merit in examining what value such explanatory memoranda may bring to the CISG or to any future harmonizing effort in the field of international contract law.

37. See Felemegas, *supra* note 24, at 254.

38. See Bazinas, *supra* note 27, at 21, 23.

39. See Rep. of the U.N. Comm'n on Int'l Trade Law, 21st Sess., Apr. 11–Apr. 20, 1988, ¶¶ 107–109, U.N. Doc. A/43/17; GAOR, 43rd Sess., Supp. No. 17 (1988).

40. See Joshua D. H. Karton & Lorraine de Germiny, *Can the CISG Advisory Council Affect the Homeward Trend?*, 13 VINDOBONA J. INT'L COM. L. ARB. 71, 74 (2009).

In the meantime, it is evident that outside actors have been able to develop some of these ideas. As a self-appointed group of experts, the CISG Advisory Council constitutes, of course, a valuable initiative to provide the kind of considered interpretive advice on CISG issues long needed.⁴¹ This advice, however is unofficial and non-binding, and this approach, unfortunately, does not resolve the sovereignty issues at play when looking at the issue from the UNCITRAL perspective.

In addition to its efforts to provide case law and digests, UNCITRAL and the secretariat have adopted other smaller-scale strategies for encouraging uniform interpretation of the CISG. These strategies include ad hoc provision of judicial training, support of educational efforts, such as the Vis Moot, and dissemination of information on scholarly works via the UNCITRAL bibliography. These efforts, however, are modest and are not always a very direct method of assisting courts.

For all of these reasons, the UNCITRAL secretariat has proposed a new strategy for implementation of commercial law reform at the domestic level. In the context of the High-Level Meeting on the Rule of Law, held in September of last year at the 67th Session of the United Nations General Assembly, the UNCITRAL secretariat proposed to states the establishment of national centres of expertise in the field of commercial law. Understanding the strong connection between economic development and rule of law, the General Assembly has acknowledged the importance of UNCITRAL's work in promoting rule of law in the economic field as an important component of promoting the rule of law more generally.

The goal behind the proposed national centres would be to strengthen the nexus between international rule-making in the field of commercial law and national legislation, policy-making, and implementation. This would include, of course, implementation of the CISG, one of UNCITRAL's most prominent texts. As a related proposal, the secretariat described specific functions that could take place in the context of these national centres. Explicitly, they could serve as a mechanism to (a) collect, analyze, and monitor national case law related to UNCITRAL texts, (b) report the findings to UNCITRAL, and (c) address the need of the judiciary to better understand the internationally prevailing application and interpretation of UNCITRAL standards and achieve effective cross-border cooperation.

This is a proposal that obviously goes beyond the current national correspondent system of CLOUT. The idea is that these national centres could serve as a direct resource for judges and practitioners. In fact, these centres could function very similarly to the permanent editorial board I mentioned earlier or even as a kind of domestic CISG advisory body, even endorsing CISG Advisory Council opinions if desired. In addition, they could review decisions and communicate directly with courts failing to ap-

41. See CISG ADVISORY COUNCIL, <http://www.cisgac.com> (last visited Apr. 9, 2013).

ply the CISG where required. By placing these centres at the national level, sovereignty concerns would be mitigated. Furthermore, the staff or researchers in these centres would be better situated to understand domestic law concerns than an international body. Certainly, with its small staff and limits in how it can interact on domestic law issues, the UNCITRAL secretariat has proven to be not adequately resourced or appropriately situated to assist courts globally in the task of uniform interpretation. That said, the secretariat would have an important residual role in the context of a network of national centres of expertise, coordinating their activities and continuing to offer the CLOUT system and other services.

A system of national centres would, of course, raise possible concerns related to homeward bias, but if these centres are staffed by experts in the international trade law field and mandated explicitly to promote uniform implementation of texts such as the CISG, these concerns should be minimized.

The biggest obstacle to such a system is, of course, resources. One of the advantages of UNCITRAL texts is that they do not have direct financial implications for contracting states. That said, states are required to fulfill their international law obligations in any case, including those found in CISG Article 7. These national centres of expertise are one proposed method for assisting them to do that since other, lower-cost, methods have not entirely succeeded. The centres themselves would constitute a cost, and there would also be costs for the UNCITRAL secretariat related to coordination, not to mention the ongoing costs related to its continuing implementation efforts, such as CLOUT.

When addressing this proposal to states, the UNCITRAL secretariat noted that such centres, considering their strong connection to the development of economic rule of law, could rely on the assistance of multilateral and bilateral donors to ensure sufficient human and financial resources. There are many donors available to fund projects related to the rule of law, particularly projects in developing countries and those with economies in transition.

I hope this proposal is of interest to states as they consider possible ways forward in the area of uniform contract law. These centres could be valuable resources for the dissemination and implementation of any texts to be developed or already developed in this area. Furthermore, they would act to continue the development at the national level of international trade law expertise, something necessary to keep the work of bodies such as UNCITRAL vibrant and relevant. Whether or not this proposal is acted upon by states, I hope it will encourage discussion and the development of other strategies as states continue to look at the development of rule of law and uniform international trade law. At the least, I hope it will remind states of their ongoing treaty obligations under the CISG and other trade law instruments.

So, in closing, the calls for further harmonization of contract law raise a number of interesting issues about additional work that can be done in this important area. In considering some of the options that have been proposed, we are reminded of the challenges we have faced not only in the creation of such harmonizing instruments but also the adoption and, possibly most importantly, the implementation of such instruments. We can draw upon the experiences of the implementation of the CISG to chart a way forward for the development of any such future projects in this area.

The challenges that we face in developing a truly harmonizing instrument are well recognized. It is up to us, collectively, to develop creative responses to ensure that the potential of harmonization efforts are fully realized. These opportunities are not only important in considering the creation of new harmonizing instruments, but allow us to reflect upon how well we are doing in fulfilling our mandate with respect to existing instruments and identifying what more can be done. To be effective, meeting these challenges will require the development of innovative solutions, adequate resourcing, and a strong commitment not only from organizations such as UNCITRAL, but also from member states and the broader academic and legal community. Let us hope that, when the opportunity next presents itself for an examination of these issues, we can report concrete progress in this area.

A NEW GLOBAL INITIATIVE ON CONTRACT LAW IN UNCITRAL:
RIGHT PROJECT, RIGHT FORUM?

KEITH LOKEN*

I. IS A NEW GLOBAL INITIATIVE NEEDED AND FEASIBLE?

AT its 45th meeting last summer, the United Nations Commission on International Trade Law (UNCITRAL) considered a proposal for possible future work in the area of international contract law.¹ The proponents suggested that there is an urgent need for a new “global initiative” in UNCITRAL to further harmonize contract law in order to significantly boost international trade. Although the chair of the Commission ultimately ruled that there was a prevailing view in the room in support of further exploratory work in this area, the response among participating states was quite mixed. A number of delegations—including that of the United States—expressed strong reservations about undertaking such a project.²

The U.S. government has considered carefully the proposal presented to the Commission. We have consulted extensively with key domestic stakeholders on this issue. In October 2012, it was the subject of a panel at the annual meeting of the State Department’s Advisory Committee on Private International Law (which includes academicians, practitioners, and representatives of business interests).³ At that meeting, the proposal made to UNCITRAL was not supported. The Executive Committee of the Uniform Law Commission (ULC)—the organization that co-developed, with the American Law Institute, the Uniform Commercial Code in the United States—recently adopted a resolution stating that the ULC op-

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1. See UNCITRAL, *Possible Future Work in the Area of International Contract Law: Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law*, U.N. Doc. A/CN.9/758 (May 8, 2012) [hereinafter *Swiss Proposal*].

2. A summary of the debate is contained in the Report of the United Nations Commission on International Trade Law. See Rep. of the U.N. Comm’n on Int’l Trade Law, 45th Sess., June 25–July 6, 2012, ¶¶ 127–32, U.N. Doc. A/67/17; GAOR, 67th Sess., Supp. No. 17 (2012) [hereinafter Report of 45th Session] (summarizing debate). Several delegations expressly objected to the ruling of the Chair as not accurately reflecting the opinions voiced during the debate and—unusually—those objections were recorded in the official Report of the Commission.

3. The State Department’s Advisory Committee on Private International Law (ACPIL) holds a plenary meeting annually. See *Private International Law*, U.S. DEP’T OF STATE, www.state.gov/s/1/c3452.htm (last visited Apr. 4, 2013) (providing information regarding ACPIL, including summary of October 11–12, 2012 annual meeting).

poses the proposal made in UNCITRAL because the project is very unlikely to be successful and because an attempt to develop the type of instrument proposed would not be a prudent use of resources.⁴

On the basis of these consultations and other analysis, it is our view that the time is not right for undertaking a global initiative. We reach this conclusion because:

1. The need for an initiative of the scale proposed has not been demonstrated (taking into account, *inter alia*, the availability of the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles)⁵ and the ability of parties to designate those Principles as the law governing their contract).

2. We are not aware of demand for such a major initiative from U.S. parties to international commercial contracts.

3. Even if the international legal system would be better if a broad instrument of the sort advocated by the proponents were successfully drafted and adopted, it is likely that the attempt to draft and adopt such an instrument would expend considerable institutional resources of UNCITRAL and its member states, detracting from UNCITRAL's continuing efforts to achieve broader adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG), as well as other projects of UNCITRAL. Moreover, we conclude that such an initiative would have little chance of coming to a successful conclusion at this time.

A. *Need for a New Global Initiative?*

Currently, the global harmonization and unification of international commercial law relies primarily on two key international instruments: the CISG⁶ and the UNIDROIT Principles.

With respect to the CISG, UNCITRAL is engaged in an ongoing effort to promote the treaty's worldwide ratification and uniform implementation. The CISG was the culmination of a half-century of work by the international community, including a decade of work in UNCITRAL. At the 2005 UNCITRAL Colloquium celebrating the 25th anniversary of the CISG, the Convention was recognized as probably the single most successful treaty in the history of modern transactional commercial law.⁷ Since that colloquium, fifteen more states have become party to the Convention,

4. See UNIF. LAW COMM'N, MINUTES: MID-YEAR MEETING OF THE EXECUTIVE COMMITTEE (2013), *available at* http://www.uniformlaws.org/shared/docs/executive/2013jan12_EC_Min_Midyear_Final.pdf.

5. See INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2010), *available at* <http://www.unidroit.org/english/principles/contracts/main.htm>.

6. See United Nations Convention on Contracts for the Int'l Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG], *available at* <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.

7. See Herbert Kronke, *The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond*, 25 J.L. & COM. 451, 458–59 (2005).

bringing the total number of states to seventy-eight.⁸ The success of the Convention can be gauged by the fact that it has proved acceptable to nations with different legal systems, varying levels of economic development, and diverse political systems. It is said that the CISG has become the *lingua franca* of sales.⁹

As was discussed during the 2005 UNCITRAL Colloquium, the focus of UNCITRAL in this area has been to promote global awareness of the CISG and to facilitate uniform interpretation and application of its provisions.¹⁰ Pursuant to decisions by the Commission, including in 1998 and 2009, the UNCITRAL Secretariat is devoting resources to developing and maintaining the CISG Digest and Case Law on UNCITRAL Texts (CLOUT) in the six official languages of the United Nations.¹¹ The system relies on a network of national correspondents designated by those states that are parties to the CISG and other instruments.¹²

The 2005 UNCITRAL Colloquium also highlighted the widespread use of the UNIDROIT Principles as a complement to the CISG. In 2007 and 2012, UNCITRAL concluded that the 2005 and 2010 editions, respectively, of the Principles “complement a number of other instruments including the United Nations Convention on Contracts for the International Sale of Goods (1980),” and further “commend[ed]” the use of the Principles as appropriate for their intended purposes, which are reflected in the Principles’ Preamble:

They shall be applied when the parties have agreed that their contract be governed by them.

They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like. . . . [And] when the parties have not chosen any law to govern their contract.

They may be used to interpret or supplement international uniform law instruments. . . . [And] to interpret or supplement domestic law.

8. See *Status 1980—United Nations Convention on Contracts for the International Sale of Goods*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Apr. 4, 2013) (listing parties to CISG).

9. See, e.g., Hiroo Sono, Contract Law Harmonization and Non-Contracting States: The Case of the CISG 1 (July 9–12, 2007), available at http://www.uncitral.org/pdf/english/congress/Sono_hiroo.pdf (providing text of presentation given at UNCITRAL Congress Modern Law for Global Commerce).

10. See Jernej Sekolec, *25 Years UN Convention on Contracts for the International Sale of Goods: Welcome Address*, 25 J.L. & COM. xvii (2006), available at <http://www.cisg.law.pace.edu/cisg/biblio/sekolec.html>.

11. See Report of 45th Session, *supra* note 2, ¶¶ 149–53, 157.

12. See *id.* ¶¶ 150–52.

They may serve as a model for national and international legislators.¹³

The UNCITRAL 1985 Model Law on International Commercial Arbitration¹⁴ and the 2010 UNCITRAL Arbitration Rules¹⁵ specify that the arbitral tribunal shall apply the rules of law designated by the parties as applicable to the dispute. In this context, the term “rules of law” refers to non-state law such as the UNIDROIT Principles. Moreover, there are contemporary international efforts to promote the availability and use of rules of law. For example, the Hague Conference on Private International Law is developing principles on choice of law in international commercial contracts, and those draft principles endorse giving effect to the choice of parties to have their contract governed by “rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules.”¹⁶ That definition of rules of law includes the UNIDROIT Principles, enabling parties who so desire to have their contracts governed by the UNIDROIT Principles.¹⁷

13. See INT’L INST. FOR THE UNIFICATION OF PRIVATE LAW, *supra* note 5, at pmb1. (providing 2010 Commission decision); Rep. of the U.N. Comm’n on Int’l Trade Law, 40th Sess., June 25–July 12, 2007, ¶ 213, UN Doc. A/67/17 (Part I); GAOR, 62d Sess., Supp. No. 17 (2007) (reporting 2007 Commission decision).

14. See UNCITRAL, UNCITRAL Model Law on International Commercial Arbitration art. 28 (1985) (as amended in 2006), *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

15. See UNCITRAL, UNCITRAL Arbitration Rules art. 35(1) (2010) (as revised in 2010), *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html.

16. HAGUE CONFERENCE ON PRIVATE INT’L LAW, DRAFT HAGUE PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL CONTRACTS art. 3 (2012), *available at* http://www.hcch.net/upload/wop/contracts2012principles_e.pdf. The Draft Hague Principles were initially approved by the Special Commission on Choice of Law in International Contracts held in The Hague on November 12–16, 2012. The Principles will be considered for final approval by the Council on General Affairs and Policy (the Conference’s governing body).

17. Many institutional arbitration rules permit the tribunal to apply directly the UNIDROIT Principles even in the absence of a choice of law. For example, Article 21(1) of the ICC Rules provides “[t]he parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.” See INT’L CHAMBER OF COMMERCE, RULES OF ARBITRATION art. 21(1) (2012), *available at* <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/ICC-Rules-of-Arbitration/#top>; see also INT’L CTR. FOR DISPUTE RESOLUTION, ARBITRATION RULES art. 28(1) (2010), *available at* <http://www.internationalarbitrationlaw.com/icdr-arbitration-rules/>; LONDON COURT OF INT’L ARBITRATION, LCIA RULES art. 22(3) (1998), *available at* http://www.bu.edu/lawlibrary/PDFs/research/portals/pdfs/lcia_rules_arbitration_english.pdf; AUSTL. CTR. FOR INT’L COMMERCIAL ARBITRATION, ACICA ARBITRATION RULES, art. 34.1 (2005), *available at* http://www.acica.org.au/downloads/ACICA_Arbitration_Rules.pdf; NETH. ARBITRATION INST., NAI ARBITRATION RULES art. 46 (1998), *available at* http://www.asser.nl/default.aspx?site_id=6&level1=14433&level2=14445; STOCKHOLM CHAMBER OF COMMERCE, SCC ARBITRATION RULES 2010 art. 22(1) (2010), *available at* http://www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler%20eng%20ARB%20TRYCK_v1_100927.pdf; Vi-

We do not think the case has been made that the current international framework is inhibiting trade or presents transactional problems to such a degree that a major international negotiation—which assuredly would be a difficult, lengthy exercise—is warranted. We have thus far not heard requests for such an initiative from U.S. practitioners or their clients—those directly involved in international sales transactions. Moreover, there is a risk that a global undertaking to revise and expand the CISG could have a chilling effect on further action by states to ratify or accede to the 1980 instrument.

As discussed at the 2005 Colloquium, the CISG was never intended to stand alone as a comprehensive framework: from the outset states envisioned that it would coexist with, and complement, other sources of law, as well as with private self-regulation and party autonomy.¹⁸ More recently, at the 2007 UNCITRAL Colloquium on Modern Law for Global Commerce it was observed that parties are increasingly selecting the CISG to govern their international contracts.¹⁹ Initiating a new global initiative at this point in time designed to change the CISG could slow that promising trend.

ENNA INT'L ARBITRAL CTR., RULES OF ARBITRATION & CONCILIATION art. 22(2) (2012), *available at* <http://www.viac.org.vn/Uploads/Quy%20tac%202012%20Eng%20-%20Final.PDF>; WORLD INTELLECTUAL PROP. ORG., WIPO ARBITRATION, MEDIATION, & EXPERT DETERMINATION RULES & CLAUSES art. 59(a) (2009), *available at* http://www.wipo.int/freepublications/en/arbitration/446/wipo_pub_446.pdf.

On a regional level, the 1994 Inter-American Convention on the Law Applicable to International Contracts states in Article 9 that “[i]f the parties have not selected the applicable law The Court . . . shall also take into account the general principles of international commercial law recognized by international organizations.” Inter-American Convention on the Law Applicable to Int’l Contracts art. 9, Mar. 17, 1984, 33 I.L.M. 732. Article 10 further recognizes that “principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case.” *Id.* art. 10. The references to general principles of international commercial law include the UNIDROIT Principles. On a domestic level, Comment 2 to U.C.C. § 1-302, as revised in 2001, states that “parties may vary the effect of [the Uniform Commercial Code’s] provisions by stating that their relationship will be governed by recognized bodies of rules or principles applicable to commercial transactions . . . [such as] the UNIDROIT Principles of International Commercial Contracts.” U.C.C. § 1-302 cmt. 2 (2001).

18. *See generally* Filip De Ly, *Sources of International Sales Law: An Eclectic Model*, 25 J.L. & COM. 1 (2005).

19. Several papers presented at the UNCITRAL Congress on Modern Law for Global Commerce at the 40th Annual Session of UNCITRAL (Vienna, July 9–12, 2007) addressed the CISG’s increased use. *See, e.g.*, Harry M. Flechtner, *Changing the Opt-Out Tradition in the United States*, (July 9–12, 2007), *available at* <http://www.uncitral.org/pdf/english/congress/Flechtner.pdf> (providing text of presentation); Eckart Brödermann, *The Practice of Excluding the CISG: Time for Change?* (July 9–12, 2007), *available at* <http://www.uncitral.org/pdf/english/congress/Broedermann-rev.pdf> (same).

B. *Feasibility of a New Global Initiative?*

It is also necessary to consider whether it is feasible to achieve the ambitious goals that the proponents of the initiative have identified. If this ambitious initiative were launched, what might be achieved?

It is not clear what the expected product of global negotiations might be.²⁰ The topics of contract law that have been proposed for such an initiative are already substantially covered in the UNIDROIT Principles.²¹ There would appear to be little value in having UNCITRAL duplicate UNIDROIT's work by developing a competing non-binding instrument. Moreover, the proposal submitted to UNCITRAL characterizes the UNIDROIT Principles' status as a soft law instrument as being a perceived shortcoming.²²

The merits of a new global commercial code as either a soft law or a hard law instrument were addressed at the UNCITRAL Colloquium celebrating the 25th Anniversary of the CISG. At that gathering, Professor Herbert Kronke, then Secretary-General of UNIDROIT, reviewed what he termed "the never-subsiding charm of codes" and concluded that the time would be better spent on, *inter alia*, greater cooperation with respect to existing instruments.²³ He also emphasized the complementary nature between the binding nature of the CISG and the non-binding nature of the UNIDROIT Principles:

What we see looking at the two instruments—the CISG as the mother of all modern conventions on the law of specific contracts and the UPICC as the (inevitably) soft-law source of modern general contract law—are neither competitors nor apples and pears. What we see is actually, and even more, potentially, a fruitful coexistence [T]he UNIDROIT Contract Principles are, obviously, complementary in that they address a wide range of topics of general contract law which neither the CISG nor any

20. See *Swiss Proposal*, *supra* note 1, at 7.

21. The proponents of a global initiative acknowledge that the UNIDROIT Principles "now cover all areas that are perceived as contract law in most legal systems." *Id.* at 4.

22. See *id.* at 5. The Hague Conference on Private International Law has determined that a soft law approach—involving principles—is preferred in developing an instrument on choice of law in international commercial contracts. See HAGUE CONFERENCE ON PRIVATE INT'L LAW, *supra* note 16.

23. See Kronke, *supra* note 7, at 462–63. Professor Kronke points out that "While Professor Bonell is envisaging the [UNIDROIT Principles] assuming that function in maintaining their present status of soft law, Professor Lando insists on their being elevated to binding rules, to be mandatorily applied to non-domestic and non-inter-European transactions." *Id.* at 463; see also, Michael Joachim Bonell, *Towards a Legislative Codification of the UNIDROIT Principles?* (July 9–12, 2007), available at <http://www.uncitral.org/pdf/english/congress/Bonell.pdf> (providing text of presentation).

other existing or future convention devoted to a specific type of transaction would ever venture to touch upon.²⁴

The negotiations relating to the CISG demonstrate the difficulty of the task. The drafters were confronted with widely different legal traditions as well as different approaches to international business transactions and different policy approaches between developing and industrialized countries. Topics such as validity, including mistake, and agency were left out of the CISG because they were not at that time considered suitable for harmonization.²⁵ Though a few states may have done so, we are not aware of, in the years since those negotiations, states reaching a broad consensus on the many very challenging issues deliberately left out of the CISG or insufficiently addressed by the CISG, or that such a consensus is likely to be found in a new global negotiation.

24. Kronke, *supra* note 7, at 458–59. Professor Kronke continues with an example concerning the concept of good faith:

While it is true that governments would be well-advised not to again discuss, for example, the concept of good faith in the context of developing rules for a *specific* transaction, as they did in Vienna where they finally settled on papering over disagreements in Article 7 CISG, we can say so only now that we have discovered an alternative vehicle for the promotion of that concept: Article 1.7 UNIDROIT Contract Principles.

Id. at 459.

25. For example, issues of substantive validity were generally excluded from the scope of the CISG pursuant to Article 4, based primarily on a Secretariat report finding that: (1) these issues rarely arise, and that there was no indication that differences in the laws with respect to contract validity lead to significant problems in international trade; and (2) “rules on duress, or similar rules on usury, unconscionable contracts, good faith in performance and the like also serve as a vehicle by which the political, social and economic philosophy of the society is made effective in respect of contracts” and

[i]t is by the extensive or the restrictive interpretation of such rules that many legal systems have effected the balance between a philosophy of sanctity of contract with the security of transactions which that affords and a philosophy of protecting the weaker party to a transaction at the cost of rendering contracts less secure.

U.N. Secretary-General, *Formation and Validity of Contracts for the International Sale of Goods*, ¶ 26, U.N. Doc. A/CN.9/128, annex. II, *reprinted in* [1977] VIII Y.B. UNCITRAL 93, U.N. Doc. A/CN.9/SER.A/1977. States subsequently decided to exclude specific rules on validity with regard to mistake because of their inconsistent treatment under various legal systems. *See Report of the Working Group on the International Sale of Goods on the Work of Its Ninth Session*, Sept. 19–30, 1977, ¶¶ 48–69, U.N. Doc. A/CN.9/142, *reprinted in* [1978] IX Y.B. UNCITRAL 65–66, U.N. Doc. A/CN.9/SER.A/1978 (decision to exclude specific rules on validity, particularly with regard to mistake). Similarly, efforts to address issues related to agency were not successful. *See, e.g.*, Rep. of the Working Group on the Work of Its Sixth Session, Jan. 27–Feb. 7, 1975, ¶ 47, U.N. Doc. A/CN.9/100, *reprinted in* [1975] VI Y.B. UNCITRAL 53 (“There was opposition to a special article on agency relationships in a convention on sales and no consensus was reached on the adoption of this proposal. At the same time it was agreed to delete any reference to agency relationship in other articles of the Convention.”). UNIDROIT subsequently developed a Convention on Agency in the International Sale of Goods, but only a few countries have ratified it and it has never entered into force. *See* Convention on Agency in the Int’l Sale of Goods, Feb. 17, 1983, 22 I.L.M. 249.

The drafting of the UNIDROIT Principles was achievable for a number of reasons, as pointed out by Professor E. Allan Farnsworth, one of the key contributors to the development of the Principles:

[D]o we not tremble when we meet at the thought of drafting principles for the entire world? . . . We do not tremble for at least four reasons. One, we are drafting mere principles and not a uniform law, so that whatever rules we write are only likely to be applied if they find favor with someone concerned with a particular transaction or dispute. . . . Two, most of our principles are unlikely to miscarry because they are framed with evident generality (e.g., “good faith and fair dealing”) or they have built-in safety valves (e.g., “unless the circumstances indicate otherwise”), giving them enough flexibility to permit a judge or arbitrator to use common sense in applying them so as to avoid an arbitrary or unfair result. Three, in some instances we have declined to deal with tough questions, as in the area . . . of invalidity on a variety of grounds under the applicable domestic law. And four, . . . UNIDROIT is free to amend the Principles . . . from time to time to take care of problems that later surface.²⁶

Moreover, the negotiations were largely conducted by experts who were not representing governments bound by national policies but rather participated in their individual capacities, thereby enjoying more flexibility in developing the Principles.²⁷ Even so, the negotiations in UNIDROIT regarding the first version of the Principles took fourteen years.

In UNCITRAL, the dynamic would be far different—governments would conduct the negotiations with more direct implications for national interests, and policy positions that must be defended. As a result, reaching consensus would inevitably be more difficult. As Professor Peter Schlechtriem observed with regard to the CISG:

No codification is ever perfect, and every legal text, therefore needs instruments and concepts that allow adjustments, development and gap-filling to cope with issues not foreseen by its drafters. This is even more so in the case of codifications based on international conventions, for, while a domestic legislator might

26. E. Allan Farnsworth, *Closing Remarks, Contract Law in a Changing World*, 40 AM. J. COMP. L. 699, 699–700 (1992).

27. See Roy Goode, *Rule, Practice, and Pragmatism in Transnational Commercial Law*, 54 INT'L & COMP. L.Q. 539, 553–54, 556 (2005) (stating that Principles demonstrate “that the formulation of international rules of general law, whether relating to international trade or otherwise, is best left to scholars,” who have “technical expertise and freedom from political restraints,” while governments can “focus on more specific areas—for example, competition law and consumer protection—where the rules are essentially mandatory rules or rules of public policy rather than dispositive provisions.”); see also Bonell, *supra* note 23.

be willing and competent to enact necessary improvements and reforms, the chances that another United Nations conference can be convened on the CISG, that it will reach results, and that all states that have enacted the Convention will also enact reforms, is almost zero. So there must be safety valves. They are interpretation and gap-filling. The basis is article 7 of the CISG, the formulation of which can now be found in a number of other international conventions, model laws and drafts.²⁸

With regard to the discussion of codifying international commercial law, it has been suggested that the experience of the United States' Uniform Commercial Code (U.C.C.) may be instructive.²⁹ Yet the United States has never attempted a comprehensive codification of the law governing the sale of goods. Rather, Article 2 of the U.C.C., while codifying many important rules in a systematic way, still relies heavily on general principles of law outside the U.C.C.—which were not the subject of harmonization efforts—to fill its many gaps. Examples include agency; what constitutes an offer to enter into a contract; and the circumstances in which a contract might be avoided on grounds such as mistake, misrepresentation, duress, and illegality. The experience in the United States suggests that certain aspects of contract law are not good candidates for codification. In the 1990s, the American Law Institute and the Uniform Law Commission considered revising Article 2 to cover certain service contracts related to contracts for the sale of goods (i.e., contracts to install, maintain, support, and repair goods). Although drafts were prepared and considered, the effort was quickly abandoned as not feasible.

The difficulties encountered in trying to codify these issues within one common law country suggest that trying to do so internationally—across common law and civil law jurisdictions—would be quite challenging. Within the United States, these topics have been dealt with through approaches such as the Restatement of Contracts, which can address the issues as principles rather than seeking codification as in the U.C.C. Similarly, the limited approach taken with regard to the CISG left these topics to be dealt with internationally in soft law instruments such as the UNIDROIT Principles.³⁰

28. Peter Schlechtriem, *Requirements of Application and Sphere of Applicability of the CISG*, 36 VICTORIA U. WELLINGTON L. REV. 781, 789 (2005).

29. See, e.g., CLIVE M. SCHMITTOFF, COMMERCIAL LAW IN A CHANGING ECONOMIC CLIMATE 30 (2d ed. 1981) (“[The] attempt to draft a world code on international trade law . . . is not an idle dream. . . . [T]here is the example of the Uniform Commercial Code of the United States. It started as an academic venture but became reality when it was adopted by 49 of the 50 jurisdictions of the United States.”); see also Michael Joachim Bonell, *Do We Need a Global Commercial Code?*, 106 DICK. L. REV. 87, 89 (2001).

30. Just as the U.S. has had difficulty in developing a comprehensive code of contract law domestically, the European Union has, in the course of considering a series of initiatives, experienced similar problems with the development of a set of uniform regional principles.

In short, the historical example of the CISG speaks for itself. Those negotiations, building on forty years of work in the international arena in other organizations, still took nearly ten years—and elected not to tackle some of the hardest issues.

II. MAXIMIZING PRODUCTIVE USE OF UNCITRAL'S RESOURCES

What, then, might UNCITRAL productively do in the area of international contract law? It is important to recognize that in fact UNCITRAL is already doing a good deal in that regard in line with its primary mandate to promote coordination and cooperation in the development of international trade law:³¹

- encouraging more widespread ratification of or accession to the CISG;³²
- developing and maintaining the CISG Digest (now third edition) and CLOUT in the six official languages of the United Nations, thereby promoting the uniform interpretation and application of the CISG;³³
- endorsing the UNIDROIT Principles as complementary to the CISG, including most recently the 2010 edition,³⁴ and
- endorsing the ICC's Incoterms, including most recently the 2010 edition.³⁵

Other UNCITRAL activities could be explored, keeping in mind the factors previously noted: demonstration of need and feasibility; scarcity of resources and competing priorities; and the value of collaboration with other organizations. For example, UNIDROIT is developing model clauses to be used by parties to ensure that the UNIDROIT Principles will govern their contracts.³⁶ When that project is complete, UNCITRAL may consider whether to endorse them.

31. Establishment of the United Nations Commission on International Trade Law, G.A. Res. 2205 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6594 (Dec. 17, 1966); *see also* Gerold Herrmann, *The Role of UNCITRAL*, in *FOUNDATIONS & PERSPECTIVES OF INTERNATIONAL TRADE LAW* 28, 34 (Ian Fletcher, Loukas Mistelis & Marise Cremona eds., 2001).

32. *See* Report of 45th Session, *supra* note 2, ¶¶ 159–60.

33. *See id.* ¶¶ 149–53.

34. *See id.* ¶¶ 137–40.

35. *See id.* ¶¶ 141–44. For a comprehensive list of texts of other organizations endorsed by UNCITRAL, *see Texts of Other Organizations Endorsed by UNCITRAL*, UNCITRAL, http://www.uncitral.org/uncitral/en/other_organizations_texts.html (last visited on Apr. 4, 2013).

36. The UNIDROIT Governing Council, at its 91st session in May 2012, decided to set up a restricted Working Group for the preparation of Model Clauses for use by parties intending to indicate in their contract more precisely in what way they wish to see the UNIDROIT Principles of International Commercial Contracts used during the performance of the contract or when a dispute arises. The Working Group, composed of experts in the field of private international law and arbitration, held its first session in Rome February 11–12, 2013. *See Model Clauses for Use by Parties of the UNIDROIT Principles of International Commercial Contracts*,

The United States has long been a strong supporter of UNCITRAL. We consider UNCITRAL a real success story—one of the most practical and productive organs in the UN system. It creates tangible legal products that can have a real impact in promoting international trade, while at the same time contributing to the rule of law globally. This record of achievement continues under the very capable leadership of Secretary Sorieul. Yet UNCITRAL, like other elements of the United Nations, is under increasing budget pressures, as are member and observer states, including developing countries.³⁷ Thus, it is important that UNCITRAL marshal its resources and be selective in its choice of projects.

One must also take into account competing priorities. With regard to possible new projects, the Commission has expressly assigned priority to another topic, which has broad support particularly among developing countries: microfinance and other means of creating an enabling legal environment for micro, small, and medium-sized enterprises.³⁸ UNCITRAL held a colloquium on that topic January 16–18, 2013 in Vienna. The Commission also endorsed exploratory work in the area of public-private partnerships and project finance.³⁹ UNCITRAL will hold a colloquium on those issues in May 2013. With the ongoing work in several working groups, UNCITRAL's resources are already spread thin.

Also, the Commission has in the past recognized that the Secretariat can face resource shortfalls with regard to efforts to promote the ratification and implementation of the CISG.⁴⁰ As Gerold Herrmann, then Secretary of UNCITRAL, observed a decade ago regarding such efforts:

[T]he Secretariat's lack of resources is a particularly disappointing feature here . . . [because] the preparation of a uniform law is an extremely expensive affair (the Sales Convention cost the United Nations alone an estimated 6 million U.S. dollars) which would mean a considerable waste if, for lack of a comparatively minute amount, the text will not be made known to the relevant people.⁴¹

UNIDROIT, <http://www.unidroit.org/english/principles/modelclauses/main.htm> (last updated Mar. 26, 2013).

37. In 2011, the United States and other UNCITRAL members had to mobilize to protect UNCITRAL's budget from proposed cuts that would have ended the traditional practice of alternating UNCITRAL meetings between Vienna and New York, a practice that the United States and other UNCITRAL members consider highly important to maintaining the diversity of representation at its meetings, the quality of UNCITRAL's work, and the global impact of its instruments. Those funds were ultimately restored, but only after extensive discussions. *See* Rep. of the U.N. Comm'n on Int'l Trade Law, 44th Sess., June 27–July 8, 2011, ¶¶ 334–44, U.N. Doc. A/66/17; GAOR 66th Sess., Supp. No. 17 (2011).

38. *See id.* ¶¶ 124–26.

39. *See id.* ¶¶ 115–23.

40. *See* Report of 45th Session, *supra* note 2, ¶ 157.

41. Herrmann, *supra* note 31, at 33.

Such efforts are equally important today.

III. CONCLUSION

Achieving further harmonization and unification of international contract law is a worthy goal. However, we must be pragmatic. Key domestic constituencies and trusted advisers tell us that the time is not right for a global initiative, principally because the desired results simply cannot be achieved at this time. If such a major undertaking were to be pursued at the present time, we envisage a contentious, multi-year negotiation that would likely not bring significant results, and at great expense to UNCITRAL and its members. There is also the risk that it could detract from existing efforts to secure widespread adoption of the CISG. The U.S. government believes that there are less ambitious but more practical alternatives for achieving progress in this area, and that UNCITRAL should continue to focus on such alternatives.

THE SOFT LAW APPROACH TO UNIFICATION OF
INTERNATIONAL COMMERCIAL CONTRACT LAW: FUTURE
PERSPECTIVES IN LIGHT OF UNIDROIT'S EXPERIENCE

ANNA VENEZIANO*

I. INTRODUCTION

I am grateful to the organizers of the 2013 *Villanova Law Review* Norman J. Shachoy Symposium for the invitation to contribute to a most interesting symposium on the future of uniform law in the field of international contracts.

This Article is centered on the advantages and disadvantages of different methodological approaches to the development of uniform rules for international trade.

In the following, I will first deal with what has been achieved so far, focusing on the two most successful uniform law instruments in the field of international contract law—namely the United Nations (UN) Convention on Contracts for the International Sales of Goods (CISG)¹ and the International Institute for the Unification of Private Law (UNIDROIT)² Principles for International Commercial Contracts (PICC).³

Turning to the recent debate on the further development of uniform law for international contracts which is taking place within UNCITRAL and elsewhere, in Part III I will then attempt to give some answers to the question posed by the present Symposium—i.e., “Has the time come for a new global initiative to harmonize and unify international trade?” In doing this, I will be assessing the suitability and the need, at the present stage, to make use of either legislative or non-legislative means to achieve further worldwide harmonization of general contract law.

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1. In 1980, the CISG was drafted under the auspices of the UN Commission on International Trade Law (UNCITRAL), which was established in 1966 as a Permanent Commission within the UN General Assembly.

2. See generally *UNIDROIT: An Overview*, UNIDROIT, <http://www.unidroit.org/dynasite.cfm?dsmid=103284> (last visited Apr. 13, 2013). UNIDROIT was founded in 1926 as an auxiliary organ of the League of Nations, and in 1940 became an independent intergovernmental organization whose membership presently encompasses sixty-three states from all five continents. See *id.*

3. See generally INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS (2010). The first edition of the UNIDROIT Principles was published in 1994, the second edition in 2004, and the third edition in 2010. For further discussion of UNIDROIT's PICC, see *infra* notes 4–28 and accompanying text.

II. WHAT HAS BEEN ACHIEVED THUS FAR

A review of the most successful instruments for the worldwide unification of contract law cannot but start with the CISG. The Convention indeed constitutes an extraordinary achievement not only for the unprecedented width of its scope of application and the high number of states from all continents which participated in the Diplomatic Conference in Vienna,⁴ nor just for its subsequent undeniable success in terms of ratifications⁵ and its practical application.⁶ Perhaps even more significantly, it has played a major role in building a universally shared vocabulary and a common denominator of rules which have since represented the basis for any academic discourse on international contract law, as well as serving as a model for national legislation⁷ and international⁸ and supranational⁹ instruments alike. Last but not least, it has offered the op-

4. See *Legislative History: 1980 Vienna Diplomatic Conference*, PACE L. SCH. INST. OF INT'L COM. LAW, <http://www.cisg.law.pace.edu/cisg/conference.html> (last updated July 13, 2007) (detailing Diplomatic Conference proceedings). The formal development of uniform rules for international sales has a long history and dates back to 1929, when UNIDROIT discussed Ernst Rabel's first proposal. UNIDROIT's work, which concluded with the adoption of The Hague Uniform Laws in 1964, was resumed by UNCITRAL and led to the adoption of the CISG. See generally PETER SCHLECHTRIEM & INGEBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 1-12 (Ingeborg Schwenzer ed., 2010).

5. At the time of this writing, there are seventy-eight contracting states from all five continents and including most major participants in the world trade. Ratifications have been steadily growing since the CISG's entry into force in 1988. In addition, a number of states have withdrawn reservations made at the outset (e.g., on the requirement of the written form or the exclusion of Part II of the Convention). See United Nations, UNCITRAL DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 436, 445 (2012) [hereinafter UNCITRAL DIGEST], <http://www.uncitral.org/pdf/english/clout/CISG-digest-e.pdf>; Ministry of Commerce, *China Contract Law and CISG Become More Consistent in Provisions on Contract Form and Their Applicability*, PEOPLE'S REPUBLIC OF CHINA, (Feb. 25, 2013), http://english.mofcom.gov.cn/article/news_release/significantnews/201302/20130200038302.shtml.

6. The by-now significant amount of international case law applying the CISG (both by national and by arbitral courts of more than thirty states) is collected in online databases which provide search facilities as well as detailed abstracts in English. See Albert H. Kritzer, *CISG Database*, PACE L. SCH. INST. OF INT'L COM. LAW, <http://www.cisg.law.pace.edu> (last updated Apr. 3, 2013); UNCITRAL DIGEST *supra* note 5; *Welcome to UNILEX*, UNILEX, <http://www.unilex.info/dynasite.cfm?dssid=2375&dsmid=14276>.

7. See Ingeborg Schwenzer & Pascal Hachem, *The CISG—Successes and Pitfalls*, 57 AM. J. COMP. L. 457, 461-63 (2009); Franco Ferrari, *General Report*, in THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS 413 (Franco Ferrari ed., 2008).

8. The most notable example being the PICC. See MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 306 (3d ed. 2005) (“[T]o 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.”).

9. Suffice it to refer, at a legislative level, to the 1999 EC Consumer Sales Directive. International uniform law, including CISG, influenced also the DCFR as

portunity to develop various methods to strive for uniformity in the interpretation by domestic courts and arbitral tribunals in different jurisdictions.¹⁰

Notwithstanding its merits, however, the CISG also shows the limits of uniformity achieved through legislative means. The need to reach a governmental consensus through the process of negotiating an international treaty reduced the chances of dealing with more controversial subjects such as contracting under standard terms or through an agent, invalidity issues, change of circumstances, pre-contractual liability, stipulated damages, many aspects of restitution, just to mention a few notable gaps. Other provisions are difficult to apply because they were the outcome of a compromise (such as the ones regarding the role of the principle of good faith, the right to specific performance, the relationship between fundamental breach and the seller's right to cure, interest for late payment).¹¹

Thus, when UNIDROIT, more than three decades ago, set up a special working group for the development of rules for international commercial contracts in general, it was decided that the innovative approach of a "soft law" instrument should be followed, instead of continuing with the traditional model of a multilateral treaty.¹² The drafters, therefore, opted for a non-binding set of rules, not assisted by force of law nor expected to principally serve the purpose of becoming legislation.¹³ They clearly had in mind the example of U.S. restatements of the law, whose

well as the recent 2011 Commission Proposal for EU Regulation on optional Common European Sales Law (CESL). See PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) (Christian von Bar et al. eds., 2009); *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final (Oct. 11, 2011). See generally Eric Clive, *Key Concepts in Uniform and Regional Private Law Instruments: An Emerging Consensus?*, 2013 UNIF. L. REV. 1.

10. The question of the uniform interpretation of the CISG has always been one of the most debated among scholars and has found its way even in case law applying the CISG. See Pilar Perales Viscasillas, *Article 7*, in UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 111 (Stefan Kröll et al. eds., 2011). The CISG Advisory Council, an independent commission established in 2001 and composed of well-known experts in the field coming from different jurisdictions, has already published a number of opinions which suggest solutions based on the review and critical assessment of interpretative trends in case law. See *Welcome to International Sales Convention Advisory Council*, CISG ADVISORY COUNCIL, <http://www.cisgac.com> (last visited Apr. 11, 2013).

11. As the drafters of the CISG were well aware. See PETER SCHLECHTRIEM, UNIFORM SALES LAW—THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 55, 61, 77 (Peter Doralt & Helmut H. Haschek eds., 1986).

12. The project, initially labeled "Progressive Unification of International Trade Law" and approved by UNIDROIT as early as 1971, was assigned to a special working group in 1980 and assumed its definitive title "Principles for International Commercial Contracts" in 1985.

13. See Stefan Vogenauer, *Introduction*, in COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC) 4 (Stefan Vogenauer & Jan Kleinheisterkamp eds., 2009).

effectiveness in practice is based solely upon their persuasive value for judges and lawyers.¹⁴

This approach was chosen for a number of different reasons. It was felt that the adoption of the CISG had represented the “maximum that could be achieved at the legislative level”¹⁵ through inter-governmental negotiations. While a conventional text is binding and therefore, at first sight, much stronger than a mere soft law product, it is precisely its binding character which makes it problematic. A “soft law” regulation would not only avoid the pitfalls of the negotiation and ratification process, but also produce a more flexible text, which could be more easily adapted to “take care of problems that later surface.”¹⁶

This method had the additional advantage of allowing the participants in the working group—composed of renowned international experts with different legal backgrounds and sitting in a personal capacity and not as representative of governments¹⁷—more freedom in endorsing solutions which, though different from the ones present in their own legal systems, were considered to be either common practice in international transactions or, in some cases, better suited to international commercial contracts. The informal method minimized the political constraints and shifted the focus to the reasonability and economic soundness of the proposed rules.¹⁸ This enabled the drafters to develop over the years a wide set of rules covering virtually all issues which are traditionally ascribed to the general part of the law of contracts and obligations.¹⁹

Finally, though no less importantly, it was felt that the acceptability of rules concerning international contracts in general should be evaluated first and foremost by the parties to the contract, because contract law for the most part is dispositive.²⁰

Clearly, the choice of a non-binding set of rules does not come without costs in terms of both legitimacy and practical impact.²¹ Their application depends upon the parties choosing to be bound by them, and, in the absence of such a choice, adjudicators will apply them only if—and

14. See E. Allan Farnsworth, *Closing Remarks*, 40 AM. J. COMP. L. 699 (1992).

15. See Michael Joachim Bonell, *Towards a Legislative Codification of the UNIDROIT Principles?*, 12 UNIF. L. REV. 233–34 (2007).

16. Farnsworth, *supra* note 14, at 700.

17. See UNIDROIT, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2010 x–xiii (2010) (listing drafters and other contributors).

18. See Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORD. L. REV. 281, 284 (1994).

19. General principles, formation, authority of agents, validity (including illegality), interpretation, content, third party rights, conditions, performance, hardship, non-performance, set-off, assignment of rights, transfer of obligations and assignment of contracts, limitation periods, and plurality of obligors and obligees.

20. See ROY M. GOODE, COMMERCIAL LAW IN THE NEXT MILLENNIUM 234 (1998). For a discussion of the merits of an “informal approach,” see KLAUS P. BERGER, THE CREEPING CODIFICATION OF THE LEX MERCATORIA 154 (1999).

21. As clearly recognized by the UNIDROIT Governing Council itself when it approved the new instrument. See UNIDROIT, *supra* note 17, at xxiii.

insofar as—they are persuaded by their intrinsic value.²² All the more so, since the PICC are not limited to offering a “restatement” of existing practices in international trade, but in some cases introduce innovative provisions.²³

Almost twenty years after the publication of their first edition, it is fair to say that the PICC, notwithstanding their non-binding nature—or maybe precisely as a consequence of their soft law character—have enjoyed great success when compared with other international uniform law regulations (including the ones which have binding force).

More than three hundred decisions rendered worldwide and referring one way or the other to the PICC are recorded;²⁴ their actual number, however, is likely to be higher, due to the fact that the majority of cases involving the PICC are decided by arbitral courts which tend to abide by a policy of confidentiality.

While it is true that the number of reported instances where parties have expressly opted in favor of the PICC or where arbitral courts have applied the PICC as the rules of law governing the substance of the dispute is still relatively limited,²⁵ their mere existence is already proof of the importance of the PICC, especially taking into account the traditional resistance of parties and their counselors against adopting new regulations.²⁶ Of particular interest in this respect are the cases where the PICC are invoked as constituting an authoritative expression of general principles of law, *lex mercatoria*, or the like. Even more interesting, however, is the circumstance that in half of the collected decisions the PICC are cited by either arbitral tribunals or, increasingly, domestic courts, as an aid to interpret or supplement the applicable domestic law (including CISG). This is particularly the case when the issue under consideration is disputed under the applicable law and the adjudicator refers to the PICC in order to support the adoption of one of the possible solutions, as being better suited to international transactions.²⁷

22. See Bonell, *supra* note 15, at 237.

23. See Vogenauer, *supra* note 13, at 6.

24. See UNILEX, *supra* note 6. At the time of this writing, 308 cases are reported, of which 167 are arbitral awards and 141 are domestic court decisions.

25. However, by now that number is not less than 1/6 of all reported cases.

26. See Michael Joachim Bonell, *Model Clauses for Use of the Unidroit Principles of International Commercial Contracts in Transnational Contract and Dispute Resolution Practice* (Feb. 2013), available at <http://www.unidroit.org/english/documents/2013/study50/mc/s-50-mc-01rev-e.pdf>. UNIDROIT has recognized the need to facilitate the choice of the PICC by the parties in the contract. A restricted Working Group was set up with the aim of preparing “Model Clauses for Use of the UNIDROIT Principles of International Commercial Contracts in Transnational Contract and Dispute Resolution Practice.”

27. See Ralf Michaels, *Preamble I*, in COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC) 65 (Stefan Vogenauer & Jan Kleinheisterkamp eds., 2009) (analogizing function of PICC to traditional functions of US Restatements).

Finally, though the PICC are not primarily aimed at becoming binding legislation, they have been expressly used as a model for contract law reforms in many national jurisdictions around the world as well as international regulations.²⁸

III. IS THERE A NEED TO DRAFT A NEW INTERNATIONAL INSTRUMENT ON GENERAL CONTRACT LAW?

I will now turn to the question posed by the present symposium on the desirability of a new international instrument concerning international trade law, with particular regard to general contract law.

The question is prompted by a recent proposal by the Swiss government requesting that UNCITRAL take action to explore the possibility of preparing a new instrument in the area of contract law.²⁹ The proposal, starting from the perceived need to further the uniformity of the law of international sales, urges UNCITRAL to “undertake an assessment of the operation of the [CISG] and related UNCITRAL instruments” and to “discuss whether further work both in these areas and in the broader context of general contract law is desirable and feasible on a global level.”³⁰

Because the proposal leaves open the issues of the precise scope as well as of the precise nature of the instrument which could be envisaged, I will first address the “desirability and feasibility” of a new binding international regulation in the form of a convention covering issues of *general contract law*, and then consider the merits of other possible approaches, again regarding *general contract law*.

The idea of drafting a legislative instrument at a global level for international commercial transactions in general has already been authoritatively suggested in the past.³¹ It was prompted by the desire to enhance the effectiveness of existing uniform law and to overcome the more obvious disadvantages of an opt-in uniform regulation such as the PICC. This view was radically opposed on the grounds that contract law is essentially ruled by party autonomy and legislation should only intervene in those sectors where mandatory provisions or debated policy choices are concerned.³²

I would like to respectfully disagree with both positions. While I am personally not against the idea of developing a binding set of rules for international contracts as a matter of philosophy, my perplexity regards the advisability of such an overambitious endeavor at the present stage. As

28. See BONELL, *supra* note 8, at 268.

29. See UNCITRAL, *Possible Future Work in the Area of International Contract Law: Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law*, U.N. Doc. A/CN.9/758 (May 8, 2012).

30. *Id.*

31. See generally Ole Lando, *CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law*, 53 AM. J. COMP. L. 379 (2005).

32. See Roy Goode, *Rule, Practice and Pragmatism in Transnational Commercial Law*, 54 INT'L COMP. L.Q. 539, 553 (2005).

mentioned above, all those who are familiar with the process of going through governmental experts' sessions first, and a diplomatic conference afterwards, are fully aware of the difficulties that arise in this connection. It is a costly and burdensome procedure, which is further complicated by the possibility of introducing reservations in order to reach consensus, and by the need to obtain ratifications afterwards. I suspect that if governments are involved, the resistance to depart from domestic law will be even greater for a project regarding the veritable "core" of domestic private law concepts such as the general law of contracts. Even if limited to cross-border transactions, it would still involve a dramatic change in national legal systems.

By expressing my strong doubts concerning the feasibility of a binding instrument covering general contract law I do not mean, however, to summarily dismiss also the idea to prepare a so-called "Global Commercial Code," which was discussed some years ago at the prompting of then-UNCITRAL Secretary Gerold Herrmann.³³ The PICC could well constitute the "general part" of such a compilation of existing uniform law instruments and be used as a point of reference to develop binding rules regarding international contracts not yet covered by an international convention.

If the proposal to draft an international convention covering general contract law is in my view overambitious, I must admit that I find the possible alternative solution of developing a set of non-binding rules on general contract law even more difficult to accept from a substantive point of view. At the very least, it would appear to be unwise to duplicate efforts at a global level and start developing yet another set of non-binding rules with a potentially universal application on the same issues already addressed by the PICC. The very success of the latter does not seem to warrant a reopening of the same issues within another global forum. All the more so, as both the 2004 and the 2010 editions of the PICC have been endorsed by UNCITRAL and their use commended "as appropriate, for their intended purposes."³⁴

A more fruitful course of action, in my opinion, would be to enhance the future development of uniform law for international trade through a better understanding and coordination of the existing instruments. In this regard, the efforts of scholars in introducing international instruments in their teaching materials, in disseminating information, and in offering authoritative interpretation cannot but continue to play a central role. An equally important element is the furthering of the cooperation among international organizations in order to promote a coherent and

33. See Bonell, *supra* note 15, at 237.

34. UNCITRAL, U.N. Doc. A/62/17 (June 25–July 6, 2012); UNCITRAL, 62d Sess., Supp. No. 17 at ¶¶ 209–13 (2008); UNCITRAL, U.N. Doc. A/67/17 (June 25–July 6, 2012); 67th Sess., Supp. No. 17 at ¶¶ 137–40 (2008) ("[The General Assembly] commends the use of the 2010 edition of the UNIDROIT Principles of International Commercial Contracts, as appropriate, for their intended purposes.").

rational employment of the (unfortunately increasingly scarce) resources devoted to the development of uniform law.³⁵ To further this aim, UNIDROIT will continue to be open to cooperation with UNCITRAL and other international organizations.

35. For more discussion of the different modalities of cooperation among inter-governmental organizations, see José Angelo Estrella Faria, *Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?*, 14 UNIF. L. REV. 21 (2009).

ARTICLE 35 OF THE CISG: REFLECTING ON THE PRESENT
AND THINKING ABOUT THE FUTURE

DJAKHONGIR SAIDOV*

I. INTRODUCTION

THE rules on the conformity of goods are not only an integral part of sales law, but they also lie at the core of the seller's primary obligations by being inextricably linked to its obligation to deliver the goods.¹ The goods are the very subject matter of a sales contract and the rules on conformity are what help define this subject matter.² Without these rules, it would often be impossible to say what it is that the seller has agreed to deliver. The rules on conformity are also essential in terms of the function of allocating commercial risks between the parties. Many buyers will complain about the conformity of the goods, allege a breach, and invoke remedies. It is essential, therefore, that there be fairly clear legal rules, particularly those applied by default, that are capable of allocating risks, thereby producing legal certainty and possibly reducing litigation.³ However, the inevitably broad nature of these rules, together with their considerable conceptual and practical significance, still makes them one of the most frequently litigated issues.⁴ All this leads to the conformity rules occupying a central place in any sales law, lying at the crossroads between the point where, on the one hand, the law enables the contract and parties' legal relationship to function and, on the other, determines whether the performance has gone astray, paving the way for a remedial route.

A look at this important issue can tell us much about the level of success and effectiveness of a sales law. With this in mind, this Article seeks to take a critical look at the rules on conformity in Article 35 of the United Nations Sales Convention (CISG or the Convention). The objective is to assess some aspects of the Convention's experience accumulated as a consequence of the application of this provision. This assessment will identify the Convention's emerging strengths and the areas that have given rise to controversy. This Article will present its author's views in re-

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1. See Handelsgericht [HG] [Commercial Court] Nov. 30, 2008, docket no. HG 930634/O (Switz.), available at <http://cisgw3.law.pace.edu/cases/981130s1.html> ("The seller's liability for the defect of goods follows from its primary obligations under the contract, i.e., delivery of the agreed goods.").

2. See U.C.C. § 2-313 cmt. 4 (1977) ("[T]he whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell . . ."); MICHAEL BRIDGE, *THE SALE OF GOODS* ¶ 7.11 (2d ed. 2009).

3. Cf. U.C.C. § 2-313 cmt. 7; BRIDGE, *supra* note 2, ¶ 7.02.

4. See, e.g., Stefan Kröll, *The Burden of Proof for the Non-Conformity of Goods Under Art. 35 CISG*, 3 BELGRADE L. REV. 162, 162 (2011); Clarence J. Morrow, *Warranty of Quality: A Comparative Survey*, 14 TUL. L. REV. 327, 327 (1940).

spect of how these issues need to be dealt with under the CISG. However, in light of the fast-changing realities, with their increasingly complex commercial transactions, practices, and continuous technological advances, a question may well be posed as to whether the CISG has exhausted itself and whether the time is ripe for a new sales law.⁵ Therefore, this Article will also tentatively reflect on whether there is room for improving or reforming the Convention's structure and experience.

All of this reflection will be done in the context of the following issues. First, the seller is exempt from liability for breaching the Convention's default rules if the buyer knew or could not have been unaware of a lack of conformity. This provision, however, does not apply to the contractual provisions on conformity. It will be discussed whether the buyer's knowledge of a lack of conformity should also be relevant to contract interpretation. Second, the paper will explore whether there is a need for a quality standard or test to underpin the Convention's ultimate default rule and, if so, what that standard should be. Third, the Article will assess the Convention's experience in dealing with cases of non-compliance with public law regulations. Finally, it will examine the relationship between the application of the Convention's provisions on conformity and issues of proof.

II. THE BUYER'S KNOWLEDGE OF A LACK OF CONFORMITY

Article 35(1) embodies the principle of the parties' freedom to contract by stating that "[t]he seller must deliver goods which are of the quantity, quality, and description required by the contract and which are contained or packaged in the manner required by the contract."⁶ Where the parties have not agreed otherwise,⁷ paragraph (2) of Article 35 provides for several rules, which are intended to determine the content and parameters of the seller's obligations in respect of the conformity of the goods. Once it is established that there was no agreement to depart from these default rules, the first question that needs to be asked is whether the goods "are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract."⁸ This rule, contained in paragraph (2)(b), is preceded by another rule in paragraph 2(a), but it is widely acknowledged that because the paragraph 2(b) rule is more specific—in that it requires the determination of whether in the circumstances there is any *particular purpose* made known to the

5. See, e.g., Olaf Meyer, *Constructive Interpretation—Applying the CISG in the 21st Century*, in CISG METHODOLOGY 319, 319–42 (André Janssen & Olaf Meyer eds., 2009).

6. U.N. Comm'n on Int'l Trade Law, United Nations Convention on Contracts for the International Sale of Goods art. 35(1), Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG], available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.

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

8. *Id.*

seller—it has priority over Article 35(2)(a).⁹ The latter rule, in turn, is the ultimate fall-back rule according to which the goods are conforming if they “are fit for the purposes for which goods of the same description would ordinarily be used.”¹⁰ Article 35(2) contains two other requirements: according to paragraph (c), the goods ought to “possess the qualities . . . which the seller has held out to the buyer as a sample or model”; paragraph (d) requires the goods to be “contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect [them].”¹¹

Paragraph (3) provides that “[t]he seller is not liable . . . for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.”¹² This provision, however, is expressly said to apply only to paragraph (2). The question that arises, therefore, is whether paragraph (3) needs to be extended to paragraph (1) and, even if not, whether the buyer’s knowledge, usually derived from having an opportunity of pre-contractual examination of the goods, should be relevant to deciding what conformity obligations were imposed on the seller by the contract.

There hardly seems to be any basis in the argument in favour of extending the application of paragraph (3) to paragraph (1). A specific statement of its applicability to paragraph (2) strongly points to the drafters’ intention not to do so. But this does not mean that the buyer’s knowledge of the actual state and condition of the goods prior to the conclusion of the contract is not relevant to interpreting the contract under Articles 35(1) and 8. It is arguable that if the buyer, having seen the goods, knows that the seller’s representation in respect of them is untrue, the buyer can hardly have a reasonable expectation that the representation will form part of the seller’s contractual obligations.¹³ The buyer’s reliance on the seller’s representation is a powerful factor in favour of the parties’ intention to treat that representation as binding on the seller, and no such reliance is present where the buyer knows the statement to be untrue.

These points are too obvious for the Convention’s drafters not to have been aware of them, and their answer is that Article 35(1) does not concern the terms implied by default, but concerns what the contract itself

9. See PETER HUBER & ALASTAIR MULLIS, *THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS* 135 (2007); PETER SCHLECHTRIEM & INGEBOrg SCHWENZER, *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* art. 35, ¶ 12 (Ingeborg Schwenzer ed., 3d ed. 2010); *THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: ARTICLE BY ARTICLE COMMENTARY* art. 35, ¶ 61 (Stefan Kröll, Loukas Mistelis & Maria del Pilar Perales Viscacillas eds., 2011) [hereinafter *ARTICLE BY ARTICLE COMMENTARY*].

10. CISG, *supra* note 6, art. 35(2)(a).

11. *Id.* art. 35(2)(c).

12. *Id.* art. 35(3).

13. See John E. Murray, Jr., “*Basis of the Bargain*”: *Transcending Classical Concepts*, 66 MINN. L. REV. 283, 294–95 (1982).

provides.¹⁴ The buyer has the right to demand fully what the seller has agreed to do and the buyer's knowledge of the actual state of the goods cannot change the content of the seller's obligation. This argument is primarily targeted at the express provisions, which, in commercial contracts, are powerful evidence of the parties' intentions and agreement. It is much weaker when the terms are implied into the contract from the surrounding facts because the buyer's knowledge is part of these facts and hence cannot be ignored.¹⁵

The level of influence this factor exerts on contract interpretation depends on the particular circumstances. At times, the fact of the buyer's inspection is hardly relevant, as was the case where the contract required a pony to be "fully fit" and where the buyer had carried out a pre-sale veterinary examination, which, whilst adequate, revealed no signs of injury or health problems.¹⁶ The correctness of the decision—holding the seller in breach—is evident by the express contractual stipulation, which was also preceded by the seller's representation of full fitness of the pony. In some other cases, in contrast, what has been fatal to the buyer's case is that it had actually seen the alleged lack of conformity and could be regarded as having given its unconditional consent to the receipt of those particular goods. This was the case where the buyer, before buying second-hand cars, inspected them and became aware of the defects, which were apparently referred to in the contract along with the requirement that the vehicles were to be in "good condition."¹⁷ The latter was presumably not meant to indicate perfection but only a condition, which could reasonably be expected from a second-hand car that had been previously subjected to a normal use.¹⁸

A more complex case involved the sale of a textile (rotary printing) machine.¹⁹ The contract referred to the "rapport equipment length 641 mm–1018 mm."²⁰ Before the contract was made, the buyer, a trader in textile machinery, had an opportunity to inspect the machine, which was not a new model (being fourteen years old) and was not capable of operating at a full rapport length.²¹ Prior to the conclusion of the contract, the seller sent a fax to the buyer referring to the same rapport length as that

14. See COMMENTARY ON THE INTERNATIONAL SALES LAW 273 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987).

15. See CISG, *supra* note 6, arts. 8, 9.

16. See *Rettin i København* Oct. 19, 2007, m.nt. (Gustavsson/LRF N.V.) (Neth.), available at <http://cisgw3.law.pace.edu/cases/071019d1.html>.

17. S.T.S., Jan. 17, 2008 (J.T.S., No. 81) (Spain), available at <http://cisgw3.law.pace.edu/cases/080117s4.html>.

18. See *id.* ("[T]he particular damages known to the Buyer did not indicate any signs that the vehicles had been involved in accidents.")

19. See Bundesgericht [BGer] [Federal Supreme Court] Dec. 22, 2000, docket no. 4C.296/2000/rnd (Switz.), available at <http://cisgw3.law.pace.edu/cases/001222s1.html>.

20. *Id.*

21. See *id.*

included in the contract, stating that the machine was “complete and operating as viewed.”²² After concluding the contract, the buyer also sent a purchase confirmation in which it declared that it would take over the machine “complete and operating as viewed.”²³ The buyer’s breach of contract claim that the stencil holders for a rapport length of 1018 mm were missing was dismissed on the ground that, being an expert, the buyer ought to have known that the machine would not conform to the latest technical specifications. Moreover, the seller “was entitled to expect that the Buyer had concluded the contract in full knowledge of the technical possibilities of the machinery and its equipment.”²⁴ In relation to contractual rapport length specification, the Swiss Supreme Court appears to have affirmed the decision of the Court of First Instance that “rapport equipment was meant as technical information in respect to the possible rapport length, which could be printed if the necessary equipment was used.”²⁵

The Swiss Supreme Court faced a difficult dilemma. On the one hand, the contract appeared to have expressly required full rapport length. On the other hand, the surrounding factual evidence—an opportunity to inspect, the buyer’s expertise, the seller’s pre-contractual letter and the buyer’s confirmation of purchase—was overwhelmingly in the seller’s favour. The court interpreted the contractual clause restrictively by assigning purely an informative function to it. Faced with an imperfect fit between the contract and the surrounding facts, the court seemed to have done its best to achieve a fair result.

A. *Does Article 35(2)(a) Imply a Certain Level of Quality?*

1. *Does Article 35(2)(a) Require an Inquiry Into the Notion of Quality?*

In fixing the ultimate default rule of conformity of the goods, many domestic legal systems rely on some notion of quality, such as “average,” “merchantable,” or “acceptable,” which is intended to indicate some level of quality that the buyer can expect. In some of these systems, “fitness for an ordinary or a common purpose” is merely one of the components that make up the notion of quality, or one of the questions to be asked in answering the question whether the goods meet the required standard of quality.²⁶ Against this background, the Convention’s default rule in Article 35(2)(a) appears narrow and limited in its content and scope. On its face, this provision does not rely on any notion of quality,²⁷ with the only relevant question seemingly being whether the goods are fit for “the pur-

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. See, e.g., Sale of Goods Act, 1979, c. 54, § 14(2)–(2)(B) (Eng.), available at <http://www.legislation.gov.uk/ukpga/1979/54>; U.C.C. § 2-314(2)(c) (1977).

27. See COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* note 14, at 280; see also FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW: UNITED

poses for which goods of the same description would ordinarily be used.”²⁸ In other words, the Convention only seems concerned with whether the goods are fit for their ordinary purposes and not with quality. Rather, quality is a broader notion that may include not only fitness for ordinary purposes, but a number of other aspects such as the goods’ physical state and condition, intrinsic qualities and features, safety, durability, appearance, finish, and freedom from minor defects.²⁹ However, fitness for purpose will often depend on quality, meaning that there is a close link between them.³⁰ Does this mean that there are cases where the inquiry into the level of quality is necessary?

It is difficult to conceive of a scenario where the fitness for ordinary purposes will be totally incapable of resolving a situation. However, some circumstances will require this test to embrace fully the particular facts. The type of case that is likely to pose challenges to this test is that involving goods of varying grades (e.g., different grades or classes of wheat) or levels of performance (e.g., the amount of fruits a juice-making machine can process within a certain time period). The delivered wheat may be capable for being processed into flour or the juice-making machine may be more than suitable for making a fruit juice, but the buyer may contend that to be fit for the ordinary purpose(s), the wheat had to be of a higher grade or the machine ought to be capable of processing more fruits per hour than it actually does.³¹ Such a contention will not be justifiable if the ordinary purpose is construed in very simple and abstract terms, that is, whether the wheat can be processed or whether the machine is capable of making a fruit juice.

The test is only workable if the ordinary purpose(s) is (are) interpreted in light of the surrounding facts, such as where they point to a highly sophisticated nature of the buyer’s business and its strong reputation for high-end products, in which case the buyer may be entitled to demand goods of a higher grade or level of performance. To be workable, the ordinary purpose has to be interpreted not with reference to what are *generally* common or ordinary purposes, but to what can be reasonably regarded as ordinary in the *particular* circumstances of the buyer and the

NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS ¶ 3.1 (1992).

28. See CISG, *supra* note 6, art. 35(2)(a).

29. See, e.g., Sale of Goods Act § 14(2)–(2)(B).

30. See ARTICLE BY ARTICLE COMMENTARY, *supra* note 9, art. 35, ¶ 73.

31. Such a contention may not be justifiable if the ordinary purpose is construed in very simple and abstract terms, that is, whether the wheat can be processed or whether the machine is capable of making a fruit juice. But if it is appropriate to interpret the ordinary purpose(s) in light of the surrounding factual setting, pointing to a highly sophisticated nature of the buyer’s business and its strong reputation for high-end products, it may demand goods of a higher grade or level of performance. The crucial question is whether the ordinary purpose is to be interpreted with reference to what is a *generally* common or ordinary purpose, or to what can be reasonably regarded as ordinary in the circumstances of the buyer and the seller.

seller. That said, if the Convention specified some general level of quality that buyers could normally expect, it could possibly provide greater clarity as to the content of the seller's duty.³² If so, an inquiry into the notion of quality can supplement and facilitate the test of fitness for ordinary purposes, but it does not seem essential.³³

2. *Different Quality Tests: The Debate*

Much of the discussion in cases and writings on the CISG seems to reflect a view different from that taken in the previous section, implying that the inquiry into the notion of quality is necessary. This discussion, in turn, makes it necessary to choose between various quality tests. In one well-known case, the buyer alleged non-conformity in oil condensate, known as Rijn Blend, due to a high level of mercury.³⁴ The buyer, a major player in the oil and gas business, contended that the levels of mercury made Rijn Blend unacceptable for further processing and sales.³⁵ The arbitration tribunal, applying Article 35(2)(a), identified three main approaches to quality.³⁶

One approach, derived from the English common law, is the merchantable quality test which, in the tribunal's words, raises the question of whether "a reasonable buyer would have concluded contracts for Rijn Blend at similar prices if such a buyer had been aware of the mercury concentrations."³⁷ Relying on the evidence of the seller's resale of the condensate at reduced prices after the buyer's non-acceptance, the tribunal held that if this standard were applied, there would be a breach by the seller because "other buyers in the market for Rijn Blend were . . . unwilling to pay the price [sellers] had agreed with [buyer]."³⁸ Considering the second test of average quality used in some civil law jurisdictions, the tribunal held that the buyer had failed to meet its burden of proof as regards the issue of "whether there [was] a common understanding in the refining

32. For a further discussion of the meaning of various quality tests, see *infra* notes 34–75 and accompanying text.

33. Some writers suggest that such an inquiry is needed even where the goods are fit for the ordinary purpose(s). See ARTICLE BY ARTICLE COMMENTARY, *supra* note 9, art. 35, ¶ 74; Clayton P. Gillette & Franco Ferrari, *Warranties and "Lemons" Under CISG Article 35(2)(a)*, 1 Internationales Handelsrecht 2, 7 (2010), available at <http://cisgw3.law.pace.edu/cisg/biblio/gillette-ferrari.html>. However, it is respectfully argued that a quality standard, in addition to the fitness for purpose standard, is unnecessary because, as explained in Article 35(2)(a), the Convention is not concerned with quality as such, but with fitness for purpose. See CISG, *supra* note 6, art. 35(2)(a). The suggestion that a further inquiry into quality is necessary even if the fitness of purpose has been established unjustifiably extends the scope of Article 35(2)(a), and transforms it into a test of quality, which it is not.

34. See *Condensate Crude Oil Mix Case* (Neth. v. U.K.), Case No. 2319 (Neth. Arb. Inst. 2002), available at <http://cisgw3.law.pace.edu/cases/021015n1.html>.

35. See *id.*

36. See *id.*

37. *Id.*

38. *Id.* (alterations in original).

industry what average quality for blended condensates (such as Rijn Blend) should have been and what levels of mercury [were] tolerable."³⁹ The buyer would thus not be liable if that test were applied. Having found no overwhelming support in cases or in writings for either of these two approaches, and noting their domestic law origins and the fact that the Convention's legislative history indicated the rejection of both standards, the tribunal held them not to be applicable.⁴⁰

Instead, the standard of reasonable quality was applied.⁴¹ In the tribunal's view, the standard was more in line with the Convention's international character and the need to promote uniformity in its application, as well as based on its general principle of reasonableness.⁴² It was held that the seller was in breach of the reasonable quality standard for two reasons.⁴³ First, the tribunal once again noted that the contract price could not, in all likelihood, have been obtained from selling Rijn Blend if other buyers were informed about the levels of mercury.⁴⁴ The Rijn Blend with low levels of mercury was apparently valued more highly than that with increased mercury content.⁴⁵ Second, the parties have had a long-term business relationship and the buyer sufficiently established that when the condensate was delivered under the previous contracts, the condensate had not contained the increased level of mercury found in the delivery under the contested contract.⁴⁶ Therefore, the buyer "was entitled under the contracts to a constant quality level of the Rijn Blend corresponding to the quality levels that had been obtained during the . . . initial period of the Contracts and on which [buyer] and its customers could reasonably rely."⁴⁷

The reasoning and the choice of a legal basis for the decision are far from flawless. The reasonable quality test was applied along the same lines as the merchantability test would have been, had it been used: that is, a critical point was the evidence that the Rijn Blend with a higher level of mercury could not have been sold to any other buyer, who was aware of the true level of mercury, at the same price as that fixed in the contract with the buyer.⁴⁸ Not only does this interpretation create confusion as to whether there are any differences between the two tests, but it also weakens the tribunal's case for the rejection of the merchantability test. Looking at the tribunal's reasoning, the relevance of Article 35(2)(a) also becomes doubtful. The possibility of selling the goods only at a reduced

39. *Id.*

40. *See id.*

41. *See id.*

42. *See id.*

43. *See id.*

44. *See id.*

45. *See id.*

46. *See id.*

47. *Id.* (alteration in original).

48. *See Gillette & Ferrari, supra* note 33, at 8.

price and the delivery of the condensate with a low level of mercury under the previous contracts were the decisive factors leading to the seller's liability. However, these factors have little to do with the ordinary purposes test in Article 35(2)(a) and are primarily relevant for the purpose of contract interpretation under Article 35(1), in conjunction with Article 8, and possibly Article 9, if the parties' prior course of dealing amounted to a "practice" within the meaning of Article 9.⁴⁹

Despite these shortcomings, the decision is helpful in several respects. It highlights several quality tests that can potentially be relevant to the application of Article 35(2)(a). It also demonstrates that although these tests are inherently vague, they may not be entirely devoid of distinct content and consequences, contrary to the view of some writers.⁵⁰ In fact, the decision illustrates how the tests, namely the merchantability and the average quality tests, can produce different results, which shows the possible significance of choosing between them.

Choosing between these standards is difficult. The merchantable quality standard does entail the danger of its strong association with some common law systems,⁵¹ but it has the advantage of being based on a fairly clear and workable test: if the goods can be resold on a market without the abatement of the price,⁵² the goods are of merchantable quality and the seller is not in breach. From the standpoint of economic considerations, the test has received some support⁵³ on the basis that, in contrast with the

49. See *id.* at 9.

50. See P.S. ATIYAH, JOHN N. ADAMS & HECTOR MACQUEEN, *ATIYAH'S SALE OF GOODS* 166 (12th ed. 2010).

51. For a discussion of the development of this test in English law, which viewed the merchantability test as comprising more than just saleability on the same terms as those in the parties' contract (with description, fitness for purpose, and acceptance being other relevant aspects of merchantability), see BRIDGE, *supra* note 2, ¶¶ 7.42–55.

52. A classic formulation of this version of the test was made in *Australian Knitting Mills Ltd. v Grant* (1933) 50 CLR 387, 413 (Austl.). In *Australian Knitting Mills*, the court held that:

[The goods] should be in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonable sound order and condition and without special terms.

Id.

53. See Gillette & Ferrari, *supra* note 33, at 12. There are cases on the CISG that have explicitly interpreted Article 35(2)(a) as based on the merchantability test. See *Clothes Case* (Austl. v. China) (China Int'l Econ. & Trade Arb. Comm'n 2003), available at <http://cisgw3.law.pace.edu/cases/030603c1.html> (expressly stating that Article 35(2)(a) means that goods must be merchantable, in noting that "the goods delivered by the [seller] were [of] poor quality and . . . could not be resold even at a discounted price. Therefore, the goods delivered by the [seller] were not resalable") (alterations in original). Several additional cases were decided in common law jurisdictions where the courts simply read the merchantability test into the CISG with no attempt to explain the reasons for doing so. See *Fryer Holdings v Liaoning MEC Grp.* [2012] NSWSC 18 (Austl.), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/2325.pdf>; *Int'l*

other two tests, it does not give rise to any undesirable incentives for the seller because it refers to a measurable benchmark—a market price.⁵⁴ It also deals with the problem of informational asymmetry by signalling the quality and other features of the goods, as well as the seller's investment in the product:

Assuming relatively competitive markets, price should reflect the inputs that the seller invests in product quality, and thus it is likely to incorporate the seller's information concerning defect rates. Price also is likely to incorporate information that buyers have about the good. Buyers are unlikely to purchase a good that carries a price in excess of the buyer's expected value for it. When buyers agree to pay a particular price for a good, therefore, they have a set of expectations about the good's characteristics. Sellers who have superior information about the qualitative characteristics of the good reveal those features through the pricing mechanism. Price, in effect, serves as a substitute for a more detailed description of the goods that would constitute an express warranty of quality.⁵⁵

The proponents of this position, resting on the supremacy of economic considerations, recognise some of the drawbacks of the merchantability test. One is its ability to distort the parties' negotiations by virtue of implicitly setting the price limit that the seller can charge: "[i]n effect, this test can be interpreted to transform price, standing alone, into a warranty."⁵⁶ Another is that the price may accommodate factors other than those relating to quality (for example, luxury goods, oligopolistic markets, or markets where the seller occupies a dominant market position), and this means that the goods' ability, or lack thereof, to command certain prices may be due not only to quality but to those other factors. That, in turn, means that in such cases, the merchantability test is not fully determinative of the quality of the goods. For this reason, those favouring this test have not advocated a firm application of the merchantable quality standard but have argued in favour of its presumption, which can be displaced upon demonstrating that the price was not fully reflective of quality.⁵⁷

Housewares v SEB (2003) CP 395 SD 01 (HC) (N.Z.), available at <http://www.cisg.law.pace.edu/cases/030331n6.html#term>; see also *Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Technical Fabrics Can. Ltd.*, 474 F. Supp. 2d 1075 (D. Minn. 2007). This approach is clearly unacceptable, as it violates the Convention's international character.

54. For a further discussion on the advantages of the merchantable quality standard, see *infra* notes 55–57 and accompanying text.

55. Gillette & Ferrari, *supra* note 33, at 12.

56. *Id.* at 14.

57. See *id.* at 15.

The average quality test has also found some support.⁵⁸ This test can be viewed almost as a mathematical test as it implies a “middle belt of quality.”⁵⁹ This shows that it also has a discernible content and should therefore be workable. The test may also point to a balanced standard, particularly for the goods of variable quality, by being set in the middle between high and low quality levels. The test has, however, been criticised on the ground that it has the effect of making the products that are below average quality drop out of the market. That, in turn, will push the average quality upwards because the disappearance of quality below average changes the meaning of average quality, since what was the middle of the range becomes the bottom end of the range. As a result, average quality “becomes meaningless because of the constant change in the standard.”⁶⁰ Whilst this outcome may well logically follow as a matter of theory, it may be questioned whether there is evidence of this test actually producing such results in practice, considering that this test has been used in many domestic legal systems, some of which govern quality in highly developed markets and economic systems.⁶¹

Some have favoured the reasonable quality standard due to its relative neutrality. The standard has no association with the well-known quality tests in domestic legal systems, which can make it more conducive to promoting uniformity and the Convention’s international character. Similar to what has been stated in the arbitration decision discussed above, the standard has been praised for its flexibility and its consonance with the idea of reasonableness underlying the CISG. Flexibility is highly desirable, in some commentators’ view, because the fitness for the ordinary purposes may require a level of quality, which is higher or lower than average quality.⁶²

Still, the standard has been criticised for creating the “lemons problem.”⁶³ Assume that there is a range of products, from low to high quality, all of which are fit for the ordinary purpose. Since reasonable quality does not fix and signal a level of quality with any precision, the buyers, who have no means of investigating the goods’ quality before receiving the delivery, will fear that what is presented to them as high quality goods are in fact goods of low quality. If it turns out that the goods are of low quality, the seller will not be held liable because those goods are still fit for the ordinary purpose. Faced with this prospect, buyers will treat all goods as

58. See, e.g., Landgericht [LG] [District Court] Sept. 15, 1994, 52 S 247/94 (Ger.), available at <http://cisgw3.law.pace.edu/cases/940915g1.html> (“The goods must be of average quality, and it does not suffice that they can only just be traded.”).

59. U.C.C. § 2-314 cmt. 7 (1977).

60. Gillette & Ferrari, *supra* note 33, at 11.

61. See, e.g., INGBORG SCHWENZER, PASCAL HACHEM & CHRISTOPHER KEE, GLOBAL SALES AND CONTRACT LAW ¶¶ 31.127–.128 (2012).

62. See ARTICLE BY ARTICLE COMMENTARY, *supra* note 9, art. 35, ¶ 79.

63. See Gillette & Ferrari, *supra* note 33, at 10.

being of low quality and refuse to pay a higher price for higher quality goods. This will result in the high quality sellers being gradually driven out of the market.⁶⁴

None of these standards emerges as a clear winner and this aspect of Article 35(2)(a) is likely to remain controversial in the foreseeable future. If the CISG is ever to be revised or if a new international sales law is ever adopted, some thought will need to be given to whether there is a need for an underlying quality standard. This is a question of policy. There have been instances where the CISG has been seen as a vehicle for promoting quality standards around the world and, if there is some truth in this position, it would point strongly to the need to articulate an underlying quality standard.⁶⁵ In that case, what minimum level of quality can reasonably be expected in international trade? At one end of the spectrum, there is a view that the lowest grade within the range of contractual description is sufficient,⁶⁶ whilst at the other end, some may believe that even such standards as average or satisfactory⁶⁷ quality, which tend to be associated with mediocrity,⁶⁸ are not good enough in the modern day of increasing consumers' expectations.

The merchantability standard is helpful in that the price will often be a powerful signal of a benchmark of quality, and consequently of fitness for the ordinary purposes, which the buyer can reasonably expect. The goods' ability or inability to be resold on a market at the same price as that in the parties' contract is a practically useful test. However, the suggestion that it should operate as a presumption seems to overstate its utility for several reasons. To begin with, there may not be a market for the goods to provide a reference point. What constitutes a market can also be a tricky question, as markets can be defined broadly or narrowly.⁶⁹ There are many variables affecting a market price in the particular circumstances—the need to transport the goods, location of a market, seasonal nature of the goods, time frames—and the direct price comparability between the contract price and the price obtainable on a market may not always be possible or fully reflective of quality.

In addition, the test's reference to a sale on a market may be more suitable for some goods than for others. For example, a market can be found more easily in respect of commodities than in the case of heavy and

64. *See id.*

65. *See Hof 's-Gravenhage Apr. 23, 2003, JOR 2003 (Rynpoort Trading & Transport NV et al./Meneba Meel Wormerveer B.V. et al.) (Neth.), available at <http://cisgw3.law.pace.edu/cases/030423n1.html>.*

66. *See* HUBER & MULLIS, *supra* note 9, at 135.

67. *See* Sale of Goods Act, 1979, c. 54, § 14 (Eng.), *available at* <http://www.legislation.gov.uk/ukpga/1979/54>; U.C.C. § 2-314(2)(c) (1977).

68. *See* ATIYAH, ADAMS & MACQUEEN, *supra* note 50, at 159.

69. *See, e.g.,* Djakhongir Saidov, *The Present State of Damages Under the CISG: A Critical Assessment*, 13 VINDOBONA J. INT'L COM. L. & ARB. 197, 209–14 (2009).

highly specialised machinery.⁷⁰ It has also been suggested that the use of this test is more relevant where the goods are bought for resale, rather than use.⁷¹ Yet another reason against the presumption relates to its likely consequence of interfering with the parties' bargain. The seller may have managed to bargain for a better price, which would not normally be obtainable for the goods at hand. Later holding this same seller liable on the basis that he or she should have delivered the goods of higher quality fails to respect and uphold the bargain that the parties struck. If the CISG is interpreted in this way, it will undermine the freedom of contract and turn the Convention into an instrument with a greater regulatory drive, closer to an extreme point of *caveat venditor* than it should be, considering it is a legal regime which is intended to encourage participation in international trade. Sellers would undoubtedly be discouraged by such a position and that would hamper trade and lead to the parties' excluding or derogating from the CISG, neither of which is in line with the Convention's aims.

Thus, if a choice had to be made, a flexible standard of reasonable quality may be the right way to move forward. To inject greater certainty into the standard, a key consideration should be that found in the merchantability test, that is, reliance on a market price and focus on whether the goods can be resold to a buyer with full knowledge of the goods' actual state and condition without any reduction in the price. Such a test would be both sufficiently flexible and certain. Without creating any presumption, it draws on the practicality and good sense underlying the merchantability test, while at the same time avoiding not only domestic law associations but, more importantly, the limitations of merchantability. For example, if there is no market to provide a reference price, or if a market price is not fully reflective of quality, the reasonable quality standard is flexible and broad enough to take account of other relevant considerations. It also does not presuppose a fixed benchmark, as is the case under the average quality test. The lack of a fixed benchmark under the reasonable quality standard is more in line with the ordinary purposes requirement: this requirement may refer, depending on the circumstances, to quality which is lower or higher than average.

With quality having to be reasonable, perfection, in the sense that the goods have to be flawless, would not, as a rule, be required.⁷² However, in the case of mass produced and manufactured goods, there may justifiably be an expectation of a higher level of quality, not far from perfection,

70. See *Bristol Tramways Carriage Co. v. Fiat Motors Ltd.* [1910] 2 K.B. 831, 840.

71. See *Bernstein v. Pamson Motors* (1987) R.T.R. 384 (Q.B.) at 387 (Eng.).

72. See *Pressure Sensors Case (China v. Braz.) Arbitration Award*, ¶ 144 (Arbitral Inst. of Stockholm Chamber of Commerce 2007), available at <http://cisgw3.law.pace.edu/cases/070405s5.html> (explaining that seller commits no breach if defects are minor and can easily be avoided by buyer or end user). There is much support for this view in the context of Article 35(2), even without any reference to the reasonable quality test. See CISG, *supra* note 6, art. 35(2).

because “modern manufactured goods are marketed and sold against a background of high expectations and quality control procedures.”⁷³ In this context, even minor defects may not be tolerated. The same may be the case if the goods are described in the contract as “new,” which almost naturally signals a greater expectation of high quality, bordering on perfection. That said, even a new product, such as a car and such goods as complex machinery or software,⁷⁴ will sometimes need a “teething,”⁷⁵ or an adjustment period. In this case, a minor defect, if it is normal or common for the goods in the initial stages of their operation, is unlikely to amount to a breach of reasonable quality and, consequently, of the fitness for the ordinary purposes test.

III. COMPLIANCE WITH PUBLIC LAW REGULATIONS

A situation frequently occurring in international trade is one in which the buyer complains that the goods do not meet the requirements of public law regulations in the country where the goods are intended to be used or sold. Which of the two parties is to bear the risk of non-compliance with the relevant regulations? Although there is no absolute uniformity in cases on this matter, a position which has been gaining wider international acceptance⁷⁶ is the one set out in what has become known as the *New Zealand Mussels* case.⁷⁷ In the *New Zealand Mussels* case, the mussels deliv-

73. BRIDGE, *supra* note 2, ¶ 7.65.

74. See Rb Arnhem June 28, 2006, 82879 / HA ZA 02-105 (Silicon Biomedical Instruments B.V./Erich Jaeger GmbH) (Neth.), available at <http://cisgw3.law.pace.edu/cases/060628n1.html>. The court of first instance held that:

Although the Court finds that it has to be tolerated that new developed software may have “teething troubles” or “start-up problems” in the beginning—this is how the Court interprets Art. 7.1 of the contract which reads “Supplier does not warrant that operation of the Products will be error free or uninterrupted, or that all non-conformities can be corrected”—it must be possible to use the software in a normal way from the beginning on. The testimonies proved that this was not the case, as there were frequent interferences and as data could not be found or loaded without consulting a technical clerk.

Id.; see also BENJAMIN’S SALE OF GOODS ¶ 11-069 (Michael Bridge ed., 8th ed. 2010) (suggesting, in context of fitness for purpose test in English law, that there should be no strict liability for non-conformities in software).

75. *Bernstein*, R.T.R. 384 (Q.B.) at 390 (“minor teething troubles . . . could be expected in any new motor car”).

76. See, e.g., Oberster Gerichtshof [OGH] [Supreme Court], Apr. 13, 2000, docket No. 2 Ob 100/00w (Austria), available at <http://cisgw3.law.pace.edu/cases/000413a3.html>; RJ & AM Smallmon v Transp. Sales Ltd. (2011) CIV-2009-409-000363 (HC) 340 (N.Z.), available at <http://cisgw3.law.pace.edu/cases/100730n6.html>; Med. Mktg. Int’l, Inc. v. Internazionale Medico Scientifica, S.R.L., No. Civ. A. 99-0380, 1999 WL 311945, at *1-3 (E.D. La. May 17, 1999) (affirming decision of arbitration tribunal that accepted approach in *New Zealand Mussels*, but holding that general rule did not apply due to presence of one of exceptions). *But see* Cour d’appel [CA] [regional court of appeal] Paris, Dec. 13, 1995 (Fr.), available at <http://cisgw3.law.pace.edu/cases/951213f1.html>.

77. Bundesgerichtshof [BGH] [Federal Supreme Court] Mar. 8, 1995, VIII ZR 159/94 (Ger.), available at <http://cisgw3.law.pace.edu/cases/950308g3.html>.

ered by a Swiss seller to a German buyer did not comply with a recommendation of the German health authorities as to their cadmium content. The German Supreme Court stated that the seller could not be held liable for non-compliance with the regulations in the buyer's country unless: (1) the regulations were the same in the seller's country; (2) the buyer specifically drew the seller's attention to the regulations; or (3) the seller had a good reason to know about them, such as where the seller had a branch in the buyer's country, had a long-established business relationship with the buyer, often previously exported the goods to that country, or promoted them in that country. Because none of these circumstances were present, the seller was deemed not to have had a duty to comply with the recommendation of German authorities.

The issue of non-compliance with public law regulations highlights a major challenge in the application of default rules on conformity. On the one hand, the rules' broad formulation and need to be defined with reference to the surrounding context unequivocally dictates that they must be applied on a case-by-case basis. On the other hand, a lack of any general guidelines would create uncertainty in this important area of sales law and give rise to an argument that the rules lack any content and meaning. This is undesirable because an effective sales law is one that not only promotes a reasonable degree of predictability, but also signals and enhances a coherent set of objectives, values, and policies. A balance thus needs to be struck between formulating a meaningful guideline, based on the Convention's policies, and responding to the particularities of all relevant circumstances of the case.

It is submitted that the approach of the *New Zealand Mussels* case manages to strike this balance. As a starting point, the court's clear position as to which of the parties is to bear the risk promotes legal certainty. However, this position is neither a fixed rule nor a presumption, and is merely a general guideline.⁷⁸ Providing for special circumstances is a way of ensuring that the Convention is fully responsive to the particular circumstances and that the seller will bear the risk where there are good reasons for doing so. The next question is whether, as a matter of principle, it is right to allocate the risk to the buyer. It is suggested that it is both fair and efficient to allocate the risk to the party who is in a better position to access the relevant information, to insure against this risk, or to avoid it. Subject to the special circumstances listed in *New Zealand Mussels*, the buyer is generally in a better position than the seller to know about the regulations in the country where the goods will be used or sold. The buyer can reduce the risk of non-compliance by drawing those regulations to the seller's attention, or by including the need to comply with them

78. Cf. JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 335 (Harry M. Flechtner ed., 4th ed. 2009) (suggesting that no starting point should be adopted).

into the contract.⁷⁹ It is also, as a rule, cheaper for the buyer to carry out the necessary investigations. Making the buyer bear the burden of investigating avoids higher costs, which would otherwise have to be incurred if this burden were borne by the seller. If sellers were put in the position of being compelled to investigate the relevant regulations in order to alleviate the risk of being held liable in the future, the prices for the goods would also have to rise because sellers would have to spread that additional cost and risk of liability to buyers. That would only hinder commerce by making trade more expensive. In short, allocating this risk to the buyer promotes economic efficiency.

New Zealand Mussels seems to represent a rare achievement on the part of the CISG. Even those legal systems which attempt to formulate the rules on conformity in a way which is more detailed and precise than that found in Article 35(2) recognize that more specific content and meaning of these rules can only emerge through layers of interpretations given in cases. *New Zealand Mussels* has presented rational and fair treatment of a frequently arising scenario involving both paragraphs (a) and (b) of Article 35(2). It has struck a good balance between flexibility and clarity. Clarity in the Convention's position has been advanced considerably thanks to this case gaining prominence by having influenced other CISG cases. In the Convention's international spirit, this case has paved a way for a uniform direction in dealing with cases of non-compliance with public law regulations. This direction is based on a coherent framework, which, at the same time, preserves fairness and avoids automaticity of outcomes. If a new international sales law is ever adopted, these cases must not be forgotten, but also must be built upon. There may be something to be said in favour of introducing a provision, formulated along the lines set out in *New Zealand Mussels*, dealing specifically with cases of non-compliance with public law regulations.

IV. PROOF

A. *Burden of Proof*

The legal issues flowing from the need to prove a claim arise in every area of sales law. The rules on conformity are by no means an exception and have, in fact, proved to be a fertile ground for dealing with issues of proof under the CISG. The first point to be addressed is that of burden of proof. It is now increasingly recognised that burden of proof is a matter governed by the CISG.⁸⁰ One relevant general principle under the CISG is that a party who asserts a right must prove the necessary preconditions

79. See Gillette & Ferrari, *supra* note 33, at 7; CLAYTON P. GILLETTE & STEVEN D. WALT, *SALES LAW: DOMESTIC AND INTERNATIONAL* 363–64 (2d ed. 2009).

80. See, e.g., Handelsgericht [HG] [Commercial Court] Sept. 9, 1993, HG930 138.U/HG93 (Switz.), available at <http://cisgw3.law.pace.edu/cases/930909s1.html>.

for the existence of that right.⁸¹ This means that under Article 35(2)(b), for example, the buyer bears the burden of proving that a particular purpose has been duly communicated to the seller.⁸² In the same vein, a party who invokes the exception to the other party's right must prove the necessary preconditions for the existence of that exception. The buyer's right to rely on the seller's obligation to ensure the goods' fitness for a particular purpose is available unless there was no actual or reasonable reliance by the buyer. The reliance provision is, in other words, an exception to the buyer's entitlement to the goods fit for a particular purpose, and the burden of proof of the preconditions for that exception lies with the seller. If the seller does not raise the issue of reliance, the goods' fitness under Article 35(2)(b) will be presumed. The burden of proof includes the burden of adducing the relevant evidence and the burden of persuasion.⁸³

The "rule and exception" principle of the allocation of burden of proof may not always be applied strictly in practice because the burden of adducing evidence is sometimes placed on a party who simply has better access to evidence but who would not otherwise bear this burden on strict principles of the allocation of burden of proof.⁸⁴ This approach, known as "proof proximity," is sometimes justified on the grounds of equity.⁸⁵ Although those decisions which have taken this approach may have done so on the basis of their domestic law,⁸⁶ some commentators argue in favour of developing the general principle of proof proximity within the CISG,⁸⁷ drawing support from the drafting history of Article 25:

Originally Art. 25, which at the time was Art. 9 provided that a breach was fundamental if "it results in a substantial detriment to the other party *and* the party in breach foresaw or had reason to foresee such a result." The "and" was in the end replaced by the present "unless" as it would be very difficult for the non-breaching party to prove that the breaching party did not foresee the result or could not have foreseen it. As the breaching party was much closer to the fact the burden of proof was imposed on it.⁸⁸

81. See, e.g., Tribunal Cantonal Valais [Appellate Court], Apr. 27, 2007, C1 06 95 (Switz.), available at <http://cisgw3.law.pace.edu/cases/070427s1.html>.

82. See Handelsgericht [HG] [Commercial Court] Sept. 9, 1993, HG930138.U/HG93 (Switz.) (taking this position not specifically in context of Article 35(2)(b), but Article 35 in general).

83. See ARTICLE BY ARTICLE COMMENTARY, *supra* note 9, art. 35, ¶¶ 188–94.

84. See Tribunal Cantonal Valais [Appellate Court], Apr. 27, 2007, C1 06 95 (Switz.) ("If the buyer rejects the goods by invoking their non-conformity the seller must prove that the goods are in conformity with the contract; if the buyer already accepted the goods the buyer would have to prove their non-conformity.")

85. See ARTICLE BY ARTICLE COMMENTARY, *supra* note 9, art. 35, ¶ 171.

86. See Tribunal Cantonal Valais [Appellate Court], Apr. 27, 2007, C1 06 95 (Switz.).

87. See ARTICLE BY ARTICLE COMMENTARY, *supra* note 9, art. 35, ¶ 170.

88. *Id.* ¶ 171.

There are undeniably differences in legal cultures, procedural environments, and views of the purpose of judicial proceedings—that is, whether they are strictly adversarial or aim to establish the truth at all costs—which have a direct impact on the way evidence is taken. Therefore, a degree of non-uniformity can be expected in matters of taking evidence and more broadly in allocating burden of proof. It is suggested, however, that legal predictability should not be undermined any further by the introduction of the proof proximity principle into the CISG. As already alluded to, proof proximity can easily contravene the rule and exception principle, and its introduction necessitates a choice between the two, either as a matter of general principle or in the particular case. That, in turn, gives rise to an additional layer of complexity and unpredictability. Reaching a substantial degree of international agreement on the rule and exception principle is a hard-earned achievement, which has potential to promote legal certainty in all areas falling within the Convention's scope. From this standpoint, recognising proof proximity as the Convention's general principle would be an unwelcome development.

B. *Standard of Proof*

In contrast, using the Convention's general principles to develop a standard of proof does have the advantage of promoting uniformity. The standard of proof concerns the amount of evidence and the degree of precision flowing from it that are sufficient to prove the existence of a legal right.⁸⁹ There is a close connection between the burden and standard of proof,⁹⁰ and having the former governed by the CISG and the latter by domestic law makes the Convention's scope piecemeal, inconsistent, and incoherent. More importantly, a standard of proof has a direct impact on the *exercise* of the innocent party's rights. The Convention's goal of promoting uniformity in its application is hardly achievable if the rights, established by the Convention, cannot be exercised in the same way due to the different standards of proof used by domestic legal systems. It is thus submitted that a standard of proof should be regarded as a matter falling within the CISG, and therefore domestic legal systems should have no role to play in formulating the applicable standard. There is now increasing support for the view that the Convention's general principle of reasonableness,⁹¹ together with the fact that absolute precision in proving the preconditions of the existence of a legal right are not always achievable, can lead to the development of the principle that such preconditions

89. See, e.g., Djakhongir Saidov, *Standards of Proving Loss and Determining the Amount of Damages*, 22 J. CONT. L. 1, 5 (2006) (explaining standard in context of proving losses).

90. See SCHLECHTRIEM & SCHWENZER, *supra* note 9, art. 35, ¶ 56.

91. See Albert H. Kritzer, *Reasonableness*, CISG DATABASE, <http://www.cisg.law.pace.edu/cisg/text/reason.html#schl> (last updated Jan. 23, 2001) ("Reasonableness is specifically mentioned in thirty-seven provisions of the CISG and clearly alluded to elsewhere in the Uniform Sales Law.").

only need to be proved with a reasonable degree of certainty.⁹² It is suggested, therefore, that, like all other issues falling within the CISG, the preconditions for the buyer's rights under Article 35 and for the exceptions available to the seller, such as the provision on reliance on its skill and judgement in paragraph (2)(b), need to be established with reasonable certainty.

C. Admissibility of Evidence

The evaluation and admissibility of evidence are often treated as falling into the procedural law realm,⁹³ which is outside the scope of the CISG,⁹⁴ a substantive law instrument. In contrast with a standard of proof, which may be classed as an issue of substantive or procedural law depending on the applicable legal regime, the admissibility of evidence appears, at first sight, to fall more clearly into the procedural law realm. Therefore, it would seem that the applicable procedural law should govern this matter. However, in some domestic systems, the admissibility of evidence may possibly be regarded as a matter of substantive law. In one case,⁹⁵ the buyer's evidence, which was based on testimony of a German inspection company to support its claim that charcoal was non-conforming under Article 35(2) of the CISG, was held inadmissible. It was so held because the buyer did not follow a procedure fixed under Article 476 of the Argentine Commercial Code according to which in order to contest the quality of the goods, the buyer ought to appeal to expert arbitration.⁹⁶ The Argentine appellate court reasoned that the CISG did not "contain any rule—[or] general [principle]—concerning the procedure to follow in order to determine the quality of goods" and ruled that because "the buyer did not determine the quality of the charcoal in accordance with the expert arbitration procedures required by Article 476 of the Argentine Commercial Code, his evidence consisting of a testimony of a German witness, the qual-

92. For similar arguments in the context of damages, see, for example, Saidov, *supra* note 89, at 5–6, 56, 70; Int'l Sales Convention Advisory Council, *Calculation of Damages Under CISG Article 74*, Advisory Council Opinion No. 6 (2006), available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op6.html>.

93. In most jurisdictions, the admissibility of evidence is treated as a procedural law issue. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 138 (1971); SCHLECHTRIEM & SCHWENZER, *supra* note 9, art. 11, ¶ 4.

94. See SCHLECHTRIEM & SCHWENZER, *supra* note 9, art. 35, ¶ 50, art. 74, ¶ 66.

95. Cámara Nacional de Apelaciones en lo Comercial [CNCom., sala E] [Second Instance Court of Appeal], 24/4/2000, "Mayer Alejandro c. Onda Hofferle" (Arg.), available at <http://cisgw3.law.pace.edu/cases/000424a1.html#ii>.

96. For a detailed explanation of the nature and purpose of an expert arbitration under Article 476 of the Commercial Code of Argentina, see Anthony J. McMahon, Note, *Differentiating Between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining "Governed By" in the Context of Article 7(2)*, 44 COLUM. J. TRANSNAT'L L. 992, 1020–23 (2006).

ity of the charcoal could not be determined.”⁹⁷ A similar decision was subsequently reached in another Argentine case.⁹⁸

Whilst the requirement regarding the referral of a matter of a lack of conformity to expert arbitration may seem to be procedural in nature,⁹⁹ some writers point out that the fact that this requirement is contained in the Argentine Commercial Code, as opposed to the Code of Civil Procedure, suggests the possibility that the admissibility of evidence was treated as a matter of substantive law.¹⁰⁰ If so, does the fact that the admissibility of evidence may be a substantive law issue in some domestic systems mean that the Convention should now be regarded as governing this issue for the same reasons as those advanced in respect of the standard of proof? These Argentine cases reaffirm the point that the distinction between the procedural and substantive law issues is relative¹⁰¹ and in itself it cannot constitute an appropriate basis for deciding what falls within or outside the Convention’s scope. This does not necessarily mean that the admissibility of evidence can be regarded as a matter governed by the CISG. The issue requires careful consideration of issues going beyond the scope of this Article. Therefore, only some tentative and general observations will be made.

As illustrated by the Argentine cases, the admissibility of evidence does endanger a uniform application of the Convention’s conformity provisions because in a number of other jurisdictions the expert witness’s report may well have been admissible. A universally agreed approach to the question of the admissibility of evidence would certainly be a significant

97. Cámara Nacional de Apelaciones en lo Comercial [CNCom., sala E] [Second Instance Court of Appeal], 24/4/2000, “Mayer Alejandro c. Onda Hofferle” (Arg.).

98. See Cámara Nacional de Apelaciones en lo Comercial [CnCom., sala E] [Second Instance Court of Appeal], 21/7/2002, “Cervecería y Maltería Paysandú S.A. c. Cervecería Argentina S.A.” (Arg.), available at <http://cisgw3.law.pace.edu/cases/020721a1.html>. In *Cervecería y Maltería Paysandú S.A. c. Cervecería Argentina S.A.*, the Argentine appellate court held that:

[T]he [Buyer]’s demand has ignored the procedure fixed imperatively by article 476 of the Commercial Code, according to which the buyer who refutes the quality of the goods should appeal to the know-how by arbitration [E]xpert arbitration is the road legally contemplated to settle this type of controversy as regards commercial sales of goods [The analysis by a German laboratory] does not replace the trial of expert arbitrators—without which [Buyer]’s allegations are not proven.

Id. (final alteration in original).

99. See McMahon, *supra* note 96, at 1028–29.

100. See Cámara Nacional de Apelaciones en lo Comercial [CNCom., sala E] [Second Instance Court of Appeal], 24/4/2000, “Mayer Alejandro c. Onda Hofferle” (Arg.).

101. See, e.g., Chiara G. Orlandi, *Procedural Law Issues and Uniform Law Conventions*, 5 UNIF. L. REV. 23, 30 n.29 (2000) (“[T]here exists no systematic abstract criterion that would enable a given case to be classified unequivocally and rationally as being either of a ‘procedural’ or a ‘substantive’ nature.”); Ingeborg Schwenzer & Pascal Hachem, *The CISG—Successes and Pitfalls*, 57 AM. J. COMP. L. 457, 471–72 (2009).

step in promoting the Convention's uniform application. There are provisions which can, conceivably, be used to develop a relevant general principle that the CISG takes a liberal approach to admitting evidence, meaning that all relevant evidence is to be admitted. Article 11 of the CISG provides that a contract "need not be . . . evidenced by writing . . . [,] is not subject to any other requirement as to form," and "may be proved by any means, including witnesses."¹⁰² Article 8(3) requires that in interpreting the parties' statement and conduct, "all relevant circumstances" need to be taken into consideration and can therefore be seen as "based on the principle of the admissibility of all evidentiary materials for the interpretation of the parties' declarations."¹⁰³

That said, there is still a strong sense that for the CISG to deal with the admissibility of evidence outside the parameters of Articles 11 and 8 is to stretch its scope beyond that intended by the drafters. It has been suggested that these two provisions were included to make it clear that there is no place in the CISG for the common law doctrines of parol evidence and statute of frauds.¹⁰⁴ Had the drafters intended the CISG to embrace fully an issue as broad in its reach as the admissibility of evidence, they would have, surely, indicated that with much greater clarity. More so, because the admissibility of evidence is *usually* regarded as a procedural matter, many countries would be surprised to discover that the CISG displaces their procedural law regimes, if the Convention is held to deal with this issue. It is highly likely that that was not the understanding the countries had in deciding to ratify the CISG.¹⁰⁵ Considering that any general principle that can be potentially developed will be inherently general and incapable of matching the level of detail of domestic rules on evidence, such an approach may also deter the ratification by other countries.

It is also doubtful whether the CISG is capable of governing and embracing this matter in all its complexity. The relevant domestic rules on the admissibility of evidence are based on a variety of policies and considerations emanating from different spheres, many of which are outside a contract law instrument like the CISG.¹⁰⁶ Many such policies will undoubtedly be worthy of legal protection whilst the CISG will be incapable

102. CISG, *supra* note 6, art. 11.

103. SCHLECHTRIEM & SCHWENZER, *supra* note 9, art. 11, ¶ 13.

104. *See* McMahan, *supra* note 96, at 1026.

105. *See id.* at 1026–28.

106. *See* IAN DENNIS, *THE LAW OF EVIDENCE* 86–87 (4th ed. 2010). The common law of evidence, for example, includes rules: against hearsay evidence; on expert witnesses (who can only give opinion on matters requiring their expertise without expressing views on the ultimate issues of the case); against evidence of bad character; on protecting confidential communications between lawyer and client; against evidence which might be injurious to public interest (the public interest immunity doctrine). Each of these rules is based on its particular rationale. *See id.* Perhaps, what all different types of rationale may have in common is that they "will represent a judgment that the 'costs' of the type of evidence in question are sufficiently great to justify a general rule of restriction." *Id.* at 87. Some of these types of rationale may also be based on the "need to protect certain rights of par-

of catering to all those policies. Finally, it can also be argued that it is best to leave the admissibility of evidence to domestic legal systems for the reasons of efficiency, speed, and practical convenience. As explained in the commentary on Section 138 of the U.S. Restatement (Second) of Conflict of Laws, the “trial judge must make most evidentiary decisions with dispatch if the trial is to proceed with celerity. The judge should therefore, as a general rule, apply the local law of his own state.”¹⁰⁷ All of these arguments point in favour of the admissibility of evidence being entirely outside the CISG, making the outcomes in the Argentine cases correct.

These arguments notwithstanding, uncertainty as regards the Convention’s relationship with the domestic rules on the admissibility of evidence has led to the emergence of more flexible approaches. In the context of Article 11 it has been contended that what is decisive is not how a rule is characterised in a given domestic jurisdiction, but its function. If a domestic rule substantially undermines a party’s evidentiary position, the rule should be classed as a rule of substantive law and therefore displaced by Article 11. If the evidence in question “merely makes it easier to prove matters,” the domestic rule on the admissibility of evidence, usually being classified as a procedural rule, should apply as such.¹⁰⁸ By analogy, it can be argued that what is decisive in cases, such as the Argentine cases above, is whether the buyer’s evidentiary position, and consequently its ability to establish its rights under Article 35(2) of the CISG, would be substantially undermined by the domestic rules on the admissibility of evidence. If so, the admissibility of evidence should be treated as part of the substantive law regime that ought to be displaced by Article 35(2). Underlying this position is the view that the recourse to domestic evidence rules “must be the exception, not the rule” in order to avoid undermining the Convention’s uniform application.¹⁰⁹ If this standpoint is taken, the decision in the Argentine case would be wrongly decided because it deprived the buyer of an opportunity to rely on the inspection company’s report to prove a lack of conformity—a piece of evidence which would probably be acceptable in many other jurisdictions.

D. *Concluding Observations*

This excursion into matters of proof highlights several areas of uncertainty as to how far the scope of a substantive law instrument should be stretched. This work has presented its tentative suggestions in respect of how these matters should be treated under the CISG. But if we were once again to imagine a new international sales law, it would be desirable to see clearer and more definitive guidance as regards the burden, standard,

ties to litigation or the need to ensure legitimacy of decision in the adjudication.” *Id.* Apart from these, every rule pursues different objectives and policies. *See id.*

107. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 138 cmt. a (1971).

108. *See* SCHLECHTRIEM & SCHWENZER, *supra* note 9, art. 11, ¶ 13.

109. *See* Orlandi, *supra* note 101, at 28.

evaluation, and admissibility of proof. As explained, all these areas have a great influence on the exercise of rights available under the substantive law regime. The more the international instruments are treated as governing these matters, the greater the potential for their uniform application. However, before extending their scope in that way, the drafters need to ensure that the international sales law is capable of governing the issues of proof. It has been shown that even an instrument like the CISG, which says very little on matters of proof, is capable of governing the issue of the burden and standard of proof in principle. In relation to the admissibility of evidence, domestic law is a preferred option. Even then, for the sake of legal certainty, an international instrument should still explain its relationship with the applicable domestic law.

V. CONCLUSION

The Convention's rules on conformity are broad and concise. This is understandable, considering that trade involves a nearly infinite number of goods and equally infinite sets of circumstances surrounding sales contracts. Nevertheless, the Convention's considerable practical experience has now exposed that the simplicity of its rules is deceptive and there are a number of questions that have no clear answers or are surrounded by controversy. One such question is whether there is really a need to search for a quality standard, which can underpin the ultimate default test of the fitness for ordinary purposes. This Article's position is that a quality standard is not essential because the fitness for the ordinary purposes test will be capable of resolving all cases unless it is interpreted in abstract terms, without regard for the parties' particular circumstances. If this is correct, the significance of the debate about the right quality standard may seem, to some extent, irrelevant. However, in some cases, such as those involving goods of different grades or varying levels of performance, a quality standard may be able to provide greater clarity as to the content of the seller's obligation, facilitating the application of the fitness for the ordinary purposes test. Also, if the Convention's rules are viewed not only as tools of contract interpretation and of the allocation of risk, but also as a vehicle for promoting some benchmark of quality around the world, there may be a more pressing need to articulate an underlying quality standard.

The rules on conformity are extremely fact-sensitive, which means that every case is to be decided on the basis of its particular circumstances. That, together with the general nature of the rules, leaves parties with very little guidance about how risks are likely to be allocated in a given case. Certainty is just as important a part of justice as flexibility, and therefore there is much to be said for promoting those solutions that have so far received greater acceptance. The approach in *New Zealand Mussels* represents one such solution, which, in addition to its relative prominence, strikes a good balance between certainty and openness to the individual facts. To an extent, a similar point can be made in respect of the courts'

acceptance that the buyer's knowledge of a lack of conformity is a relevant factor in interpreting the contract under paragraph (1) of Article 35, despite paragraph (3) explicitly treating the buyer's knowledge as relevant only to default rules in paragraph (2). Whether the buyer was in the position to be aware of a lack of conformity at the time of the contract cannot be ignored in the face of the Convention's contextual rules of contract interpretation.

It has long been evident that the issues of proof have considerable impact on substantive law rights. No consistency in the exercise of the rights available under the CISG can be expected if the issues of proof are treated differently. It is for this reason that much work has been done to advocate bringing the burden and standard of proof into the Convention's scope. There is, however, a limit on how far the Convention's reach can be extended. It has been argued that the CISG is not capable of dealing adequately with the admissibility of evidence.

All in all, there is little doubt that the Convention has proved to be capable of resolving the issue of conformity of the goods. But, if a new international sales law ever replaces the CISG, several questions are worth thinking about in drafting the new provisions on conformity. First, would it be useful to introduce an overarching quality standard? Second, should the rules be more detailed by giving guidance for certain specific cases, such as that given in *New Zealand Mussels*? Finally, to what extent should a sales law instrument govern the matters of proof, such as burden and standard of proof, and the evaluation and admissibility of evidence?

DEFINING THE BORDERS OF UNIFORM INTERNATIONAL
CONTRACT LAW: THE CISG AND REMEDIES FOR INNOCENT,
NEGLIGENT, OR FRAUDULENT MISREPRESENTATION

ULRICH G. SCHROETER*

I. INTRODUCTION

THE creation of uniform international contract law, as of uniform law in general, is never all-encompassing. Instead, uniform law instruments are typically limited in their scope, because the uniform provisions on which the drafters can agree are limited or because there is no need to unify neighboring areas of law. The borders of uniform contract law thereby created in turn create their own problems, most prominently among them the need to define the relationship between the uniform law and the rules of non-unified domestic law.¹

Under the United Nations Convention on Contracts for the International Sale of Goods (CISG), this task is particularly important and difficult when it comes to remedies under domestic law and their applicability to CISG contracts.² In such cases, any recourse to local, non-unified law involves the risk of upsetting the balance of rights and obligations of international buyers and sellers that has been laid down in the CISG: whenever domestic law provides a party with a remedy it would not have under the CISG's rules, its concurrent application potentially undermines foreseeability and legal certainty in international trade. The arguably most distinctive CISG features that each party should be able to rely upon are provisions limiting the access to or the measure of its remedies. A buyer's obligation to give notice of non-conformity to the seller within a reasonable time after he has discovered or ought to have discovered it, under CISG Article 39(1), plays a significant role in practice, with Article 39(2) of the CISG cutting off all of the buyer's remedies when two years after delivery no notice has been given.³ A party may furthermore only avoid

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1. See FRITZ ENDERLEIN & DIETRICH MASKOW, *INTERNATIONAL SALES LAW* art. 4, ¶ 1 (Oceana Pubs. 1992), available at <http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html#art04a>.

2. See CA 7833/06 *Pamesa Ceramica v. Yisrael Mendelson Ltd.* ¶ 58 [2009] (Isr.) (“[A] complex issue.”); see also Ingeborg Schwenzer & Paschal Hachem, *Article 4*, in *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* ¶ 19 (Ingeborg Schwenzer ed., 3d ed. 2010) (“A difficult and extremely controversial issue.”) [hereinafter *CISG COMMENTARY*].

3. See CA 7833/06 *Pamesa Ceramica v. Yisrael Mendelson Ltd.* ¶ 52 [2009] (Isr.) (discussing application of remedies in tort after period for giving notice of non-conformity had expired); see also U.N. Comm'n on Int'l Trade Law, *United Nations Convention on Contracts for the International Sale of Goods* art. 39(1),

the contract in cases in which the other party has committed a “fundamental” breach of contract, under Article 25 CISG, thereby making the burdensome unwinding of contracts an *ultima ratio* (remedy of last resort).⁴ And the damages that a party may claim for a breach of contract may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract.⁵

In trying to prevent these and other rules of the CISG from being circumvented, the solution is generally seen in international uniform law’s prevalence over concurring bodies of law:⁶ “Displacing inconsistent domestic law,” so it has been said, “is of the essence of establishing uniform law.”⁷ The theoretical foundations on which this accepted outcome is based are, on the contrary, not uniform. One approach that could be described as “international” is pointing to the rules of the CISG itself, notably Article 7(1), and arguing that the CISG’s international character and the need to promote uniformity in its application require the preemption of domestic law.⁸ A different line of argument with a more “national” focus primarily looks to the contracting states’ domestic legal order that may explicitly or implicitly grant prevalence to the CISG. An example for the first type of rule can be found in the Australian state of New South Wales, where an express clause in the parliamentary act implementing the CISG clarifies that “[the] provisions of the Convention prevail over any other law in force in New South Wales to the extent of any inconsistency.”⁹ A non-CISG-specific rule of prevalence is followed in the United States, where reference has been made to the CISG’s nature as federal law, which therefore “trumps” state common law and the Uniform Commercial Code.¹⁰ The difference between these approaches may eventually be

Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG], available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>

4. See CISG, *supra* note 3, art. 25; see also Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 3, 1996, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2364, 2366, 2008 (Ger.); Ulrich G. Schroeter, *Article 51*, in CISG COMMENTARY, *supra* note 2, ¶ 51.

5. See CISG, *supra* note 3, art. 74.

6. See Bundesgericht [BGer] [Federal Supreme Court] Sept. 15, 2000, CISG-online No. 770 (Switz.); ENDERLEIN & MASKOW, *supra* note 1, art. 4, ¶ 4.2; JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION ¶ 73 (Harry M. Flechtner ed., 4th ed. 2009); Ulrich Magnus, *Wiener UN-Kaufrecht (CISG)*, in J. VON STAUDINGER’S KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN AT EINL ZUM CISG ¶ 42 (rev. ed. de Gruyter 2013); BURGHARD PILTZ, INTERNATIONALES KAUFRECHT ¶¶ 2–125 (2d ed. 2008).

7. HONNOLD, *supra* note 6, ¶ 73.

8. See MARTIN KÖHLER, DIE HAFTUNG NACH UN-KAUFRECHT IM SPANNUNGSVERHÄLTNISS ZWISCHEN VERTRAG UND DELIKT 66 (Tübingen: Mohr 2003); PILTZ, *supra* note 6, ¶¶ 2–68.

9. See Sec. 6 Sale of Goods (Vienna Convention) Act 1986 No. 119.

10. See *Asante Techs., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1151 (N.D. Cal. 2001); JOSEPH LOOKOFKY, UNDERSTANDING THE CISG § 2.3 (4th ed. 2012); William S. Dodge, *Teaching the CISG in Contracts*, 50 J. LEGAL EDUC. 72, 72

small, however, because even the “national” view tends to incorporate an international perspective, referring to the CISG’s preamble which stresses 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.” U.S. courts have concluded that the expressly stated goal of developing uniform international contract law to promote international trade “indicates the intent of the parties to the treaty to have the treaty preempt state law causes of action,”¹¹ thereby supporting the prevalence of the CISG’s provisions with an interpretation of the CISG itself.

The prevalence of uniform international contract law is, of course, only needed and only justified where and as far as its rules attempt to govern exclusively, and not outside the scope of the CISG’s substantive coverage. The borders of the CISG therefore also define the scope of its prevalence and of domestic laws’ corresponding preemption. Accordingly, the crucial question is: Where exactly do the borders of the CISG run?¹²

II. DEFINING THE BORDERS OF THE CISG: A NOVEL TWO-STEP APPROACH

Describing the substantive scope of the CISG is not easily done, both when attempted in the abstract and with regard to a particular question. Commentators have criticized that in many of the pertinent cases decided under the CISG, no detailed reasoning is given why certain issues fall within or outside the CISG’s scope of application.¹³ In Part A below, two “traditional” approaches that can be identified in case law and legal writings will be discussed, before an alternative approach will be presented in Part B.

(2000); John C. Duncan, Jr., *Nachfrist Was Ist? Thinking Globally and Act Locally: Considering Time Extension Principles of the U.N. Convention on Contracts for the International Sale of Goods in Revising the Uniform Commercial Code*, 2000 BYU L. REV. 1363, 1372 (2000); David Frisch, *Commercial Common Law, The United Nations Convention on the International Sale of Goods, and the Inertia of Habit*, 74 TUL. L. REV. 495, 503–04 (1999).

11. *Asante Tech.*, 164 F. Supp. 2d at 1151; *see also* *Geneva Pharms. Tech. v. Barr Labs., Inc.*, 201 F. Supp. 2d 236, 285 (S.D.N.Y. 2002), *aff’d in part, rev’d in part*, 386 F.3d 485 (2d Cir. 2004).

12. *See* Peter Schlechtriem, *The Borderland of Tort and Contract: Opening a New Frontier?*, 21 CORNELL INT’L L.J. 467, 470–71 (1988).

13. *See* Stefan Kröll, *Selected Problems Concerning the CISG’s Scope of Application*, 25 J.L. & COM. 39, 56 (2005).

A. "Traditional" Approaches

1. *Reliance on CISG Article 4*

A significant number of courts and authors turn to Article 4 of the CISG in order to determine where the exact borders of the CISG run.¹⁴ This provision states:

This 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.¹⁵

By using a strict wording ("governs only"), Article 4 of the CISG at first sight indeed seems to provide a hard and fast description of the CISG's material sphere of application.¹⁶ However, this first impression is soon refuted by the apparent incorrectness of the statement made in its first sentence: The CISG clearly also governs matters *other* than the formation of sales contracts and the rights and obligations of the seller and the buyer arising from such contracts.¹⁷ The CISG notably also governs the modification of sales contracts, in Article 29, and the obligations of contracting states under public international law arising from the CISG, in Articles 89–101.¹⁸ The first sentence of Article 4 of the CISG could therefore in itself be viewed as a misrepresentation, namely one made by the drafters of the CISG in respect to the CISG's content. It would then arguably qualify as a merely "innocent" misrepresentation, as the drafting history of the CISG indicates that the delegates considered the provision to

14. See *Caterpillar, Inc. v. Usinor Industeel*, 393 F. Supp. 2d 659, 674 (N.D. Ill. 2005); Oberlandesgericht [OLG] [Court of Appeals] Hamm 2010, *INTERNATIONALES HANDELSRECHT* [IHR] 59, 63 (Ger.); Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 *YALE J. INT'L L.* 1, 19 (1993); Christoph R. Heiz, *Validity of Contracts Under the United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, and Swiss Contract Law*, 20 *VAND. J. TRANSNAT'L L.* 639, 647–59 (1987); Rudolph Lessiak, *UNCITRAL-Kaufrechtsabkommen und Irrtumsanfechtung*, *östJBI* 1989 487, 492; LOOKOFSKY, *supra* note 10, § 2.6; Joseph Lookofsky, *CISG Case Commentary on Preemption in Geneva Pharmaceuticals and Stawski*, *PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALES OF GOODS* 115 (2004), available at <http://cisgw3.law.pace.edu/cisg/biblio/lookofsky8.html>.

15. See CISG, *supra* note 3, art. 4.

16. See LOOKOFSKY, *supra* note 14, at 115 ("[S]eemingly clear-cut delimitation.").

17. See CISG COMMENTARY, *supra* note 2, art. 4, ¶ 2.

18. See CISG, *supra* note 3, art. 29 (involving modification of sales contracts); see also *id.* arts. 80–101 (involving obligations of contracting states under public international law).

be a correct shorthand description of the CISG's substantive coverage¹⁹—its lack of precision was apparently overlooked. In addition, and maybe equally important, the terms “formation of the contract of sale” and “rights and obligations of the seller and the buyer arising from such a contract” are themselves open to interpretation, thus providing no guidance to courts and arbitral tribunals that could not easier be drawn from an evaluation of the CISG's detailed provisions in Part II and III of the CISG.

In its second sentence, Article 4 of the CISG goes on to list two issues it is particularly “not concerned with,” namely the validity of the contract or of any of its provisions or of any usage (subparagraph a) and the effect which the contract may have on the property in the goods sold (subparagraph b). Notably the “validity exception” in subparagraph (a) has gained widespread recognition as a supposedly important carve-out from the CISG's material scope,²⁰ and a heated discussion has developed about the need to interpret the “validity” concept autonomously²¹ or in accordance with domestic law.²²

Contrary to the approach just described, it is submitted that the second sentence of Article 4 of the CISG in truth is lacking any delimiting use because the list of issues it contains is neither inclusive nor exclusive in nature.²³ It is not inclusive because it does not provide that any question concerning the validity of sales contracts or a contract of sale's effects on the property in the goods is per se outside the CISG's scope—on the contrary, it specifically assumes that the CISG might govern such questions elsewhere in its provisions (“[E]xcept as otherwise expressly provided in this Convention . . .”). Since one of the express provisions referred to is CISG Article 7(2) with its reference to general principles underlying the CISG, the “except as” caveat makes Article 4's second sentence a mere

19. See UN DOC. A/CONF. 97/5, Official Records 17, art. 14 (using term “substantive coverage”).

20. See Hartnell, *supra* note 14, at 4–5; Joseph Lookofsky, *In Dubio Pro Conventione? Some Thoughts About Opt-Outs, Computer Programs and Preemption under the 1980 Vienna Sales Convention (CISG)*, 13 DUKE J. COMP. & INT'L L. 263, 280–81 (2003).

21. See CISG COMMENTARY, *supra* note 2, art. 4, ¶ 31; Milena Djordjevic, *Article 4*, in THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS ¶ 14 (Stefan Kröll, Loukas Mistelis & Maria del Pilar Perales Viscasillas eds., 2011); ENDERLEIN & MASKOW, *supra* note 1, art. 4, ¶ 4.3.1; Heiz, *supra* note 14, at 660–61.

22. See KARL H. NEUMAYER & CATHERINE MING, CONVENTION DE VIENNE SUR LES CONTRATS DE VENTE INTERNATIONALE DE MARCHANDISES: COMMENTAIRE art. 4, ¶¶ 2, 6, 7 (1993); Denis Tallon, *Article 79*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION ¶ 2.4.3 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987); see also Geneva Pharms. Tech. v. Barr Labs., 201 F. Supp. 2d 236, 285 (S.D.N.Y. 2002).

23. *Contra* Warten Khoo, *Article 4*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION ¶ 2.2 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987) (“By specifically enumerating these matters, the article places it beyond doubt that they are entirely outside the ambit of the Convention.”).

reference to the need to establish the CISG's material scope by way of interpreting all of its provisions.²⁴ In addition, the statement's introductory phrase ("In particular . . .") makes clear that it is not exclusive in nature, so that issues not covered by the second sentence of Article 4 may nevertheless be outside the CISG's scope. Through the combination of two opposed exceptions, the provision is thus deprived of any regulatory meaning, rendering moot which issues it applies to and how its terms should be interpreted.

At the end of the day, Article 4 of the CISG therefore neither reveals with certainty which questions are governed, nor which questions are not governed by the CISG. In all but the most obvious cases, courts and arbitrators have to look elsewhere for guidance.

2. *Reliance on Dogmatic Categories of Domestic Law: Contract v. Tort, etc.*

Another frequently used approach relies on dogmatic categories in determining the scope of the CISG and its relationship to domestic law: The CISG, so it is said, "is about contracts," and accordingly neither about "procedure" nor about "tort" or other presumably "non-contractual" areas of law.²⁵ With respect to the relationship between the CISG and remedies for tortious behavior that is of primary interest for the purposes of the present article, this approach has found some support among commentators.²⁶

a. Case Law Under the CISG: A Mixed Picture

Case law decided under the CISG, however, has been somewhat more varied in its recourse to the "contract v. tort" dichotomy. On one end of the scale is the decision in *Viva Vino Import Corp. v. Farnese Vini S.R.L.*²⁷ with its generic "The CISG does not apply to tort claims," a statement that has been cited with approval in further U.S. cases like *Geneva Pharmaceuti-*

24. See Christoph Benicke, *Article 4*, in MÜNCHENER KOMMENTAR ZUM HANDELSGESETZBUCH ¶ 4 (2d ed. 2007); Khoo, *supra* note 23, ¶ 2.1; ULRICH G. SCHROETER, UN-KAUFRECHT UND EUROPÄISCHES GEMEINSCHAFTSRECHT—VERHÄLTNIS UND WECHSELWIRKUNGEN § 6, ¶¶ 149–51 (2005); *contra* ENDERLEIN & MASKOW, *supra* note 1, art. 4, ¶ 3.1; PILTZ, *supra* note 6, ¶¶ 2–125.

25. See *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 388 (7th Cir. 2002) ("The Convention is about contracts, not about procedure."); Bundesgericht [BGer] [Federal Supreme Court] July 11, 2000, CISG-online No. 627 (Switz.).

26. See Michael Bridge, *A Commentary on Articles 1–13 and 78*, in THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 235, 246 (Franco Ferrari, Harry Flechtner & Ronald A. Brand eds., 2004); Djordjevic, *supra* note 21, art. 4, ¶ 10; Joseph M. Lookofsky, *Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules*, 39 AM. J. COMP. L. 403, 409 (1991); Lookofsky, *supra* note 20, at 286.

27. No. 99-6384, 2000 WL 1224903, at *1 (E.D. Pa. Aug. 29, 2000).

cal v. Barr Laboratories,²⁸ *Sky Cast v. Global Direct Distribution*,²⁹ and *Dingxi Longhai Dairy v. Becwood*.³⁰

The court in *Geneva Pharmaceuticals*, however, did not stop there. Citing Professor Schlechtriem,³¹ it rather went on to caution: “Just because a party labels a cause of action a ‘tort’ does not mean that it is automatically not pre-empted by the CISG. A tort that is in actuality a contract claim, or that bridges the gap between contract and tort law may very well be pre-empted.”³² This line of thought was subsequently picked up by yet another U.S. District Court in *Electrocraft Arkansas, Inc. v. Super Electric Motors, Ltd.*,³³ where the court—once more citing Professor Schlechtriem³⁴—said:

Thus, a tort that is in essence a contract claim and does not involve interests existing independently of contractual obligations (such as goods that cause bodily injury) will fall within the scope of the CISG regardless of the label given to the claim The question for this Court, then, is whether Electrocraft’s negligence/strict liability claim is, as argued by Super Electric, “actually . . . a breach-of-contract claim in masquerade.”³⁵

It accordingly moved away from primarily focusing on dogmatic categories towards considering the substance of the remedy concerned. A similar perspective was also adopted by courts outside the United States. In *ING Insurance v. BVBA HVA Koeling*,³⁶ a Belgian Court of Appeals held that a party to a CISG contract that commits a fault in the performance of the contract can only be held liable on an extra-contractual basis if the alleged fault is a not a fault against a contractual obligation but against the general duty of care, and if that fault causes other damage than the damage caused by faulty performance of the agreement.³⁷ In *Pamesa Ceramica v. Yisrael Mendelson*,³⁸ the Supreme Court of Israel in turn commenced by asking the rhetorical question: “Does placing the word ‘tort’ at the top of

28. See *Geneva Pharms. Tech. v. Barr Labs.*, 201 F. Supp. 2d 236, 286 (S.D.N.Y. 2002).

29. See *Sky Cast, Inc. v. Global Direct Distribution, L.L.C.*, No. 07-161, 2008 WL 754734, at *7 (E.D. Ky. Mar. 18, 2008).

30. See *Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp., L.L.C.*, 718 F. Supp. 2d 1019, 1024 (D. Minn. 2010).

31. See Schlechtriem, *supra* note 12, at 474.

32. *Geneva Pharms. Tech.*, 201 F. Supp. 2d at 286 n.30 (citing Schlechtriem, *supra* note 12).

33. No. 4:09-cv-00318, 2009 WL 5181854 (E.D. Ark. Dec. 23, 2009).

34. See *id.* at *5 (citing Schlechtriem, *supra* note 12, at 473).

35. *Id.*

36. Hof van Beroep [HvB] [Court of Appeal] Antwerpen, Apr. 14, 2004 (Belg.).

37. See *id.*

38. CA 7833/06 *Pamesa Ceramica v. Yisrael Mendelson Ltd.* ¶ 27 [2009] (Isr.).

the claim release the buyer from the inspection and notice obligations, and does it deprive the seller of the defences that the [C]onvention provides . . . ?”³⁹ The court then, in a very carefully reasoned decision, developed a balanced approach similar to the ones outlined above. In concluding, it held that weight should be given to the interests which the uniform law on the one hand and the domestic law on the other seek to protect, and that a claim in tort should only be allowed to be heard alongside the CISG when those interests are not identical.⁴⁰

Courts in yet other CISG contracting states have generally given even less weight to the contract/tort dichotomy. A German court of appeals ruled that concurrent tort claims, assuming that they were available, would in any case be barred once the notice of non-conformity under CISG Article 39(1) had not been timely given,⁴¹ thereby effectively denying an independent application of tort rules where a contract between the parties is governed by the CISG. Most recently, the German Supreme Court refrained from ruling on the relationship between the CISG’s remedies and claims for damages under domestic tort law—because the additional availability of tort claims would not have affected the outcome of the pending case—but its reference to the disputed nature of the question among legal writers indicates that the Court did not consider the solution to be obvious.⁴²

b. Discussion

In the author’s opinion, dogmatic classifications or labels like “contract,” “tort,” or “procedure” can and should play no role at all in defining the CISG’s substantive scope. The reason is simple: the CISG itself provides no autonomous definition of these categories, and their contents as well as limits in domestic laws are often uncertain⁴³ and—most important in an international uniform law setting—not internationally uniform.

The institution of common law misrepresentation, occasionally characterized as a “strange amalgam of law and equity and of contract and tort,”⁴⁴ is one case in point: while innocent misrepresentation (to be discussed in more detail below) constitutes an instrument of contract law

39. *Id.* ¶ 54.

40. *See id.* ¶¶ 69–70.

41. *See* Oberlandesgericht [OLG] [Court of Appeals Thüringen] May 26, 1998, *Transportrecht, Beilage Internationales Handelsrecht* [TranspR-IHR] 25, 29 (Ger.).

42. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] 2013, *NEUE JURISTISCHE WOCHENSCHRIFT* [NJW] 304, ¶ 17 (Ger.).

43. *See* *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988) (“Except at the extremes, the terms ‘substance’ and ‘procedure’ precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn.”).

44. JOHN BURROWS, JEREMY FINN & STEPHEN TODD, *LAW OF CONTRACT IN NEW ZEALAND* 302 (3d ed. 2007).

under English law,⁴⁵ it is regarded as part of tort law in the United States.⁴⁶ The consequence would be that remedies for innocent misrepresentation under English law would be preempted by the CISG, while remedies under U.S. law would not—a result that hardly seems convincing, given that the content of both rules is rather similar. Uncertainties in classifying particular remedies are similarly reflected in other parts of the law of misrepresentation, with liability for negligent misrepresentations under English law having been referred to as “contract in tort’s clothing.”⁴⁷

Another example is the “contract with protective effect for third parties,” a legal concept developed by the courts under German law, that a well-known comparative law scholar once characterized as “a mere curiosity.”⁴⁸ It assumes that contracts have protective effects for non-contracting parties if the contracting parties’ intent—as determined through interpretation of their contract in accordance with the principle of good faith⁴⁹—was such, thus resulting in the third party’s own contractual claim for damages if one of the contracting partners has breached its contractual obligations. In “interpreting” the contract, German courts have often gone far beyond the wording of the contract and the intentions of commercially reasonable parties,⁵⁰ thus e.g., deducing a seller’s intent to extend the protective effects of a contract with a surveyor to any buyer of the house to be sold⁵¹ and even granting a third party a contractual claim for damages although, due to a valid limitation of liability clause, the contracting party itself would not have had such a claim.⁵² The contractual classification of expert liability towards third parties can arguably only be explained with a (thinly veiled) attempt to escape German law’s lack of tort liability for pure economic losses. Not surprisingly, third party claims in comparable situations would be classified differently in other legal systems, with U.S. law potentially granting a claim in tort⁵³ and Swiss law having created an extra category “between contract and tort.”⁵⁴

45. See Michael Bridge, *Innocent Misrepresentation in Contract*, in 57 CURRENT LEGAL PROBLEMS 277, 278 (Jane Holder et al. eds., 2004).

46. See RESTATEMENT (SECOND) OF TORTS § 552C (1977).

47. A.J.E. Jaffey, *Contract in Tort’s Clothing*, 5 J. LEGAL STUD. 77, 101–03 (1985).

48. 1 HEIN KÖTZ & AXEL FLESSNER, EUROPEAN CONTRACT LAW 253 (Tony Weir trans., 1997).

49. See BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], Jan. 2, 2002, Bundesgesetzblatt 38, § 242 (Ger.).

50. See Ulrich G. Schroeter, *Die Dritthaftung staatlich anerkannter Gutachter im deutschen und schweizerischen Recht*, in PRIVATE LAW: NATIONAL—GLOBAL—COMPARATIVE: FESTSCHRIFT FÜR INGEBORG SCHWENZER ZUM 60. GEBURTSTAG 1565 (Andrea Böhler & Markus Müller-Chen eds., 2011).

51. See Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 8, 1995, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 392, 1995 (Ger.).

52. See *id.* ¶ 25; Bundesgerichtshof [BGH] [Federal Court of Justice] 2010, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1277 (1278) (Ger.).

53. See RESTATEMENT (SECOND) OF TORTS § 552(1) (1977).

54. Bundesgericht [BGer] [Federal Supreme Court] Dec. 23, 2003, 130 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 345, 349 (Switz.).

As a third and final example, one may refer to the French instrument of “*action directe*,” under which sub-buyers who have purchased goods from an intermediate seller have a direct claim against the manufacturer of the goods, relating to defects in those goods or to their unsuitability for their intended purpose.⁵⁵ In French case law and legal writing, there is agreement that this claim is contractual in nature,⁵⁶ despite the fact that this classification is clearly at odds with the privity of contracts.⁵⁷ After all, the manufacturer has undertaken no contractual obligation towards sub-buyers later purchasing the goods in the course of a chain of contracts, whose identity and domicile is generally unknown to the manufacturer. It is therefore not entirely surprising that the European Court of Justice⁵⁸ has held that, when measured against the yardstick of the categories of EU law, the French *action directe* cannot be regarded as a matter relating to a contract,⁵⁹ but rather as a matter relating to tort, delict or quasi-delict.⁶⁰ In doing so, the Court of Justice noted that “it appears that the relationships between manufacturer and sub-buyer are perceived differently in the Member States,”⁶¹ and that in the great majority of them a manufacturer’s liability in this context is not regarded as being of a contractual nature.⁶²

All of the examples described above have one thing in common: the dogmatic classification that the respective legal instruments received has its source in domestic law, and particularities of the respective domestic law were the reason why some of the instruments received their dogmatic labels in the first place. It is submitted that any approach relying on such categories should therefore not be followed in an international uniform

55. See Michel Cannarsa & Olivier Moréteau, *The French “Action Directe”: The Justification for Going Beyond Privity*, in EUROPEAN PERSPECTIVES ON PRODUCERS’ LIABILITY 311 (Martin Ebers, André Janssen & Olaf Meyer eds., 2009).

56. See Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 9, 1979, Bull. civ. I, No. 241 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., Jul. 12, 1991, Bull. civ., No. 5 (Fr.); Cannarsa & Moréteau, *supra* note 55, at 312.

57. See Cannarsa & Moréteau, *supra* note 55, at 311.

58. See Case C-26/91, Jakob Handte & Co. GmbH v. Traitements Mécanochimiques des Surfaces SA, 1992 ECR I-3916, ¶ 16 (discussing Article 5 No. 1 Brussels Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters of 1968); Case C-543/10, Refcomp SpA v. Axa Corporate Solutions Assurance SA et al., ¶ 32 (2013) (unpublished) (reviewing Council Regulation 44/2001, art. 5(1)(a), 2001 O.J. (L 12) 1, 4 (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [hereinafter Brussels I Regulation]).

59. See Brussels I Regulation, *supra* note 58, art. 5(1)(a).

60. See *id.* art. 5(3); see also Peter Mankowski, in BRUSSELS I REGULATION art. 5, ¶ 200 (Ulrich Magnus & Peter Mankowski eds., 2d ed. 2012).

61. Case C-543/10, Refcomp SpA v. Axa Corporate Solutions Assurance SA et al., ¶ 38 (2013) (unpublished).

62. See Case C-26/91, Jakob Handte & Co. GmbH v. Traitements Mécanochimiques des Surfaces SA, 1992 ECR I-3916, ¶ 20.

law setting.⁶³ In essence, it would amount to an interpretation of the CISG's material scope in light of domestic law, as represented by the dogmatic classification of the competing domestic rules of law. This is arguably incompatible with Article 7(1)'s guidelines, which call for an "autonomous" interpretation of the CISG's provisions, including those defining the borders of the CISG.

B. *A Novel Two-Step Approach*

Against the background of the deficiencies that the "traditional" approaches described above have shown—most prominently among them the lack of uniformity created—it seems both necessary and appropriate to search for an alternative approach which is better in line with the demands made by Article 7(1). In this spirit, I propose in the following section a novel two-step approach designed as a tool allowing for a more uniform definition of the CISG's borders.

1. *Basic Outline*

The two-step approach's basic formula runs as follows: a domestic law rule is displaced by the CISG if (1) it is triggered by a factual situation which the CISG also applies to (the "factual" criterion), and (2) it pertains to a matter that is also regulated by the CISG (the "legal" criterion). Only if both criteria are cumulatively fulfilled, the domestic law rule concerned overlaps with the CISG's sphere of application in a way that will generally result in its preemption.⁶⁴

The development of this two-step approach and its criteria are based on the assumption that the CISG's rules (and not domestic law) must serve as the starting point in establishing the relationship between the CISG and concurrent legal rules.⁶⁵ In developing a suitable methodical approach, Article 7(1) is the primary provision from which guidance can be drawn: the directive it provides for courts and arbitral tribunals—to have regard to the CISG's international character and to the need to promote uniformity "in its application"—also needs to be observed when determining the CISG's scope of application, because any recourse to a domestic rule of law in place of the CISG effectively means that the latter is not being applied at all. It is submitted that the desirable uniform outcome in this context can best be achieved by combining a factual criterion with a legal criterion, both of which will be outlined in more detail below.

63. See ENDERLEIN & MASKOW, *supra* note 1, art. 4, ¶ 4.2; Ingeborg Schwenzer & Pascal Hachem, *The CISG—Successes and Pitfalls*, 57 AM. J. COMP. L. 457, 471 (2009).

64. For a further discussion of how the outcome is different only where the CISG exceptionally governs an issue without doing so exhaustively, see *infra* notes 207–09.

65. See CA 7833/06 Pamesa Ceramica v. Yisrael Mendelson Ltd. 27, ¶ 53 [2009] (Isr.); Ulrich Huber, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) art. 45, ¶ 50 (Peter Schlechtriem ed., 1998).

2. *First Step: The Factual Criterion*

When investigating the factual criterion somewhat closer, it soon becomes clear that a fact-related yardstick at least comparable to the description proposed here has been frequently mentioned by commentators in the past. Professor Honnold notably argued that all domestic law rules are displaced, which turn on “the very same operative facts that invoke the rules of the Convention,”⁶⁶ and many writers have followed his approach or have used a similar test.⁶⁷

a. Reasons

At least two reasons speak in favor of focusing on the facts of cases covered by two concurring legal rules in order to establish the relationship between these rules. First, this focus avoids the difficulties already described above⁶⁸ which inevitably arise when dogmatic categories of domestic law are being relied upon in an international setting. By looking to the substance of the rules rather than their label,⁶⁹ and with this substance being identified by factual standards, an internationally uniform solution will likely be easier to reach. And second, a factual criterion is arguably more attuned to the viewpoint of merchants for whose benefit, as can be seen from its Preamble, the CISG’s rules were eventually written. From merchants’ perspective, it is primarily important to know which factual behavior in the conduct of their business will result in what kind of legal consequences, so that they will be able to adjust their actions accordingly. Since the legal consequences depend on which legal rules are applicable, it is sensible to also base the precise definition of the CISG’s material scope and thereby the relationship between international uniform law and domestic law on factual circumstances. Through this use of factual instead of dogmatic legal standards, one may hope that it is possible for merchants to foresee which of two conflicting laws will be applied to their case. To this end, the criterion prevents factual situations covered by the CISG from leading to a surprising application of foreign domestic rules, the latter appearing (from the merchant’s perspective) like the proverbial “rabbit out of the hat.”⁷⁰

66. HONNOLD, *supra* note 6, ¶ 65.

67. See Enderlein & Maskow, *supra* note 1, art. 4, ¶ 3.1; CLAYTON P. GILLETTE & STEVEN D. WALT, SALES LAW: DOMESTIC AND INTERNATIONAL 49 (2000); Heiz, *supra* note 14, at 647 (“[F]actual situation triggers a provision of domestic law as well as a rule of the Convention.”); KÖHLER, *supra* note 8, at 67; PILTZ, *supra* note 6, ¶¶ 2–148; Schwenger & Hachem, *supra* note 63, at 471; Peter Winship, *Commentary on Professor Kastely’s Rhetorical Analysis*, 8 NW. J. INT’L L. & BUS. 623, 638 (1988).

68. For a further discussion of the difficulties arising out of dogmatic categories of domestic law, see *supra* notes 14–24.

69. See HONNOLD, *supra* note 6, ¶ 65.

70. See Magnus, *supra* note 6, art. 4, ¶ 28.

b. The Need for a Second (“Legal”) Criterion

It is submitted, however, that in many cases the factual criterion is not enough, and that it will often require a second step in order to decide whether a given domestic law rule is being displaced by the CISG. This second step is necessary because the same factual situation may well be regulated by different rules from different perspectives and for different purposes, not all of which are exhaustively covered by the CISG. The factual criterion alone may therefore be too blunt an instrument for an assessment that does not stop at finding *that* a factual setting has at all been regulated, but also takes into account *why and to which end* it has been regulated.

The case *Stawski Distributing Co. v. Zywiec Breweries PLC*,⁷¹ decided by the United States District Court for the Northern District of Illinois in 2003, provides a practical example. It involved a longstanding business relationship between a Polish brewery and a Chicago-based importer and distributor of beer. The parties had concluded an exclusive distribution agreement which, according to the court, was potentially governed by the CISG.⁷² When the seller notified the buyer that he intended to terminate the agreement, the question arose whether the provisions of the Illinois Beer Industry Fair Dealing Act⁷³—a state law in relation to the beer industry which places a number of restrictions on relationships between beer wholesalers and brewers—could be applied alongside the CISG, or whether they were preempted. In case of the Illinois Beer Industry Fair Dealing Act, the factual criterion addressed above was clearly fulfilled, because the Act’s applicability was triggered by a factual situation which the CISG also applied to. According to its Section 2(B), the Act “shall be incorporated into and shall be deemed a part of every agreement between brewers and wholesalers and shall govern all relations between brewers and their wholesalers,” thereby also including agreements and relations between wholesalers and foreign brewers. Since the CISG in turn also applies to contracts of sale between brewers and wholesalers as long as they have their respective places of business in different states, the applicability of both the Act and the CISG is triggered by the same factual situation. Authors who exclusively rely on this factor⁷⁴ would therefore have to con-

71. No. 02 C 8708, 2003 WL 22290412 (N.D. Ill. Oct. 6, 2003).

72. *See id.* at *2. The court held that “if this were a typical case, there could be little dispute that the CISG would apply and be considered the authoritative law on this subject.” *Id.* The published facts of the case do not make clear whether this assessment was correct, because exclusive distribution agreements only qualify as “contracts for the sale of goods” in the sense used by CISG Article 1(1) if they already create obligations between the parties concerning the delivery of goods, but not if they leave it to the parties to decide at a later stage whether such transactions will be conducted. *See* Schroeter, *supra* note 4, Introduction to Arts. 14–24, ¶ 66.

73. 815 ILL. COMP. STAT. 720/1 (1982).

74. For a discussion of cases that were decided upon factual criteria, see *supra* notes 61–62.

clude that the Illinois Beer Industry Fair Dealing Act is being displaced by the CISG⁷⁵—a result that seems premature,⁷⁶ because the Act was not necessarily enacted in order to address the same type of risk as the CISG.

3. *Second Step: The Legal Criterion (or: What's the Regulated "Matter"?)*

As a second step within the two-step approach proposed here, it is therefore necessary to determine whether the domestic law rule covering the factual situation at hand also pertains to a "matter" regulated by the CISG.⁷⁷ This second step enables courts and arbitral tribunals to take into account the regulatory purpose and focus of the concurring legal rules, limiting the CISG's preemptive effect to domestic laws that pertain to a matter already regulated by the CISG, but allowing for their parallel application where the regulated matters are different.

This immediately raises the question: What's the "matter"? The CISG itself uses the term "matter" first and foremost in Article 7(2) in addressing the filling of "gaps" within the CISG's rules: it provides that "[q]uestions 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,"⁷⁸ thereby making clear that "matter" is understood as a wider term than "question," with each matter governed by the CISG potentially involving more than one question. The term "matter" furthermore is being employed in Articles 90 and 94, in which the CISG addresses its relationship towards other instruments of uniform law or instances of the same or closely related domestic laws that concern "matters governed by this Convention." In this context, there is agreement among commentators that "matter" refers not only to the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract (i.e., the broad areas mentioned in the first sentence of Article 4), but may also apply to smaller subject areas.⁷⁹ The only dispute concerns the question of whether a matter in the sense employed by Articles 90 and 94 requires a certain minimum breadth,⁸⁰

75. See, e.g., *Stawski Distributing Co.*, 2003 WL 2290412. This was the position taken by the Polish brewery in this case.

76. See Lookofsky, *supra* note 14, at 121.

77. See Schlechtriem, *supra* note 12, at 473.

78. CISG, *supra* note 3, art. 7.

79. See Franco Ferrari, *Article 94*, in SCHLECHTRIEM/SCHWENZER KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT ¶ 2 (Ingeborg Schwenzer ed., 5th ed. 2008); Magnus, *supra* note 6, art. 94, ¶ 4; Peter Schlechtriem, Ingeborg Schwenzer & Pascal Hachem, *Article 94*, in CISG COMMENTARY, *supra* note 2, ¶ 4). But see Johnny Herre, *Article 94*, in UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) ¶ 4 (Stefan Kröll, Loukas Mistelis & Maria del Pilar Perales Viscaillas eds., 2011).

80. See CHRISTOPH BRUNNER, UN-KAUFRECHT—CISG art. 94, ¶ 3 (2004); Magnus, *supra* note 6, art. 94, ¶ 4.

with examples given by legal writers ranging from consumer protection⁸¹ over late payments⁸² to product liability.⁸³ The preferable opinion rejects a minimum requirement of this sort, because neither the wording of these provisions nor policy considerations support such a narrow reading.⁸⁴

In our context, a matter can be described as a particular risk that is being addressed in the CISG and thereby allocated between the parties.⁸⁵ For this purpose, it is not decisive through which legal tools the respective risk is addressed and allocated; in other words, it is only relevant that the matter is governed, but not how. The matter governed by the CISG in Article 27 is therefore the risk that certain communications get lost during transmission, independent of the legal consequences attached to such loss. And the matter governed in Article 45 is not the buyer's right to claim damages or to rely on other remedies, but rather the risk of the seller's contractual obligations not being fulfilled and the allocation of the consequences.

In defining the CISG's material scope of application, this "legal" criterion is useful because it allows us to make a reasoned assessment of the CISG's relationship towards domestic rules of law in cases that fall into the scope of both legal rules. When being applied to the constellation in *Stawski*, it confirms that the district court was eventually right in holding that the Illinois Beer Industry Fair Dealing Act could be applied despite the agreement between brewer and wholesaler being governed by the CISG.⁸⁶

81. See Peter Schlechtriem, *Article 94*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) ¶ 4 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005).

82. See *id.*; *contra* Herre, *supra* note 79, art. 94, ¶ 4.

83. See Magnus, *supra* note 6, art. 94, ¶ 4.

84. See Schlechtriem, Schwenzer & Hachem, *supra* note 79, ¶ 4; SCHROETER, *supra* note 24, § 10, ¶ 40.

85. See CA 7833/06 Pamesa Ceramic v. Yisrael Mendelson Ltd. 27 [2009] (Isr.) (providing approaches comparable to, though not necessarily identical with, position taken here). The Supreme Court of Israel held that:

[T]he interests which [the buyer] is struggling to protect are not identical to the interests which the uniform law of the convention seeks to protect, a distinction which I think should be given weight when making the decision as to whether to allow a claim in tort to be heard alongside the arrangements in the convention.

Id. ¶ 70; see also Markus Müller-Chen, *Article 45*, in CISG COMMENTARY, *supra* note 2, ¶ 32 ("[T]he [concurrent] remedy cannot be in conflict with the regulatory goals of the Uniform Sales Law.").

86. See generally *Stawski Distributing Co. v. Browary Zywiec S.A.*, 349 F.3d 1023 (7th Cir. 2003). The district court based this (arguably correct) result on a reasoning different from the one developed here, namely the fact that the state of Illinois had promulgated the Act pursuant to the power reserved to states by the Twenty-First Amendment to the United States Constitution. A duly ratified treaty could not, therefore, override this reserved power. On appeal, the United States Court of Appeals for the Seventh Circuit characterized the district judge's suggestion that the Twenty-First Amendment entitles states to trump the nation's treaty commitments to its trading partners as "wholly novel" and vacated the judgment. See *id.* at 1026.

the Act aims at promoting the public's interest in fair, efficient, and competitive distribution of malt beverage products by regulating the business relations of brewers and wholesaler vendors, notably in order to assure that beer wholesalers are free to manage their business enterprises and maintain the right to independently establish their selling prices (despite the typically overwhelming bargaining power of breweries).⁸⁷ As the CISG neither attempts to regulate these specific issues arising in the area of beer distribution nor similar issues in other regulated industries,⁸⁸ the legal criterion was therefore not fulfilled.

III. DEMONSTRATING THE APPROACH'S PRACTICAL APPLICATION: THE CISG AND DOMESTIC LAW REMEDIES FOR MISREPRESENTATION

During the early years after the CISG's adoption, it was the relationship between the CISG and domestic law remedies for mistake that stood at the center of academic attention.⁸⁹ More recently, however, the applicability of common law remedies for misrepresentation⁹⁰ in CISG cases has started to generate discussions, triggered by an increasing number of U.S. court decisions in which the issue is being addressed. The positions adopted by commentators range from the suggestion that the CISG in general does not preempt claims for misrepresentation⁹¹ to the opposite position that considers all rescission rights for misrepresentation displaced by the CISG.⁹² In this author's opinion, it is helpful to distinguish between domestic legal rules providing remedies for innocent misrepresentation, negligent misrepresentation, and fraudulent misrepresentation, respectively. Each of these categories will be addressed in turn.

A. *Innocent Misrepresentation*

Remedies for honest or "innocent" misrepresentations made by a contracting party could be viewed as the example best suited to demonstrate the dangers inherent in applying concurrent domestic law remedies to CISG contracts. In court practice under the CISG, on the contrary, this constellation has seemingly not yet arisen, with the past cases (as far as published and accessible) all having involved claims for negligent or fraudulent misrepresentation.

87. See Illinois Beer Industry Fair Dealing Act, 815 ILL. COMP. STAT. ANN. 720/2(A) (West 2009).

88. See Schlechtriem, Schwenzler & Hachem, *supra* note 79, ¶ 39.

89. See Heiz, *supra* note 14, at 647–48.

90. See INGBORG SCHWENZLER, PASCAL HACHEM & CHRISTOPHER KEE, GLOBAL SALES AND CONTRACT LAW 214 (2012) (stressing functional comparability of doctrines of mistake and misrepresentation).

91. See, e.g., Lookofsky, *supra* note 20, at 285–86.

92. See, e.g., Bridge, *supra* note 26, at 243–44.

1. *Definition*

In English law, a misrepresentation as such has conventionally been defined as a false statement of material fact that at least in part induces entry into a contract with the maker of the statement.⁹³ In the United States, the *Restatement (Second) of Torts* uses a comparable, although not identical, description when speaking of a misrepresentation of a material fact for the purpose of inducing the other party to act or to refrain from acting in reliance upon it.⁹⁴

The “innocent” nature of a misrepresentation is usually defined negatively. An innocent misrepresentation is a misrepresentation that is neither fraudulent nor negligent,⁹⁵ thus resulting in a form of strict liability⁹⁶ whenever this type of honest misinformation gives rise to rights or remedies on the side of a misinformed party. The remedies attached to innocent misrepresentations differ among the common law jurisdictions that know this institution, although these differences—as will be further demonstrated below⁹⁷—are without effect for their relationship to the CISG.

2. *The Factual Criterion*

At first glance, the factual criterion within the two-step approach is clearly fulfilled in those cases:⁹⁸ Domestic law rules on innocent misrepresentation and the CISG both cover factual situations in which parties negotiating a sales contract exchange information about material facts.

Upon closer scrutiny, certain doubts may emerge when one remembers the well-known dispute about the CISG’s scope with respect to pre-contractual duties. After all, the prevailing opinion among commentators holds that the CISG does not impose pre-contractual duties on the parties,⁹⁹ given that a proposal made by the (then) German Democratic Republic to introduce a general liability for “*culpa in contrahendo*” was

93. See Bridge, *supra* note 45, at 279; 1 CHITTY ON CONTRACTS ¶ 6-006 (30th ed. 2008); see also SCHWENZER, HACHEM & KEE, *supra* note 90, ¶ 17.08 (providing comparative law point of view).

94. See RESTATEMENT (SECOND) OF TORTS § 552C(1) (1977).

95. See CHITTY ON CONTRACTS, *supra* note 93, ¶ 6-094; RESTATEMENT (SECOND) OF TORTS § 552C(1) (1977).

96. See RESTATEMENT (SECOND) OF TORTS § 552C(1) cmt. a (1977).

97. For a further discussion, see *infra* notes 155–60.

98. See HONNOLD, *supra* note 6, ¶ 240.

99. See MICHAEL BRIDGE, THE INTERNATIONAL SALE OF GOODS: LAW AND PRACTICE ¶ 12.04 (2d ed. 2007); Urs Peter Gruber, *Article 14*, in MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH ¶ 12 (6th ed. 2012); PETER HUBER & ALISTAIR MULLIS, THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS 28–29 (2007); Magnus, *supra* note 6, art. 4, ¶ 42; Lisa Spagnolo, *Opening Pandora’s Box: Good Faith and Precontractual Liability in the CISG*, 21 TEMP. INT’L & COMP. L.J. 261, 291, 309 (2007); Wolfgang Witz, *Articles 14–24*, in INTERNATIONALEINHEITLICHES KAUFRECHT VOR ¶ 17 (2000). *Contra* Michael Joachim Bonell, *Vertragsverhandlungen und culpa in contrahendo nach dem Wiener Kaufrechtsübereinkommen* 693, 700–01 (1990); Diane Madeline Goderre, Note, *International Negotiations Gone Sour*:

discussed at the Vienna Diplomatic Conference, but ultimately rejected.¹⁰⁰ Does this mean that there is in truth no coverage of the same factual scenarios, because innocent misrepresentation involves the violation of pre-contractual informational duties which the CISG does not provide for?

The answer to this question, it is suggested here, must be in the negative. At the outset, it should be pointed out that, irrespective of the position that one adopts in the abovementioned dispute about pre-contractual obligations under the CISG, it can hardly be doubted that the CISG covers some facts that take place at the pre-contractual stage: For once, Part II of the CISG contains elaborate rules about the two parties' declarations through which a contract is formed, namely offer and acceptance.¹⁰¹ Both declarations are by definition made and received during the pre-contractual phase, since the contract is only concluded once the acceptance of an offer becomes effective.¹⁰² And second, Article 8(3) refers to the pre-contractual negotiations between the parties as a factor to be considered for purposes of interpreting the parties' declarations and conduct.¹⁰³ That the CISG itself does not regulate the parties' pre-contractual duties does therefore not mean that it generally does not apply to any factual situations at the pre-contractual stage, thereby giving completely free reign to domestic pre-contractual regulations.

For the purposes of the two-step approach presented here, the decisive factual situation covered by the CISG is the formation of the contract. This means that the CISG only overlaps with domestic law rules on innocent misrepresentation insofar as they also apply to the formation of a sales contract, but not as far as they cover misrepresentations made without an ensuing contract formation. The latter carve-out nevertheless only insignificantly reduces the degree of overlap as to the factual situations covered. Many domestic laws quite similarly restrict the right to claim damages for innocent misrepresentations made during contract negotiations to cases in which a contract has been concluded, but offer no such remedy where the representee has refrained from entering into a contract.¹⁰⁴ Should a given law on misrepresentation decide otherwise, its

Precontractual Liability Under the United Nations Sales Convention, 66 U. CIN. L. REV. 257, 280–81 (1997).

100. See UN Doc. A/CONF. 97/5, Official Records at 294–95; see also PETER SCHLECHTRIEM, *UNIFORM SALES LAW: THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 57 (Peter Doralt & Helmut H. Hascheck eds., 1986).

101. See CISG, *supra* note 3, arts. 14–17 (governing offer); *id.* arts. 18–22 (governing acceptance).

102. See *id.* art. 23.

103. See Goderre, *supra* note 99, at 279; Schroeter, *supra* note 4, Introduction to Arts. 14–24, ¶ 54.

104. Compare JOHN CARTWRIGHT, *MISREPRESENTATION, MISTAKE AND NON-DISCLOSURE* ¶¶ 3–50 (3d ed. 2012) (discussing English law), with E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 235 (1987) (discussing U.S. law and noting “[i]ndeed, it

rules could generally be applied to false statements made during negotiations that could have led to the conclusion of a CISG contract, but eventually did not.

The interpretation of the CISG's scope described above is more important when it comes to national rules on pre-contractual liability that may grant a party a right to damages where contract negotiations have failed,¹⁰⁵ but that are not triggered by the incorrectness of statements made but rather by a party's decision to break off the negotiations. In assessing the applicability of such domestic law rules¹⁰⁶ alongside the CISG, the CISG's limited "factual" coverage with respect to the pre-contractual stage should not conceal that the CISG covers these situations through its rules on contract formation in Articles 14–24. By providing, on one hand, that no offer can be accepted as long as no proposal has been made that indicates the offeror's intention to be bound in case of acceptance¹⁰⁷ or valid offers were duly withdrawn¹⁰⁸ or revoked,¹⁰⁹ and stipulating, on the other hand, that a contract is only formed once an offer has been accepted¹¹⁰ and that the offeree even has a right to change his mind about acceptances made,¹¹¹ the CISG stresses the parties' right to freely walk away from contractual negotiations before their respective declarations have become binding. Domestic law rules providing for damage claims in cases where a negotiation has been broken off are therefore triggered by factual circumstances also covered by the CISG, although the latter provides that such factual situations should yield no legal consequences.¹¹²

In conclusion, it can be summarized that the factual criterion within the two-step approach is fulfilled where the relationship between the CISG and domestic laws on innocent misrepresentation is concerned.¹¹³

3. *The Legal Criterion*

The legal criterion requires more thought: Do domestic law rules on innocent misrepresentation pertain to a matter also regulated by the

would seem that a party to failed negotiations might have a claim based on any misrepresentation, including one by nondisclosure, that upon being discovered caused the negotiations to fail").

105. See UN Doc. A/CONF. 97/5, Official Records at 294. The unsuccessful proposal by the German Democratic Republic in Vienna would also have covered such cases. See *id.*

106. See Farnsworth, *supra* note 104, at 239–49, 282–84.

107. See CISG, *supra* note 3, art. 14(1).

108. See *id.* art. 15.

109. See *id.* art. 16.

110. See *id.* arts. 18, 23.

111. See *id.* art. 22.

112. See Schroeter, *supra* note 4, Introduction to Arts. 14–24, ¶ 63, art. 14, ¶ 29 For a further discussion relating to the fact that national rules on fraudulent behavior can always be applied alongside the Convention, see *infra* notes 208–10.

113. See BRIDGE, *supra* note 99, ¶¶ 12.21–.22; HONNOLD, *supra* note 6, ¶ 240.

CISG? This could be doubted if the matter was framed narrowly, for example, as “protection of contracting partners from unintended misinformation.” It seems in line with the CISG’s international character, however, to adopt a more functional view.¹¹⁴ The matter that is indeed being regulated in both rules is *the buyer’s state of knowledge about features of the goods at the moment of contract conclusion*. The CISG addresses this matter in a number of provisions in its Part III, thereby preempting concurrent rules of domestic law:¹¹⁵

a. The Parties’ State of Knowledge About Features of the Goods as Regulated Matter

It does so first in Article 35(1), albeit only indirectly. By providing that the seller must deliver goods that are of the quantity, quality, and description required by the contract, Article 35(1) refers to the content of the parties’ sales agreement as understood by the parties. This common understanding is to be determined in accordance with the rules on interpretation of party statements and conduct in Article 8,¹¹⁶ with the relevant point in time being the moment of contract conclusion.¹¹⁷ Article 35(1) CISG thereby divides the task to inform oneself or the other party between the seller and the buyer. If the seller has made a statement about the quality of the goods and the buyer accepted it, it became part of the contract (as interpreted in light of the negotiations)¹¹⁸ so that the consequences of the delivered goods lacking this quality are governed by Article 45, and not by domestic law rules on innocent misrepresentation.¹¹⁹ If the parties have mentioned certain technical specifications of the machine in their contract in a manner that allows a reasonable person in the buyer’s position to determine the machine’s production capacity, it is up to the buyer to ask for additional information before concluding the contract if the specifications given are insufficient for his individual purposes.¹²⁰

In requiring the goods’ fitness for the purposes for which goods of the same description would ordinarily be used, Article 35(2)(a) must similarly be read as referring to the “ordinary use” at the moment of contract formation,¹²¹ although the precise point in time will rarely be decisive

114. See CISG, *supra* note 3, art. 7(1).

115. Note that this is not the only matter regulated in the Convention that may be the subject of a misrepresentation. See *infra* notes 188–89.

116. See HONNOLD, *supra* note 6, ¶ 224; Ingeborg Schwenzer, *Article 35, in CISG COMMENTARY*, *supra* note 2, ¶ 7.

117. See CISG, *supra* note 3, art. 23.

118. See *id.* art. 8(3).

119. See HONNOLD, *supra* note 6, ¶ 240.

120. Bundesgericht [BGer] [Federal Supreme Court] Dec. 22, 2000, CISG-online No. 628 (Switz.); see also CISG, *supra* note 3, art. 8(2).

121. See Stefan Kröll, *Article 35, in THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* ¶ 68 (Stefan Kröll, Loukas Mistelis & Maria del Pilar Perales Viscacillas eds., 2011).

because ordinary uses are not prone to change. The provision nevertheless incorporates a division of informational risks comparable to the one under Article 35(1) because Article 35(3) declares the seller to not be liable if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of the goods' lack of fitness for their ordinary use. In that case, the buyer has no remedy under the CISG¹²² because the goods' non-conforming nature was before the buyer's eyes to see.¹²³ Article 35(2)(a) and (3) do, however, impose neither an obligation on the seller to inform the buyer of such lack of fitness,¹²⁴ nor an obligation on the buyer to examine the goods prior to contract conclusion,¹²⁵ but rather pursue their regulatory goal by granting or taking away access to the CISG's remedies listed in Article 45. Articles 41 and 42 contain a functionally equivalent regulation that deals with the goods' freedom from rights and claims of third parties, and that similarly connects the availability of buyers' remedies to the parties' state of knowledge at the moment of contract conclusion. Already at the outset, the seller only owes the goods' freedom from those intellectual property rights of which, at the time of the conclusion of the contract, the seller knew or could not have been unaware of,¹²⁶ whereas other (unrecognizable) third party rights¹²⁷ or rights that the seller only becomes aware of after contract conclusion do not entail his liability.¹²⁸ The question under the law of which state the goods must be free from such rights then partially depends on the parties "contemplation" regarding the prospective use of the goods at the time of the conclusion of the contract under Article 42(1)(a). If, on the contrary, it is the buyer who knew or could not have been unaware of a right or claim at the time of the conclusion of the contract, Article 42(2)(a) declares the seller exempt from liability—knowledge only subsequently gained by the buyer, again, does not yield a similar result.¹²⁹

With respect to the conformity of the goods, Article 35(2)(b) further provides that they do not conform with the contract unless they are fit for any particular purpose "expressly or impliedly made known to the seller" at the time of the conclusion of the contract. This provision is another

122. See Magnus, *supra* note 6, art. 35, ¶ 46.

123. See HONNOLD, *supra* note 6, ¶ 229.

124. See Magnus, *supra* note 6, art. 35, ¶ 48.

125. See ENDERLEIN & MASKOW, *supra* note 1, art. 35, ¶ 20; HONNOLD, *supra* note 6, ¶ 229; Kröll, *supra* note 121, art. 35, ¶ 160; Magnus, *supra* note 6, art. 35, ¶ 48; PILTZ, *supra* note 6, ¶¶ 5–52; Schwenger, *supra* note 116, art. 35, ¶ 36.

126. See CISG, *supra* note 3, art. 42(1).

127. A dispute remains as to whether a seller's duty flows from CISG Article 42 to investigate intellectual property. See Ruth M. Janal, *The Seller's Responsibility for Third Party Intellectual Property Rights Under the Vienna Sales Convention*, in SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: FESTSCHRIFT FOR ALBERT H. KRITZER ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY 203, 213–17 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008) (referring to "the adequate allocation of the contractual risk between the parties").

128. See Schwenger, *supra* note 116, art. 42, ¶ 16.

129. See *id.* art. 42, ¶ 19.

example for the allocation of informational rights and duties through the CISG: Article 35(2)(b) makes the seller's liability under the CISG dependent on a particular purpose having been "made known" to him, thereby indicating that the seller is generally under no duty to enquire about particular, non-ordinary purposes for which the goods could be used, nor is he under a duty to inform the buyer about the goods' lack of fitness for such purpose. Once an intended use has been made known to him (without its "contemplation between the parties" being required, as under Article 42(1)(a))¹³⁰ and he has nevertheless entered into the contract, the seller is liable if the goods are unsuitable for the use.¹³¹ If, on the contrary, the buyer chooses not to inform the seller about the particular purpose for which he intends to use the goods, he cannot expect compensation—any information not given by the buyer until after the contract formation does entail the seller's liability.¹³² The CISG also defines autonomously how ("expressly or impliedly")¹³³ and by whom (in practice usually by the buyer, but information provided by a third party should similarly suffice)¹³⁴ the particular purpose must have been made known to the seller, thereby displacing standards of information and enquiry that may exist under domestic laws.¹³⁵ In addition, however, Article 35(2)(b) *in fine* demands that, under the circumstances, the buyer relied and that it was reasonable for him to rely on the seller's "skill and judgement" before the seller's liability can ensue. The CISG's latter test is remarkably similar in wording and purpose to the requirement under the English law of misrepresentation as stated in *Esso Petroleum Co. v. Mardon*,¹³⁶ where Lord Denning based liability for damages on the representation by a man "who has or professes to have special knowledge or skill."¹³⁷ This similarity indicates that both legal rules indeed pertain to the same regulatory matter.

The parties' state of knowledge *after* the moment of contract conclusion is furthermore addressed in Articles 38–40: once the buyer has discovered or ought to have discovered the goods' lack of conformity, he has to inform the seller within reasonable time under Article 39(1) at pain of otherwise losing his right to rely on the discernible non-conformity.¹³⁸ If, however, it is the seller who becomes aware or cannot be unaware of facts

130. See Janal, *supra* note 127, at 221.

131. See Magnus, *supra* note 6, art. 35, ¶ 26.

132. See ENDERLEIN & MASKOW, *supra* note 1, art. 35, ¶ 10; KÖHLER, *supra* note 8, at 233; Magnus, *supra* note 6, art. 35, ¶ 30; Schwenger, *supra* note 116, art. 35, ¶ 23.

133. See Schwenger, *supra* note 116, art. 35, ¶ 22.

134. See Kröll, *supra* note 121, art. 35, ¶ 112.

135. See Khoo, *supra* note 23, ¶ 3.3.3.

136. See *Esso Petroleum Co. v. Mardon*, [1976] Q.B. 801 (Eng.).

137. See *id.*

138. See CISG, *supra* note 3, art. 39(1).

giving rise to a non-conformity after the contract has been concluded,¹³⁹ Article 40 provides that he in turn must either inform the buyer or lose his right to rely on the buyer's insufficient notice of non-conformity. Comparable rules with respect to third party rights or claims attached to the goods are contained in Article 43.

In summary, Articles 35 and 38–44 therefore install a delicate web of awareness-related rules which are based on a balanced distribution of informational risks.¹⁴⁰ This distribution should not be disturbed by the application of rules of domestic law which may (and often will) allocate these risks differently.

b. The Party's State of Knowledge About the Other Party's Ability to Perform as Regulated Matter

Similarly, the parties' state of knowledge at contract conclusion about their contracting partner's ability to perform and his creditworthiness is a matter governed by Articles 71 and 72.¹⁴¹ This has important effects for the CISG's relationship towards remedies under national law that are triggered by a party's innocent but incorrect statements about his or her own ability to perform or creditworthiness (although negligent or fraudulent misrepresentations about these issues are arguably more important in practice).¹⁴²

Article 71(1) addresses the matter by providing that a party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of: (a) a serious deficiency in his ability to perform or in his creditworthiness or (b) his conduct in preparing to perform or in performing the contract. Article 71(2) supplements this right of suspension by a right of stoppage in transit if the seller has already dispatched the goods before the grounds described above become evident, and Article 72 in turn provides for a right to declare the contract avoided if, prior to the date for performance of the contract, it is clear that the other party's serious deficiency in his ability to perform or in his creditworthiness will result in a fundamental breach of contract.¹⁴³

Articles 71 and 72 should be read as offering an exhaustive regulation of the informational risk distribution about the parties' ability to per-

139. The relevant point in time is a matter of dispute. See Schwenzer, *supra* note 116, art. 40, ¶ 8.

140. See also KÖHLER, *supra* note 8, at 231, 256.

141. See ENDERLEIN & MASKOW, *supra* note 1, art. 4, ¶ 3.1; Karin Fleisch, *Der Irrtum über die Kreditwürdigkeit des Vertragspartner und die Verschlechterungseinrede*, Betriebsberater 873, 876–77 (1994); PETER SCHLECHTRIEM & PETRA BUTLER, UN LAW ON INTERNATIONAL SALES ¶ 261 (2009).

142. See *infra* notes 165–88 and 189–209, respectively.

143. See CISG, *supra* note 3, art. 25.

form,¹⁴⁴ thereby preempting concurrent rules of domestic law that deal with the same matter.¹⁴⁵ This regulatory intent becomes particularly apparent when looking at the limitations laid down in the provisions' wording which relate both to the prerequisites of the remedies provided and to their effect. By requiring that the serious deficiency in performance ability or in creditworthiness has only become apparent after the conclusion of the contract, Articles 71(1) makes it clear that deficiencies that were already apparent at an earlier stage—although maybe not positively known to the other party¹⁴⁶—do not result in a right of suspension if the contract has nevertheless been entered into with the respective party.¹⁴⁷ The CISG thereby operates on the assumption that each party will gather sufficient information about his contracting partner in the run-up to the contract formation in order to determine the contracting partner's ability to fulfill the contract¹⁴⁸—if doubts arise, he may give the prospective contracting partner a chance to dispel them or refrain from entering into the contract (*caveat creditor*). Should a party choose to neglect this pre-contractual due diligence and to conclude the contract despite his unawareness, he acts at his own risk. National laws on misrepresentation are often based on other (and internationally divergent) disclosure obligations and are therefore incompatible with the CISG's regulatory approach in this matter.

The CISG furthermore provides a structured set of remedies for the situations discussed here: the rights of suspension and stoppage under Article 71 only lead to a right to avoid the contract if the conditions laid down in Articles 49, 64, or 72 are met,¹⁴⁹ and Articles 45(1)(b), 61(1)(b), and 74 *et seq.* govern a party's right to claim damages¹⁵⁰ where the other party is lacking in his performance abilities. Domestic law rules on innocent misrepresentation may again provide for a right of rescission, damage claims, or both under different prerequisites and must accordingly be dis-

144. See Djakhongir Saidov, *Article 71, in UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)* ¶ 16 (Stefan Kröll, Loukas Mistelis & Maria Del Pilar Perales Viscasillas eds., 2011).

145. See WILHELM ALBRECHT ACHILLES, *KOMMENTAR ZUM UN-KAUFRECHTSÜBEREINKOMMEN (CISG)* art. 71, ¶ 1 (2000); Christiana Fountoulakis, *Article 71, in SCHLECHTRIEM & SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* ¶ 35 (Ingeborg Schwenzer ed., 3d ed. 2010); ROLF HERBER & BEATE CZERWENKA, *INTERNATIONALES KAUFRECHT* art. 71, ¶ 16 (1991); Magnus, *supra* note 6, art. 71, ¶¶ 40–43; SCHLECHTRIEM & BUTLER, *supra* note 141, ¶ 261. *Contra* Lessiak, *supra* note 14, at 493.

146. See Flesch, *supra* note 141, at 873; Saidov, *supra* note 144, ¶ 16.

147. See Trevor Bennett, *Article 71, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION* ¶ 1.9 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987); Alexander von Ziegler, *The Right of Suspension and Stoppage in Transit (and Notification Thereof)*, 25 J.L. & COM. 353, 363 (2005).

148. See Fountoulakis, *supra* note 145, ¶ 24.

149. See Flesch, *supra* note 141, at 876.

150. See Fountoulakis, *supra* note 145, ¶ 55; see also Saidov, *supra* note 144, ¶¶ 59–60.

placed. Case law under the CISG has confirmed that Article 71 excludes all legal remedies that are provided under the applicable national law for the situation where, subsequent to the conclusion of the contract, serious doubts arise about the other party's ability to perform his obligations.¹⁵¹

c. Irrelevance of Misrepresentation Becoming Term of the Contract

The qualification of the issues just mentioned as matters regulated by the CISG must apply irrespective of whether the misrepresentation concerned has become a contractual term or not:¹⁵² by providing uniform rules for the prerequisites under which a certain quality or description of the goods is "required by the contract" and under which the goods otherwise "conform with the contract," the CISG *e contrario* also defines the conditions under which information exchanged during the contract negotiations does not trigger a contractual obligation owed by the seller.¹⁵³ In the latter case, the CISG therefore implicitly provides that the seller shall not be subject to any remedies arising from such pre-contractual information (even if found to be false), thereby comprehensively regulating the matter and preempting domestic law. (The situation is different only where a party acts fraudulently, as will be discussed in more detail below.)¹⁵⁴

d. Irrelevance of Type of Remedy Provided by Domestic Law

What has just been said with regard to the prerequisites for remedies laid down in the CISG and in domestic law is similarly true for the type of remedies provided by the respective rules. If a given matter is being regulated by the CISG, it is therefore the CISG alone which determines what remedies shall be available to the parties as part of such regulation, thereby implicitly excluding all other types of remedies that would be available under concurrent domestic laws. The CISG's prevalence over domestic law accordingly not only secures *that* the uniform sales law regulates its matters undisturbed, but also *how* it regulates them.

151. See Oberster Gerichtshof [OGH] [Supreme Court] Feb. 12, 1998, docket No. 2 Ob 328/97t (Austria) (discussing Articles 1(1)(b), 6, 7(2), 38, 39, 40, 44, 45, 71, 73, 74, 75, 76, and 77); see also Oberlandesgericht [OLG] [Court of Appeals] Cologne May 19, 2008, Internationales Handelsrecht 181, 2008 (Ger.) (discussing Articles 4, 38, 39, 53, 71, and 81, specifically with reference to rights of retention under domestic law).

152. *Contra* Khoo, *supra* note 23, ¶ 3.3.5. See also BRIDGE, *supra* note 99, ¶ 12.21. On the differences in English law between misrepresentations that become part of the contract and those that do not, see BRIDGE, *supra* note 99, ¶ 12.20. Note that in cases of (failed) contract negotiations that do not result in any contract being concluded, the "factual criterion" is not fulfilled. See *infra* notes 198–201.

153. See CISG, *supra* note 3, art. 35(1)–(2). *But see* BRIDGE, *supra* note 99, ¶ 12.21 (expressing doubts in this respect).

154. For a further discussion, see *infra* notes 207–09.

The CISG's relationship towards domestic laws on innocent misrepresentation is therefore the same irrespective of the type(s) of remedies that the applicable law attaches to such misrepresentation. Where the two-step approach has clarified that domestic law is preempted by the CISG, preemption applies no matter whether the misinformed party would otherwise have had a right to claim damages (as under U.S. law),¹⁵⁵ a right to rescind the contract (as under English law),¹⁵⁶ or a right to rely on the courts' discretion to declare the contract subsisting and award damages in lieu of rescission (as under English law).¹⁵⁷ Nor does it make any difference how the measure of damages under the law of misrepresentation is calculated¹⁵⁸ or that avoidance of sales contracts under the CISG is prospective, while rescission for misrepresentation in common law systems is retrospective.¹⁵⁹ Rights to rescission under misrepresentation law do in particular not escape preemption because they could be classified as a "validity" issue under the second sentence of Article 4.¹⁶⁰ As earlier discussed,¹⁶¹ where a given matter is regulated in the CISG, the uniform sales law has—in the words of Article 4—"expressly provided otherwise."

4. Conclusion

As a result, domestic law remedies for innocent misrepresentations relating to matters governed by the CISG—most importantly (but not exclusively)¹⁶² to the two issues mentioned above, namely features of the goods and the other party's ability to perform respectively his or her creditworthiness—are preempted by the CISG; an outcome about which there is wide-spread agreement among commentators.¹⁶³ All other misrepresentations are not preempted, as for example those concerning the

155. See generally RESTATEMENT (SECOND) OF TORTS § 552C(1) (1977).

156. See Misrepresentation Act, 1967, § 2(1) (Eng.); see also CARTWRIGHT, *supra* note 104, ¶¶ 4–29.

157. See Misrepresentation Act, § 2(2).

158. *But see* RESTATEMENT (SECOND) OF TORTS § 552C cmt. b (1977) (suggesting that for domestic settings differences in measure of damages may affect relationship between actions for innocent misrepresentation and actions for breach of warranty); see also *Electrocraft Ark., Inc. v. Super Elec. Motors, Ltd.*, No. 4:09-CV-00318 SWW, 2009 WL 5181854, at *6 (E.D. Ark. Dec. 23, 2009) ("In addition, Electrocraft seeks identical damages for its negligence/strict liability claim as it seeks for its breach of contract and warranty claims.").

159. See Bridge, *supra* note 26, at 244. On the lack of practical differences between prospective avoidance and retrospective rescission in sale of goods cases, see Bridge, *supra* note 45, at 285–86.

160. See Schlechtriem, *supra* note 12, at 474. *But see* Khoo, *supra* note 23, ¶ 3.3.4.

161. See *supra* notes 14–24.

162. For a discussion of another issue, i.e., the timeliness of the goods' delivery, see *infra* notes 188–89.

163. See BRIDGE, *supra* note 99, ¶ 12.21; Bridge, *supra* note 26, at 244; Bridge, *supra* note 45, at 303 n.124; CISG COMMENTARY, *supra* note 2, art. 4, ¶ 18; HONNOLD, *supra* note 6, ¶ 240; Schroeter, *supra* note 4, Introduction to Arts. 14–24, ¶ 62.

identity of the seller or of the buyer.¹⁶⁴ The answer to the question “can domestic law remedies for innocent misrepresentation be applied in CISG cases?” is therefore the proverbial lawyer’s reply: “It depends”

B. *Negligent Misrepresentation*

An issue that has arisen more frequently in practice is the relationship between the CISG and remedies for negligent misrepresentation.

1. *Definition*

In the United States, the *Restatement (Second) of Torts* describes a negligent misrepresentation and its consequences as follows:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.¹⁶⁵

In English law, the functional equivalent reads:

Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true.¹⁶⁶

Both concepts thus share the requirement of a lack of reasonable care (i.e., negligence) on the side of the maker of the statement, although English law fails to mention this requirement directly: Section 2(1) of the Misrepresentation Act of 1967 rather focuses on misrepresenting a person’s belief in the statement’s truth. While it is therefore theoretically possible that circumstances may exist in which a person may make a statement without having reasonable ground to believe it, yet in which it would be held that he was not (having regard to all the circumstances) negligent,¹⁶⁷ those cases will be exceedingly rare. Despite the differences in wording

164. See HONNOLD, *supra* note 6, ¶ 240. On further discussion of misinformation as to the parties’ identity, see SCHWENZER, HACHEM & KEE, *supra* note 90, ¶¶ 17.35–.36.

165. RESTATEMENT (SECOND) OF TORTS § 552(1) (1977).

166. Misrepresentation Act, 1967, § 2(1) (Eng.).

167. See CHITTY ON CONTRACTS, *supra* note 93, ¶ 6-068.

and in regulatory approach, there is accordingly agreement that liability under Section 2(1) of the Misrepresentation Act, too, is essentially founded on negligence.¹⁶⁸

In the past, a number of U.S. courts have had to deal with the relationship between remedies for alleged negligent misrepresentations by the seller and the CISG. Most of them allowed the application of damage claims for negligent misrepresentation alongside the CISG.¹⁶⁹ The essential reasoning they gave was brief and simple: “The CISG does not apply to tort claims,” and therefore claims for negligent misrepresentation are controlled by state law.¹⁷⁰ Some commentators agree,¹⁷¹ but others have rightly criticized this approach for being incompatible with the CISG’s international character and its uniform interpretation.¹⁷² After all, it relies on dogmatic categories of domestic law that are not internationally uniform. In the same spirit, a Belgian Court of Appeals held that a lack of information by the seller in relation to the use of the goods that the buyer relied upon constituted a contractual breach; therefore, it could not be used as a basis for extra-contractual liability unless the buyer could prove that the damage suffered is different than that caused by the seller’s faulty contract performance.¹⁷³

2. *The Factual Criterion*

When resorting to the alternative two-step approach proposed here, the factual criterion raises the question: Are cases of negligent misrepresentation factual situations not covered by the CISG because the CISG contains no specific rules on negligence, making negligent behavior an

168. See *Gran Gelato Ltd. v. Richcliff Grp. Ltd.*, [1992] Ch. 560 at 573 (Eng.); GUENTER H. TREITEL, *THE LAW OF CONTRACT* 350 (11th ed. 2003); see also *Bridge, supra* note 45, at 301 (“[P] resumed negligence.”).

169. See *Miami Valley Paper, L.L.C. v. Lebbing Eng’g & Consulting GmbH*, No. 1:05-CV-00702, 2009 WL 818618, at *11 (S.D. Ohio Mar. 26, 2009); *Sky Cast, Inc. v. Global Direct Distrib., L.L.C.*, No. CIV.A. 07-161, 2008 WL 754734, at *6 (E.D. Ky. Mar. 18, 2008); *Geneva Pharms. Tech. v. Barr Labs.*, 201 F. Supp. 2d 236, 286–88 (S.D.N.Y. 2002). But see *Electrocraft Ark., Inc. v. Super Electric Motors, Ltd.*, No. 4:09CV00318 SWW, 2009 WL 5181854, at *6 (E.D. Ark. Dec. 23, 2009).

170. See *Sky Cast, Inc.*, 2008 WL 754734, at *7 (“Thus, negligent misrepresentation is a tort claim completely different from a claim for breach of contract. Being a tort claim, the court concludes that it is not controlled by the CISG, which only concerns the sales of good[s] between merchants in different countries”); *Geneva Pharms. Tech.*, 201 F. Supp. 2d at 286 (“The CISG clearly does not preempt the claims sounding in tort.”).

171. See *Bridge, supra* note 26, at 246. But see *id.* at 244; Khoo, *supra* note 23, ¶ 3.3.4; LOOKOFSKY, *supra* note 10, § 4.6; Lookofsky, *supra* note 20, at 280; Lookofsky, *supra* note 26, at 409.

172. See CISG, *supra* note 3, art. 7(1); Schwenzer & Hachem, *supra* note 63, at 471.

173. See *ING Ins. v. BVBA HVA Koeling, Hof van Beroep [HvB]* [Court of Appeal] Antwerpen, Apr. 14, 2004 (Belg.).

“operative fact” that, in the words of Professor Honnold, does not “invoke the rules of the Convention”?¹⁷⁴

The answer is that the factual criterion is fulfilled since both rules do in fact turn on the same operative facts. The reason can be found in the Secretariat’s commentary on the CISG, which states: “In order to claim damages it is not necessary to prove fault or a lack of good faith or the breach of an express promise, as is true in some legal systems. Damages are available for the loss resulting from any objective failure by the seller to fulfill his obligations.”¹⁷⁵ The CISG accordingly embodies a deliberate choice that the question of negligence is irrelevant to the buyer’s right to recover from the seller for damage caused by non-conforming goods.¹⁷⁶ It therefore does cover factual constellations in which negligence by a party is involved, although it does not require that a party acted negligently.

3. *The Legal Criterion*

The second criterion works essentially along the same lines as in cases of innocent misrepresentation. Again, the matter that is regulated is the misinformed party’s state of knowledge at the moment of contract conclusion. This is supported by the traditional categories within the law of misrepresentation where fraudulent misrepresentations were distinguished from non-fraudulent misrepresentations, the latter category including the innocent and the negligent variety.¹⁷⁷ The additional factor present in cases of negligence—the failure to exercise reasonable care—merely affects the measure of damages, but does not change the essential character of the remedy.

When applying the legal criterion to the three U.S. cases mentioned above, in which the courts found domestic law rules on negligent misrepresentation not to be displaced by the CISG, the results are as follows: *Miami Valley Paper v. Lebbing Engineering & Consulting*¹⁷⁸ concerned false statements by the seller according to which the goods (used machines) were “a very good deal” and the current owner was selling them because of bankruptcy. Both were considered by the district court to be mere statements of opinion (“puffery”), insufficient to support a negligent misrepresentation claim and furthermore did not relate to a matter regulated by the CISG because they neither formed part of the goods’ contractual

174. HONNOLD, *supra* note 6, ¶ 62.

175. UN Secretariat, Commentary on Art. 41 of the 1978 Draft of the CISG, cmt. 3, UN Doc. A/CONF. 97/5, Official Records 37, 48, 55.

176. See HONNOLD, *supra* note 6, ¶ 73.

177. See RESTATEMENT (SECOND) OF TORTS § 552C cmt. a (1977); CHITTY ON CONTRACTS, *supra* note 93, ¶ 6-005; TREITEL, *supra* note 168, at 349–50. Under English law, the point became less clear through *Hedley Byrne & Company Ltd. v. Heller & Partners Ltd.* and the enactment of the Misrepresentation Act 1967. See TREITEL, *supra* note 168, at 349–50.

178. No. 1:05-CV-00702, 2009 WL 818618, at *12 (S.D. Ohio Mar. 26, 2009).

description, nor affected the purposes for which they could be used.¹⁷⁹ In *Geneva Pharmaceuticals v. Barr Laboratories*,¹⁸⁰ the alleged negligent misrepresentation consisted of the seller's failure to disclose that he was no longer willing or able to supply the buyer (a manufacturer of generic pharmaceuticals) with the goods (clathrate, a chemical substance used in the manufacture of pharmaceuticals) under future contracts.¹⁸¹ At first glance, the issue could be considered a matter covered by Article 71(1) because it pertained to the seller's ability to perform. Upon closer scrutiny, however, it becomes clear that the legal criterion under our two-step approach was not fulfilled. The alleged misinformation by the seller only concerned future contracts that would have involved the same type of goods, but not the performance of the contract at hand, the latter being the only matter regulated by Article 71(1).¹⁸² Both cases were therefore correctly decided when applying the test suggested here.

In *Sky Cast v. Global Direct Distribution*,¹⁸³ on the contrary, the legal criterion was arguably fulfilled, and domestic law remedies for negligent misrepresentation should therefore have been considered preempted.¹⁸⁴ In that case, the timeliness of the delivery of the goods (light poles that were needed for an ongoing construction project) stood at the center of the dispute. After the parties had agreed on delivery dates in their contract, the seller allegedly provided the buyer with false information concerning the actual time of the upcoming delivery, thereby leading to the buyer's claim for negligent misrepresentation when the announced delivery was late.¹⁸⁵ It is submitted that in doing so, domestic law was applied to a matter exclusively covered by Article 33 (time of delivery) and Articles 45 *et seq.* (buyer's rights in cases of late delivery) of the CISG.¹⁸⁶

4. Conclusion

In summary, domestic law remedies for negligent misrepresentation are equally preempted as far as they relate to features of the goods sold or the ability of one party to perform the contract and therefore—in the ter-

179. See CISG, *supra* note 3, art. 35(1); see also *id.* art. 35(2).

180. 201 F. Supp. 2d 236 (S.D.N.Y. 2002).

181. See *id.* at 286.

182. See CISG, *supra* note 3, art 71(1). The “substantial part of his obligations” that Article 71(1) speaks of is a substantial part of the party's obligations under the *present* contract (the performance of which may then be suspended by the other party), not under future contracts. See *id.*

183. No. CIV.A. 07-161, 2008 WL 754734 (E.D. Ky. Mar. 18, 2008).

184. See SCHWENZER, HACHEM & KEE, *supra* note 90, ¶ 49.31.

185. See *Sky Cast, Inc.*, 2008 WL 754734, at *11. The district court concluded that the information given by seller had in fact not been false and therefore dismissed the claim. See *id.*

186. *Contra* Schlechtriem, *supra* note 12, at 475 (mentioning “obligations to deliver conforming goods in time” as example for topics and interests outside CISG).

minology used here—pertain to a matter also regulated by the CISG.¹⁸⁷ Again, remedies for other types of negligent misrepresentations remain applicable, for example, incorrect information about a third party's willingness to guarantee performance of the contract.¹⁸⁸

C. *Fraudulent Misrepresentation*

This leaves us with the last type of misrepresentation, namely fraudulent misrepresentation. Does the line of arguments presented above with respect to negligent misrepresentation also apply to cases of fraud, because, after all, the CISG operates independently of notions of fault or lack of good faith?

1. *Definition*

No, it does not. Claims for or because of fraudulent inducement,¹⁸⁹ fraudulent misrepresentation,¹⁹⁰ common law fraud,¹⁹¹ tortious interference with business relations,¹⁹² *arglistige Täuschung*,¹⁹³ *absichtliche Täuschung*,¹⁹⁴ duress,¹⁹⁵ deceit, or intentional harm all remain applicable alongside the CISG. While this result is commonly agreed upon both in

187. See BRIDGE, *supra* note 99, ¶ 12.21; Michael Bridge, *A Comment on "Towards a Universal Doctrine of Breach—The Impact of CISG"* by Jürgen Basedow, 25 INT'L REV. L. & ECON. 501, 510 (2005); HONNOLD, *supra* note 6, ¶ 73; Peter Huber, in MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH art. 45, ¶ 24 (6th ed. 2012); Kröll, *supra* note 121, art. 35, ¶ 204; Schlechtriem, *supra* note 12, at 473; Schroeter, *supra* note 4, Introduction to Arts. 14–24, ¶ 62; SCHWENZER, HACHEM & KEE, *supra* note 90, ¶ 49.31; Ingeborg Schwenzer, *Buyer's Remedies in the Case of Non-conforming Goods: Some Problems in a Core Area of the CISG*, 101 ASIL PROC. 416, 421 (2007); Schwenzer & Hachem, *supra* note 63, at 471.

188. See Schroeter, *supra* note 4, Introduction to Arts. 14–24, ¶ 62.

189. See *Beijing Metals & Minerals v. Am. Bus. Ctr., Inc.*, 993 F.2d 1178, 1180 (5th Cir. 1993) (acting under Texas law); *Miami Valley Paper, L.L.C. v. Lebbing Eng'g & Consulting GmbH*, No. 1:05-CV-00702, 2009 WL 818618, at *1 (S.D. Ohio Mar. 26, 2009) (acting under Ohio law).

190. See *Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp., L.L.C.*, No. 08-762, 2008 U.S. Dist. LEXIS 51066, at *6–7 (acting under Minnesota law).

191. See *TeeVee Toons, Inc. v. Gerhard Schubert GmbH*, No. 00 Civ 5189, 2006 WL 2463537, at *13–16 (S.D.N.Y. Aug. 23, 2006) (acting under New York law).

192. See *Electrocraft Ark., Inc. v. Super Electric Motors, Ltd.*, No. 4:09-CV-00318 SWW, 2009 WL 5181854, at *8 (E.D. Ark. Dec. 23 2009) (acting under Arkansas law); *Viva Vino Imp. Corp. v. Farnese Vini S.R.L.*, No. CIV.A. 99-6384, 2000 WL 1224903, at *1 (E.D. Pa. Aug. 29, 2000) (acting under Pennsylvania law).

193. See Oberlandesgericht [OLG] [Court of Appeals] Hamm, INTERNATIONALES HANDELSRECHT [IHR] 59, 63 (2010) (Ger.) (acting under German law).

194. *Cantonal Court St. Gallen*, INTERNATIONALES HANDELSRECHT [IHR] 2009, 161 (Switz.) (acting under Swiss law).

195. See *Beijing Metals & Minerals v. Am. Bus. Ctr., Inc.*, 993 F.2d 1178, 1184–85 (5th Cir. 1993) (acting under Texas law).

case law¹⁹⁶ and in legal writing,¹⁹⁷ the precise reasons behind it are not often spelled out. In my opinion, they can be described in the manner explained below.

2. *The Factual Criterion*

When asking whether domestic law remedies for fraudulent misrepresentation are triggered by a factual situation which the CISG also applies to, this question cannot be denied simply because a party's fraudulent intention, i.e., one's knowledge of the untrue character of one's representation,¹⁹⁸ is a mere state of mind and as such does not qualify as a fact. The state of a man's mind, as the English Court of Appeals famously put it, "is as much a fact as the state of his digestion."¹⁹⁹ Where rules on fraudulent misrepresentation are concerned, the factual criterion is instead fulfilled because the CISG also covers cases in which the seller is positively aware of the goods' non-conformity, but nevertheless concludes the contract. Some authors, however, have expressed a different view and argued that the CISG does not address factual situations involving fraud²⁰⁰—a position which, if followed through, would arguably have to deny parties to CISG contracts that were induced by fraudulent misstatements any remedies arising from the CISG. This differs from the position taken here, which will be addressed in more detail below.²⁰¹

3. *The Legal Criterion*

Rules on fraudulent misrepresentation, however, concern a different regulatory matter than the CISG's provisions. This, again, does not follow from the fact that many domestic laws treat fraud and its consequences as a matter of tort law. The dogmatic classification within national legal systems should not influence the autonomous interpretation of the CISG's scope in accordance with Article 7(1). Such classification is furthermore not internationally uniform. German sales law, for example, until not too long ago, considered the seller's fraudulent misrepresentation about the

196. See Zurich Chamber of Commerce, YB Comm. Arb. 128, ¶ 149 (1998).

197. See Benicke, *supra* note 24, ¶ 19; Johan Erauw & Harry Flechtner, *Remedies Under the CISG and Limits to Their Uniform Character*, in THE INTERNATIONAL SALE OF GOODS REVISITED 35, 66 (Petar Šarčević & Paul Volken eds., 2001); Fountoulakis, *supra* note 145, ¶ 25; Heiz, *supra* note 14, at 653–54; HONNOLD, *supra* note 6, ¶ 65; Kröll, *supra* note 121, art. 35, ¶ 205; Lookofsky, *supra* note 20, at 280; Schlechtriem, *supra* note 12, at 474; Schroeter, *supra* note 4, Introduction to Arts. 14–24, ¶ 62; Schwenger, *supra* note 116, art. 35, ¶ 49; Schwenger, *supra* note 187, at 421.

198. See RESTATEMENT (SECOND) OF TORTS § 526 cmt. a (1977).

199. See *Edgington v. Fitzmaurice*, [1885] L.R. 29 Ch.D. 459 at 483 (Lord Bowen L.J.).

200. See HONNOLD, *supra* note 6, ¶¶ 65, 73.

201. See *infra* notes 207–09.

quality of goods as one of the few reasons giving rise to a *contractual* right of the buyer to claim damages.²⁰²

The decisive reason is that domestic legal rules on fraudulent misrepresentation deal with violations of the “obligation of honesty” (as the *Restatement (Second) of Torts* puts it)²⁰³ or the “general obligation of honesty in speaking” (as described by an English author),²⁰⁴ which is a matter different from mere breaches of contractual obligations or from a lack of due care. The CISG does not attempt to regulate the specific consequences triggered by such party behavior. In the Hague Sales Laws of 1964, predecessors to the CISG of 1980, this point was still expressly clarified. Article 89 of the Uniform Law on the International Sale of Goods (ULIS) stated: “In case of fraud, damages shall be determined by the rules applicable in respect of contracts of sale not governed by the present Law.”

The fact that ULIS Article 89 has no explicit counterpart in today’s CISG should not be read as an indication of the CISG’s position being different.²⁰⁵ The developments during the drafting stage of the CISG made clear that the provision was merely left out in an attempt to shorten the overall length of the CISG’s text, combined with the hope that it would be possible to adopt a new concurring international instrument to govern questions of fraudulent party behavior—a plan that eventually did not succeed. The lack of a provision along the lines of ULIS Article 89 did not signal an intent of the CISG’s drafters to include fraud among the matters regulated by the CISG,²⁰⁶ so that remedies for fraudulent misrepresentation can be applied alongside the CISG.

4. *Concurrent Applicability of Uniform and Domestic Law*

The above-mentioned result of the two-step approach raises one last question to be addressed in the present paper, namely: Does the fact that the effects of fraudulent party behavior is not among the matters regulated by the CISG mean that the CISG is displaced in favor of national rules on fraudulent misrepresentation? The answer must be “no.” Rather, both sets of rules apply alongside each other, leaving the aggrieved party with the choice of which rule to base one’s claims upon.²⁰⁷ This follows from an interpretation of the CISG. The purpose of the CISG’s remedies is the compensation of parties that have suffered a breach of contract, regardless of whether the conclusion of this contract was fraudulently in-

202. See BÜRGERLICHES GESETZBUCH [BGB] [Civil Code] § 463 (Ger.) (as in force until December 31, 2001).

203. RESTATEMENT (SECOND) OF TORTS § 552 cmt. a (1977).

204. CARTWRIGHT, *supra* note 104, ¶ 6-01.

205. *But see* LOOKOFSKY, *supra* note 10, § 4.6 n.71.

206. See SCHLECHTRIEM, *supra* note 100, at 34; Schlechtriem, *supra* note 12, at 474.

207. See Cantonal Court St. Gallen, INTERNATIONALES HANDELSRECHT [IHR] 2009, 161 (Switz.); Oberlandesgericht [OLG] [Court of Appeals] Cologne May 21, 1996 (Ger.); Schroeter, *supra* note 4, Introduction to Arts. 14–24, ¶ 62.

duced in the first place. A different interpretation would deprive parties that suffered fraud in addition to a breach of contract of their remedies under the CISG, a result that would be irreconcilable with the promotion of good faith that CISG Article 7(1) demands. This was also the prevailing opinion under ULIS Article 89.²⁰⁸ At the end of the day, CISG contracts obtained through fraudulent misrepresentation accordingly constitute one of the rare cases that the CISG does govern, but not exhaustively.²⁰⁹

IV. CONCLUSION

Defining the exact substantive scope of the CISG is a difficult but necessary task. It is necessary because the scope determines over which domestic rules of law the CISG prevails, thereby preempting the concurrent domestic law's application,²¹⁰ and difficult because the CISG itself provides limited guidance about the method through which this definition is to be achieved. This article has discussed two approaches used in this regard in case law and legal writings on the CISG: the reliance on Article 4²¹¹ and on dogmatic categories of domestic law as "contracts" and "torts,"²¹² and found them both wanting, particularly in light of Article 7(1) calling for an internationally uniform interpretation of the CISG's scope.

Against this background, a novel two-step approach has been developed with the CISG's Article 7(1) in mind.²¹³ According to this approach, a domestic law rule is displaced by the CISG if: (1) it is triggered by a factual situation that the CISG also applies to (the factual criterion), and (2) it pertains to a matter that is also regulated by the CISG (the legal criterion). Only if both criteria are cumulatively fulfilled, the domestic law rule concerned overlaps with the CISG's sphere of application in a way that will generally result in its preemption. In applying this approach to remedies for misrepresentation known in common law jurisdictions, it has been demonstrated that remedies for both innocent²¹⁴ and negligent misrepresentation²¹⁵ are preempted by the CISG if—and only if—they pertain to matters already regulated by the CISG, notably the buyer's state of knowledge about features of the goods at the moment of contract conclu-

208. See Ronald Harry Graveson, Ernst Joseph Cohn & Diana Graveson, *UNIFORM LAWS ON INTERNATIONAL SALES ACT 1967* 104 (1968); Weitnauer, *Article 89, in KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT*, EKG, ¶ 3 (Dölle ed., 1976).

209. Another case that falls into this general category is arguably that of contracting parties demanding a judgment for specific performance. While the CISG in principle grants such a right, Article 28 expressly authorizes the adjudicating court to refer to "its own law" in order to determine whether such a judgment should be entered.

210. See *supra* notes 1–12.

211. See *supra* notes 14–24.

212. See *supra* notes 25–63.

213. See *supra* notes 64–88.

214. See *supra* notes 93–164.

215. See *supra* notes 165–88.

sion or the parties' state of knowledge about the other party's ability to perform. Remedies for fraudulent misrepresentation, on the contrary, can always be applied alongside the CISG.²¹⁶

The methodical approach presented here is no more than a means to a necessary end, namely the uniform and predictable definition of the borders of the CISG. As it is clear that the purpose of the CISG—the creation of a uniform international law—will be frustrated if it is possible to circumvent its provisions by bringing claims under domestic law,²¹⁷ it is hoped that the two-step approach may also prove useful in determining the relationship between the CISG and other instruments of domestic law, thereby allowing international merchants to foresee which rules will apply to their cross-border sales transactions.

216. *See supra* notes 190–210.

217. *Cf.* CA 7833/06 Pamesa Ceramica v. Yisrael Mendelson Ltd. 27, ¶ 54 [2009] (Isr.).

PRINCIPLES OF ASIAN CONTRACT LAW: AN ENDEAVOR OF
REGIONAL HARMONIZATION OF CONTRACT LAW
IN EAST ASIA

SHIYUAN HAN*

I. INTRODUCTION

FOLLOWING the development of the globalized economy, it was inevitable that relevant private law rules would be harmonized and unified. This kind of harmonization and unification is both a global and a regional endeavor. In Asia (especially in East Asia) there is a private initiative by scholars trying to harmonize rules of contract law, and the aim is to create a model law called Principles of Asian Contract Law (PACL).

This paper begins, in Part II, with a discussion of how the PACL can become a continuous project rather than merely an idea. Part III then examines why the PACL is necessary for East Asia given that China, South Korea, and Japan are member states of the United Nations Convention on Contracts for the International Sale of Goods (CISG). Part IV examines what has been done to create the PACL. Part V addresses some basic issues with the PACL. Finally, Part VI discusses the future of the PACL.

II. THE FIRST STEP TOWARD CREATING A PACL

In East Asia, many scholars are conscious of the need for regional harmonization of private law. For example, Japanese professor Zentaro Kitagawa described an idea for a model contract law in the mid-1980s.¹ In 2004, at an international symposium in Qingdao, China, Professor Eichi Hoshino,² Professor Young Jun Lee,³ Professor Sang Yong Kim,⁴

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1. See Zentaro Kitagawa [北川善太郎], *Zhongguo de he tong fa yu mo fan he tong fa* [*Chinese Contract Law and Model Contract Law*], translated in *Guo wai fa xue* [FOREIGN LEGAL THEORIES] 3–4 (Chen Wang trans., 1987).

2. See Eichi Hoshino [星野英一], *Ri zhong han min fa zhi du tong yi hua de zhu wen ti* [*Issues on the Harmonization of the Civil Laws of Japan, China and South Korea*], translated in 4 *Zhong ri min shang fa yan jiu* [STUDIES ON CIVIL AND COMMERCIAL LAW OF CHINA AND JAPAN] 3–20 (Tao Ju ed., Tao Ju trans., Law Press China 2006).

3. See Young Jun Lee [李英俊], *Dongya tong yi mai mai fa de gou xiang* [*Ideas of an Uniform Sales Law in East Asia*], translated in 4 *Zhong ri min shang fa yan jiu* [STUDIES ON CIVIL AND COMMERCIAL LAW OF CHINA AND JAPAN] 167–76 (Tao Ju ed., Lulun Jin trans., Law Press China 2006).

4. See Sang Yong Kim [金相容], *Zuo wei Dongbeiya pu tong fa de tong yi mai mai fa de li fa fang xiang* [*The Direction of the Legislation of a Uniform Sales Law as Ius Commune in North-east Asia*], translated in 4 *Zhong ri min shang fa yan jiu* [STUDIES ON CIVIL AND COMMERCIAL LAW OF CHINA AND JAPAN] 210–16 (Tao Ju ed., Lulun Jin trans., Law Press China 2006).

and I⁵ spoke about the harmonization of civil law in East Asia. My suggestion during the symposium was to borrow the experience of the Principles of European Contract Law (PECL) Commission and to start a cooperative drafting effort of comparative study and model law between Chinese, Japanese, and Korean scholars. Specifically, I suggested that a “path to the harmonization of contract law or private law may be to start from scholars, from non-government initiatives and from model law.”⁶ However, the idea has not initiated any action in the following several years.

In October 2009, I organized an international symposium named “Unification of Private Law in Europe and its Impact in East Asia” at Tsinghua University School of Law. The main purpose of the symposium was to improve the harmonization of private law in East Asia. The symposium not only invited European scholars⁷ to report on the work of unification of contract law and tort law in Europe, but also invited several Asian scholars, including Professor Wang Zejian (Taiwan), Young Jun Lee (South Korea),⁸ Sang Yong Kim (South Korea),⁹ Naoki Kanayama (Japan),¹⁰ Naoko Kano (Japan),¹¹ Kunihiko Nakata (Japan),¹² Lei Chen (Hong Kong), and a number of Chinese scholars from Beijing.

Just after the symposium, Professor Wang Zejian, Young Jun Lee, Naoki Kanayama, Naoko Kano, and I gathered in my research room in Tsinghua University School of Law. After discussing the possibility of a PACL co-operate project, we reached a common view, which I call the Beijing Agreement. According to the Agreement, Wang, Lee, Kanayama, and Han each will establish a research team and organize future PACL

5. See Shiyuan Han [韩世远], *Cong PECL kan Dongya he tong fa xie tiao hua zhi lu* [A Path to the Harmonization of East Asian Contract Law: With an Inspiration of the PECL], in 4 *Zhong ri min shang fa yan jiu* [STUDIES ON CIVIL AND COMMERCIAL LAW OF CHINA AND JAPAN] 198–209 (Tao Ju ed., Law Press China 2006).

6. *Id.*

7. Reports by European Scholars include: Christiane C. Wendehorst, *The Quest for a Coherent Civil Code: Comparing EC and PRC*, 4 *TSINGHUA L. J.* 7 (Yinsheng Zhai trans., 2010); Bernhard A. Koch, *Tort Liability in the “Draft Common Frame of Reference” (DCFR) and in the Principles of European Tort Law (PETL)—Similarities and Differences* (2005) (on file with author); Knut Benjamin Pissler, *Service Contracts in Chinese Contract Law: An Approach according to the European Draft Common Frame of Reference*, in *TOWARDS A CHINESE CIVIL CODE 273* (Lei Chen & C.H. (Remco) van Rhee eds., 2012).

8. Lee, *supra* note 3.

9. Sang Yong Kim, *Possibility of Restoration and Creation of Ius Commune in the North East Asian Region*, in *Higashi Asian shihou no syosou* [MANY ASPECTS OF EAST ASIAN PRIVATE LAWS] 283 (Takashi Oka, Masami Okino & Yoshikazu Yamashita eds., 2009).

10. Naoki Kanayama [金山直樹], [Challenge to PACL].

11. Naoko Kano [鹿野菜穂子], [Recent Development of Japanese Consumer Law & Policy].

12. Kunihiko Nakata [中田邦博], [Contents and Performance of Contract and Consumer Law in Japan—The Role of Consumer Contract Law].

forums. This was the start of the international/regional co-operation on PACL in East Asia.¹³

The formation of the PACL project was based on an agreement among scholars from three East Asian countries. The three countries have their own unique history of private law. It is difficult to say which country's law is better; however, if the law is appropriate for the conditions of a country, then it is a good law. The aim of the PACL is to create a set of rules and principles appropriate for Asian countries.

III. WHY HAVE THE PACL?

If China, the world's second largest economy, Japan, the world's third largest economy, and South Korea will cooperate, it will absolutely attract the world's attention. We have to admit, however, that the situation in East Asia is very complicated, considering the history, the public sentiment, and the international relations among the countries. We also cannot ignore the important role of economic and commercial exchange among the countries. For the past several years, relations among the three countries can be accurately described as politically cold, but economically warm.

The significant volume of transactions among the three countries calls for common rules. After China joined the CISG as one of the original member states, South Korea and Japan became member states of the CISG in the years 2004 and 2008, respectively. Since the CISG is now a common rule of the three countries, is it still necessary to have the PACL?

This is a very natural question; however, the following points illustrate the necessity of the PACL. First, the CISG covers only sales contracts. For other kinds of contracts, it is still necessary to have the PACL as a set of common general rules. Second, even with sales contracts, the CISG does not cover every aspect of a contract. For example, validity and transfer of ownership have not been regulated by the CISG. Third, the CISG is more than thirty years old. In the past thirty years, the world has changed significantly. New challenges call for new rules. Fourth, the CISG was designed by European and American scholars and specialists. It reflects mainly the experiences of the western world. For East Asian people, it is still necessary for Asian scholars to produce an Asian voice.

Furthermore, the PACL differs in some ways from the CISG. The differences may be analyzed from two perspectives: form and content.

First, it is clear that the PACL has some differences in form when compared with the CISG. The PACL is not a convention. It does not have any binding force of law. It regulates the general part of contract law, including the validity of contract. Therefore, the PACL may be a good supplement to the CISG in practice.

13. See Naoki Kanayama, *PACL [On the Meaning and Questions of a PACL]* [in Japanese], 1406 *JURIST* 102, 105 (2010).

Second, the differences in content between the PACL and the CISG, if any, should be analyzed carefully. Such analysis would be good both for the PACL and the CISG. When writing the PACL, the drafter must provide reasons that support the drafter's position. Moreover, the drafting of the PACL may provide an opportune time to re-evaluate the content of the CISG. For example, if the PACL's position is consistent with the custom of Asia and different from the position of the CISG, we should re-think whether the CISG sufficiently addresses Asian customs.

IV. WHAT HAS BEEN DONE ABOUT THE PACL?

Several meetings have been held regarding the PACL, including: March 7–8, 2010, Keio University, Tokyo, the First PACL Forum, General Principles and Interpretation of Contracts; August 25–26, 2010, Ho Chi Minh University, Vietnam, the Second PACL Forum, Formation of Contract; December 14–15, 2010, Seoul University, South Korea, the Third PACL Forum, Non-performance; May 21–22, 2011, Osaka, the Fourth PACL Forum, Validity of Contract; September 17–18, 2011, Tsinghua University, Beijing, the Fifth PACL Forum, Performance; December 17–18, 2011, Seoul University, South Korea, the Sixth PACL Forum, Non-performance; March 4–6, 2012, Keio University, Tokyo, the Seventh PACL Forum, General Matters, Performance and Non-performance; December 14–15, 2012, Seoul University, South Korea, the Eighth PACL Forum, Performance and Non-performance.

V. SOME BASIC ISSUES ABOUT THE PACL

A. *The Nature of the PACL*

1. *Nongovernmental and Private Initiative*

The PACL project has not been supported or authorized by any government. It is a purely private initiative that is independent of politics. In principle, the participants have not obtained any financial gain from their involvement in the project. They took part in the meetings at their own expense; however, this does not mean that the national/regional teams could not find financial support for their involvement. For example, Professor Kanayama obtained financial support from the Fondation pour le droit continental and the Ministry of Education, Culture, Sports, Science and Technology of Japan. Professor Lee obtained financial support from the Humboldt Foundation. I obtained financial support from Tsinghua University. Thus, the specific participant or national/regional team receives the financial support, not the PACL project as a whole. The PACL, as a common research result, collectively belongs to all participants in the project,¹⁴ and not solely to one person or one national/regional team.

14. This point was discussed and affirmed during the 2012 Tokyo PACL Forum.

2. *Academic Product*

The PACL is a product of academic exchange and co-operation. The participants of the PACL are mainly professors and, to a lesser extent, lawyers from different Asian countries or regions. They come together sharing a common academic ideal: the pursuit of academic democracy and freedom. They have different academic backgrounds, but they are not spokespeople for any specific legal family, either their own or that of any western legal family.

B. *The Aimed Position of the PACL*

Since the PACL is a nongovernmental private initiative and an academic product, it does not have any “binding force of law.” It is only a “model law” or “soft law.”¹⁵ So the force of the PACL, if there is any, is not from *ratione imperii*, but from *imperio rationis*.¹⁶ In Asia there is no organization like the European Commission or European Union. People cannot pin their hopes on any external authority. If the PACL can play a role in practice, it can rely only on its own force of persuasion.

Professor Michael Joachim Bonell has analyzed the UNIDROIT Principles in practice as: (1) Reception in academic and professional circles; (2) Model for national and international legislation; (3) Guide in contract negotiations; (4) Law chosen by the parties to govern their contract; (5) Rules of law referred to in judicial proceedings.¹⁷ The success of UNIDROIT’s Principles of International Commercial Contracts (PICC) in practice has gone beyond all expectations.

As to the PACL, of course people may optimistically expect it has a similar function in practice. However, such optimistic possibilities and ambitious ideals depend on the crux of the matter—the quality of the final result. In other words, the PACL as a model law should not be a simple copy of the PICC or the PECL.

C. *Work Methods of the PACL*

1. *Sketch of Work Methods of the PACL*

The current structure of the PACL project includes three chairmen, several national/regional teams, and a voting system. English has been

15. See Kanayama, *supra* note 13, at 103.

16. Professor Reinhard Zimmermann has pointed out that the DCFR is intended to be a reference text which, unlike the PECL, is to secure its authority not from *imperio rationis* but *ratione imperii*, i.e., by virtue of the European Community endorsing or adopting it in one form or another. See Reinhard Zimmermann, *The Present State of European Private Law*, 57 AM. J. COMP. L. 479, 491 (2009).

17. See Michael Joachim Bonell, *The UNIDROIT Principles in Practice—The Experience of the First Two Years*, UNIF. L. REV. 34 (1997); see also Michael Joachim Bonell, *UNIDROIT Principles 2004—The New Edition of the Principles of International Commercial Contracts Adopted by the International Institute for the Unification of Private Law*, UNIF. L. REV. 5 (2004).

the working language of the project from the very beginning. The three current chairmen are Shiyuan Han (China), Naoki Kanayama (Japan) and Young Jun Lee (South Korea). National/regional teams include Cambodia, China, Hong Kong, Taiwan, Indonesia, Japan, Myanmar, Nepal, Singapore, South Korea, Thailand, and Vietnam. The PACL forums utilize a voting system to resolve differences of opinion. The above methods have been used successfully for three years, producing several positive results. Nevertheless, the methods also have several problems.

2. *Efforts to Improve the Work Methods of the PACL*

After an investigation of the methods of the PECL Commission,¹⁸ I made a proposal to the participants of the 2012 Tokyo Forum regarding possible improvements to the methods of the PACL. The central ideas of the proposal include the following points.

a. Using Reporters Instead of National/Regional Teams

The PACL project needs reporters instead of national teams. The reporters would play several important roles. For example, the reporters would be in charge of drafting the articles, comments, and notes. If a task were given to a specific person, such as the reporter, rather than a national team, it would be much clearer what the individual should do.

The participants in the PACL project are not really representatives of their own nations. National teams are also suboptimal due to sensitive historical issues in East Asia. The final result of the project should not be a result of “political quarrels” between Asian nations. It is *imperio rationis* which will give the PACL strength. The PACL project should follow rationalism rather than nationalism.

A reporter should be a specialist in contract and comparative law—a professor proficient in English and able to participate in the PACL Forum frequently. The reporter should be nominated by the PACL project (or the commission).

b. Setting up a Drafting Group

The drafting group is composed by the reporters. The drafting group may hold small meetings (compared to the forum’s larger meeting) if it is necessary. If the small meetings are separate from the larger one, it will be much more efficient for the project, at least from the perspectives of time and money. It is not necessary to hold the forum three times a year. However, in terms of similarities, both the small meetings and the larger meeting may adopt a “voting system.”

18. See COMM’N ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW PARTS I & II xi–xvi (Ole Lando & Hugh Beale eds., 2000).

c. Setting up an Editing Group

Native English speakers should be in charge of the editing group.

3. *Final Thoughts Regarding the PACL's Methods*

The above proposal has been discussed at the forum, and many of the ideas have been adopted. The “national reporter” has been re-labeled the “jurisdictional reporter” so as to take into account the status of Hong Kong, Taiwan, and Macau. The “nominated reporter” has been instituted to review the current drafts. Nominated reporters are to work closely with the original drafters. Any disagreements between a nominated reporter and an original drafter should be set out in writing and considered by the drafting committee. Nominated reporters are not bound by the current draft articles because nominated reporters should take into account the jurisdictional reporters, as well as generally consider coherence and the level of detail across the five chapters of the PACL.

Without the original drafters’ transcending the limitations of nationalism and following rationalism, it is impossible to introduce a nominated reporter system. Currently, the South Korean team’s original draft is reviewed by a nominated reporter from Taiwan. Moreover, China’s team’s original draft is reviewed by a nominated reporter from Singapore. Through such collaboration, the quality of the drafts will improve.

D. *Strategies of the PACL*

1. *A Quick Draft?*

Compared to the PECL, the pace of work of the PACL is very quick. In the past three years there have been eight PACL forums. Five chapters of the PACL have been drafted. However, my hope is actually to slow down the work, because most of the participants in the project are part-time contributors. With limited time and energy, it is difficult for them to maintain that pace while still preserving quality.

Before the Seoul Forum of December 2010, I raised this issue with Professors Kanayama and Lee.¹⁹ By the end of the forum, when the three of us gathered to discuss the future agenda, both of them expressed a desire for a “quick” draft. Professor Lee mentioned that, as a man in his seventies, he wished to see the PACL finished as soon as possible. As a substantive matter, I do not know why Professor Kanayama supported that approach. One possibility is that he needed to demonstrate progress to his financial supporters in order to maintain funding.

19. The first meeting of the First Commission of the PECL was in December 1980. The main result of the First Commission was sections regarding performance, non-performance, and remedies, which were published in the year 1995. The PECL Commission spent more than ten years on performance and non-performance; compared with the PECL, the speed of the PACL was astonishing.

I respect their concerns, but I support a more measured approach. There is an old Chinese saying, “slow work brings fine result” (literally, the saying is “Man gong chu xi huo”—soft fire makes sweet malt). Being anxious to achieve rapid success may bring bad results. Until now the project has resulted in five chapters, but they are only a rough draft. In order to ensure quality and persuasiveness, we will need to carefully review these drafts in the future.

2. *Brief Principles or Detailed Rules?*

Different drafters from different countries prepared the five chapters of the PACL. Generally speaking, the drafts by the Japanese drafting team (including a section regarding the interpretation, formation, and validity of contracts) are comparatively simple, while the drafts by the South Korean team (non-performance) and the Chinese team (performance) are much more detailed.

If the PACL, as a model law, is too simple,²⁰ what is its value to judges or legislatures? How attractive will the PACL be to the parties of a contract? Although they are called “principles,” actually the PECL’s provisions are more similar to general rules. And the PICC may constitute the same character,²¹ insofar as it is not limited to “principles.” According to Article I of the PACL, “[t]hese Principles are intended to be applied as *general rules* of contract law in the Asian Countries.” The reality should correspond to its name.

3. *Restatement or Innovation?*

The concept of a restatement of law is a product of American law. For a civilian, the “restatement” is no more than a systematic tidying-up of the existing legal rules and principles. Restatements generally do not contain “new” proposals. If we inspect the PECL as an example, on one hand, it may say that it is a kind of “restatement” of European contract law. From the format of the PECL—article, comment, illustration, and note²²—it is clear that the American Restatement of Law has its impact on the PECL. On the other hand, the PECL is not merely a “restatement” of law—it contains some new proposals.²³ Thus, the PECL’s success should

20. For example, the current draft of “Formation of Contract” by the Japanese team contains only nine articles, while its counterpart, the Contract Law of China contains thirty-five articles. The provisions of the PACL here are much simpler compared with the Chinese Contract Law; thus, it will not be attractive to Chinese legislature, judges, or contractual parties. I recommend that this part of the PACL be re-drafted.

21. See PRINCIPLES OF EUROPEAN CONTRACT LAW art. 1:101 (1994) (“These Principles are intended to be applied as general rules of contract law in the European Union.”).

22. See Ole Lando, *Principles of European Contract Law: An Alternative to or a Precursor of European Legislation?*, 40 AM. J. COMP. L. 573, 579 (1992).

23. While comparing the PECL and the American Restatements, Professor Zimmermann has pointed out that “[t]he American Restatements, obviously, pro-

not be separated from a path the PECL followed—namely by utilizing the restatement as the basis for the PECL and then going beyond such a restatement.

Turning to the existing results of the PACL project, many observers might consider the PACL insufficient in restating existing Asian law. Such a restatement of Asian law would need to be based on a comparative study of the existing Asian laws in an attempt to find their common core. Without an adequate comparative study, the PACL will lack a strong foundation.²⁴

Why should the PACL project try to find and restate the common core of existing Asian law? One reason may be that, in doing so, the PACL can become a modern *lex mercatoria* or Asian *ius commune*. Generally speaking, merchants are familiar with their domestic laws. The closer the rules of the PACL are to the merchants' domestic rules, the more likely it is that the merchants will accept it. Another reason may be that comparative studies will make the final results of the PACL project unique and attractive. For example, the national reports, prepared by Asian scholars, will serve as rare academic resources.

One additional point must be made. By emphasizing the restatement of Asian laws, the author does not indicate that he objects to innovation. The participants of the PACL project should uphold the ideal of a restatement and, at the same time, respect the practical reality. Here, to “uphold the ideal of a restatement” means to draft a set of rules and principles appropriate for Asian people. “Respecting the practical reality” means building the ideal of a PACL on the basis of the reality of Asian laws. An ideal PACL can only be obtained by utilizing the restatement as the basis for the PACL and then going beyond that base.

E. *Any Distinguishing Asian Feature of the PACL?*

Since the CISG, the PECL, the PICC, and the Draft Common Frame of Reference (DCFR) already exist, the PACL, as a latecomer, should have a distinguishing feature to demonstrate its necessity. Is there any distinguishing Asian feature in the PACL? This question is in heated dispute.

vided a source of inspiration for the draftsmen of the PECL.” Zimmermann, *supra* note 16, at 512 n.24. Compared to that with which the authors of the American Restatement were faced, the task undertaken by the draftsmen of the PECL has a more creative nature. *See id.* at 483 (“Divergences between the national legal systems had to be resolved, decisions implying value judgments and policy choices had to be taken, and sometimes unconventional solutions were adopted which the draftsmen of the PECL themselves describe as ‘a progressive development from [the] common core.’”); *see also* Reinhard Zimmermann, *The Present State of European Private Law*, 57 AM. J. COMP. L. 483 (2009).

24. *See* Won Lim Jee (池元林) [On the Harmonization of Contract Law in Asia], 83 HORITSU JIHO [LAW TIMES] 82, 89 (2011) (emphasizing importance of comparative study as premise of PACL).

Some think that the “distinguishing Asian feature” of the PACL is no more than an illusion.²⁵ As a threshold matter, I reject the validity of that concern altogether. So long as the PACL is a product of comparative law study and is built on the basis of the existing Asian laws, there is no need to worry that there is not any distinguishing Asian feature.

However, I am not so pessimistic about whether the PACL contains Asian characteristics. For example, when the Chinese team prepared the “Performance of Contract” portion of the PACL, the participants found that a creditor’s right of subrogation and right of revocation are two common cores of the laws of Japan, South Korea, and China (including Taiwan).²⁶ Accordingly, the Chinese team drafted articles to reflect those rights. Since there is no corresponding part in both the PECL and the PICC, such rights can justifiably be considered a distinctly Asian feature in the PACL.

Although the PACL project has not dealt with the release of claims yet, that would be another distinguishing Asian feature. There is a noticeable difference between the idea of release between the West and the East. In the West, release is normally understood as a contract requiring an agreement of the two parties. The basic idea is that a “favor should not be forced.” In the East, in contrast, release is a unilateral act.

The PACL is not merely a set of rules and principles. It should be viewed as a whole, and the black letter rules are an integral part of the whole. Thus, the above question regarding distinctly Asian features may be divided into two parts.

First, is there any distinguishing Asian feature in the black letter rules of the PACL? The answer is “not exactly”; however, we should not be disappointed about that answer, because it is not desirable for the black letter rules of the PACL to have an excessively Asian character. Such an outcome would signify that the PACL runs contrary to the harmonization or unification of global contract law.

Second, is there any distinguishing Asian feature in other parts of the PACL, including the commentary, the notes, and the national reports? This question involves the underpinnings of the black letter rules of the PACL. It reveals the rationale, the understanding, and the logic of the rules. It also reveals the practical experiences of the rules. This part of the PACL can and should have a distinguishing Asian feature.

Behind the phenomenon of the controversial issue of “distinguishing Asian feature” lies a divergence of the understanding about work methods of the PACL. Unfortunately, its logic is that Asian features—including

25. See Naoki Kanayama (金山直樹), [*From Comparative Law to PACL*], 973 NBL 8, 14 (2012).

26. For provisions on the creditor’s right of subrogation, see Japanese Civil Code art. 423; South Korean Civil Code art. 404; Taiwan Civil Code arts. 242–243; Chinese Contract Law art. 73. For provisions on the creditor’s right of revocation, see Japanese Civil Code arts. 424–26; South Korean Civil Code art. 404; Taiwan Civil Code arts. 244–245; Chinese Contract Law arts. 74–75.

Asian law—are no more than results of the reception of western laws, a mere copy that created a quick product “made in Asia.” On the other hand, finding Asian laws will lead to careful comparative studies, thus allowing researchers to find a common core of Asian laws, and finally, yielding a possible Asian common law.

F. *The Prospects*

What may one expect to be the result of our efforts? Will the Principles of Asian Contract Law become rules written in the sand?²⁷

The PACL is a part of the academic discourse in Asia. We are now reviewing and finalizing its articles and preparing comments and notes for it. It is not easy, but we are trying our best to finish and publish it. We aim to publish Part I of the PACL—“Performance and Non-performance”—and a European publisher will publish the English version. In Asia, Chinese, Japanese, and Korean versions will also be published.

There will be no Asian equivalent of the European Union in Asia in the near future, and it is therefore impossible for the PACL to become the actual law of the entire Asian continent. However, some Asian countries, including Japan and South Korea, are amending their national civil laws. The PACL can serve as a model for such work. In that way, we may realize the harmonization of national contract laws in at least East Asia. Additionally, the PACL may also eventually play a role in both arbitration and trial law.

27. This was the question faced by professor Ole Lando when he worked with his colleague to draft the PECL. *See* Lando, *supra* note 22, at 584.

THE INTERPRETATION IN MEXICO OF THE UNITED NATIONS
CONVENTION ON CONTRACTS FOR THE INTERNATIONAL
SALE OF GOODS

ALEJANDRO OSUNA-GONZÁLEZ*

I. INTRODUCTION

THE United Nations Convention on Contracts for the International Sale of Goods (CISG)¹ came into effect in Mexico on January 1, 1989.² The purpose of this Article is to assess the manner in which the CISG has been applied by the Mexican courts. Unfortunately, and despite that it has been more than twenty-four years during which international sales involving parties in Mexico have likely been governed by the CISG, very few cases applying the CISG have come to light.

Finding Mexican CISG cases is complicated. The Mexican judicial system poses the biggest obstacle, since state and federal decisions are generally not reported. Nevertheless, I have been able to obtain twenty-six decisions (at the trial and appellate levels) derived from some nine court cases,³ but I am certain that there are more CISG cases out there.

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1. U.N. Comm'n on Int'l Trade Law, United Nations Convention on Contracts for the International Sale of Goods art. 35, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG], available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.

2. See Diario Oficial de la Federación [DO] [Official Diary of the Federation], Mar. 17, 1988 (Mex.).

3. The cases are: *Peterman Lumber, Inc. v. Encinos Rossy, S.A. de C.V.*, Juzgado Sexto de Primera Instancia del Partido de Estado de Baja California [Sixth Civil Court of First Instance of the State of Baja California], July 2001; *Banks Hardwoods v. Jorge Angel Kyriakidez García*, Segunda Sala del Tribunal Superior de Justicia de Baja California [Second Court of the Superior Tribunal of Justice, Baja California], Mar. 24, 2006; *Georgia Pacific Resins, Inc. v. Grupo Bajaplay, S.A. de C.V.*, Baja California, Cuarto Tribunal Colegiado del Decimoquinto Circuito [Baja California, Fourth Panel of the Fifteenth Circuit Court], Aug. 2007; *Kolmar Petrochemicals Americas, Inc. v. Idesa Petroquímica S.A. de C.V.*, Primer Tribunal Colegiado en Materia Civil del Primer Circuito [First Civil Court of the First Circuit], Mar. 2005; *Agrofrut Rengo, S.A. v. Levadura Azteca, S.A. de C.V.*, Quinto Tribunal Colegiado en Materia Civil del Primer Circuito [Fifth Civil Court of the First Circuit], May 2005; *Barcel, S.A. v. Steve Kliff* [Second Panel of the Superior Court of Justice], Mar. 2007; *Wolf Metals, Inc. v. Fetasa de Mexicalia, S.A.* Also, there are two cases where the CISG clearly applied, but the judges ignored its application: *Texas CCC, Inc., v. A&J Cheese Co. de Mexico, S. de R.L. de C.V.*, decided by the Fifth Civil Court in Tijuana, Baja California; and *Gerhard Deutsch*

Most of the state court decisions were provided to me by acquaintances that are actively involved in litigating collection cases and know of my interest in CISG decisions. A couple of them, I argued myself.

The federal CISG decisions were obtained through contacts in the federal judiciary who assisted me in locating cases in the judiciary's intranet, which is not open to the public. There are three references to the CISG in the Supreme Court-administered JUS case law database, but two of them are derived from administrative cases applying customs legislation, while the other case is in reference to a cosigner of a debt, who secured a CISG governed transaction with real property.

The scope of this Article is rather limited. Instead of discussing each and every one of the Mexican CISG decisions—most of which I have already discussed elsewhere⁴—I have limited my discussion to four cases that address the issues of contract formation, the standard of proof to show a contract exists, contract performance, and damages: *Kolmar Petrochemicals Americas, Inc. v. Grupo Idesa*; *Georgia Pacific Resins, Inc. v. Grupo Bajaplay, S.A. de C.V.*; *Banks Hardwoods Inc. v. Jorge Angel Kyriakides*; and *Agrofrut Rengo, S.A. v. Levadura Azteca, S.A. de C.V.*

II. A SAMPLING OF MEXICAN CISG CASES

A. *Kolmar Petrochemicals Americas, Inc. v. Grupo Idesa, S.A. de C.V.*⁵

1. *Background*

This case involves an American purchaser-plaintiff and a Mexican seller. A purchase representative at Kolmar, after ending a phone conversation with seller's agent, sent seller an email confirming their discussions, which included: that the contract was for 3,000 metric tons of MEG at \$392.50 FOB/seller's terminal at Coatzacoalcos; payment as of thirty days from the date on the bill of lading; and goods to be delivered in January 2003. Seller then emailed confirming the purchase order, but stating that it needed to get confirmation that their loading terminal would be available in 2003. Seller further added that it would contact buyer by the following Monday.

Three days later (December 2, 2002), buyer sent another email requesting clarification of seller's comments regarding the availability of the terminal. On December 19, buyer sent another email designating the ship

Produktions und Vertriebsges, M.B.H v. Artiken, S.A. de C.V., from Leon, Guanajuato, Mexico.

4. See Alejandro Osuna-González, *La Interpretación Judicial en México Relativa a la Convención de las Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías*, CONTRATACIÓN Y ARBITRAJE INTERNACIONALES 91-129 (Universidad Nacional Autónoma de México, 2005).

5. See *Kolmar Petrochemicals Americas, Inc. v. Idesa Petroquímica S.A. de C.V.*, Quincuagésimo Juzgado Civil de Primera Instancia del Distrito Federal [Fiftieth Civil Court of First Instance in the Federal District], Oct. 2004. I thank attorney Miguel Bernal for providing me with a copy of the decisions rendered in this case, without whose help this Article would not have been possible.

that would pick up the 3,000 tons of MEG, and requesting that seller confirm its nomination of the ship that afternoon. More than twenty days after buyer's last communication (January 10, 2003), Idesa's agent sent an email claiming that the situation had gotten complicated, that he was *fighting* to save the transaction, but that the 3,000 tons of MEG had already been reserved. Seller further indicated that it was under a lot of pressure so that its company did not lose money, and made a new offer to deliver to buyer at the same terminal but at a price of \$400 per ton, or at \$415 per ton delivered at an alternate terminal in the port of Altamira. Agent for Idesa acknowledged in his email that he was not honoring their original agreement. Agent for Kolmar refused to renegotiate the terms of what he believed was a closed deal, and considered the seller's conduct a breach of their agreement made in late November. Kolmar filed a lawsuit in Mexico City for damages suffered as a consequence of seller's refusal to deliver the goods at the agreed upon price. Idesa defended on the grounds that no contract had been formed because, according to their internal procedures, it was not in their own standard form. Idesa also defended by stating that their January 10th proposal had not been accepted by the buyer.

In his ruling, the first-instance judge qualified Kolmar's November 2002 email as a proposal to Idesa to enter into a contract, and that Idesa's email of January 10, 2003 was a counteroffer per CISG Article 19.⁶ The judge also reasoned that Idesa never issued a final confirmation of *all* of the conditions established in Kolmar's "offer," because Kolmar's proposal not only concerned the price, goods, and quality, but it also referred to the time and manner of delivery, and that not all of these terms had been unconditionally accepted by seller. The judge further argued that seller never consented to delivering the goods at its terminal in Coatzacoalcos, nor did it agree that this delivery would take place in January 2003. In my opinion, the court's first mistake was qualifying Kolmar's agent's confirmatory email as an offer when it was merely putting in writing what was likely a verbal agreement that had been made over the phone.⁷ The court's

6. CISG, *supra* note 1, art. 19 reads:

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Id.

7. Professor María del Pilar Perales Viscasillas arrived at this same conclusion on this case. See María del Pilar Perales Viscasillas, *Modification and Termination of the Contract (Art. 29 CISG)*, 25 J.L. & COM. 167, 173 n.30 (2005). This source also

decision should have included an analysis of CISG Article 8 (regarding interpretation of a party's intent),⁸ and CISG Article 14 (on what constitutes an offer)⁹ to see if buyer's email actually qualified as a proposal to make a contract, or if from reading its contents an alternate interpretation was possible. This did not take place.

It was only logical that after this initial *snafu* by the court, any other communication by Kolmar's agent would very likely be qualified as a counteroffer per CISG Article 19. But even this view is questionable. After rereading seller's email of January 10, 2003, agent for Idesa was in fact admitting to Kolmar that it would not be honoring the agreement it had originally made by phone, and recognized that this would surely cause problems. Idesa was now attempting to extract a higher price from Kolmar. Unfortunately, the court did a terrible job of using CISG Article 8 to interpret the statements made by both buyer and seller. In my opinion, the parties agreed on all of the basic terms (goods, quantity, and quality), and only left pending the issue of confirming the availability of seller's terminal. Also, the fact that seller remained silent after buyer emailed seller twice—once to request clarification on issue of the terminal, and later to designate the ship that would pick up the goods—could have been interpreted to mean that seller was in agreement with buyer¹⁰—at least this is the only reasonable understanding that I can extract per CISG Article 8(2). If the contrary were true, Idesa would have immediately con-

appears on UNCITRAL's website at <http://www.uncitral.org/pdf/english/CISG25/Viscasillas.pdf> (last visited Apr. 12, 2013).

8. CISG, *supra* note 1, art. 8 provides:

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Id.

9. CISG, *supra* note 1, art. 14 reads:

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

Id.

10. I am not particularly troubled with CISG Article 18(1) regarding the silence issue, because in this case, buyer was not making a proposal, but was requesting clarification and advising seller of the ship that would pick up the goods.

tacted Kolmar to clarify that no contract had yet been concluded after Kolmar's emails. Instead, Idesa's agent would not email until the second week of January 2003, and only to advise Kolmar that it wanted to increase the price and possibly change the place of delivery, aware that this would potentially cause problems. My opinion is further supported by the fact that Idesa never mentioned that there was an issue regarding the availability of the terminal; it was all about the price.

With regards to the interpretative mandates under CISG's Article 7 (internationality, uniformity, and good faith) the judge used the civilian expression *aceptación lisa y llana* (roughly *full and unconditional acceptance*), a phrase that has a clear local law connotation, although the decision does acknowledge that in matters governed by the CISG, there is no room for the Federal Civil Code to apply. With regard to the need to promote uniformity, the judge did not cite any case law interpreting the CISG, nor does it seem that buyer made any attempt to do so in an attempt to persuade the judge.¹¹ It is also evident that no effort was made by the court to interpret the CISG in a manner that promotes the observance of good faith, although it is likely that the court assumed *it was* by not allowing Kolmar to go after Idesa, with whom (the court believed) it never concluded a contract.

2. *Kolmar Appeals the Decision*

Kolmar appealed to Mexico City's Superior Court,¹² claiming that the trial court had erred when analyzing the evidence and applying the CISG to the facts. According to buyer, the court should have found, by a proper interpretation of CISG Articles 7 and 8, that the parties had in fact made a verbal agreement, and that seller failed to object to the emails sent after they negotiated the contract. Kolmar also claimed that the court misconstrued seller's lack of response to Idesa's email, designating the ship as a non-acceptance, and that in doing so, the trial court had also violated Article 9 of the CISG.¹³ Kolmar further added that CISG Article 19(3) was not applicable.

11. See *Zivilgericht Kanton Basel-Stadt [ZG] [Civil Court] Dec. 21, 1992, docket no. P4 1991/238 (Switz.)*, available at <http://www.unilex.info/case.cfm?id=104>; *Oberlandesgericht Frankfurt am Main [OLG] [higher regional court] July 5, 1995 (Ger.)*, available at <http://www.unilex.info/case.cfm?id=169>.

12. See *Kolmar Petrochemicals America, Inc. v. Grupo Idesa, S.A. de C.V., Sala Civil del Tribunal Superior de Justicia del Distrito Federal [Superior Civil Court of Justice of the Federal District]*, Jan. 2005.

13. This issue arose because Kolmar claimed that the court had misinterpreted Kolmar's email advising it of the name of the ship that would pick up the goods in Altamira, and that in fact, in spite of the email's wording, it was not necessary for Idesa to approve of the ship. This constituted a violation of CISG Article 9, which incorporates commercial usages and practices either followed by the parties or that is widely observed in international trade.

In its decision, the Superior Court affirmed the ruling and reasoned that the trial court had given proper weight to the emails submitted by buyer-plaintiff, and that it was “evident” that:

The parties had not agreed on the price, payment, quality and quantity and place and time of delivery, thus triggering the proviso contained in paragraph 3 of article 19 of the United Nations’ Convention on Contracts for the International Sale of Goods (Vienna, nineteen eighty); therefore, it is incorrect to even talk about the existence of a contract.

Unfortunately, the Superior Court read CISG Article 19(3) as a *check-list* of items which the parties must fully satisfy for a contract to be concluded, an interpretation that is clearly wrong. The Appellate Court further reasoned that, because seller never responded to buyer’s request for clarification on the issue of seller’s terminal, nor to acceptance of the ship designated by buyer to pick up the goods, that this was a clear indication that buyer’s *offer* had not been accepted. The Superior Court further argued that the parties had not agreed on the price and place of delivery, and in doing so, the Superior Court went back to Idesa’s email in which it was attempting to renegotiate the price. Just like the trial court, the Superior Court failed to analyze this issue properly. As noted in my discussion of the trial court’s decision, the parties had already agreed to the goods, the price, and date and place of delivery; the only thing that was pending was the availability of seller’s terminal.

Echoing the view of the trial court, the Superior Court denied that the good faith principle provided for under Article 7 of the CISG had been violated in any way because the parties had never arrived at a consensus with regard to the price of the goods, nor regarding the place and time of delivery, making it improper for buyer to attempt to enforce a contract that was never legally concluded. In its view, the Superior Court probably thought it was in fact enforcing the mandate for the promotion of good faith.

The Superior Court dismissed the claim that the trial court had made a wrongful interpretation of CISG Article 8, instead reasoning that the court had disposed of this issue correctly, and that the exchange of emails showed that the parties were merely negotiating. In my opinion, the Superior Court should have analyzed CISG Article 8 in tandem with Articles 14 and 19, not in an isolated manner as it did.

The Superior Court did not include any citations to case law or treatises, nor does it appear that Kolmar’s counsel attempted to sway the court by doing so. I believe a different result could have been achieved had this occurred.

3. *The Decision at the Circuit Court Level*¹⁴

Finally, buyer appealed before the Circuit Court (*amparo* proceeding), claiming that the trial and appellate courts had infringed Kolmar's fundamental rights due to the lower courts' erroneous interpretation of Article 1853 of the Federal Civil Code and Articles 7, 8, and 9 of the CISG. Unfortunately for buyer, the First Panel of the First Circuit found that neither the trial nor the appellate courts had committed any violations when interpreting CISG Articles 7, 8, and 9, because seller never made an unconditional acceptance (*aceptación lisa y llana*) of buyer's proposal to conclude a contract, and that therefore no violation of buyer's fundamental rights had taken place.

B. *Georgia Pacific Resins, Inc. v. Grupo Bajaplay, S.A. de C.V.*¹⁵

1. *Background*

In this case, Georgia Pacific Resins, Inc., (GPR), an American seller-plaintiff, filed a complaint in Tijuana against Grupo Bajaplay, S.A. de C.V. (Bajaplay), a Mexican buyer demanding U.S. \$139,696.98 for various shipments of resins. According to the facts as recited in the decision, the commercial relationship began in 1997 when a corporate officer of buyer completed a sale on a credit application that was transmitted by fax to seller. This application for sale on credit contained a few standard clauses with some general terms. During a period spanning a few years, buyer would fax purchase orders to acquire the resins it would use in its industrial process. The goods would later be shipped from the United States to the Mexican buyer by way of a carrier unrelated to the parties.

In their response, Bajaplay denied having completed the credit application, and also denied faxing any purchase orders to GPR. Buyer also refused to acknowledge it had received the resins seller had sold and delivered, even though evidence such as original invoices and shipping documents issued by the trucking company had been submitted and indicated Bajaplay was the buyer and consignee.

In his decision, the judge agreed with Bajaplay's argument. According to the court, GPR did not meet its burden of proving that it had delivered the goods to Bajaplay nor that Bajaplay had actually received them. The fax printouts, invoices, and shipping documents provided by seller were given no weight, which denied seller the right to receive the payment it was due. Clearly, the judge made a bad decision by setting the evidentiary threshold wrongfully high. In issuing his decision, the judge did not look at the CISG as the law applicable to the merits (nor did he mention

14. *Kolmar Petrochemicals Americas, Inc. v. Idesa Petroquímica, S.A. de C.V.*, Primer Tribunal Colegiado en Materia Civil del Primer Circuito [First Civil Court of the First Circuit], Mar. 2005.

15. *Georgia Pacific Resins, Inc. v. Grupo Bajaplay, S.A. de C.V.*, Juzgado Primero Civil del Partido Judicial de Tijuana [Sixth Civil Court of Tijuana], Mar. 2006.

any other law for that matter). A proper methodology applying the CISG would have yielded a different result, and would have ultimately saved GPR a lot of time. The CISG's Article 11 provides that a contract's conclusion or evidence of its existence need not be reduced to a writing. In fact, its existence may be proved by witnesses, a minimum threshold that is clearly surpassed when a party is able to provide invoices, faxed purchase orders, and evidence that the goods were placed in the hands of a carrier for shipment to buyer.¹⁶ Also, commentary to the draft of CISG Article 11 clearly noted that this provision had been included because contracts for the international sale of goods are often concluded by means of communication that do not always involve a written contract.¹⁷ The purpose was to facilitate the showing that a contract exists.

Even from a procedural perspective, the judge contradicted the evidence, weighing rules that were already part of the Commerce Code at the time the judgment was issued,¹⁸ which were heavily influenced by UNCITRAL's Model Law on Electronic Commerce.¹⁹

Another aspect that was evident was the judge's inability to distinguish between seller's obligation to deliver the goods and the arrival of the goods at buyer's premises. Under both the CISG²⁰ and the Commerce Code (enacted in 1889),²¹ goods can be deemed as delivered when the seller places them at a buyer's disposal, or in the hands of a carrier. Had the judge looked at the CISG, he could have easily avoided committing this horrendous mistake.

2. *The Judgment on Appeal*

If the ruling by the trial level court was deficient, the decision rendered by the Second Chamber of the Superior Court of Baja California was worse.²² GPR argued that the trial level judge had failed to give due regard to evidence such as the invoices, transport documents, and the

16. See Jose Luis Morales y/o Son Export, S.A. de C.V., de Hermosillo Sonora, México v. Nez Marketing de Los Angeles, California, Mexican Commission for the Protection of Foreign Trade (COMPROMEX), May 1993.

17. See JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 410 (1989) [hereinafter DOCUMENTARY HISTORY].

18. See Código de Comercio [CCo.] [Commercial Code], arts. 1205, 1298-A (Mex.); Diario Oficial de la Federación [DO] [Official Diary of the Federation], 27 de Agosto de 2009. The judge also did not consider that buyer failed to make a proper objection to the documents submitted as evidence.

19. See UNCITRAL Secretariat, *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996, with Additional Article 5 bis as Adopted in 1998* (1999), available at http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (last visited June 12, 2013).

20. See CISG, *supra* note 1, art. 31.

21. The Mexican Commerce Code was heavily influenced by the Spanish Commerce Code.

22. See *Georgia Pacific Resins, Inc. v. Grupo Bajaplay, S.A. de C.V.*, Segunda Sala del Tribunal Superior de Justicia de Baja California [Second Panel of the Superior Court, Baja California], Jan. 2007.

purchase orders that buyer had sent by fax. GPR also argued that the trial level judge had erred by failing to apply the CISG.

In its decision, the Second Chamber considered that the invoices had been unilaterally prepared by the GPR; thus, they lacked any evidentiary value. With regard to the transport documents, the Second Chamber reasoned that because these did not have a signature or a stamp indicating receipt by Bajaplay, the Second Chamber could not consider that the goods had been received; therefore, the existence of the contract had not been proven.²³ Evidently, the Second Chamber committed the same mistake, by refusing to recognize the existence of the contract, and by confusing the delivery of the goods with buyer actually taking possession of them.

The biggest blunder was the Second Chamber's wrong-headed conclusion that, because Article 1 of the CISG provides that it applies to contracts for the international sale of goods, and because seller had not shown that a contract even existed, it was senseless to look into this body of law. This is equivalent to refusing to analyze the U.C.C. to determine whether a contract has been formed under its rules, when a reading of the statute would be necessary in order to make such a determination.

In another part of its opinion, the Second Chamber stated that "from the record it is evident that none of the parties cited the CISG as being applicable." In my opinion, this represents an abdication of the court's obligation to know the law—a duty that stems not just from a rule of procedure,²⁴ but is a fundamental right specifically recognized under the Constitution, that every person appearing before a Mexican court is entitled to receive a decision that is "*reasoned in accordance with the letter of the Law, its legal interpretation, or the general principles of law.*"²⁵

3. *The Decision at the Circuit Court Level (Amparo)*²⁶

Seller then appeared before the Federal Circuit Court claiming that the decision rendered by the Baja California appellate court was in violation of its fundamental right to receive a judgment in accordance with the law because the trial and appellate courts had failed to apply the CISG to the merits of the dispute. The Circuit Court agreed with seller, and ordered the appellate court to issue a new judgment based on the CISG, after reiterating that a judge is under an obligation to apply the law based

23. See Handelsgericht des Kantons St. Gallen [HG] [Commercial Court] Dec. 5, 1995 docket no. HG 45/1994 (Switz.), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V00/550/47/PDF/V0055047.pdf?OpenElement>.

24. See Código de Comercio [CCo.] [Commercial Code], art. 1324.

25. See Constitución Política de los Estados Unidos Mexicanos [C.P.], Diario Oficial de la Federación [DO], 5 de Febrero de 1917, art. 14, ¶ 4 ("In civil cases, the final decision shall be issued pursuant to the letter of law or its legal interpretation, and lacking such law, it shall be rendered based on general principles of law.").

26. Quejoso [Complaint], Georgia Pacific Resins, Inc. Amparo Directo 225/2007, Cuarto Tribunal Colegiado del Decimoquinto Circuito [Fourth Court of the Fifteenth Circuit].

on the legal principle of “*da mihi factum, dabo tibi ius*” (“give me the facts, I shall give you the law”) and “*iura novit curia*” (“the judge knows the law”). According to the Circuit Court, the parties were not required to request that the court of first instance or the Second Chamber apply the CISG, because it was not a foreign body of law, but rather a national law because of its status as a treaty ratified by the Mexican Senate.²⁷

However, the Circuit Court was not exempt from committing its own mistakes. It reasoned that when a contract is concluded abroad, but will have effects in Mexico, a court must first look into the validity of the transaction prior to analyzing the application of the CISG. Clearly, the Circuit Court confused the facts because the contract was not made abroad. Additionally, the invalidity of the contract was never raised as a defense by buyer, but rather that the contract had never even existed, which are two very distinct issues. The case would not end here. The Second Chamber later issued a new decision claiming to apply the CISG, but once again found for buyer on the same evidentiary grounds, refusing to acknowledge the validity of faxed documents.

Seller would once again appeal to the Federal Circuit claiming that the Second Chamber Court was refusing to apply the law and acknowledge the existence of the contract based on the evidence that GPR had submitted. Seller also argued that the CISG did not require that GPR show that the goods actually arrived in Tijuana, and that it would suffice to show that they were delivered to a carrier to deem that GPR had performed its obligations. The Circuit Court agreed with GPR. It would reason that seller had in fact submitted original invoices that were never properly objected to by buyer; that seller performed its obligation to deliver the goods per CISG Article 31 by placing them with a carrier, and that the faxed documents along with parts of the testimony rendered by an officer of Bajaplay were sufficient to deem the contract as existing. The Circuit Court then ordered the Second Chamber to issue a new decision.

Finally, on April 29, 2008,²⁸ the Second Chamber issued a second and final decision consistent with that of the Circuit Court. In that decision, the Second Chamber starts by acknowledging that the dispute is governed by the CISG because seller and buyer have their *domiciles* in contracting states. Clearly, the Second Chamber’s use of the word *domicile* was wrong, since the CISG intentionally left out this word and instead opted for the more neutral phrase “*place of business*.”

27. Professor Alejandro Garro shed some light on the fact that in some legal systems the parties’ failure to cite the CISG could be interpreted as a tacit exclusion under CISG Article 6. The common law system does not follow the “*jura novit curia*” principle and a decision from the Oregon Court of Appeals found that it was extemporaneous for parties to cite the CISG if they did not do so at the trial level. The case is *GPL Treatment, Ltd. v. Louisiana-Pacific Corporation*, 914 P.2d 682 (Or. 1995).

28. This is an unpublished decision of the Judgment of the Second Chamber of the Baja California Superior Court, dated April 29, 2008.

The Second Chamber then went on to explain that seller had appeared to demand specific performance under CISG Article 61(b). With regards to the existence of the contract, it cited CISG Article 11's stipulation that the contract need not be evidenced by writing, and that notwithstanding, seller had submitted twenty invoices that proved its existence. The Chamber also reasoned that seller had performed its obligations per CISG Articles 30 and 31, as evidenced by the shipping documents when it delivered the goods to the trucking company for shipping. The Second Chamber also ruled that per CISG Article 59, payment was not conditioned on a formal request or compliance with any other formality. Were it not for the fact that the Second Chamber was forced to issue the decision, I would have to acknowledge that it was not that the ruling was not bad in terms of its structure and reasoning. Of course, there were no citations to foreign case law to promote uniform interpretation, but then again, is a court *always* to do so when the language of a CISG provision is clear, or should a judge only do so in what Dworkin would call *hard cases*?²⁹

C. Banks Hardwoods Inc. v. Jorge Angel Kyriakidez³⁰

This case was brought by an American plaintiff, Banks Hardwoods, Inc. (BHI), against a Mexican buyer, Jorge Angel Kyriakidez (JAK), who made a verbal agreement to buy various shipments of timber. It went generally undisputed that the parties had established the practice of entering into verbal agreements for the sale of timber, and that for each order made to BHI, JAK would issue a postdated check as a form security. BHI would make the wood available at its place of business in San Diego, California, where JAK would appear to pick up the timber for its import to Tijuana, Mexico. BHI claimed it was owed a total of U.S. \$9,287.00 worth of goods. JAK raised a defense that is typically raised in such agreements: that they had not agreed on the date of payment and, thus, JAK's obligation would not become due until BHI served JAK with a formal demand for payment, as provided for under Article 2080 of the Federal Civil Code.³¹ That argument—as made by buyer—would make the complaint filed by seller flounder.

29. See generally H. Allen Blair, *Hard Cases Under the Convention on the International Sale of Goods: A Proposed Taxonomy of Interpretive Challenges*, 21 DUKE J. COMP. & INT'L L. 269 (2011).

30. See *Banks Hardwoods v. Jorge Angel Kyriakidez García*, Juzgado Sexto de lo Civil de la Ciudad de Tijuana [Sixth Civil Court of the City of Tijuana], Aug. 2005. I would like to thank Romelio Hernández for sharing copies of his decisions.

31. Código Civil Federal [CC] [Federal Civil Code], Diario Oficial de la Federación [DO], 30 de Agosto de 1931. The Federal Civil Code's Article 2080 reads:

If the time to make payment has not been fixed and if such obligation is one to deliver, the creditor may not demand payment until after thirty days following a formal request, either with the assistance of the court, or, with the assistance of a notary or two witnesses. Regarding obligations to perform, it must be complied with when so demanded by the creditor,

The trial court found for BHI. In reaching its decision, however, the judge considered that the documents submitted were of the kind contemplated under Articles 371, 372, and 373 of the Commerce Code, when in fact none of these provisions were applicable because they were displaced by the CISG. With regard to the defense raised by buyer—that no formal demand had been previously made—the judge dismissed buyer’s argument citing CISG Article 58, ruled that payment became due when the goods were placed at buyer’s disposal in San Diego, California, and ordered JAK to pay the outstanding amount plus interest. In doing so, the trial court did not discuss CISG Articles 61 and 62 (nor any other statute) to justify BHI’s right to require that JAK pay the price, making the decision incomplete and legally defective, because the relief granted was not reasoned in law. The same can be said about the court’s order that JAK pay BHI interest at a rate of 6% per annum, because seller was unable to prove that they had agreed to a 2% monthly interest as claimed. Clearly, in spite of the fact that this could be a favorable decision from seller’s perspective, the methodology that was followed leaves much to be desired. The Superior Court of Baja California continued this odd “mix ‘n match” practice of internal and international rules, even though the Commerce Code is clearly inapplicable in cases involving international sales.

On appeal, JAK argued that the trial level judge had failed to consider its argument that no formal demand had been made by BHI, and that therefore BHI’s complaint should not have succeeded.³² The Superior Court dismissed this argument, and affirmed the judgment issued by the trial court, but committed the same mistake of citing provisions from the Commerce Code. Regarding the issue of the prerequisite *formal demand* required under the Civil Code, the Superior Court found that this formality was not applicable, as this matter was governed by Articles 58 and 59 of the CISG, which provide that payment was not subject to the compliance of any type of formality.³³ The Superior Court then went on to discuss the importance of promoting the observance of good faith in international trade, as provided for under Article 7 of the Convention, and even included a passage from the CISG’s preamble,³⁴ when it stated that:

provided sufficient time has transpired for the performance of the obligation.

Id.

32. *See* Banks Hardwoods v. Jorge Angel Kyriakidez García, Segunda Sala del Tribunal Superior de Justicia de Baja California [Second Panel of the Superior Court of Justice of Baja California], Mar. 2006.

33. CISG, *supra* note 1, art. 59 (“The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.”).

34. Although the Preamble was added in the latter part of the discussions, it consequently has a very relative value. *See* John Honnold, UNIFORM LAW FOR INTERNATIONAL SALES 598 (2d ed. 1991) (“UNCITRAL did not prepare a preamble nor was this matter considered by the committees of the Vienna Conference that considered its Convention’s substantive provisions [A] preamble was first consid-

The United Nations Convention on Contracts for the International Sale of Goods, entered into on the eleventh day of April of nineteen eighty, has as its primary objective the creation of common provisions to govern said legal act, based on the premise that international trade must be based on principles of equality and mutual benefit, which constitutes an important element to Foster friendly relations amongst member States, and therefore, taking into account the New International Economic Order, as the Contracting States, by way of this Convention, adopted uniform rules, applicable to the international sale of goods, taking into account different social, economic and legal backgrounds, to contribute to the removal of legal obstacles in international trade.

In spite of its attempt to improve on the judgment issued by the trial court, the Superior Court's decision was just as flawed. It reiterated the practice of issuing judgments citing provisions from the CISG and the Commerce Code that the CISG displaces, even though the Superior Court acknowledged that the domestic statute was displaced. In another part of its decision, the Superior Court said that the CISG includes its own rules of interpretation, requiring that it be applied *uniformly* and in a manner that assures the observance of good faith in international trade. Clearly, in spite of the fact that the Superior Court referred to all of the interpretative criteria, the reality is that it failed to observe at least two criteria: the mandates to apply both an international and uniform interpretation of the CISG, which can only be achieved when judges (or arbitrators) take into account international case law in applying it.

D. Agrofrut Rengo, S.A. v. Levadura Azteca, S.A. de C.V.

1. *Background*

In this case, Agrofrut Rengo, S.A. (Rengo) a Chilean seller, filed an action against Levadura Azteca, S.A. de C.V. (Azteca), a Mexican buyer of eighty containers of canned peaches. After receiving the first twenty-two containers—and refusing to pay for them—Azteca cancelled the contract for the remainder. The contract was evidenced by a purchase order that was sent in December of 2002, in which buyer requested eighty containers that would each carry nine hundred boxes of canned peaches at a price of \$15.65 per box, payable thirty days after each shipment's date of arrival. The parties agreed that seller would first send eleven containers per month starting in February and ending in July of 2003, and a final shipment of fourteen containers in August 2003, for a total price of \$1,126,800.00.

ered and prepared by the Drafting Committee on April 9, two days before adjournment of the Conference . . .”).

The first shipment of eleven containers arrived on February 28, 2003, while a second shipment arrived a mere two weeks later, on April 17. Claiming late delivery of the second shipment, on May 5, 2003, Azteca advised Rengo that it was cancelling the contract for the remaining fifty-eight containers, and additionally refused to pay for the twenty-two containers it had previously received. Rengo filed a complaint with the Twelfth Civil Court in Mexico City³⁵ demanding payment for the twenty-two containers and interest, as well as damages for the loss of profits from the balance of the cancelled shipment. In its response, Azteca raised as a defense that the parties had not agreed on a place and time for payment, per Articles 2080 and 2082 of the Federal Civil Code. Buyer also counter-claimed for specific performance for the fifty-eight containers due under the contract, as well as damages it claimed to have suffered as a result of the late delivery of the other two shipments.

In its decision, the court ordered Azteca to pay seller \$309,870.00 U.S. for the twenty-two containers it had received plus interest, but denied Rengo's claim for loss of profit damages. The court reasoned that buyer's acceptance of the two late deliveries, per Articles 374, 375, and 376 of the Commerce Code, had made the sale final,³⁶ particularly because there was no dispute with regard to the quality of the goods. In spite of the apparent correctness of the result, it is clear that the trial court made a mistake by not applying the CISG to the case. This issue required an analysis of CISG Article 33 regarding the time of delivery³⁷ to first determine if the contract provided that the goods were to be delivered on a fixed date or within a period of time, and then decide whether seller had breached. The next step in the analysis required that the judge assess whether the alleged delay in delivering the second shipment amounted to a fundamental breach per CISG Article 25 (which would have allowed buyer to avoid the contract),³⁸ or if the delay would merely allow buyer to claim damages. Once this occurred, the judge should have ordered Azteca to pay per CISG Articles 61 and 62. Unfortunately, the judge seemed comfortable with applying a law that had already been displaced by the CISG some fifteen years earlier.

With regard to the loss of profit damages claimed by Rengo, the judge considered these to be tantamount to interest and that an order to pay interest had already been made when it ordered Azteca to pay for the two shipments. Clearly, CISG Article 74 authorizes loss of profit damages,³⁹

35. Quejoso [Complaint], Juzgado Décimo Segundo Civil del Distrito Federal [Tenth Civil Court of the Second Federal District], Expediente 30/2004.

36. See Código de Comercio [CCo] [Commercial Code], art. 375, Diario Oficial de la Federación [DO], 27 de Agosto de 2009 (Mex.) ("Si se ha pactado la entrega de las mercancías en cantidad y plazos determinados, el comprador no estará obligado a recibirlos fuera de ellos; pero si aceptare entregas parciales, quedará consumada la venta en lo que a éstas se refiere.").

37. See CISG, *supra* note 1, art. 33.

38. See *id.* art. 25.

39. See *id.* art. 74.

while CISG Article 78 provides that interest does not prejudice the right to any other damages a party may have.⁴⁰ However, the judge seems to have ignored the applicability of the CISG to this issue and made what was clearly a bad decision. The judge further reasoned that Rengo was barred from obtaining damages because no evidence had been submitted to show that these had actually been suffered.

In addressing buyer's defenses (that the time and place for payment had not been fixed in the contract), the judge found this to be a matter governed by the CISG, and that absent an agreement, and per CISG Article 57, seller's place of business is the place to effect payment,⁴¹ while the obligation to pay arises once the seller delivers the goods to the buyer or delivers the documents as provided for under the contract and the CISG.⁴² Unfortunately, the judge did not explain why he decided that some issues should be disposed of based on the Commerce Code (i.e., time of delivery or finality of the sale), while other issues (i.e., right to receive payment even if no place or time have been fixed) were to be decided based on the CISG. The only answer is that the judge was unfamiliar with the scope of the CISG, and opted to travel down a road he was more familiar with, clearly violating not just the CISG, but also a constitutional mandate that judges are obligated to render their decisions based on the applicable law or its legal interpretation. Here, that clearly did not happen.

2. *The Appeal*

Both Rengo and Azteca appealed the trial court's decision to Mexico City's Superior Court.⁴³ In Rengo's appeal, it claimed that the trial court wrongfully applied the Federal Civil Code's Articles 1949, 2104, 2108, 2109, and 2110, and that the trial court did not provide a reasoned decision as to why seller was being denied loss of profit damages. Clearly, Rengo committed a major error in citing these provisions as the applicable law to the merits of the dispute, when these issues (i.e., rights of seller against a breaching buyer and the entitlement to damages) all fall within the CISG. Buyer made a similar error when it appealed arguing (based on the Civil Code) that the trial court had erred in ordering Azteca to pay seller, when neither the date nor the place of payment had been fixed in the contract, that prior to instituting its complaint, Rengo should have made a formal demand for payment, and that the matter was not yet ripe for a lawsuit.

In its decision, the Superior Court made a grandiose statement that it would apply the CISG—an announcement that causes nothing but disap-

40. *See id.* art. 78.

41. *See id.* art. 57.

42. *See id.* art. 58.

43. *See* *Agrofrut Rengo, S.A. v. Levadura Azteca, S.A. de C.V.* The appeals were lodged under file numbers 767/04/09 and 767/04/10, and were decided by the Superior Court of the Federal District (Mexico City) on March 16, 2005.

pointment after reading it. Most of the issues raised on appeal were disposed of with the Superior Court relying on the Federal Civil Code—a body of law that was (for this case at least) irrelevant. Regarding Rengo's claim to loss of profit damages, the Superior Court affirmed the trial court's decision, restating that, when the trial court ordered Azteca to pay interest on the amounts due for the twenty-two containers, seller's request had been satisfied by the trial court. Clearly, the Superior Court repeated the same mistake of confusing such distinct items as damages and interests, and obviously failed to even look at the CISG, though it is not surprising, considering that not even the seller was claiming that it was the applicable law.

In its wrong-headed analysis, the Superior Court also reasoned that Rengo needed to prove there was a direct nexus between the breach and the damages it claimed to have suffered, and that Rengo had failed to show a deprivation of a profit as a direct result of the breach. The court further argued that Rengo did not even provide evidence showing that it had purchased additional machinery to perform its obligations under the contract, nor that it had manufactured the goods. The court's reasoning is not only wrong, it is also blatantly absurd. Parties enter into sales contracts to make a profit. If breached, this will typically cause a loss to the non-breaching party. CISG Article 74 clearly authorizes a party to demand damages,⁴⁴ including loss of profits, which, in the case of a seller, could be calculated by taking into account the seller's sales price minus its expenses in producing the goods. With regard to the issue that seller did not prove it had produced the goods pending delivery under the contract, it is evident that the Superior Court, showing absolute ignorance, failed to take into account that under CISG Article 77,⁴⁵ a non-breaching party is required to take measures to mitigate its losses (including loss of profit), at the risk of having the other party claim a reduction. Because buyer had cancelled the contract, it is very likely that Rengo refrained from producing the canned fruit. Clearly, it was not under a duty to produce the goods, and had it acted otherwise, this would have increased damages.

Another mistake that is evident from the Superior Court's reasoning is its interpretation of what the limit for damages should be. It stated that a party may be entitled to damages that are an *immediate and direct* result of the breach—a rule that is provided for under the Civil Code that was superseded in cases governed by the CISG. It is not surprising, given the inconsistent application of the CISG, that the Superior Court would not understand that this matter was not governed by the Civil Code. The mistake is not trivial. The limits set forth under the Mexican Civil Code's Article 2110 and Article 74 of the CISG are different. While under the Civil Code damages are subject to an immediacy and directness requirement (which severely limits the amounts that a party may be entitled to

44. See CISG, *supra* note 1, art. 74.

45. See *id.* art. 77.

receive), the CISG takes a more liberal approach. By allowing a party to claim damages that the breaching party knew would be a *possible consequence* of his or her breach of contract, the CISG includes a foreseeability requirement that considers what the contracting party knew at the time it was making the contract.

The Superior Court committed another error by violating the three CISG interpretative *commandments* provided for under Article 7. First, it relied on case law interpreting the Federal Civil Code's Article 1949 in order to deny Rengo its claim to loss of profit damages, in a clear violation of the CISG's mandate to take into account its international character. It also failed to promote uniformity, because not a single case or treatise on the CISG was cited, which could have assisted the Superior Court in making a correct decision. Finally, it allowed Azteca to walk away without properly compensating Rengo after it had wrongfully terminated the contract (depriving Rengo of its profits), which clearly does not do much in terms of promoting the observance of good faith in international trade.

With regard to Azteca's counterclaim for specific performance for the remainder of the fifty-eight containers, the Superior Court ruled against Azteca because it had not performed its part of the bargain, and in reaching this decision, it also mistakenly relied on Article 1949 of the Federal Civil Code.⁴⁶ Even if there is an apparent soundness in the result, the reasoning is evidently flawed because this provision did not even apply. A correct methodology would have included a discussion of CISG Article 81,⁴⁷ which relieved Rengo from any pending performance that was due under the contract because of Azteca's notice that it was cancelling it.⁴⁸ This decision once again shows a complete misunderstanding of the CISG and how it displaces the Commerce and Civil Codes. Of the few salvageable fragments from the decision on appeal is the confirmation that Article 57 of the CISG provides a gap filling rule for those cases where the parties do not agree on the place of payment.

46. See Código Civil Federal [CC] [Federal Civil Code], art. 1949, Diario Oficial de la Federación [DO], 30 de Agosto de 1931. This provision reads: Article 1949—The right to avoid contractual obligations is implicit in reciprocal agreements, in the event that one of the parties fails to perform what it is obliged to.

The non-breaching party may choose between demanding specific performance or avoidance, and will be entitled to damages in any case. A party may also request avoidance even after it has chosen specific performance, when it is impossible to perform.

Id. It is worth noting that even the application of this provision was wrong from a domestic perspective. The applicable provision should have been Article 376 of the Commerce Code.

47. See CISG, *supra* note 1, art. 81(1).

48. See *id.* art. 72.

3. *Federal Court Review of the Superior Court's Decision*

As a consequence of the decision rendered by the Superior Court, both Rengo and Azteca appealed before the Fifth Panel of the First Circuit.⁴⁹ In a nutshell, seller's issue was that its fundamental rights had been violated when the courts refused to grant Rengo's claim for damages, because it was being deprived of earnings it was rightfully entitled to receive from the cancelled contract. According to Rengo, neither the judge at the trial level nor the magistrates on appeal took into account that there was evidence on record showing Azteca's breach for failure to pay, as well as the cancellation of the contract, and that therefore, the courts should have ordered buyer to pay damages. The Panel from the Circuit Court did not agree.

In its decision, the Circuit Court made an interpretation of Articles 1949, 2108, 2109, and 2110 of the Federal Civil Code and refused to find for Rengo, claiming that no evidence had been submitted to allow the calculation to be made. As with the trial and Superior Court, this decision was wrong because it continued to apply the Federal Civil Code when it was not even applicable,⁵⁰ as if it in some way superseded the CISG. The Circuit Court was also wrong in setting such a high standard for the proof of damages. According to an opinion of the CISG Advisory Council, it would suffice to show the facts in a reasonable manner, not with mathematic precision;⁵¹ otherwise, one of the purposes of the CISG—uniform application—would be undermined,⁵² because some countries may have varying standards to prove damages. Such varying standards would in turn

49. See *Agrofrut Rengo, S.A.*, amparo No. 292/2005, and *Levadura Azteca, S.A. de C.V.*, amparo No. 293/2005, both before el Quinto Tribunal Colegiado en Materia Civil del Primer Circuito.

50. Seller's rights can be enforced under the CISG per Article 61, which includes a *catalogue* of available remedies that a seller can use to enforce its rights against the buyer, such as the right to demand performance of the payment obligation. Articles 74 and 76 include rules that permit the parties to calculate their damages. CISG Article 78 explains the cumulative nature of damages and interest.

51. See CISG Advisory Council, Opinion No. 6, Calculation of Damages under CISG Article 74, *available at* <http://cisgw3.law.pace.edu/cisg/CISG-AC-op6.html>.

52. See *id.* The CISG opinion provides the following:

2.3 The existence of differing rules concerning the proof of damage could lead to the differential treatment of similarly situated parties. For example, buyers attempting to prove future losses often rely on assumptions about market prices and the amount of future sales. If a seller wrongfully refuses to deliver a new product or a product that the buyer had not previously been in the business of selling, there may be little concrete evidence on which the aggrieved buyer can base its damages claim, which would mainly consist of loss of profit. In such a case, countries requiring a high level of proof with regard to the fact that the aggrieved party suffered a loss would likely not allow the recovery of lost profits under Article 74. However, in countries that have a more relaxed level of proof, the aggrieved party may be able to recover such damages under Article 74. This result would be unfair and undermine the goal of the CISG to provide a uniform law on the sale of goods. In addition, the former approach would be contrary to the principle of full compensa-

invite breach of contracts, undermining the principle of full compensation on which the CISG is based. In this case, that is exactly what has happened. All the courts involved in this matter set the standard unreasonably high, and ruled in accordance with the local “*immediate and direct consequence*” standard, not the “possible consequence” standard provided for under Article 74 of the CISG.

The Circuit Court, parroting the trial and the Superior Court, opined that seller was not entitled to receive loss of profit damages, because seller had not shown that it had made the pending delivery of goods under the contract.⁵³ However, buyer’s notice that it would no longer receive seller’s goods was wrongful avoidance, which freed seller from any pending obligation under the contract and also left its rights to claim damages intact.⁵⁴ Furthermore, had seller manufactured the goods (as the court implied was a prerequisite), this would have constituted a violation of the duty to mitigate provided for under CISG Article 77, which I have already addressed.

With regard to the claims asserted by Azteca stemming from what it considered to be a flawed application of Article 375 of the Commerce Code,⁵⁵ Rengo was entitled to obtain payment because it was under an obligation to show that it had complied with all of its obligations under the contract—namely, the production of the remaining fifty-eight containers of canned peaches. Buyer also insisted that its fundamental rights were being violated because Rengo had not served Azteca with a formal demand for payment, and that therefore the case was not ripe and should have been dismissed. The Circuit Court dismissed buyer’s claim—but for the wrong reasons—and simply parroted the argument from the trial and appellate courts regarding the time of payment, but did not mention Article 59 of the CISG, which was also relevant.⁵⁶

III. THE MISAPPLICATION OF THE CISG IN MEXICO

After this sampling of Mexican cases, one should wonder whether this uniform sales law endeavor makes any sense, at least from the Mexican perspective. All of the cases that I have found have been particularly bad examples of CISG application. There was an abundant use (and abuse) of

tion. It also could provide an incentive for a party to breach its contractual obligations.

Id.

53. See CISG, *supra* note 1, art. 72.

54. See *id.* art. 81.

55. This Article provides that if delivery has been agreed to, in certain amounts and at a certain time, the buyer is not obligated to receive the goods if they are late, but if the buyer accepts partial delivery, the sale shall be deemed final with regard to these goods.

56. See CISG, *supra* note 1, art. 59 (“El comprador deberá pagar el precio en la fecha fijada o que pueda determinarse con arreglo al contrato y a la presente Convención, sin necesidad de requerimiento ni de ninguna otra formalidad por parte del vendedor.”).

expressions typical of Mexican contract law, as well as excessive court reliance on the Mexican Commercial and Civil Codes and case law interpreting them, even when issues were clearly governed by the CISG. Even in those cases where judges made a grandiose announcement that they would apply the CISG, it would all end in a hollow promise—judges continued to reason their cases based on domestic statutes.

From this sample, it was also clear that the lawyers involved in these disputes were not citing the CISG properly, nor were they attempting to persuade judges with foreign case law interpreting the CISG or treatises discussing it. I believe that part of the problem may be cultural. As I have mentioned on other occasions, the responsibility for this abandonment of the CISG cannot be placed on the shoulders of judges alone; some of it must be shared by the Mexican bar and law schools. Law schools must teach the CISG and make it part of their mandatory curricula, and it must also be included by the publishers of commercial statutes in Mexico. Save for one publisher, none of them include the CISG as part of their commercial law compilations.

The same problem the CISG faces has also affected other uniform laws that we have adopted. Take for example UNCITRAL's Model Law of Arbitration adopted in Mexico's Commerce Code in 1993. In 2006, the Mexican Supreme Court addressed the issue of *Kompetenz-Kompetenz* in a manner that caused more than a few eyebrows to rise.⁵⁷ In a divided decision, the majority held that courts had jurisdiction to address the validity of arbitration clauses, and not arbitrators. The minority cited ample authority, including the Model Law, as well as various rules from major arbitration institutions showing how this was a uniform standard. Unfortunately, the majority was not swayed, and issued a judgment that is contrary to the international consensus that arbitrators have jurisdiction to rule on their own jurisdiction.

In another example, Mexico adopted various rules on electronic commerce (clearly inspired by UNCITRAL's Model Law on Electronic Commerce), which were dispersedly included in various statutes such as the Federal and Civil and Commercial Codes and the Federal Code of Civil Procedures. To this date, courts still struggle with the proper weight to be given to electronic communications.

In spite of my somewhat bleak assessment, I still believe there is hope. Recent changes to Mexico's Constitution have incorporated by reference those rights afforded under human rights treaties that Mexico has ratified, which has caused an interesting effect: Mexican lawyers and judges are now becoming aware of the need to take into account these international instruments and now look at decisions from human rights courts. The

57. *See* Competencia para conocer de la acción de nulidad del acuerdo de arbitraje prevista en el primer párrafo del art. 1424 del código de comercio, Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court of Justice of the Nation], Novena Época, tomo XXIV, Sept. 2006, Materia: Civil, Tesis: 1a./J. 25/2006, Pagina 5 (Mex.).

question is how to replicate this effect in the international commercial law field.

I close with two suggestions. First, I propose that UNCITRAL prepare a practical handbook for judges to interpret the CISG and other uniform laws. This could be done in collaboration with other organizations such as UNIDROIT or the Hague Conference on Private International Law, which has published numerous handbooks on the international treaties it has promoted. Second, I propose that UNCITRAL promote training on the use and interpretation of its international treaties and uniform laws to reach the goal of promoting the uniform interpretation of international trade law.

LAW WARS: AUSTRALIAN CONTRACT LAW REFORM
vs. CISG vs. CESL

LISA SPAGNOLO*

I. INTRODUCTION

IT is an interesting time to be an academic in the field of contract law in Australia. From our remote island, we look to the changes taking place in European contract law. We look to the development of Asian initiative in the Principles of Asian Contract Law (PACL), the worldwide growth and influence of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and UNIDROIT Principles, and the Swiss Proposal before the United Nations regarding the CISG. From the perspective of Australian lawyers, even those who primarily are interested only in domestic contract law, all of this has recently become more than a passing interest since Australia is potentially about to begin its own reform process. Accordingly, now, for the first time, Australian governments are considering the spread of uniform law in the context of potential reform of Australian law. This paper considers briefly the Australian background, the status of the current reform process, and the possible influences of uniform law and harmonization efforts on the Australian position.

II. AUSTRALIAN BACKGROUND

Australia operates on the basis of a federal system which unified prior colonies of the British Empire in 1900. Under the Australian Federal Constitution, specific areas of law are reserved to the national federal legislature, while some matters are said to be governed concurrently with the provinces (states). Residual concerns not specified in the Federal Constitution are matters of state law. Contract law falls into this category.

Accordingly, Australian contract law, which was based on the common law of England, has since federation been subjected to piecemeal (and differing) legislative reform in each state, and to divergent court decisions in each state. Naturally, this has resulted in a number of divergences between the law of contract in the different states. It would be wrong to overstate the significance of these differences. Nonetheless, they do result in unnecessary compliance and information costs. Furthermore, even where the substance of the law is exactly the same, the simple fact of multiple sources of law—both legislative and judicial case law—creates costs for those who must deal with the law applicable to domestic contracts in Australia. Moreover, much of Australian domestic contract law has in-

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creasingly proved anachronistic and complex, creating further unnecessary transaction costs for commercial parties.

A. *Divergences in Australian Domestic Contract Law*

While perhaps not the “chaotic mess” characteristic of the situation that culminated in the publication of the Uniform Commercial Code (UCC) in the United States in 1952,¹ Australia’s various states have managed to develop a number of different rules in relation to contract. Unfortunately, unlike the United States, we do not have a body in the nature of the American Law Institute (ALI). It is also probably relevant that we only have six states and two mainland territories, whereas the variations leading to the UCC were spread across fifty states.

It is interesting that the ALI noted that the main defects in American law at that time were “uncertainty and complexity.”² Again, a federal system, indeed, one which strongly influenced Australia’s constitutional structure, had created a recipe for divergence. The answer in that case had been to harmonize by codification, driven by an independent non-profit and well-respected scholarly organization.³

Australian jurisdictions differ in many regards:

- *Degrees of Legislation*: Some have contract law statutes, others do not (for example, writing requirements).
- *Privity*: Following from the High Court decision in *Trident*⁴ almost thirty years ago, the rules relating to third party benefit remain confusing and in need of harmonization. Some jurisdictions within Australia (Queensland, Western Australia, Northern Territory) have now eroded the privity rule, and now recognize contracts for the benefit of third parties in some circumstances by means of statute,⁵ but these reforms are not uniform, and the circumstances in which they apply are confusing.⁶ Moreover, other jurisdictions continue to rely upon the slow, confusing, and limited common law

1. See Larry A. DiMatteo, *The Curious Case of Transborder Sales Law: A Comparative Analysis of CESL, CISG, and the UCC*, in CISG VS. REGIONAL SALES LAW UNIFICATION: WITH A FOCUS ON THE NEW COMMON EUROPEAN SALES LAW 25, 27, 32 (Ulrich Magnus ed., 2012).

2. See *id.* at 27.

3. See *id.* at 27–28.

4. *Trident General Insurance Co. Ltd. v McNiece Bros. Pty. Ltd.* (1988) 165 CLR 107 (Austl.).

5. See, e.g., *Property Law Act 1974* (NT) s 56 (Austl.); *Property Law Act 1974* (Qld) s 55 (Austl.); *Property Law Act 1969* (WA) s 11 (Austl.).

6. See Bryan Horrigan, Emmanuel Laryea & Lisa Spagnolo, Submission in Response to Federal Attorney-General’s Discussion Paper ‘Improving Australia’s Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law’ § 1.1.2. (July 20, 2012), available at <http://www.ag.gov.au/Consultations/Documents/SubmissionstotheReviewofAustralianContractLaw/Submission%20035%20-%20Contract%20Law%20Review%20-%20Horrigan%20Laryea%20Spagnolo.pdf>.

developments, which on the whole do not reflect modern commercial realities.⁷ Only for insurance contracts is there federal legislation to enable third party beneficiaries to take enforcement action.⁸

- *Capacity*: “The law relating to the capacity of natural persons to enter into, or be bound by contracts they enter into, vary greatly among the jurisdictions in Australia.” Specifically, “[t]he categories of incapacity are minority, mental incapacity, and intoxication. Of these, minority is the main issue . . . [and] the effect of a contract with a minor and the consequences for the parties vary greatly among the jurisdictions.”⁹ The reason is that “[t]he law on minority consists of a combination of common law (inconsistently applied) and state and territory legislation of varying content.”¹⁰ While “capacity may not be an issue in business to business (B2B) contracts . . . it can be an issue in business to consumer (B2C) contracts. In online B2C contracts, where the parties may be located in different jurisdictions, difficult issues may arise.”¹¹
- *Proportionate Liability*: This differs across the various jurisdictions.
- *Inconsistent Legislation*: Some retain inconsistent legislation, or have not enacted legislation despite agreement between the jurisdictions to act in a uniform manner.¹²

7. Following from the *Trident* case, where limited third party rights were recognized for an insurance contract. However, reasons for the High Court decision varied in their scope and basis, and the law still remains underdeveloped and uncertain.

8. *See Insurance Contracts Act 1984* (Cth), s 48 (Austl.).

9. Horrigan, Laryea & Spagnolo, *supra* note 6, § 1.1.4.

10. *See id.* The Submission further notes:

NSW has a comprehensive statute, the *Minors (Property and Contracts) Act 1970* (NSW). Victorian law needs to be gleaned from the *Age of Majority Act 1977* (Vic) and some provisions in *Goods Act 1958* (Vic) and the *Supreme Court Act 1986* (Vic). Queensland’s law consist of *Law Reform Act 1995* (QLD), and the common law. In SA, the law is to be found in *Age of Majority (Reduction) Act 1971* (SA) and the *Minors’ Contracts (Miscellaneous Provisions) Act 1979* (SA). WA’s law comprises *Age of Majority Act 1972* (WA) and the *Statute of Frauds (Amendment) Act 1828* (UK) (“*Lord Tenterden’s Act*”) in its original form as imperial legislation. Tasmania, ACT and NT all have a combination of statutes and the common law.

Id.

11. *Id.* § 1.1.5.

12. Two examples should suffice: NSW “curiously” retains the *Contracts Review Act 1980* despite the fact that an agreement was reached between states to repeal all inconsistent legislation upon enactment of the ACL. *See* Luke Nottage, The Government’s Proposed “Review of Australian Contract Law”: A Preliminary Positive Response 5 (July 16, 2012), available at <http://www.ag.gov.au/Consultations/Documents/SubmissionstotheReviewofAustralianContractLaw/Submission%2008%20-%20Contract%20Law%20Review%20-%20Dr%20Luke%20Nottage.pdf>.

Also, despite agreement five years ago amongst the State Attorneys General (SCAG) to implement the ECC, the process is still incomplete, with Queensland still not having yet passed the legislation to update its ETA.

B. *Complex and Antiquated Australian Contract Law*

Australia's sales laws imply certain non-mandatory terms concerning domestic commercial sales law contracts, such as the need for goods to meet their description, merchantable quality, and fitness for purpose.¹³ These laws, however, date from the early 19th century.¹⁴ Even this is painting far too kind a picture, because the provisions of those laws were themselves drawn from the English legislation with its origins at the time of the industrial revolution. It goes without saying that commercial domestic sales laws in Australia are rather antiquated.

Overlaid onto this regime is the *Australian Consumer and Competition Act 2010*, which incorporates the Australian Consumer Law (ACL). This is a far-reaching federal statute, which implements Australia's competition law, but which also contains consumer protection measures, including rules on misleading conduct in all trade and commerce, and rules on unconscionable conduct. The law also provides for mandatory implied terms, for example warranting quality, in relation to consumer contracts. Recently updated, the law maintains the basic structures in relation to implied terms present in its predecessor from 1974,¹⁵ with a few tweaks.¹⁶

Australia suffers from many legislative and common law overlaps. The existence of legislation often will not prevent application of the common law, resulting in a range of remedies pursuant to statute and common law (including equitable relief). This can seriously compound the complexity of the law related to, for example, enforceability of contracts of indemnity and guarantees, which can not only be rendered unenforceable on grounds of unconscionable conduct under common law (particularly on the basis of equitable relief), but also on statutory grounds arising pursuant to the new legislative definition of unconscionability.¹⁷

The High Court of Australia has not helped clarify many areas where this would be desirable. In matters of state law, unlike the US Supreme Court, the Australian High Court has the capacity to resolve differences between the case law in various jurisdictions, or to clarify areas in which confusion has arisen. However, for many reasons, it frequently fails to do so.

One such area is the parol evidence rule, which has remained stuck in a time warp in Australia, despite its progression in the U.K. While the House of Lords under Lord Hoffman has broadened the test, Australia still requires "ambiguity" to exist before extrinsic evidence is admissible to interpret the intention of the parties. The High Court has consistently said that a time will come when this rule will be revisited, amid attempts by

13. As this is a matter of state law, a different statute applies in each state and territory.

14. *See Sale of Goods Act 1896* (Tas) (Austl.).

15. *See Trade Practices Act 1974* (Cth) (Austl.) (repealed 2011).

16. One was the change from "merchantable quality" to "acceptable quality."

17. *See* Horrigan, Laryea & Spagnolo, *supra* note 6, § 2.10.

lower courts to forge ahead and recognize the utility of extrinsic evidence such as conversations. However, the High Court has been saying this for almost thirty years, and as recently as last year, repeated its mantra of preventing further development until it had re-examined the issue, simultaneously refusing to take on a case which raised just such a question.¹⁸ The High Court has also failed to clarify whether a general duty to perform contractual obligations in good faith exists,¹⁹ whether terms of earlier contracts can be incorporated into later contracts by conduct,²⁰ and what will suffice for consideration.

The “prior legal duty” or “existing legal duty” rule states that where an obligation is already owed, that obligation cannot be offered as good consideration to support a new promise. To overcome this strict rule, the “practical benefit” exception eliminates the effect of the prior legal duty rule in certain circumstances. However, this rule, originally developed in the U.K.,²¹ is troublesome to say the least. Furthermore, it has been modified where applied in Australia,²² and is not applied consistently throughout all Australian jurisdictions. It appears that New South Wales’ courts are more willing to find the exception exists, but courts in other jurisdictions are less willing, and in any event the rule is very uncertain, and theoretically hard to justify.

Indeed, given the growth in equitable concepts of estoppel, the entire concept of consideration may need a more major overhaul, as it has caused serious problems in variations of contract, where often commercial practices are such that modifications lack consideration.

It should be noted that consideration is not a requirement of contract in the CISG or in civil law jurisdictions. Thus, the problem posed by the existing legal duty rule in Australia (and some other common law jurisdictions) does not arise in contracts governed by the CISG or the contract law of civil law jurisdictions.

As Luke Nottage discusses in his submission to the Attorney-General’s Department, High Court rulings in the area of contract law often seem

18. See *Western Export Servs., Inc. v Jireh International Pty. Ltd.* [2011] HCA 45 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2011/45.html>.

19. See AUSTRALIAN ATTORNEY-GENERAL’S DEP’T, IMPROVING AUSTRALIA’S LAW AND JUSTICE FRAMEWORK: A DISCUSSION PAPER TO EXPLORE THE SCOPE FOR REFORMING AUSTRALIAN CONTRACT LAW 8 (2012) [hereinafter ATTORNEY-GENERAL’S DEP’T DISCUSSION PAPER], available at <http://www.ag.gov.au/Consultations/Documents/ReviewofAustraliancontractlaw/DiscussionpaperImprovingAustraliaLawandJusticeFrameworkAdiscussionpaperexploringthescopeforreformingAustraliancontractlaw.pdf>; see also Horrigan, Laryea & Spagnolo, *supra* note 6, at 18 n.57 (“High Court expressly declined to address the status, content, and limits of good faith under Australian contract law in *Royal Botanic Gardens and Domain Trust v South Sydney City Council*”). No suitable test case for revisiting such issues had reached the High Court by mid-2012.

20. See ATTORNEY-GENERAL’S DEP’T DISCUSSION PAPER, *supra* note 19, at 8.

21. See *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.*, [1991] 1 Q.B. 1 (Eng.).

22. See *Musumeci v Winadell Pty Ltd.* [1994] 34 NSWLR 723 (Austl.).

antiquated in many respects by comparison with international standards.²³ One such finding is the refusal of the High Court to recognize the admissibility of subsequent conduct as evidence of what parties originally intended in relation to the interpretation of contractual terms,²⁴ the requirement of impossibility rather than commercial impracticability to trigger frustration, and “insistence that the only relief available is automatic termination of the contract” should frustration be found.²⁵

In Australia, there has been an unfortunate tendency for multiple judgements even amongst majority and minority decisions in the High Court. The result has been, even in decisions meant to “clarify” previously confusing areas of law, or where the law has been advanced to a degree, such as the incremental recognition of third party enforcement in *Trident*, a confusing array of reasoning and lack of direction in the law.²⁶ In other words, more complexity. This can lead to injustice, with parties able to behave opportunistically.²⁷

There is one respect in which Australian law is certainly *not* antiquated. Electronic Transactions Acts have been enacted in each of the states and territories except for Queensland, which reflect the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts (ECC).²⁸ Furthermore, it is anticipated at the time of writing that Queensland is about to introduce a bill to enact the latter. This means that Australia is one of the jurisdictions at the forefront of modernization in relation to electronic transactions. Ironically, this does not address the many fundamental problems already indicated, although it gives some indication that where a need for reform is perceived, Australian lawmakers can implement change, albeit slowly and not always uniformly.

III. AUSTRALIAN REFORM AGENDA

A. *Preface to 2012: The Profession*

Until recent times, despite these problems, there has been little appetite for law reform for Australian contract law. The legal profession has appeared content to live with anachronism, complexity, and divergence, in an attitude of “if it ain’t broke, don’t fix it!” Undoubtedly, the successive waves of legislative reform in relation to specific subject matters—consumer law, credit codes, tenancies, securities law—were enough to keep

23. See generally Nottage, *supra* note 12.

24. See ATTORNEY-GENERAL’S DEP’T DISCUSSION PAPER, *supra* note 19, at 8.

25. See Nottage, *supra* note 12, at 5.

26. See Horrigan, Laryea & Spagnolo, *supra* note 6, § 1.1.2 (explaining situation for other jurisdictions that have not implemented statutes dealing with privity rule remains confusing, and federal legislation only removes uncertainty in *Trident* for insurance contracts).

27. See *id.* § 1.1.1.

28. See G.A. Res. 60/21, U.N. Doc. A/RES/60/21, (Dec. 9, 2005).

both the profession and academics well-occupied, and most probably have dampened the capacity for change to something as fundamental as contract law.

In particular, despite the pivotal role played by key Australians in the development of uniform law at the international level—first, in relation to the CISG, then the UNIDROIT Principles—it has been interesting to note the time warp in the Australian legal profession's recognition of the importance and utility of the CISG. Likewise, while case numbers slowly grow in frequency in Australia, the judiciary has consistently shown a lack of understanding or interest in the correct application of the CISG. Frequently, counsel fail to plead the CISG where it is the applicable law, and it is overlooked by the court. The profession still maintains the practice of routinely excluding the CISG in drafting contracts. This is almost poignant, given the widespread participation of many Australian teams in the Vis Moot, and the tremendous success which Australian law schools enjoy in the Moot. This author has previously explained this lack of uptake on a number of bases, including failure to include the CISG in general contract law curricula, and on law firm culture as a group dynamic, influencing young lawyers against advising the use of the CISG.

Around 2010, a number of senior judicial officers and academics began to point out the lack of engagement of the profession in Australia with international law. Justice Paul Finn, a judge of the Australian Federal Court and academic who has been instrumental in the UNIDROIT movement,²⁹ Justice Michael Kirby of the Australian High Court,³⁰ and Chief Justice Robert French of the Australian High Court³¹ each remarked in different papers on Australia's "isolationist" legal attitude. The current author's own summary of the manner in which the CISG had been received in Australia was published in 2009.³² These laments were picked up in academic and extra-curial commentary, but little progress seemed apparent.

Since that time, Australian law firms, themselves with high hopes of expanding into Asia and beyond, have increasingly merged with global law firms. Almost all of the former "big four" firms have merged; Linklaters with the former Allens Arthur Robinson, King & Wood with the former

29. See Paul Finn, *Internationalisation or Isolation: The Australian Cul De Sac? The Case of Contract*, in *THE INTERNATIONALISATION OF LAW: LEGISLATING, DECISION-MAKING, PRACTICE AND EDUCATION* 145 (Mary Hiscock & William Van Caenegem eds., 2010).

30. See Justice Michael Kirby, *Overcoming Australia's Equity Isolationism*, 3 J. EQ. 1 (2009) (Austl.).

31. See Robert French, Chief Justice, High Court of Austl., Speech at Supreme Court of New South Wales Annual Conference: International Law and Australian Domestic Law 6–8 nn.9–11, 13 (Aug. 21, 2009), available at <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj21aug09.pdf>.

32. See Lisa Spagnolo, *The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers*, 10 MELBOURNE J. OF INT'L LAW 141 (2009).

Mallesons, Ashurst with Blake Dawson, and Herbert Smith with Freehills. Allen & Overy, Clifford Chance, and Norton Rose have all entered the Australian market.³³ Australia seemed to have escaped the global financial crisis relatively unscathed, but it was felt amongst the legal profession. The face of the profession has changed under pressure from slowing economic activity, a booming mining industry, and large growth in trade with Asia.

B. *Events of 2012*

Somewhat surprisingly, on March 22, 2012, the Australian Federal Attorney-General issued a discussion paper canvassing the possibility of reforming Australian contract law. The stated aim of the discussion paper was to assist the Australian government “[to] explor[e] the scope for reforming Australian contract law” to make it simpler, fairer, and more efficient.³⁴

The discussion paper refers to reasons for considering reform of Australian domestic contract law, including problems with:

- accessibility;
- certainty;
- simplification;
- setting standards of conduct;
- supporting innovation;
- e-commerce;
- supporting relational contracts;
- small and medium-sized businesses;
- internal harmonisation; and
- internationalisation.

The possibility of a codified law modernized to reflect international trends was mooted. The discussion paper noted the judicial and academic criticisms mentioned above. A number of “infolets” were issued, each detailing specific areas of potential reform, including one of which referred comprehensively to the UNIDROIT Principles. The CISG’s role in Australia was also noted. Specifically, the discussion paper called for submissions from academics, the profession, and others on the following questions:

1. What are the main problems experienced by users of Australian contract law? Which drivers of reform are the most important for contract law? Are there any other drivers of reform that should be considered?
2. What costs, difficulties, inefficiencies, or lost opportunities do businesses experience as a result of the domestic operation of Australian contract law?

33. See Nottage, *supra* note 12, at 4.

34. See ATTORNEY-GENERAL’S DEP’T DISCUSSION PAPER, *supra* note 19.

3. How can Australian contract law better meet the emerging needs of the digital economy? In what circumstances should online terms and conditions be given effect?
4. To what extent do businesses experience costs, difficulties, inefficiencies, or lost opportunities as a result of differences between Australian and foreign contract law?
5. What are the costs and benefits of internationalising Australian contract law?
6. Which reform options (restatement, simplification, or substantial reform of contract law) would be preferable? What benefits and costs would result from each?
7. How should any reform of contract law be implemented?
8. What next steps should be conducted? Who should be involved?

A number of months were allowed for submissions on the discussion paper, and submissions closed on July 20, 2012. The submissions received were predominantly from academics, non-lawyer professional/business groups, lawyer associations, and law firms (in that order).³⁵ There were fifty-eight written submissions and sixty-five online survey responses from the public.³⁶

In June 2012 two open consultations forums were held and these were attended by representatives of peak bodies, as well as consumer, business, academic, legal, and professional stakeholders.³⁷ Five further consultations were held with individuals unable to attend the open sessions. Attendees from the legal profession were in general terms in favour of specific piecemeal reform, but opposed to a code, and not in favour of utilizing international instruments of harmonized law if reforms were to be implemented.

35. Non-confidential submissions were published online on November 21, 2012. See *Submissions to the Review of Australian Contract Law*, ATTORNEY-GENERAL'S DEPARTMENT, <http://www.ag.gov.au/Consultations/Pages/SubmissionstotheReviewofAustralianContractLaw.aspx> (last visited Apr. 9, 2013). The Attorney-General's Department Report to Senate Standing Committee lists the authors of formal submissions. There were submissions from academics (16); non-lawyer professional/business associations (15); lawyer associations/peak bodies (9); lawyers/law firms (6) as well as corporations/in-house lawyers (2); government (2) and a further eight submissions. See ATTORNEY-GENERAL'S DEPARTMENT, REPORT TO SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS (2012) [hereinafter REPORT TO STANDING COMMITTEE], available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/estimates/sup_1213/ag/QoN_57-CLD.pdf.

36. See REPORT TO STANDING COMMITTEE, *supra* note 35.

37. Notably, a few large law firms and legal professional associations participated in the process including Ashurst (formerly Blake Dawson Waldron), Herbert Smith Freehills (formerly Freehills), King & Wood Mallesons and the Law Council of Australia, Australian Academy of Law, Australian Business Lawyers and Advisers, Australian Corporate Lawyers Association, Australian Government Solicitor, and the NSW Young Lawyers. See *id.*

It is interesting to also reflect upon the nature of the written submissions. There were a number of submissions from non-legal professional bodies which were concerned with single points, such as the need to address fairness of contractual terms for the protection of their members.³⁸ Some called for specific harmonization legislation in respect of the divergent areas mentioned above.³⁹ Those that addressed the issue at all, tended to oppose federal codification generally on rather vague bases.⁴⁰

As one would expect, the legal profession tended to be more specific. For example, the peak body representing in-house lawyers working for corporations in Australia mentioned the issues of divergence and the need for harmonization between the states in the areas discussed earlier.⁴¹ It also called for simplification and centralization of contract law, but opposed internationalization along the lines of the CISG.

Codification or centralization of contract law at the federal level found more favour amongst academics. The Australian Academy of Law, comprised of academics and judges, simply pointed out that the process would be difficult due to overlaps, and would require extensive consultation (after arguing for rectification of divergences between states).⁴² Many preferred codification and/or a soft law restatement of principles.⁴³

Justice Bathurst in his personal submission expressed doubt that a national code would improve predictability, and argued it may lead to confusion and rigidity.⁴⁴ His Honour noted that any code would need to be interpreted and would become overlaid with case law in any event, thus

38. See Ass'n of Prof'l Eng'rs, Scientists & Managers, Austl., Review of Australian Contract Law (July 2012), available at <http://www.ag.gov.au/Consultations/Documents/SubmissionstotheReviewofAustralianContractLaw/Submission%20009%20-%20Contract%20Law%20Review%20-%20APESMA.pdf>.

39. See, e.g., Austl. Bankers' Ass'n, Improving Australia's Law and Justice Framework—Discussion Paper Scope for Reforming Australian Contract Law 4 (Aug. 7, 2012), available at <http://www.ag.gov.au/Consultations/Documents/SubmissionstotheReviewofAustralianContractLaw/Submission%20057%20-%20Contract%20Law%20Review%20-%20Australian%20Bankers%20Association.pdf>; Austl. Chamber of Commerce & Indus., Response to Attorney-General's Department Discussion Paper (July 27, 2012), available at <http://www.ag.gov.au/Consultations/Documents/SubmissionstotheReviewofAustralianContractLaw/Submission%20049%20-%20ACCI%20-%20for%20publication.pdf>.

40. See Austl. Bankers' Ass'n, *supra* note 39, at 3–4.

41. See Austl. Corporate Lawyers Ass'n, Improving Australia's Law and Justice Framework: Reforming Australian Contract Law 3 (July 20, 2012) [hereinafter ACLA], available at <http://www.acla.com.au/documents/item/1023>.

42. See generally Australian Academy of Law, Response to Attorney-General's Department Discussion Paper (July 23, 2012), <http://www.ag.gov.au/Consultations/Documents/SubmissionstotheReviewofAustralianContractLaw/Submission%20041%20-%20Contract%20Law%20Review%20-%20Australian%20Academy%20of%20Law.pdf>.

43. See, e.g., Horrigan, Laryea & Spagnolo, *supra* note 6, at 23; Nottage, *supra* note 12, at 12–14.

44. See Thomas Frederick Bathurst, *Codification of Contract Law—A Flawed Proposal*, CONT. L. REV. 1, 6–8 [hereinafter Bathurst Submission], available at <http://www.ag.gov.au/Consultations/Documents/SubmissionstotheReviewofAustralian->

becoming unpredictable. Further, a code could never be fully comprehensive without becoming far too detailed.

While these arguments are quite valid, in truth they are not reasons why a code should not be adopted *per se*. No one code can ever provide all the answers. Neither the common law nor a code can ever be totally predictable. The real question must be directed to whether a code can bring relative improvements in predictability, reduction of complexity, and gains in accessibility by comparison with what we have presently.

The argument attributes little weight to the benefit of reducing the number of sources of law (by comparison with various pieces of state and federal legislation, state case law and federal case law), and resultant improvement in the accessibility of the law. Of course, post-code, the law must continue to be developed by court interpretation, and must respond to sociological, economic, and technological change.⁴⁵ With respect, this fact cannot serve as an argument in favour of common law and against codification, since such adaptations must occur irrespective of whether the basic rule or principle derives from a case or legislative text—in other words, the law must grow in either case to fit new circumstances regardless of its form. However, even after the law continues to develop by means of judicial interpretation, one significant benefit of codification is the overall ordering of concepts within a single framework, to which cases themselves refer and to which those cases, regardless of court system, become referable, indexed, and more easily accessible.

This is not to say that such benefits are worth the transition costs of reform. However, a balanced perspective needs to be maintained between the costs and benefits of a single centralized consolidation, especially if a large part of the problem is the complexity and overlap of sources of laws and remedies across and within jurisdictions in Australia. If a code is aimed at removing existing problems of divergence, or more importantly, reforming the rules of contract law in a way the present system has been unable to achieve, then perhaps the price may be worth it.

As Australia debates and weighs its options in relation to “internationalizing” its domestic law of contract, various questions arise.

IV. DOES AUSTRALIAN NEED LAW REFORM?

The first question must be whether any reform to Australian contract law is necessary, useful, or even worthwhile. Clearly, the profession as a whole appears to think little needs to be done.

There can always be an easy argument against change. Every change involves costs. However, this must be weighed against the background of the ageing and complexity of certain parts of Australian contract law, and the areas in which divergences occur. Furthermore, as various jurisdic-

ContractLaw/Submission%2055%20-%20Contract%20Law%20Review%20-%20Bathurst.pdf (last visited Mar. 14, 2013).

45. *See id.* at 6.

tions around the world adopt domestic laws that are based upon the same harmonized uniform models, Australian law may well increasingly stand out as different from the rest.

Difference in and of itself is not necessarily bad, and may even encourage some parties to select Australian law to govern their contracts. However, the reality is that difference involves learning costs and uncertainty. Coupled with the need to modernize and harmonize across the states, this may motivate any future reform of domestic contract law to seriously look at harmonized instruments as a basis for any new rules.

As some commentators observe, there are other reasons prompting a revisiting of Australian contract law. Nottage points out that consumer law growth is one driver, as well as the changes to the legal landscape through widespread mergers of large home-grown law firms with the major multinational legal firms and/or entry of those firms into the Australian law market, prompted by the mining boom and high levels of trade with Asia.⁴⁶

There are significant complexities in Australian contract law which simply don't need to be there—as discussed earlier, for example, the need for consideration, the admissibility of various forms of evidence about intention, and divergence on questions of capacity, frustration, and third parties. There are issues which should be addressed and modernized—for example, consideration and good faith. However, it may be the case that some actors within the Australian law market also stand to benefit most from the maintenance of such divergence and complexity.

Australian legal practice has boomed in recent decades as the level of complexity in the law has increased. Obviously this is not solely attributable to growth in legal complexity alone, but as anticipated by several commentators, it is noteworthy that some of the most vocal opposition to simplification comes from law firms.⁴⁷ Like any economic actor, path dependent behaviour within law firms and opposition to change within the legal profession must be anticipated as a normal heuristic behaviour and group dynamic, even where the change would be substantively efficient for clients. Previously, the author has analysed exactly such behaviour at length in relation to choices to opt out of the CISG, despite its comparative efficiency.⁴⁸

46. See Nottage, *supra* note 12, at 4.

47. This was predicted in some submissions. See, e.g., Horrihan, Laryea & Spagnolo, *supra* note 6, § 1.8 (“For contract law . . . there are . . . conflicting economic interests . . . in relation to . . . reform . . . entail[ing] moral hazard issues and path dependent behaviours [Thus] any change will . . . meet resistance from the bulk of the legal profession, irrespective of benefits to business.”); Nottage, *supra* note 12, at 7.

48. See Lisa Spagnolo, *Truth or Dare? The Interrelatedness of the Efficiency of the CISG, Influences on Lawyers' Choice of Law and Interpretation* 174, 189, 202–16 (Ph.D. Thesis, 2012) [hereinafter *Truth or Dare*]; see also Lisa Spagnolo, *Green Eggs & Ham: The CISG, Path Dependence, and the Behavioural Economics of Lawyers' Choices of Law in International Sales Contracts* 6 J. PRIVATE INT'L LAW 417, 435–39, 445–53, 456 (2010)

Therefore, opposition from the profession is not altogether surprising given the learning costs involved for firms and the self-reinforcing risk-reward structures created by the complex environment, despite the fact that change may significantly improve the transaction costs and efficiency of doing business for their clients.⁴⁹ Costs of inefficiency are presently not borne by the profession, but by business which may contract sub-optimally as a result of inefficient laws, therefore there is little incentive for law firms to support change.⁵⁰

Furthermore, the law market is one of specialist expertise, and lawyers control that expertise. Information asymmetry may have a powerful impact on the potential for any efficient reform.⁵¹ Consequently, while loss of GDP contributions from legal services might be far outweighed by growth in general business contributions to GDP due to reforms,⁵² the vocal and organized lobbying of the legal profession is likely to carry more weight in the reform process.

V. WHAT MODEL FOR AUSTRALIAN REFORM?

If Australian contract law should indeed be reformed, then the second question that arises is to which model should it look for inspiration? There are a number of competing models of harmonized laws on the market. Each has its advantages and disadvantages, and each is shaped by the times and institutional influences that led to its creation.⁵³

Additionally, the CISG has clearly influenced law reform in many jurisdictions, and that influence has prompted the present Australian review. However, another influential harmonizing law reform is on the horizon—the Draft Common European Sales Law (CESL). Therefore, this paper asks a final question: Will the CISG still be able to influence non-European domestic law reform projects, such as the one being considered in Australia? Or—will CESL be more influential on future non-European law reform?

[hereinafter *Green Eggs*] (discussing reasons for lawyer persistence in exclusion of CISG despite its efficiency at substantive and procedural levels compared with relative efficiency of alternative choices of law).

49. See *Truth or Dare*, *supra* note 48, at 202–16; see also *Green Eggs*, *supra* note 48, at 444–53.

50. See Nottage, *supra* note 12, at 6.

51. See *Truth or Dare*, *supra* note 48, at 196–202; see also *Green Eggs*, *supra* note 48, at 439–44.

52. See Nottage, *supra* note 12, at 6.

53. See generally Sandeep Gopalan, *A Demandeur-Centric Approach to Regime Design in Transnational Commercial Law*, 39 *GEO. J. INT'L L.* 327 (2008); see also Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales Law*, 25 *INT'L REV. L. ECON.* 446, 479–84 (2005).

A. CISG

Synchronizing Australian domestic law with the law applicable to international sales in Australia and with the law forming the basis for many domestic law reform initiatives throughout the world seems a sensible approach. It would minimize transaction costs and improve predictability for outcomes. It would also address a considerable problem in Australia—resistance to the use and application of the CISG by practitioners and courts. The negative attitude of the profession toward the CISG was noted by the Attorney-General's Department.⁵⁴

Some of the submissions indeed demonstrate disquiet about using the CISG as the basis for domestic law reform.⁵⁵ However, as might be expected given the low levels of familiarity with CISG in Australia, such concerns frequently demonstrate a level of ignorance about the CISG rather than any serious substantive problem with it. Indeed, it could not otherwise have already served as the model for reform in many jurisdictions.⁵⁶

The rules in the CISG have been tried and tested and found generally successful enough to form the basis for domestic reform elsewhere. The CISG is the basis for domestic reforms including the African OHADA,⁵⁷ the Draft Common Frame of Reference (DCFR), the Draft European Union CESL Regulation, the modernized German Law of Obligations, the Contract Law of the People's Republic of China, the law of Estonia and most modern Eastern European sales laws, as well as the Nordic sales legislation, and the New Draft Japanese Civil Code.⁵⁸ For commercial transactions, the CISG is an appropriate basis for reform in Australia. The

54. See ATTORNEY-GENERAL'S DEP'T DISCUSSION PAPER, *supra* note 19, at 8.

55. See ACLA, *supra* note 41, at 4 (arguing that it would mean that goods could not be returned on basis of failure of fitness for purpose). This is incorrect. If the breach is a fundamental breach pursuant to Article 25 then the contract can be avoided. See *id.*

56. The CISG has had direct impact on domestic law in China, Germany, Scandinavia, Japan, Québec, Czech Republic, Russia, and Estonia. It has affected reforms in the Netherlands, Germany, Japan, Greece, and the African OHADA member states. It has had an indirect impact on the domestic law of Denmark, France, and Italy via the European Union Directive on certain aspects of the sale of consumer goods and associated guarantees. See Council Directive 99/44, 1999 O.J. (L 171) 12 (EC) (European Union Directive on Sale of Consumer Goods and Associated Guarantees).

57. See ORG. FOR THE HARMONIZATION OF BUS. LAW IN AFRICA (OHADA), DOING BUSINESS 2011: MAKING A DIFFERENCE FOR ENTREPRENEURS (2011), <http://www.eisourcebook.org/cms/Organisation%20for%20the%20Harmonization%20of%20Business%20Law%20in%20Africa.pdf>. In particular, see the section on sales, which the Swiss Proposal refers to as “practically a transcript” of the CISG. See U.N. G.A. Rep. of the Comm'n on Int'l Trade Law, *Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law*, 3, U.N. Doc. A/CN.9/758, 45th Sess. (May 8, 2012) [hereinafter *Swiss Proposal*]. However, the Swiss Proposal also notes modifications in the OHADA sales section, and that a further project on broader contract law drawing from UNIDROIT Principles seems to have stalled. See *id.* at 5–6.

58. See *Swiss Proposal*, *supra* note 57, at 3.

Attorney-General's discussion paper gives the impression that the department is aware of the CISG's influence elsewhere on reform projects, but is wary and seeking to test the waters.

B. *UNIDROIT Principles*

Modelling Australian domestic law on the UNIDROIT Principles of Commercial Contracts would similarly align the domestic law with other reformed domestic laws that have drawn from UNIDROIT, including most relevantly for Australia, China. Naturally, since UNIDROIT is structured upon the CISG, this also largely achieves the alignment of laws applicable to domestic contracts with those applicable to international contracts within Australia.

Notably, the UNIDROIT Principles go further than the CISG, so modelling upon UNIDROIT Principles would introduce new concepts hitherto not known to Australian domestic law. They deal with validity, agency, contracts benefiting third parties, set-off, limitation periods, assignment, illegality, multi-party contracts, and contractual unwinding. UNIDROIT Principles are drafted by non-government representatives who are aiming for an "ideal" solution. Not being restricted by the need to represent national interests, obviously the UNIDROIT Principles have been capable of a more expansive reach. However, for nations uncomfortable with the CISG for its civilian overtones, some of these "ideal" solutions, while logically attractive, may nonetheless be a step too far.

The UNIDROIT Principles have rightfully had a significant influence on the Attorney-General's discussion paper, and have themselves formed the basis for an entire "infolet" attachment to the discussion paper.⁵⁹

C. *CESL*

The proposed Common European Sales Law (CESL) is "a major advancement of the idea of a European cont[r]act [sic] law."⁶⁰ It has been claimed that the CESL is "an attempt at harmonizing an increasing[ly] chaotic set of Directives."⁶¹

The proposed regulation of the European Union avoids the political minefields of a comprehensive civil code, or even general contract law, and instead targets consumer protection harmonization as well as online trading and related services.⁶² Consequently, it attempts to provide for cross-border transactions by consumers and small-to-medium sized enterprises (SMEs), and can be applicable to all commercial transactions if the

59. See generally ATTORNEY-GENERAL'S DEP'T, THE UNIDROIT PRINCIPLES: LESSONS FOR AUSTRALIA? (2012), <http://www.ag.gov.au/Consultations/Documents/ReviewofAustraliancontractlaw/TheUNIDROITPrincipleslessonsforAustralia.pdf> (infolet attached to Attorney-General's discussion paper).

60. See DiMatteo, *supra* note 1, at 25.

61. See *id.* at 33.

62. See *id.*

adopting member state so wishes.⁶³ Nonetheless, its application is proposed as an “opt-in” regime; that is, parties will need to select CESL to govern their contract. The inclusion of a “review clause” in the CESL hints that it is a stepping-stone to a broader future contract code.⁶⁴

Thus, like the CISG, it is an instrument aimed at harmonization. The CESL has been strongly influenced by the CISG,⁶⁵ as was its formative predecessor, the DCFR. Unlike the CISG, mandatory rules predominate the CESL. As one might expect, the CESL consumer provisions are mandatory, but additionally, the CESL cannot be opted into in part, even for non-consumer transactions.⁶⁶

The CESL has its advantages and disadvantages, which are examined in far more detail elsewhere. Its interpretive sections build upon those in the CISG, in particular, autonomous interpretation, resort to general principles, and trade usages and practices. These sections of the CESL helpfully and expressly enunciate principles, and refer expressly to purposive interpretation “having regard to the nature and purpose of the contract,” something only implicit in the CISG.⁶⁷ The CESL’s reference to trade usages is not limited to international usages like the CISG, and CESL expressly refers to a “reasonableness” standard in its interpretive methodology.⁶⁸

Much has been said about the CESL’s structure, which is complex because it attempts to regulate both B2B and B2C transactions separately when it might have been simpler to regulate them within a unified set of remedial provisions.⁶⁹ Many critics believe it was manifestly unwise to try to regulate both types of transactions in the one instrument at all, including the present writer. As Castellani notes:

63. See *Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, art. 13(a), COM (2011) 635 final (Nov. 10, 2011) [hereinafter *CESL*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF>.

64. See *id.* art. 15.

65. See *Swiss Proposal*, *supra* note 57, at 5 (comparing CISG with CESL); see also DiMatteo, *supra* note 1, at 31 (arguing this is especially so in relation to formation of contract). The CISG directly influenced the Draft Common Frame of Reference for the European Union, especially IV.A on sales, but also II on contract formation, and III on obligations and remedies. See PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) (Christian von Bar et al. eds., 2009); see also *id.* at 1329–30, § IV.A.-2:306 n.1 (discussing third party rights or claims based on industrial property or other intellectual property, which subsequently formed basis for CESL)

66. See *CESL*, *supra* note 63, art. 11.

67. See *id.* art. 5; see also *id.* arts. 1–4; DiMatteo, *supra* note 1, at 41.

68. Compare *CESL*, *supra* note 63, art. 5, with U.N. Comm’n on Int’l Trade Law, United Nations Convention on Contracts for the International Sale of Goods art. 9, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter *CISG*], available at <http://www.unctral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.

69. See DiMatteo, *supra* note 1, at 33.

Consumer protection rules should be of mandatory application in order to be effective, while rules applicable to business-to-business transactions need to be optional in order to ensure freedom of contract. This explains why the two sets of rules are usually kept separate. How the two goals could be pursued in the same instrument remains unclear given the optional nature of the [CESL].⁷⁰

The idea of treating SMEs differently than larger business is not completely new to Australian “consumer” protection laws. Despite the obvious, inherent problem of defining an SME, the effect of drawing various lines often fails to deal with the underlying aim of correcting for various informational asymmetries or differences in bargaining power.⁷¹ Furthermore, one must query the difficulty of isolating SMEs in an environment where corporate acquisition and restructuring are not at all uncommon. Nonetheless, it appears that the regulation of SMEs may in part be motivated by a desire to capture some B2B relationships within the CESL framework. Unfortunately, this would tend to encroach upon the B2B transactions harmonized under CISG, thereby increasing, rather than reducing, fragmentation.⁷² The inclusion of “standard terms” as opposed to “negotiated terms” also presents considerable confusion, and the varying manner in which they are dealt with throughout the CESL is somewhat perplexing.⁷³

Given that Australia presently implies terms into commercial and consumer sales under separate statutes, and relies upon common law for general rules of contract, it would be a vast and unwise step for Australia to adopt a combined and therefore problematic regime like the CESL. However, given that the CESL is the most recent harmonized regime in the area, there should be no doubt that it will be examined in the process of reform in Australia.

Significantly, as was noted in the Attorney-General’s discussion paper, optional regimes for contractual rules will often fail to succeed in Australia due to practitioner resistance.⁷⁴ The comment was originally made in relation to the CISG, which Australian practitioners frequently exclude.⁷⁵ However, one would imagine that the CESL model of opting in would be

70. Luca Castellani, *CISG in Time of Crisis: An Opportunity for Increased Efficiency*, in 4TH ANNUAL MAA SCHLECHTRIEM CONFERENCE: GLOBALIZATION VERSUS REGIONALIZATION 44 (Ingeborg Schwenzer & Lisa Spagnolo eds., 2013).

71. See DiMatteo, *supra* note 1, at 25.

72. See CISG Advisory Council Declaration No. 1, The CISG and Regional Harmonization (Aug. 3, 2012), available at <http://www.cisgac.com/default.php?ipkCat=128&ifkCat=217&sid=217>.

73. See Ingeborg Schwenzer, *CESL and CISG*, in 4TH ANNUAL MAA SCHLECHTRIEM CONFERENCE: GLOBALIZATION VERSUS REGIONALIZATION 109–11 (Ingeborg Schwenzer & Lisa Spagnolo, eds. 2013).

74. See ATTORNEY-GENERAL’S DEP’T DISCUSSION PAPER, *supra* note 19, at 20.

75. See *id.* at 17.

even less effective unless widespread support from lobby groups was garnered first, something that might be unlikely for any code resembling the CESL in Australia. Furthermore, the comment in the discussion paper makes it clear that the Attorney-General is well aware of the potential weakness in such a model.

The CESL as a consumer law regime has considerable potential to protect consumers (and SMEs). Like UNIDROIT Principles, it also goes far further than the CISG, but it does so by implementing provisions on issues with consent, unfair terms, pre-contractual disclosure requirements, and electronic contracts. The CESL is structurally challenging, very far reaching, and simultaneously, does not govern some areas which it might have dealt with (such as capacity, ownership, the concurrent possibility of tort/contract liability, or illegality).⁷⁶

Above all else, the CESL is not a suitable regime for commercial transactions. Its far reaching provisions, significant intrusions into party autonomy, and pre-contractual disclosure requirements should be carefully weighed up in determining if it would be a suitable model for commercial transactions. Furthermore, even as a consumer-protective measure, its suitability should be measured against existing protections within the ACL. Finally, it must be doubted that even a suitably crafted opt-in structure would work within Australia.

A related issue for any reform structure—if it were to govern commercial transactions—is how it would operate alongside the CISG, the law in Australia for international sales. The Australian government has an international obligation to implement the CISG. Any design that covers both cross border and domestic sales, even if it allowed parties to “opt out,” would therefore involve a potential breach of this obligation.⁷⁷

D. *Swiss Proposal*

The “Swiss Proposal” refers to a proposal put to the General Assembly of the United Nations on May 8, 2012 by the Swiss government concerning the CISG.⁷⁸ The proposal supports “future work in the area of international contract law.”⁷⁹

Essentially, it suggests that, given the huge increase in the volume of world trade over the past thirty years, perhaps:

[The] time has come for UNCITRAL (i) to undertake an assessment of the operation of the [CISG] and related UNCITRAL instruments in light of practical needs of international business parties today and tomorrow, and (ii) to discuss whether further work both in these areas and in the broader context of general

76. See Schwenzer, *supra* note 73, at 101.

77. See Horrigan, Laryea & Spagnolo, *supra* note 6, § 7.7.

78. See generally *Swiss Proposal*, *supra* note 57.

79. *Id.* at 1.

contract law is desirable and feasible on a global level to meet those needs.⁸⁰

The proposal draws attention to the fact that the CISG does not govern certain important areas, but leaves them to domestic law.⁸¹ One such area is validity, another is ownership of goods. Naturally, the remaining differences in ascertaining the content of different domestic laws, and drafting standard terms to deal with them, involves transaction costs.

The proposal highlights a few key aspects for possible future work. First, the areas left of the CISG's coverage: agency, validity, battle of the forms, specific performance, applicable interest rates, mistake, fraud, duress, gross disparity, illegality, unfair terms, third party rights, set-off, assignment, and multi-party contracts.⁸² The proposal also points out that regional harmonization efforts have the potential to cause fragmentation.⁸³

Essentially then, the Swiss Proposal seeks support for the notion of extending the subject matter of the CISG to closely associated areas that were previously avoided in the belief that the work should be done in a different instrument, or that consensus was unlikely at the time. It does not seek to overhaul the structure of the CISG in any way that might jeopardize its, so far, largely successful operation around the world.

The proposal was considered in June–July 2012, and met with mixed responses. Therefore, the Swiss Proposal remains, although future directions for it have not yet been agreed upon. An UNCITRAL Expert Group Meeting held in February 2013 in Seoul, Korea, further discussed the issue.

VI. PROCESS INTO THE FUTURE

Given Australia's resistance to reform in the past, it would be more surprising still if Australia moved to a national contract law code, let alone one based on any international instrument. While this author would most favour a slowly developed, centralized, and easily accessible contract code based on CISG, and drawing on UNIDROIT Principles where appropriate, as the solution most likely to lead to an efficient and modern law of contract for Australia, this outcome is unfortunately unlikely.

More likely is the potential for a gradual movement, perhaps with the issue of an initial persuasive "restatement of contract principles," in the hope that this will sway courts and practitioners to adjust to the potential for hard law changes in the future. The importance of building a wide consensus for harmonized change amongst powerful lobby groups such as practitioner bodies, law firms, and business and industry associations, has

80. *Id.* at 2.

81. *See id.*

82. *See id.* at 6–7 n.3.

83. *See id.* at 7.

been proven time and again. One need only look at the failure of Revised Article 2 of the UCC, “which was published in 2003 and . . . soundly rejected by the [U.S.] states,”⁸⁴ or the recent success of Brazilian industry and professional groups in convincing the Brazilian government to accede to the CISG. Another possibility will be more modest hard law reforms implemented by cooperation in each of the states.

No decision has yet been made on whether reform of any type should take place. No comment has been made in relation to the submissions or public responses at all. The deafening silence has now continued for some nine months.

On October 16, 2012, in answer to a number of questions posed to the Minister in a parliamentary committee about the status of the review, the Minister presented a report on the review and simply stated, “[t]he Government will consider the feedback received during the review to determine the need for any reform and possible next steps.”⁸⁵

As of January 18, 2013 there were still no further developments emanating from within the department.⁸⁶ Furthermore, at the time of writing, the Federal Attorney-General had resigned, and a new Attorney-General recently has begun his term in office. The department is continuing in its deliberations, and nothing is likely to be announced until later this year. Moreover, a federal election looms large in September 2013. Anyone still holding their breath might be well advised to stop.

VII. CONCLUSION

One might expect that, one way or another, diversity between Australian states will be addressed, and furthermore, Australia may well move to some soft law implementation of a more international set of contract rules in place of the overly complex rules that exist today for domestic contracts. While one might logically expect the CISG and/or UNIDROIT Principles to be the primary influence on this development, this will depend on how far the federal government perceives a need for mandatory consumer protective measures beyond those in existence under the Australian ACL presently. Should it make this a priority, one can expect that

84. See DiMatteo, *supra* note 1, at 35.

85. REPORT TO STANDING COMMITTEE, *supra* note 35, at 5. This was the Minister’s response to each and every one of the following questions posed in the Senate Standing Committee by Senator Brandis, including:

6. When will the review be finalised and released publicly?

7. Is an Australian contract code a possible outcome/recommendation of the review?

8. What is the view of the Department on the possibility of an Australian Contract code?

9. Does the Department subscribe to the view that a contract code will add complexity and inefficiency to contracts in Australia?

See id. at 1–2.

86. Email from Attorney-General’s Department, to the author and Luke Nottage (Jan. 18, 2013) (on file with author).

the CESL will be examined, although it may carry less influence given its many detractors.

If the government were to create a broad restatement of principles, the influence of the CISG and/or UNIDROIT Principles will have to be tempered by the need for the government to navigate the skepticism with which these have been received within Australia. However, if this process is conducted with a realist's eye to the competing economic pressures within the Australian legal environment, and the significant influence the CISG has already had on domestic law reform in so many countries, then one suspects that they will be given significant weight.

The Swiss Proposal may have some effect on this process. While on the one hand, it may eventually lead to the CISG being even more attractive as an international standard for law reform, on the other hand, it may add some (largely unjustified) gravitas to the numerous and vocal detractors within the Australian legal profession. It might wrongfully be perceived as demonstrating that there is something "wrong" with the CISG. In fact, the conservatism and simplicity that underscores its solutions are its strength to date. The CISG presents a well-accepted basis for reform. By comparison to the ambitious but highly criticized CESL, this means that, at least for commercial transactions, the CISG continues to provide a widely accepted modern standard and steady blueprint. The perception, therefore, would be wrong.

However, especially in a country like Australia, perception is reality. If the profession is already wary of the CISG on the ill-conceived basis that it is "vague" or "unknown," then inevitably, the news that it may be amended will make such detractors even more uncomfortable with using the CISG as a basis for domestic reform.

As yet, most at this stage have not learned of the Swiss Proposal. It is therefore of great importance that the Swiss Proposal is explained in a pragmatic and open way to audiences within Australia. Should the Australian government actively participate in the ongoing debate on the proposal, this may assist in disseminating appropriate information to prevent such a perception from arising.

AN ASSESSMENT OF THE CONVENTION ON THE LIMITATION
PERIOD IN THE INTERNATIONAL SALE OF GOODS
THROUGH CASE LAW

LUCA G. CASTELLANI*

THE first product of the work of the United Nations Commission on International Trade Law (UNCITRAL) in the area of international sale of goods was the Convention on the Limitation Period in the International Sale of Goods (Limitation Convention),¹ which intended to consolidate a limited, but complex area of the law of sale of goods.² The Limitation Convention was a forerunner and indeed functionally forms a part of the United Nations Convention on Contracts for the International Sale of Goods (CISG).³ It was finalized and adopted as a separate treaty due to the uncertainty surrounding the possibility to conclude rapidly the preparation of the CISG.⁴

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1. See Convention on the Limitation Period in the International Sale of Goods, June 14, 1974, 13 I.L.M. 952 [hereinafter Unamended Limitation Convention], available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_limitation_period.html; Protocol Amending the Convention on the Limitation Period in the International Sale of Goods, Apr. 11, 1980, 19 I.L.M. 696 [hereinafter Amended Limitation Convention]; see also Entry Into Force for the United States of the Convention on the Limitation Period in the International Sale of Goods, With Protocol, 60 Fed. Reg. 3484-01 (Jan. 17, 1995).

2. For selected articles discussing the Limitation Convention, see Katharina Boele-Woelki, *The Limitation of Rights and Actions in the International Sale of Goods*, 4 UNIF. L. REV. 621, 621–50 (1999); Anita F. Hill, *A Comparative Study of the United Nations Convention on the Limitation Period in the International Sale of Goods and Section 2-725 of the Uniform Commercial Code*, 25 TEX. INT'L L.J. 1, 1–22 (1990); Hans Smit, *The Convention on the Limitation Period in the International Sale of Goods: UNCITRAL's First-Born*, 23 AM. J. COMP. L. 337, 337–62 (1975); Kazuaki Sono, *Unification of Limitation Period in the International Sale of Goods*, 35 LA. L. REV. 1127 (1975); Peter Winship, *The Convention on the Limitation Period in the International Sale of Goods: The United States Adopts UNCITRAL's Firstborn*, 28 INT'L L. 1071 (1994); see also REINHARD ZIMMERMANN, *COMPARATIVE FOUNDATIONS OF A EUROPEAN LAW OF SET-OFF AND PRESCRIPTION 1* (2002). Moreover, the provisions of the Limitation Convention are commented on in, SCHLECHTRIEM & SCHWENZER: COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 1215–70 (Ingeborg Schwenzer ed., 3d ed. 2010).

3. See Convention on Contracts for the International Sale of Goods art. 35, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG], available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html. The CISG concluded in 1980.

4. However, a sudden acceleration in the drafting process brought the adoption of the CISG in 1980.

As of January 1, 2013, the Limitation Convention had been adopted by twenty-nine states, including the United States of America. However, until recently case law interpreting and applying the Limitation Convention was not readily available to a wide audience. This article will assess the relevance of the Limitation Convention through a preliminary analysis of the case law applying that treaty. This study will assist in evaluating the contribution of the Limitation Convention to current and future law reform initiatives in the field of contract law.

I. AN OVERVIEW OF THE SUBSTANTIVE CONTENT OF THE LIMITATION CONVENTION

The Limitation Convention establishes uniform rules governing the period of time within which a party to a contract for the international sale of goods must commence legal proceedings against another party to assert a claim arising from that contract, or relating to its breach, termination, or validity. By doing so, the Limitation Convention brings clarity and predictability to an aspect of great importance for the adjudication of a claim.

Most legal systems limit or proscribe a claim being asserted after the lapse of a certain period of time. This is done to prevent the institution of legal proceedings at such a late date that the evidence relating to the claim is likely to be unreliable or lost, and to protect against the uncertainty that would result if a party were to remain exposed to unasserted claims for an extensive period of time or even forever.⁵ However, numerous disparities exist among legal systems with respect to the conceptual basis for doing so, resulting in significant variations in the length of the limitation period and in the rules governing the claims after that period. Those differences have the potential to greatly complicate the adjudication of claims arising from international sales transactions. In an attempt to address those difficulties, the Limitation Convention was prepared and then adopted in 1974. The Convention was amended by a protocol adopted in 1980 in order to harmonize its text with that of the CISG, in particular, with regard to scope of application and admissible treaty declarations.

The Limitation Convention applies to contracts for the sale of goods between parties whose places of business are in different states if both of those states are contracting states, or—but only in its amended version—when the rules of private international law lead to the application of the law of a contracting state. It may also apply by virtue of parties' choice.

The Convention sets the limitation period at four years in Article 8.⁶ In certain cases, such as acknowledgment of the debt in writing or per-

5. This may not, however, be the case of those legal systems influenced by Islamic law. See Fatima Akaddaf, *Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?*, 13 PACE INT'L L. REV. 1, 42–46 (2001) (concluding, however, compatibility of Limitation Convention with Islamic law).

6. See Unamended Limitation Convention, *supra* note 1, art. 8.

formance of an act that has the effect of recommencing the limitation period, that period may be extended to a maximum of ten years.⁷ The Limitation Convention also regulates certain questions pertaining to the effect of commencing proceedings in a contracting state.

The Limitation Convention further provides rules on the cessation and extension of the limitation period, which ceases when the claimant commences judicial or arbitral proceedings or when it asserts claims in an existing process. If the proceedings end without a binding decision on the merits, it is deemed that the limitation period continued to run during the proceedings. However, if the period has expired during the proceedings or has less than one year to run, the claimant is granted an additional year to commence new proceedings.⁸

No claim shall be recognized or enforced in legal proceedings commenced after the expiration of the limitation period.⁹ Such expiration is not to be taken into consideration unless invoked by parties to the proceedings;¹⁰ however, states may lodge a declaration allowing for courts to take into account the expiration of the limitation period on their own initiative.¹¹ An exception to the rule barring recognition and enforcement after the expiration of the limitation period occurs when the party raises its claim as a defense to or set-off against a claim asserted by the other party.¹²

II. CASE LAW ON THE LIMITATION CONVENTION

A. *À la recherche de la jurisprudence perdue*

Article 7 of the Limitation Convention sets forth the duty to interpret and apply the text in light of its international character and the need to promote uniformity. Reporting and disseminating relevant cases are activities critical to achieving the goal of uniform interpretation and application of the treaty. However, case law applying the Limitation Convention has not been readily available for several years. This has affected the general opinion on the relevance and effective application of the Convention: the lack of decisions was explained as evidence of a lack of relevance of the treaty, an observation that, in turn, may have discouraged active advocacy in favor of the adoption of this text.

UNCITRAL is tasked with the promotion not only of the adoption of the texts that are the product of its work, but also with their uniform interpretation. In order to discharge this function, UNCITRAL has requested its secretariat maintain Case Law on the UNCITRAL Texts (CLOUT) case reporting system. CLOUT collects and publishes abstracts of decisions ap-

7. *See id.* art. 23.

8. *See id.* art. 17.

9. *See id.* art. 25(1).

10. *See id.* art. 24.

11. *See id.* art. 36.

12. *See id.* art. 25(2).

plying UNCITRAL texts, making them available at no cost in the six official languages of the United Nations.¹³ More recently, CLOUT abstracts have been compiled in digests of case law, presenting main interpretative trends in a neutral and accessible manner.

However, no case on the Limitation Convention had been reported for about two decades after the entry into force of the treaty in 1988. An interesting question then arose: Was the lack of cases due to the inexistence of those cases, or rather to the fact that cases were not reported to the UNCITRAL secretariat? Hence, the secretariat embarked on a global search for cases, alerting correspondents and other experts of the issue, and asking for their cooperation. Cases started to emerge; the most meaningful were selected for publication in CLOUT. Currently, CLOUT contains cases applying the Limitation Convention from Croatia, Cuba, Hungary, Montenegro, Poland, Serbia, Slovenia, Ukraine, and the United States. Cases referring to the Limitation Convention have been reported also from the Slovak Republic and Switzerland. Certainly, many more cases exist but are not yet easily accessible by an international audience. It seems therefore appropriate to conclude that the Limitation Convention is indeed relevant and applied, but that case reporting systems in the jurisdictions where it is applied are not easy to access for foreigners due to linguistic and other reasons. Additional work is desirable in order to highlight the importance of sharing precedents interpreting uniform law, both for future guidance and to inform the global trade law community of the commitment to the uniform interpretation of texts of supranational origin.

Improved availability of case law may, on the one hand, raise practitioners' awareness of the Limitation Convention, thus leading to its wider application, and, on the other hand, highlight the importance of reporting existing cases, thus paving the way to collecting further material to be used for orientation and guidance. The first case from the United States mentioning the Limitation Convention, albeit to discard its applicability,¹⁴ may be seen as a promising sign of this new attitude.

B. *La jurisprudence retrouvée*

1. *Scope of Application*

Not surprisingly, the vast majority of the cases reported discuss the scope of application of the Limitation Convention. In this respect, a significant issue arises from the fact that Yugoslavia had become a party to the Convention in 1978, and therefore necessarily adopted its unamended version. Moreover, Yugoslavia did not adopt the amended version of the Limitation Convention when ratifying the CISG. Thus, the successor

13. See *Case Law on UNCITRAL Texts (CLOUT)*, UNCITRAL, http://www.uncitral.org/uncitral/en/case_law.html (last visited Apr. 13, 2013).

14. See *Maxxsonics USA, Inc. v. Fengshun Peiying Electro Acoustic Co.*, No. 10 C 1174, 2012 WL 962698, at *1 (N.D. Ill. Mar. 21, 2012) [CLOUT Case 1186].

states to Yugoslavia need to explicitly state that they intend to adopt the amended version of the treaty when becoming a party to the Limitation Convention. This was done by Slovenia and, more recently, by Montenegro. The matter is relevant because one major difference between the unamended and amended versions of the Limitation Convention is the possibility to apply the treaty by virtue of rules of private international law: in states that are parties to the unamended text, the Limitation Convention may apply only if all contractual parties have their place of business in contracting states.

The rule seems clear, but the case law offers a remarkable variety of options and solutions. A Slovenian court pointed out the fact that the Limitation Convention should apply since all the contractual parties had their places of business in contracting states.¹⁵ Conversely, another Slovenian court ruled out the application of the Convention when one party to the contract had its place of business in a non-contracting state.¹⁶ However, the court did not verify if the Limitation Convention could have applied by virtue of its Article 3(1)(b).¹⁷

Likewise, a Slovak court considering a case where a party was not in a contracting state, decided for the non-applicability of the Limitation Convention. However, it did not discuss Article 3 of the Limitation Convention, and, in particular, the declaration lodged by the Slovak Republic on Article 3(1)(b), but rather pointed at the fact that Austrian law was applicable by virtue of private international law rules, and that Austria is not a party to the Limitation Convention.¹⁸

A similar statement on the need for all contractual parties to have their place of business in contracting states for the Limitation Convention to apply was made by a Serbian arbitrator; here, however, this is the only case in which the Convention may apply, as Serbia is a party to the unamended version of the Convention.¹⁹ Likewise, another Serbian decision did not apply the Limitation Convention when one party had its place of

15. *See* Višje sodišče v Ljubljani [Ljubljana High Ct.], Oct. 13, 2010, VSL sodba I Cpg 972/2010 (Slovn.) [CLOUT Case 1154], *available at* http://www.sodisce.si/znanje/sodna_praksa/visja_sodisca/2010040815253998. The parties were located in Belarus and Slovenia.

16. *See* Višje sodišče v Ljubljani [Ljubljana High Ct.], Apr. 8, 2010, VSL odločba II Cpg 260/2010 (Slovn.), *available at* <http://www.sodisce.si/vislj/odlocitve/2010040815245114/>. The parties were located in Italy and Slovenia.

17. Slovenia is a party to the amended version of the Convention. In this case, since the court found that Italian law applied, and Italy is not a party to the Limitation Convention, the outcome of the decision would have been similar.

18. *See* Krajský súd v Bratislave [Regional Ct. Bratislava], Oct. 11, 2005, KS BA-26CB/114/1995 (Slovk.), translation *available at* <http://www.cisg.sk/en/26CB-114-1995.html>. The parties were from Austria and the Slovak Republic.

19. *See* [Foreign Trade Ct. of Arbitration attached to the Serbian Chamber of Commerce in Belgrade], Jan. 5, 2007, No. T-13/05 (Serb.) [CLOUT Case 1138], *available at* <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/070105sb.html>. One party had its place of business in Serbia and the other in the United States.

business in a contracting state and the other did not, but the decision did not discuss explicitly the applicability of the Limitation Convention.²⁰

Another application of the same rule by a Serbian court²¹ contains an element of special interest: the contract had been concluded by a company with its place of business in Serbia (a state party to the Limitation Convention) and a company with its place of business in the German Democratic Republic (another state party to the Limitation Convention) on December 12, 1989.²² Since the Federal Republic of Germany did not become a party to the Limitation Convention, the court concluded that the requirements for the application of the Convention are not met. However, the matter deserves further analysis on the application of inter-temporal treaty law as the Limitation Convention was, indeed, in force in both states at the moment of the conclusion of the contract.²³

In line with the above cases, a Montenegrin court observed that Montenegro was a party to the unamended text of the Limitation Convention,²⁴ and therefore all parties had to have their places of business in contracting states for the Convention to apply.²⁵ However, another Montenegrin court applied the Limitation Convention in a case where one of the parties had its place of business in a non-contracting state, despite the fact that Montenegro was, at the time of the judgment, still a party to the unamended Limitation Convention.²⁶ The court justified its decision with the international nature of the transaction.

The Polish Supreme Court observed that the Limitation Convention is not applicable under Article 3(1)(a) and (b) in a case involving an Ital-

20. See [Foreign Trade Ct. of Arbitration attached to the Serbian Chamber of Commerce in Belgrade], Jan. 24, 2006, No. T-12/04 (Serb.), available at <http://cisgw3.law.pace.edu/cases/060124sb.html>. The parties were located in Australia and Serbia. Serbia is a party to the unamended version of the Limitation Convention.

21. See Vrhovni sud Srbije u Beogradu, May 28, 2003, Prev. 112/2003 (Serb.) [CLOUT Case 1131].

22. The German Democratic Republic acceded to the Federal Republic of Germany effective October 3, 1990.

23. See Martin Karollus, *Judicial Interpretation and Application of the CISG in Germany 1988-1994*, 1 CORNELL REV. CISG 51, 51 n.11, 52 (1995). The matter has been debated by German scholars. See Fritz Enderlein, *Das UN-verjährungsübereinkommen und seine Geltung in Deutschland* [The UN-Limitation Convention and Its Applicability in Germany], in DER WEG ZUR DEUTSCHEN RECHTSEINHEIT: INTERNATIONALE UND INTERNE AUSWIRKUNGEN IM PRIVATRECHT 65, 65-81 (Erik Jayme & Oliver Furtak eds., 1991) (Ger.); Ulrich Magnus, *Aktuelle Fragen des UN-Kaufrechts* [Current Issues of UN-Sales Law], 1 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 79, 92-94 (1993) (Ger.); Karsten Thorn, *Die UN-Verjährungskonvention und ihre Geltung in Deutschland* [The UN Limitation Convention and Its Validity in Germany], 13 IPRAX 215, 215-16 (1993) (Ger.).

24. The statement was correct at the time the judgment was rendered.

25. See Enker and Zeničko-dobojski kanton v. Zeljezara Niksic Lld [Ct. App. Montenegro], Oct. 8, 2010, Ca. No. Mal. 341/10 (Montenegro) [CLOUT Case 1050].

26. See Mi-Rad Int'l, Inc. v. Top Art Lld [Ct. App. Montenegro], Jan. 22, 2009, Ca. No. Mal. 418/07 (Montenegro) [CLOUT Case 1053].

ian party “since Italy is not a party to the Convention.”²⁷ However, it remains unclear which law would be applicable.²⁸ If Polish law were applicable, the Limitation Convention might apply by virtue of Article 3(1)(b).

A United States court indicated that the Limitation Convention is not applicable when a party has its place of business in a non-contracting state. In fact, when the United States acceded to the amended version of the Convention, it lodged a declaration preventing the application of Article 3(1)(b).²⁹

Article 3(1)(b) of the Limitation Convention refers to the applicability of the law of a contracting state to contracts for the sale of goods. A Swiss decision illustrated the point by explaining that:

If the conflict of laws rules of the forum State lead to the application of the substantive law of a Contracting State to the United Nations Convention on the Limitation Period in the International Sale of Goods of 14 June 1974, the issue of limitation is to be determined in accordance with this Convention.³⁰

The court ultimately concluded that the Convention did not apply.

A Hungarian court applied the Limitation Convention on the basis of the agreement of the parties.³¹ This argument evokes a rather complex matter. The CISG may be applied by virtue of the parties’ choice of law, to the extent that a choice of non-national law is permissible under applicable law, or that the chosen national law incorporates the CISG; it may also apply within the limits recognized to contractual freedom, and in that case its provisions are incorporated in the contract.³² However, similar application mechanisms in the field of prescription law, which is more sensitive to

27. See “O.O.” AG in *M. v. Leszek W. & Zbigniew W.* [Pol. Sup. Ct.], Dec. 19, 2003, Case No. III CK 80/02 (Pol.) [CLOUT Case 1081]. Other cases were decided similarly; see, e.g., [Pol. Sup. Ct.], Nov. 17, 2008, Case No. I CSK 105/08 (Pol.); [Poznan App. Ct.], Jan. 24, 2006, Case No. I ACa 795/05 (Pol.) (between Polish and Italian parties); see also [Poznan App. Ct.], Aug. 5, 2009, Case No. I ACa 483/09 (between a Polish party and a Belgian party, before the entry into force of the Limitation Convention for Belgium).

28. The analysis carried out on secondary sources, such as CLOUT abstracts, is necessarily limited by the amount of information available in those sources. Access to the original texts would, of course, greatly improve the quality of the analysis, which is therefore to be intended as a call to elicit further work on those original sources.

29. See *Maxxsonics USA, Inc. v. Fengshun Peiyong Electro Acoustic Co.*, No. 10 C 1174, 2012 WL 962698, at *1 (N.D. Ill. Mar. 21, 2012) [CLOUT Case 1186].

30. See Bundesgericht [BGer] [Federal Supreme Court], May 18, 2009, docket no. 4A_68/2009 (Switz.), available at <http://cisgw3.law.pace.edu/cases/090518s1.html>. The private international law rules pointed at Swiss law, and Switzerland is not a party to the Limitation Convention.

31. See [Heves Cnty. Ct.], Apr. 8, 2008, Case No. 4.G.20.305/2007/20 (Hung.) [CLOUT Case 1055].

32. See PETER HUBER & ALASTAIR MULLIS, *THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS* 65–66 (2007).

matters of public policy, might incur additional hurdles. In other words, limitation matters might be more likely to be deemed of mandatory application than substantive rules on sale of goods. Therefore, limitation matters might be excluded from those left to party autonomy.

Another Hungarian decision seems to exclude the applicability of the Limitation Convention on the basis of the fact that one party does not have its place of business in a contracting state.³³ However, in the abstract there is no reference to a discussion of the possible application via rules of private international law, which is, in principle, possible given that Hungary is a party to the amended version of the Convention.

Interesting examples of the expansive application of the Limitation Convention come from Croatia, a state that is not a party to the Limitation Convention.³⁴ In two cases, a Croatian court found that the Limitation Convention applied, in conjunction with the CISG, where both parties had their place of business in states where the Limitation Convention is not in force.³⁵

Similarly, in Cuba the Limitation Convention was applied although one of the parties was not located in a contracting state. Cuba is a party to the amended version of the Limitation Convention. The court argued in favor of the applicability of the convention on the basis of its nature of *lex specialis*, allowing the provisions of a treaty to prevail over those of national legislation, as well as the fact that the parties had not opted out of it. The CISG was also applied to the case.³⁶

This survey, albeit brief, provides some significant results. The provisions on the scope of application of the Limitation Convention are not easily applied. From the case law available, it may seem that indirect application under Article 3(1)(b) is sometimes neglected. At the same time, a significant trend towards expansive application is also present.

One possible reason for such expansive application of the Limitation Convention is the attraction exercised by the CISG. Another reason is the desire to apply rules deemed more suitable for transnational matters than domestic ones. A third reason could relate to the desire to simplify the quest for applicable law by preventing the resort to private international law rules, which are particularly complex in the case of limitation law. Hence, if the application of a supranational text can be invoked, the

33. See [Hajdú-Bihar Cnty. Ct. in Debrecen], Apr. 26, 2007, Case No. 5.G.40.127/2007/31 (Hung.) [CLOUT Case 1056].

34. The adoption of the Limitation Convention might be considered by that country in the near future.

35. See *Jelen d.d. v. Malinplast GmbH* [High Commercial Ct.], Oct. 30, 2007, Case No. Pž-1134/05-3 (Croat.) [CLOUT Case 912]; *Industria Conciaria S.p.A. v. Šimecki d.o.o.* [High Commercial Ct.], July 26, 2005, Pž-2728/04-3 (Croat.) [CLOUT Case 919]. The abstracts do not provide further information on the judicial reasoning.

36. See *Nelson Servizi S.r.l. v. Empresa RC Comercial* [Sala de lo Económico de lo Tribunal Supremo Popular], Apr. 30, 2009, Case No. 3 (Cuba) [CLOUT Case 1052].

courts might have a preference for doing so. At a general level, it should not be forgotten that cases involving issues of limitation are often difficult to deal with given the practical challenges of gathering evidence as time passes. Therefore, simplification in the form of applicability of uniform texts may be particularly welcome.

Similar considerations were made with respect to arbitration proceedings,³⁷ where it was suggested that the Limitation Convention should apply not only under its own terms, but also through the discretionary power attributed by provisions enacting Article 19(2) of the UNCITRAL Model Law on International Commercial Arbitration.³⁸

2. *Other Issues*

While most reported cases on the Limitation Convention deal exclusively or partially with the scope of application, additional issues, touching on the substance of the treaty, have also been discussed.

With respect to the commencement of the limitation period, dealt with in Article 10(1) of the Limitation Convention, it was indicated that the right to a claim arising from a breach of contract begins to run from the date when the breach of contract occurs.³⁹ In a case relating to partial payment of the price, the court deemed the date of the order of the goods to be the date of the breach of contract.⁴⁰ In another case relating to partial payment of price, the sole arbitrator considered the dates of delivery of the goods as relevant for the commencement of the limitation period.⁴¹

Article 19 of the Limitation Convention indicates that a new limitation period shall commence when the creditor performs, under certain conditions, acts which, under the law of the state in which the debtor has its place of business, have the effects of recommencing the limitation period. This article needs therefore to be complemented with the relevant national legislation. In Hungary, that national legislation was identified in Articles 327 and 329 of the Civil Code, referring, inter alia, to the suspension of the limitation period due to a written notice requesting performance of a claim, the judicial enforcement of a claim, the acknowledgment of a debt by the obligor, and the assignment of a claim.⁴²

37. See Benjamin Hayward, *New Dog, Old Tricks: Solving a Conflict of Laws Problem in CISG Arbitrations*, 26 J. INT'L ARB. 405, 432 (2009).

38. See UNCITRAL Model Law on International Commercial Arbitration, G.A. Res. 61/33, 61st Sess., U.N. Doc. A/RES/61/33 (Dec. 18, 2006).

39. See *Mi-Rad Int'l, Inc. v. Top Art Lld* [Ct. App. Montenegro], Jan. 22, 2009, Ca. No. Mal. 418/07 (Montenegro) [CLOUT Case 1053].

40. Further information on the agreed date of payment is unfortunately not available in the abstract.

41. See [Foreign Trade Ct. of Arbitration Attached to the Serbian Chamber of Commerce in Belgrade], Jan. 5, 2007, No. T-13/05 (Serb.) [CLOUT Case 1138].

42. See *Fovárosi Itélotábla* [Metropolitan Judicial Board in Budapest], Oct. 9, 2008, Decision No. 14.Gf.40.225/2008/3 (Hung.) [CLOUT Case 1054]; [Heves

Under Article 20(1) of the Limitation Convention, the limitation period shall commence again if the debtor acknowledges in writing its obligation to the creditor before the expiration of the previous limitation period. A decision correctly equates the data message (in this case, an e-mail) to the written form in presence of legislation establishing such functional equivalence.⁴³ Functional equivalence between electronic and paper media is achieved through the identification of the relevant provision in national legislation, after application of the rules of private international law. At a general level, it should be noted that matters of equivalence between electronic and written form in the Limitation Convention may be fully addressed by the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts,⁴⁴ and, in particular, its Article 20.

A further matter of special interest relates to the application of the Limitation Convention to trade taking place in the former Yugoslavia. Armed conflicts necessarily disrupt commercial relations. The post-conflict peace-building process should bear in mind the necessity of bringing fairness and predictability to disputes related to commercial relations that took place before the breaking out of the conflict. Due to the significant amount of time often elapsed during the conflict, limitation issues are likely to be particularly relevant in those cases.

In this regard, it was indicated that Article 21 of the Convention, relating to cases when the creditor is prevented from causing the limitation period to cease to run due to circumstances beyond the control of the creditor and which he could neither avoid nor overcome, applies in cases of war.⁴⁵

Article 24 of the Limitation Convention requires that a party shall invoke the expiration of the limitation period for it to be taken into consideration. It was clarified that the party should provide evidence of when the limitation period commences and expires.⁴⁶ Last, but not least, Article 27 of the Limitation Convention has been explicitly cited as a persuasive model in a case decided by the Polish Supreme Court and relating to

Cnty. Ct.], Apr. 8, 2008, Case No. 4.G.20.305/2007/20 (Hung.) [CLOUT Case 1055].

43. See *LLC Horizont Marketing-Finance-Logistika v. LLC Terkyrii-2* [High Commercial Ct. of Ukraine], Dec. 17, 2009, Case No. 2009/17/140-3571 (9/56-1492) (Ukr.) [CLOUT Case 1051].

44. See *United Nations Convention on the Use of Electronic Communications in International Contracts art. 20*, Nov. 23, 2005, U.N. Doc. A/60/515 (registration pending; treaty entered into force on Mar. 1, 2013).

45. See *Enker and Zeničko-dobojski kanton v. Zeljezara Niksic Ltd* [Ct. App. Montenegro], Oct. 8, 2010, Ca. No. Mal. 341/10 (Montenegro) [CLOUT Case 1050].

46. See *Višje sodišče v. Ljubljani* [Ljubljana High Ct.], Oct. 13, 2010, VSL sodba I Cpg 972/2010 (Slovn.) [CLOUT Case 1154].

the limitation of claims relating to interests.⁴⁷ Thus, a provision contained in the Limitation Convention contributed to fill a legislative gap in Polish domestic law.

III. CURRENT STATUS OF THE LIMITATION CONVENTION AND PROSPECTS FOR WIDER ADOPTION

Although the CISG and the Limitation Convention clearly complement each other, the former has been significantly more successful in terms of adoption by states than the latter. Several reasons contribute to this: lack of resources, including parliamentary time, for international trade law reform may induce states to prioritize the adoption of the CISG over that of the Limitation Convention, given the broader scope of the CISG;⁴⁸ moreover, the public policy concerns associated with limitation may mean that additional caution is necessary when considering supranational uniform texts in this field; finally, at the outset, the Limitation Convention was perceived as a product of the interests of socialist countries and as such was received with caution in Western and Central Europe. The adoption of the Limitation Convention in some capitalist countries, including the United States of America, did not sufficiently change this perception.⁴⁹

The Limitation Convention is particularly relevant in certain regions of the world, namely Eastern Europe and North and Central America, where it enjoys significant adoption.⁵⁰ Further expansion of its application in those regions would therefore be particularly useful to strengthen certainty in regional commercial relations.

Additional states became parties to the Limitation Convention at a regular, albeit reduced pace, and usually in conjunction with the adoption of the CISG or following that adoption. In other cases, the consideration process is still at an early stage. Thus, in certain countries, such as Japan and the People's Republic of China, academics have recommended the adoption of the Convention.⁵¹ In Canada, the Uniform Law Commission

47. See Sad Najwyższy Izba Cywilna [Civ. Chamber of Sup. Ct.], Jan. 26, 2005, Case No. III CZP 42/04 (Pol.).

48. See generally Kazuaki Sono, *The Limitation Convention: The Forerunner to Establish UNCITRAL Credibility*, 16 PACE INT'L L. REV. 147 (2004).

49. The United States ratified the Limitation Convention on May 5, 1994, i.e., twenty years after the adoption of the treaty by a diplomatic conference.

50. The application of the Limitation Convention (as well as that of the CISG) in Mexico was extended to all contracts for international sale of goods involving a Mexican party and a maritime carriage leg. See Ley de Navegación y Comercio Marítimos [LNCM] [Law of Navigation and Maritime Commerce] art. 255, June 1, 2006 (Mex.), available at <http://info4.juridicas.unam.mx/ijure/fed/67/256.htm?s=>.

51. See H. Song & J. Zhao, *Comments on the Convention on the Limitation Period in the International Sale of Goods—Discussing the Possibility of Ratifying the Convention*, 6 J. INT'L TRADE 48–52 (1984); Yasutomo Sugiura, *Japan After Acceding to the CISG—Should We Consider Ratifying the Limitation Convention Next?*, in TOWARDS UNIFORMITY:

prepared in 2000 a new Uniform International Sales Conventions Act meant to deal with several conventions.⁵² However, the Uniform International Sales Conventions Act has not yet been adopted by any Canadian jurisdiction for several reasons: limited political visibility and therefore low priority on the legislative agenda; complexity of dealing with multiple treaties (including the two versions of the Limitation Convention) simultaneously; and on-going reform towards even shorter prescription periods (two years) at the domestic level. Those arguments do not preclude further legislative action, provided adequate reasoning and support are given.

One current trend relates to the adoption of the amended version of the Limitation Convention by those states that have already adopted the unamended one. The Dominican Republic and Montenegro have recently done so, in the context of a wider effort to modernize their international trade law framework.

Another trend relates to the possible reconsideration of certain declarations lodged upon becoming a party to the treaty, and, in particular, the one lodged under Article 36 bis of the Limitation Convention (Article XII of the Protocol), relating to the exclusion of the application of the convention under its Article 3(1)(b) when only one party to a contract for sale of goods is from a contracting state and that state's law applies by virtue of private international law rules.⁵³ This declaration was entered into by Czechoslovakia and the United States of America. By introducing this declaration, Socialist Czechoslovakia wished to ensure the application of its special legislation for foreign trade; reciprocity may have influenced the adoption of the declaration in the United States.⁵⁴ The Czech Republic and Slovakia have carried over the original declarations upon succession to Czechoslovakia, but have subsequently opted for other forms of economic organization and the special legislation meant to be protected has been abolished for some time.⁵⁵ As similar declarations lodged when becoming a party to the CISG are being reviewed, it is desirable that the same process is carried out with respect to the Limitation Convention.

Moreover, the Limitation Convention is interesting not only for its intrinsic technical qualities and for the fact that it sheds light on a particu-

THE 2ND ANNUAL MAA SCHLECHTRIEM CISG CONFERENCE (Ingeborg Schwenzer & Lisa Spagnolo eds., 2011).

52. See INTERNATIONAL SALES CONVENTIONS ACT (Unif. Law Conference of Can. 2000), available at <http://www.ulcc.ca/en/uniform-acts-en-gb-1/473-international-sales-conventions-act/674-international-sales-conventions-act>.

53. This mechanism was introduced to reproduce the scope of application adopted in the CISG. Kazuaki Sono points out that Article 3 of the Limitation Convention, as amended, refers to the law applicable to the contract of sale, and not to the law applicable to the limitation period. See Sono, *supra* note 48, § IV.C.

54. See Gary F. Bell, *Why Singapore Should Withdraw Its Reservation to the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 9 SING. Y.B. INT'L L. 55 (2005).

55. See JOSEF FIALA, JAN HURDIK & KATARINA KIRSTOVÁ, *CONTRACT LAW IN THE SLOVAK REPUBLIC* 22 (2010).

larly intricate area of the law of sale of goods. At times of repeated calls for further codification of uniform texts, it seems particularly advisable to seek careful coordination between regional and global levels, and to capitalize on existing texts by using them as building blocks towards the establishment of a broader legislative framework. Hence, the Limitation Convention is now receiving renewed interest in light of a global trend that sees legislative reform towards a reduction of the time period necessary for limitation and, at the same time, increased difficulty in ascertaining applicable law, in part due to that legislative reform activity.

Some recent efforts to modernize limitation law have given due recognition to the existence of the Limitation Convention, though they have not necessarily led to new adoptions of that Convention.⁵⁶ However, this was not always the case. Recently, the Explanatory Memorandum of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law explains, with respect to the CISG, that “[t]he Vienna Convention regulates certain aspects in contracts of sales of goods but leaves important matters outside its scope, such as defects in consent, unfair contract terms and prescription,”⁵⁷ but does not mention the existence of the Limitation Convention, despite the fact that eight of the twenty-seven European Union member states are a party to it.⁵⁸

A detailed comparison of the draft provisions of the Common European Sales Law with those of the Limitation Convention would be highly useful. Awareness of the need for this type of work seems to be growing.⁵⁹

At a very preliminary level, it should be noted that draft Articles 178 and 179 of the Common European Sales Law introduce the notion of a short period of prescription, applicable to the creditor, and of a long period of prescription, applicable to the debtor, as well as that of presumptive commencement of the prescription period from the time when the creditor “could be expected to have become aware of the facts as a result of which the right can be exercised.”⁶⁰ However, long-distance commercial relations require certainty and therefore are based, to the extent possible, on objective, rather than subjective circumstances. This approach was

56. See CONFÉDÉRATION SUISSE [SWISS CONFEDERATION], CODE DES OBLIGATIONS [CO] [CODE OF OBLIGATIONS], RAPPORT RELATIF À L'AVANT-PROJET, § 3.2.2 (2011) (Switz.), available at <http://www.ejpd.admin.ch/content/dam/data/wirtschaft/gesetzgebung/verjaehrungsfristen/vn-ber-f.pdf>.

57. *Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, at 5, COM (2011) 635 final (Oct. 11, 2011).

58. Those eight states are: Belgium, the Czech Republic, Hungary, Norway, Poland, Romania, Slovakia, and Slovenia. Bulgaria is a signatory of the unamended version of the Limitation Convention but has not yet ratified it.

59. See Prescription in the Proposal for a Common European Sales Law, PARL. EUR. DOC. PE 462.466 (2012). This document, which formulates a number of remarks on the draft articles on prescription of the Common European Sales Law, also makes reference to certain provisions of the Limitation Convention.

60. *Regulation of the European Parliament and of the Council on a Common European Sales Law*, at 108, COM (2011) 635 final (Nov. 10, 2011).

adopted in Article 10 of the Limitation Convention and seems preferable. The mechanism adopted in the draft Common European Sales Law seems more adequate for consumer protection, which is a main goal of that text. Legislative techniques for consumer protection and long-range commercial transactions seem, however, still remarkably different.⁶¹

IV. CONCLUSION

The relevance of the Limitation Convention in judicial practice seems higher than the attention it usually receives from doctrine and practitioners. While a significant number of states have already adopted the treaty, additional effort should be made to promote it.⁶² Moreover, special attention should be given to coordinate law reform efforts in the field of prescription of contractual actions with the provisions of this text.

Case law indicates that there is a desire on the part of courts to take advantage of the existence of the Convention. Cases dealing with limitation in cross-border trade are particularly complex, and accordingly the contribution to the predictability of the rule of law provided by a uniform text is appreciated. Hence, states that are already parties to the CISG, or that are considering becoming parties, should take into consideration the possibility of adopting the Limitation Convention, too. Statistically, it is interesting to note that, due to the pattern of regional and sub-regional trade, often the Limitation Convention has not been applied in cases in which one party has its place of business in a contracting state, and the other party has its place of business in Austria or Italy. If the provisions of the Limitation Convention are considered adequate for the needs of cross-border trade, those two states, both already parties to the CISG, might wish to give careful consideration to the benefits arising from the adoption of the Convention.

61. The Draft Common European Sales Law has generated significant discussion. The difficulty of reconciling the goals of consumer protection and facilitation of cross-border trade among professionals is one point often made among many commentators. See Vincent Heuzé, *Le technocrate et l'imbécile: Essai d'explication du droit commun européen de la vente*, 25 SEMAINE JURIDIQUE 1225, 1225–32 (2012) (Fr.); Nicole Kornet, *The Common European Sales Law and the CISG—Complicating or Simplifying the Legal Environment?*, 19 MAASTRICHT J. EUR. & COMP. L. 164, 164–79 (2012) (Neth.).

62. See Ingeborg Schwenzer & Simon Manner, *The Claim is Time-Barred: The Proper Limitation Regime for International Sales Contracts in International Commercial Arbitration*, 23 ARB. INT'L 293, 307 (2007) (discussing limitation period issues in arbitral proceedings, recognizing that Limitation Convention “would be appropriate in the overwhelming majority of cases,” but adding that Limitation Convention finds rare application due to its limited acceptance, and suggesting therefore recourse to provisions on limitation of Unidroit Principles of International Commercial Contracts). While that solution might be acceptable given the flexibility of arbitrators and parties to arbitral proceedings in identifying the applicable law, judges and parties to court proceedings may not enjoy a similar freedom. Formal adoption of the treaty seems therefore the most desirable solution.

The existence of two different versions of the Limitation Convention adds complexity to its interpretation. To avoid such complications, states that are parties to the unamended version of the Limitation Convention should become parties to the amended text. This applies, in particular, to those states that are already parties to the CISG.

Finally, when a state becomes a party to the Limitation Convention, special attention should be given to the rule contained in Article 43 bis of the Convention, indicating that, unless otherwise specified, the state becomes a party to the unamended version of the Convention only. This might lead to a result contrary to the intention of the state as well as to the prevailing trend towards expansion of the scope of application of the Limitation Convention and its alignment with that of the CISG.

UNIDROIT PRINCIPLES AS A SOURCE FOR GLOBAL SALES LAW

HENRY DEEB GABRIEL*

THE germination period for the United Nations Convention on Contracts for the International Sale of Goods (CISG) was forty-five years, and once it was completed it was slow to be adopted. It is now showing its age, and the question has been posed as to whether it is time to revise or expand its scope. Given its history, though, whether a revision or expansion of the CISG is a viable project that justifies the resources is subject to serious question.

Among the problems this project might encounter is a lack of resources, a clear articulation of the need for the project, the inability to define its scope, and the likelihood of widespread ratification within a reasonable time. Recent attempts to revise domestic and regional laws are instructive about the possible problems this project may have.

It may be that the barriers for a future convention on global contract law is not a realistic project, and the more recent path of soft law instruments, such as the UNIDROIT Principles of International Commercial Contracts (Principles), is a more viable method of providing global uniformity in contracts. Alternatively, another path is to replicate the creation of the CISG by relying on an initial product from UNIDROIT that provides for UNIDROIT's distinct working methods, and then have that work as the basis for a convention on global contract law, through the United Nations Commission on International Trade Law (UNCITRAL). This would entail a close working relationship between UNIDROIT and UNCITRAL.

I. A NEW PROJECT?

At the last Plenary Meeting of UNCITRAL in the summer of 2012, the government of Switzerland proposed that UNCITRAL undertake a project to develop an instrument, presumably a binding convention,¹ to harmonize principles of contract law (hereinafter the proposal).² The scope of the project proposed is very ambitious.³

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1. The proposal cites as one of the faults of the UNIDROIT Principles of International Commercial Contracts, and therefore as a justification of the new project, the fact that the Principles are not binding law. See UNCITRAL, *Possible Future Work in the Area of International Contract Law: Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law*, at 4–5, U.N. Doc. A/CN.9/758 (May 8, 2012) [hereinafter *Proposal*].

2. See *id.* at 3.

3. The proposal sets out the following as possible topics:

The proposal was met with some strong opposition, and there was no strong support for it.⁴ Regardless, it was concluded that the Secretariat should organize colloquia and undertake further study of the project.⁵ This conference is part of the Secretariat's mandate. In this paper I examine whether this project is a feasible one, and if so, whether UNIDROIT and its work can play a significant role in the forging of a global contract law.

Initially it must be recognized that the proposal asserts, but does not demonstrate a need for, an international convention on contract law. Before discussing the possible need for the project, as an initial inquiry, I would like to address what may be some drawbacks to UNCITRAL undertaking this project.

[G]eneral provisions, among others: freedom of contract, freedom of form; formation of contract, among others: offer, acceptance, modification, discharge by assent, standard terms, battle of forms, electronic contracting; agency, among others: authority, disclosed/undisclosed agency, liability of the agent; validity, among others: mistake, fraud, duress, gross disparity, unfair terms, illegality; construction of contract, among others: interpretation, supplementation, practices and usages; conditions; third party rights; performance of contract, among others: time, place, currency, costs; remedies for breach of contract, among others: right to withhold performance, specific performance, avoidance, damages, exemptions; consequences of unwinding; set-off; assignment and delegation, among others: assignment of rights, delegation of performance of duty, transfer of contracts; limitation; joint and several obligors and obligees.

Id. at 7 n.4.

4. A summary of the debate is contained in the Report of the United Nations Commission on International Trade Law. *See* Rep. of United Nations Comm'n on Int'l Trade, June 25–July 6, 2012, ¶¶ 127–32, U.N. Doc. A/67/17, 45th Sess. [hereinafter UNCITRAL Report]. In the United States, the National Conference of Commissioners on Uniform State Laws has also come out against the proposal. There are several areas for suggested coverage in the proposal that would be of particular concern for American law. These include the general difficulty with reconciling American law and the common law with other legal traditions—for example, defects of consent, the nature of software contracts, consumer contracts, unfair contracts, and, pre-contractual information duties.

5. The official report states the following:

After discussion, it was determined that there was a prevailing view in support of requesting the Secretariat to organize symposiums and other meetings, including at the regional level and within available resources, maintaining close cooperation with U[NIDROIT], with a view to compiling further information to assist the Commission in the assessment of the desirability and feasibility of future work in the field of general contract law at a future session. Many delegates, however, urged that priority should be given to other work of the Commission, in particular in the area of microfinance. A number of delegates expressed clear opposition and strong reservations with regard to further work in the field of general contract law. In addition, several delegates, noting the significant opposition to the proposal by Switzerland, objected to the characterization of the debate on that topic as reflecting a prevailing majority view in favour of additional work.

Id. ¶ 132.

A. *Limited Resources*

UNCITRAL is facing significant budget pressures, as are many of its member states. Given this, the proposal, which would take many years to complete and which would use significant resources of UNCITRAL, would appear to need a strong justification for moving forward. Because the member states will have the final decision whether to go forward with the proposal, those states that have raised the issue of resources for this project⁶ can be expected to continue with this objection.

It should also be noted that after several decades of work, UNIDROIT has recently completed Part III of the UNIDROIT Principles at a substantial allocation of the financial resources available to UNIDROIT. Several countries that are members of both UNIDROIT and UNCITRAL have suggested that this project would be redundant and repetitive of work already completed, and therefore would be a waste of limited resources available for UNCITRAL's other work.⁷

B. *Flawed Justifications*

The proposal suggests two major reasons for the need of a new instrument. Neither is supported by any empirical evidence. First, it is suggested that “[i]t goes without saying that different domestic laws form an obstacle for international trade”⁸ At best, this is anecdotal and unproven. The fact that parties still routinely opt out of the CISG would belie this assertion. Second, it is suggested that “[t]oday’s international sales practice shows that contracts—by the choice of the parties—tend to be governed by a closed circle of domestic laws”⁹ Assuming this is true, it alone does not justify a global contract law, as there is no evidence that parties who choose a specific domestic law to govern their transactions are unhappy with their choices.

Evidence suggests just the opposite. It is not the specific law governing the transaction that parties are normally concerned about. Usually, the concern by parties is knowing with certainty in advance which law will govern the transaction in order to be able to contract around the default provisions.

Implicit, but not stated in the proposal, is the assumption that one party may be disadvantaged by current choice of law provisions that favor an existing law. Yet there is no evidence that a specific commonly used law of contract actually disfavors any parties. Nor is there any evidence that the parties that are now choosing a specific law under a choice of law

6. *See id.* ¶ 130.

7. *See id.* ¶ 131.

8. *Proposal*, *supra* note 1, at 2.

9. *Id.* at 3.

clause will somehow be dissuaded from making the same choice in the future.¹⁰

C. *Need*

The proposal suggests the need for both a revision of the present provisions of the CISG as well as an expansion of the scope of the sales convention.¹¹ The probability of either occurring is not likely.

1. *Revising the CISG*

Before undertaking a revision of the CISG, two considerations must be examined: whether there are substantial existing flaws in the CISG that need to be remedied, and the likelihood that the project would be successful. As to the first question, there is no evidence that serious flaws in the existing CISG have been articulated.¹² It is neutral and does not favor any particular party. Its wide use suggests it has not found any major detractors among potential users. In fact, the CISG has been “a worldwide success.”¹³ At present, with seventy-eight contracting states, it has been one of the most successful private international law treaties ever entered into force.¹⁴

Moreover, to the extent that parties are dissatisfied with any of the provisions of the CISG, these provisions can be easily and effectively modified to meet the parties’ requirements.¹⁵ The CISG, as with all modern sales codes, is primarily a set of default rules that can easily be modified or disclaimed.¹⁶ This inherent flexibility allows the maximum in party autonomy and therefore militates against the need for revision.

The larger problem that arises is not the substance of the CISG, but the process by which it would be revised. Although the CISG is one of the more successful international commercial instruments, having been ratified by seventy-eight countries, it took years before it became widely ratified. Promulgated by UNCITRAL in 1980, the United States became a party only in 1989, Japan in 2008. The Scandinavian countries have just ratified Part II this year. Given this slow and uneven adoption, there has justifiably been great reluctance to reopen the CISG.

10. If the parties have bothered to put in a choice of law clause, the parties presumably know to contract around those provisions of the law they have chosen that do not reflect the agreement they wish to have.

11. *See Proposal, supra* note 1, at 6–8.

12. *See, e.g.,* Henry Deeb Gabriel, *The CISG: Raising the Fear of Nothing*, 9 VINDOBONA J. INT’L COM. L. & ARB. 219, 219 (2005).

13. INGBORG SCHWENZER, PASCAL HACHEM & CHRISTOPHER KEE, *GLOBAL SALES AND CONTRACT LAW* ¶ 3.20 (2012).

14. For a discussion on how the CISG has been a source for other law, see *supra* note 13, ¶¶ 3.20–.24.

15. *See* Convention on Contracts for the International Sale of Goods art. 6, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG], available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.

16. *See id.*

It is worthwhile to remember that originally the 2005 UNCITRAL Electronic Commerce Convention was intended to amend the CISG, but quickly morphed into a free-standing instrument because of the fear of reopening the CISG. These reservations still justifiably exist. The particular concern is the possibility of two competing instruments—an original and a revised CISG.

2. *Expanding Scope Beyond the CISG*

To draft a global contracts law convention more expansive than the CISG, as suggested in the proposal,¹⁷ will require coverage of subject areas specifically chosen not to be covered by the CISG, and many of these areas were not covered because of the difficulty of universal consensus. Thus, for example, the proposal suggests rules to govern the validity of contracts.¹⁸ This is one area that the drafters of the CISG not only did not provide for, but specifically added an article to exclude it from the scope of the convention.¹⁹

It is not persuasive that because some of these topics are covered in the UNIDROIT Principles, that they are easily accommodated in a binding

17. *See Proposal, supra* note 1, at 3.

18. For example, issues of substantive validity were generally excluded from the scope of the CISG pursuant to Article 4, based primarily on a Secretariat report finding that: (1) these issues rarely arise, and that there was no indication that differences in the laws in respect to contract validity lead to significant problems in international trade; and (2) “rules on duress, or similar rules on usury, unconscionable contracts, good faith in performance and the like serve as a vehicle by which the political, social, and economic philosophy of the society is made effective in respect of contracts,” and:

[I]t is by the extensive or the restrictive interpretation of such rules that many legal systems have effected the balance between a philosophy of sanctity of contract with the security of transactions which that affords and a philosophy of protecting the weaker party to a transaction at the cost of rendering contracts less secure.

U.N. Secretary-General, *Formation and Validity of Contracts for the International Sale of Goods: Rep. of the Secretary-General*, ¶¶ 25–26, U.N. Doc. A/CN.9/128, Annex II (Feb. 3, 1977), *reprinted in* [1977] 8 Y.B. Comm’n on Int’l Trade L. 93, U.N. Doc. A/CN.9/SER.A/1977. States subsequently decided to exclude specific rules on validity with regard to mistake because of their inconsistent treatment under various legal systems. *See Rep. of the Working Group*, Sept. 19–Sept. 30, 1977, ¶¶ 48–69, U.N. Doc. A/CN.9/142, 9th Sess., *reprinted in* [1978] 9 Y.B. Comm’n on Int’l Trade L. 61, 65–66, U.N. Doc. A/CN.9/SER.A/1978 (discussing decision to exclude specific rules on validity, particularly with regard to mistake). Similarly, efforts to address issues related to agency were not successful. *See, e.g., Rep. of the Working Group*, Jan. 27–Feb. 7, 1975, ¶ 47, U.N. Doc. A/CN.9/100, 6th Sess., *reprinted in* [1975] 6 Y.B. Comm’n on Int’l Trade L. 49, 53, U.N. Doc. A/CN.9/SER.A/1975 (“There was opposition to a special article on agency relationships in a convention on sales and no consensus was reached on the adoption of this proposal. At the same time it was agreed to delete any reference to agency relationship in other articles of the Convention . . .”). UNIDROIT subsequently developed a Convention on Agency in the International Sale of Goods, but only a few countries have ratified it and it has never entered into force. *See United Nations Convention on Agency in the International Sale of Goods*, Feb. 17, 1983, 22 I.L.M. 249.

19. *See CISG, supra* note 15, art. 4.

convention. As is discussed below, both the working methods of UNIDROIT, as well as the differences between the soft law nature of the UNIDROIT Principles and the binding nature of the CISG as a convention, do not allow for an easy adaptation in convention form of all of the areas covered in the UNIDROIT Principles.

It is worth noting that the proposal also suggests some areas of coverage that are beyond what would normally be found in general contract law.²⁰ For example, shipping terms are suggested as a topic.²¹ This seems an odd addition. Shipping terms are not part of the general law of contract, and there is no international consensus on standard shipping terms. The INCOTERMS²² come close, and there appears to be no problem that needs to be addressed in this area.

II. HAS UNIDROIT ALREADY DONE THE WORK?

If the proposal becomes a working project, as the proposal is, to a significant extent, a proposal to cover areas already covered in the UNIDROIT Principles, the result of the project would be to create a binding convention out of what is presently a soft law instrument.²³ Thus, any significant justification for the proposal must be based on the need to supplement or supplant the UNIDROIT Principles with a similar binding convention.

It must also be noted that the UNIDROIT Principles have had relatively little usage and impact since first promulgated in 1994. Unless there is some compelling distinction between the Principles and a binding convention that suggests a greater likelihood of party usage of the convention, the need for the convention would appear already to be shown as minimal.

That the convention would be binding where the UNIDROIT Principles are not does not suggest a need for the project. Moreover, even with a binding convention, there is the question of whether parties would routinely opt out of its application, or whether countries would even see the need to ratify the convention in the first place. Both of the concerns go to the larger question of whether the members of UNCITRAL are willing to commit to the long process of drafting a global sales law convention without more evidence of a compelling need.

The proposal suggests that a convention is necessary to supplant the UNIDROIT Principles because courts are reluctant to give effect to soft law instruments.²⁴ However, lawyers appreciate the difference between a

20. *See Proposal, supra* note 1, at 7 n.4.

21. *See id.* For an exhaustive list of Switzerland's proposed areas of coverage, see *supra* note 3.

22. Int'l Chamber of Commerce, *Incoterms 2000*, ICC Pub. no. 560 (2000).

23. *See Proposal, supra* note 1, at 4–5 (explicitly stating that goal of project is to create binding convention out of soft law instrument).

24. *See id.* at 5.

choice of law provision and the incorporation of the Principles as terms to an agreement, and it is quite easy to choose the Principles as governing the contractual relationship if parties wish.

There is an assumption in the proposal that if UNIDROIT could agree on these areas of contract, a convention could be negotiated along the same lines. As will be discussed below, this ignores core differences between the UNIDROIT Principles and a binding UNCITRAL convention. The fact that the UNIDROIT Principles are non-binding and therefore do not have the same importance and urgency, a binding convention creates some distinct advantages.

However, before addressing the questions of whether the convention would serve important functions not met by the UNIDROIT Principles and whether the drafting of a convention on global contract law in and of itself is a feasible project, I want to first examine the advantages that the UNIDROIT Principles have as a soft law instrument.

A. *General Advantages*

In many circumstances, particularly in the area of private international law, soft law instruments,²⁵ such as the Principles, have advantages over conventions and treaties. For example, non-binding general principles can achieve the goal of uniform, or at least harmonized law,²⁶ be-

25. Non-binding legal principles are often referred to as “soft law.” “[S]oft law’ is understood as referring in general to instruments of a normative nature with no legally binding force, and which are applied only through voluntary acceptance” Michael Joachim Bonell, *Soft Law and Party Autonomy: The Case of the UNIDROIT Principles*, 51 *LOV. L. REV.* 229, 229 (2005). These are generally established legal rules that are not positive law and are therefore not judicially binding. *See id.* The various soft law instruments in international commercial law include model laws, a codification of custom and usage promulgated by an international non-governmental organization, the promulgation of international trade terms, model forms, contracts, restatements by leading scholars and experts, or international conventions. *See id.* Although soft law principles do not begin as positive law, they can of course become positive law both by adoption by courts or tribunals or by adoption in the agreements of transactional parties. *See id.*

26. UNCITRAL notes the following distinction between harmonization and unification:

“Harmonization” and “unification” of the law of international trade refers to the process through which the law facilitating international commerce is created and adopted. International commerce may be hindered by factors such as the lack of a predictable governing law or out-of-date laws unsuited to commercial practice. The United Nations Commission on International Trade Law identifies such problems and then carefully crafts solutions which are acceptable to States having different legal systems and levels of economic and social development.

“Harmonization” may conceptually be thought of as the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions. “Unification” may be seen as the adoption by States of a common legal standard governing particular aspects of international business transactions. A model law or a legislative guide is an example of a text which is drafted to harmonize domestic law, while a convention is an international instrument which is adopted by

cause there is less necessity to accommodate various legal traditions or domestic laws. Also, they may be adopted in part as well as a whole, thereby providing flexibility for an easier basis for adoption in a given court or arbitration because there is less conflict between the international and the domestic law as there would be in the case of a binding convention.²⁷ In addition, because there is no need to have principles adopted by a given jurisdiction, the principles are more easily and readily available for use. Since these principles are not binding, their likely effect is more to set norms instead of hard and fast rules, while still achieving the goal of creating broad international standards.²⁸

States for the unification of the law at an international level. Texts resulting from the work of UNCITRAL include conventions, model laws, legal guides, legislative guides, rules, and practice notes. In practice, the two concepts are closely related.

FAQ—*Origin, Mandate and Composition of UNCITRAL*, UNCITRAL, http://www.uncitral.org/uncitral/en/about/origin_faq.html (last visited Apr. 11, 2013). I think this distinction is important because many, including myself, see true international unification as a goal that may not be possible given the different legal traditions in the world. Harmonization, on the other hand, is a much more reachable goal.

27. In addition to the UNIDROIT Principles, some of the other more successful soft law instruments are the UNCITRAL Arbitration Rules, the more recent UNIDROIT Principles and Rules of Transnational Civil Procedure, and the UNCITRAL legislative guide to secured transactions. Private organizations, such as the International Chamber of Commerce, have a long history of drafting very successful soft law documents. In the case of the ICC, this would include the highly influential INCOTERMS (shipping terms) and the Uniform Customs and Practice for Documentary Credits (letters of credit).

28. Of the three major international governmental organizations that are delegated the task to produce international commercial law instruments—UNCITRAL, UNIDROIT, and the Hague Conference on Private International Law—two of the organizations, UNIDROIT and UNCITRAL, have been quite active in producing soft law instruments because of these broad advantages for soft law instruments.

UNCITRAL is a subsidiary body of the General Assembly of the United Nations, established in 1966. The Commission has a general mandate to harmonize and unify the law of international trade. Since its founding, UNCITRAL has prepared a wide range of conventions, model laws, and other instruments that deal with the substantive law that governs trade transactions or other aspects of business law which have an impact on international trade. UNCITRAL is made up of sixty member states from five regional groups. Members of the Commission are elected for terms of six years. The terms of half the members expire every three years. Membership will increase to sixty member states over the next few years to provide greater representation.

UNIDROIT is an independent intergovernmental organization with its seat in Rome. The purpose of UNIDROIT is to study the needs and the methods for modernizing and harmonizing private law, particularly commercial law, at the international level. UNIDROIT was created in 1926 as an auxiliary organ of the League of Nations. Following the demise of the League of Nations, UNIDROIT was reestablished in 1940 on the basis of a multilateral agreement. This agreement is known as the UNIDROIT Statute, and the membership of UNIDROIT is restricted to states that have acceded to the statute. There are presently fifty-nine member states.

The Hague Conference on Private International Law consists of sixty-four member states. The First Session of the Hague Conference on Private Interna-

Although suggested in the proposal that parties are disadvantaged by non-binding rules such as the Principles,²⁹ the proposal presents no evidence of this. In fact, in many areas, well-known soft law instruments have become the international standards, and there has never been any suggestion that these instruments suffer any usage or recognition disabilities. Thus, for example, the UCP 600³⁰ and the INCOTERMS,³¹ are so commonly used and accepted today that they often govern by default, absent a contrary party agreement.

B. *Harmonization of the Positive Law Is Fraught with Difficulties*

A UNCITRAL convention on global sales law would not be drafted in a vacuum, but would be drafted with the backdrop of the CISG as well as the various domestic laws of the member states. In the case of a new treaty or convention, there is the strong desire by the adopting jurisdictions to have the treaty or convention be consistent with the domestic law of the jurisdiction.³² Yet, the ability to harmonize a new treaty or convention with existing domestic or international law is subject to a variety of difficulties.³³ This is particularly the case if there is an existing convention or treaty such as the CISG being revised instead of being drafted anew. Con-

tional Law was convened in 1893 by the Netherlands on the initiative of T.M.C. Asser, who won the Nobel Peace Prize in 1911. Subsequent sessions were held in 1894, 1900, 1904, 1925, and 1928. The Seventh Session was held in 1951, and this session culminated with the preparation of a statute, which made the Conference a permanent intergovernmental organization. The statute entered into force on July 15, 1955. Since 1956, regular Plenary Sessions have been held every four years. Under the statute, the Netherlands Standing Government Committee on Private International Law ensures the operation of the Conference.

29. See *Proposal*, *supra* note 1, at 5.

30. Int'l Chamber of Commerce, *Uniform Customs and Practice for Documentary Credits 600*, ICC Pub. no. 600 (July 1, 2007).

31. *Incoterms 2000*, *supra* note 22.

32. This, of course, may include international laws that are part of the domestic law of a given jurisdiction.

33. Thus, for example, after twelve years of work revising the American Uniform Commercial Code, the fruits of attempting to harmonize the Uniform Commercial Code with the CISG were reduced to the following prefatory comment:

When the parties enter into an agreement for the international sale of goods, because the United States is a party to the Convention, the applicable law may be the United Nations Convention on Contracts for the International Sale of Goods (CISG). Since many of the provisions of the CISG appear quite similar to provisions in Article 2, early in the process of drafting the amendments the drafting committee considered making references in the Official Comments to similar provisions in the CISG. However, upon reflection, the drafting committee concluded that these references should not be included because their inclusion might suggest a greater similarity between the Article 2 and the CISG than in fact exists.

Henry Deeb Gabriel, *Universalism and Tradition: The Use of Non-Binding Principles in International Commercial Law*, in *LIBER MEMORIALIS: UNIVERSALISM, TRADITION, AND THE INDIVIDUAL* 474 n.15 (Petar Šarčević ed., 2006).

versely, soft law instruments such as the UNIDROIT Principles were not subject to the same pressure to be harmonized with existing law.

As for a private international law convention such as the proposal for a global sales law, inevitably the actual and perceived problems of the existing statute, which will be primarily the CISG, would have to be addressed. With the revision of an existing convention or treaty, the focus tends to be inward-looking and focused on the existing convention or treaty itself. In addition, the revisers of an existing convention or treaty will bring to the process their familiarity with the existing convention or treaty. As such, it is likely that they are less familiar with other laws that might be appropriate to consider for purposes of drafting the ideal instrument that is most compatible with modern business practices. Moreover, to the extent that there is a push to harmonize across the different legal traditions of the various states involved in the drafting of the convention or treaty, compromises, both in the language as well as the legal concepts, may have to be made which do not necessarily reflect the best view, but simply a view that all parties can agree upon as consistent with their internal law.³⁴

This is not the case with soft law instruments, and the UNIDROIT Principles are an example of this. With the Principles, it was not necessary to attempt to harmonize the entirety of any specific jurisdiction or any international convention, such as the CISG. Instead, without the internal pressure to conform to a specific law, the drafters were able to pick provisions selectively among many sources to meet a specific need. This process of picking and choosing provided for systematic reflection on what should be the best result, and not simply a possible result.

C. *No Need to Accommodate Specific Legal Traditions or National Laws*

As will certainly be the case in the proposed global contract law convention, there would be a strong tendency toward the creation of an instrument that would reflect the legal traditions of the potential adopting states because treaties and conventions must be fashioned in a way to encourage adoption by various states, in order to create a high comfort level with the appropriateness of the instrument. This would inevitably result in an attempt to reconcile differing legal traditions, and would create problems both in terms of the time necessary to finish the instrument as well as the actual substance of the resulting convention.

Preparation of international commercial law conventions and treaties tends to be a long process, and part of the long length of time is attributable to the incessant search for common principles and the reconciliation

34. Much of the success of the CISG, for example, is based on the fact that the CISG is not based on any particular set of underlying established domestic legal principles, and instead, was drafted to be independent of, rather than to work in conjunction with, any particular domestic law. To the extent that one can attach a specific legal tradition to the CISG, it is a blend of both the common law and civilian traditions.

of established principles from different legal systems and traditions. This need was a large part of the reason why the CISG took years to prepare even though it began with the template of the Hague Sales Convention.

Moreover, the CISG is fairly limited in its coverage, and to a large extent this is due to the inability to reconcile the major legal traditions. For example, questions of validity, title, and property rights³⁵ are specifically excluded from the CISG, as are consumer contracts³⁶ and product liability actions.³⁷ Yet, these are some of the proposed coverage areas in the global contract law proposal.³⁸

Possibly more important, the need to accommodate specific legal traditions locks the drafters into a straightjacket of limited possibilities that often prevents the examination for the best solution. This is often politically driven. The late Professor Allan Farnsworth, for example, describes what distinguished the work leading to the CISG, in which he was an American delegate, and the work leading to the UNIDROIT Principles, in which he was a member of the working group: “While the atmosphere in UNCITRAL was political (because delegates represented governments, which were grouped in regional blocs), that in UNIDROIT was apolitical (because participants appeared in their private capacity).”³⁹

For this reason, the UNIDROIT Principles are viewed as “neutral” contract law principles in that they reflect a balance of interests and have not been formulated by any government. It is not clear that the CISG has this level of neutrality or whether a new expanded draft could be neutral either.

D. *No Need for Ratification*

Soft law, unlike treaties and conventions, are not subject to the lengthy process of ratification that can hold up enforcement for years.⁴⁰ For example, one of the most successful international conventions in recent times, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), was completed in 1958 but not ratified by the United States until 1970. Moreover, although the New York Convention has been very successful, this has not been the case with many recent international commercial law conven-

35. See CISG, *supra* note 15, arts. 4(a)–(b).

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

37. See *id.* art. 5.

38. See *Proposal, supra* note 1, at 7 n.4.

39. E. Allan Farnsworth, *The American Provenance of the UNIDROIT Principles*, 72 TUL. L. REV. 1985, 1989 (1998).

40. This can be the case with domestic law as well. For example, after a thirteen year drafting process of the revisions of Article Two of the Uniform Commercial Code, the revisions were withdrawn from consideration a decade later after there had been no adoptions by any states. See Henry Deeb Gabriel, *The 2003 Amendments of Article Two of the Uniform Commercial Code: Eight Years or a Lifetime After Completion*, 52 S. TEX. L. REV. 487, 493 (2011).

tions.⁴¹ In addition, in a federal system, such as the United States, Canada, or Mexico, ratification often entails complicated political maneuvering between the federal and the state or provincial governments.⁴²

It has been suggested that soft law instruments, such as the Principles, have been successful precisely because:

[T]hey are not binding, have not been influenced by governments and do not pose any threat to national legal systems. Like the UNCITRAL Model Law on Arbitration, they are designed to be a unifying influence and a resource, but it is left to legislatures, courts and arbitral tribunals to decide to what extent they assist in the solution of problems.⁴³

E. *Flexible Guidance for Tribunals*

Soft law instruments, such as principles and restatements, have been widely used by courts and arbitrations as a basis for forging new legal rules, as well as interpreting existing ones. In the common law world, particularly the United States, courts have long relied upon the various Restatements of the Law produced by the American Law Institute as a source of law. Moreover, arbitration tribunals, which are generally not bound by domestic choice of law restrictions, often adopt legal rules, such as the UNIDROIT Principles, because of the neutrality of the rules. This flexible use, which allows dynamic growth of the law, is not possible through a fixed, adopted text such as a convention.

Moreover, soft law is often used as a basis for gap fillers when the otherwise applicable international or domestic law does not address the specific question. For example, because the UNIDROIT Principles have a broader scope than the CISG, the Principles have been used to resolve questions not addressed by the CISG.⁴⁴

41. The 1964 Convention relating to a Uniform Law on the International Sale of Goods, which was the basis for the CISG, has only been ratified by eight countries. See Convention on International Sale of Goods and Formation of Contracts for International Sale of Goods, July 1, 1964, 3 I.L.M. 854.

42. Obviously, a similar problem exists between the European Union and its member states.

43. Roy Goode, Communication on European Contract Law (n.d.), available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/5.6.pdf.

44. See, e.g., Hideo Yoshimoto v. Canterbury Golf Int'l Ltd. (2001) 1 NZLR 523 (CA) 547 (N.Z.), available at <http://cisgw3.law.pace.edu/cases/001127n6.html>; Cour d'appel [CA] [regional court of appeal] Grenoble, Oct. 23, 1996 (Fr.), available at <http://cisgw3.law.pace.edu/cases/961023fl.html>. Whether this guidance is always useful may be questioned because, with the convenience of having existing rules in place, there is some reported tendency of tribunals to follow soft law principles blindly without any analysis of why the rules are appropriate or whether the rules are better suited for the issue than competing rules. See, e.g., Gregory E. Maggs, *Ipsa Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508, 508-14 (1998); Symeon C.

III. WHAT COULD BE ACHIEVED WITH THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS MIGHT NOT BE SUBJECT TO REPLICATION AT UNCITRAL

Putting aside the question of whether the Principles themselves have largely achieved what might be gained from a global contract law convention, there is also the question of whether UNCITRAL would be able to replicate the work and product of UNIDROIT. A comparison between the working methods of UNIDROIT and UNCITRAL may suggest difficulties that UNCITRAL would have with this project that were not present in UNIDROIT's drafting of the Principles.

The working methods of UNIDROIT may be better suited for this type of project. The UNIDROIT Principles were drafted by a select group of contract specialists from around the world who knew their own country's law, were fluent in comparative law, and therefore were able to balance competing legal traditions. The members of the UNIDROIT working group did not have the task of supporting and defending their respective domestic laws. This type of work is much harder to accomplish at UNCITRAL because members of the UNCITRAL working groups represent their respective governments. Thus, both the working methods of UNIDROIT, a small group of highly specialized experts in the field, as well as the lack of the need to accommodate any particular nation's domestic laws, allowed for a more neutral process and result than might be expected out of a UNCITRAL drafting process. Moreover, the scope of the Principles covers a variety of subjects that a UNCITRAL convention is not likely to be able to resolve because the mandatory nature of a convention will have individual countries disagreeing over some issues that were not contentious in UNIDROIT.

It is also important to keep in mind that the drafting of the UNIDROIT Principles had some difficulties that the uninitiated may not appreciate. An example is illegal contracts. The UNIDROIT Working Group spent five years on this subject and was unable to come up with any rule to govern illegal contracts.⁴⁵ It should be borne in mind that this was

Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1272-73 (1997). There is the question of whether the instrument is intended to reflect current commercial practice or whether the instrument is intended to reflect the drafters' aspirations as to what the law should be. Sometimes an instrument can be both. This is certainly the case with the American Restatements of the Law, which are drafted by the American Law Institute. See, e.g., E. Allan Farnsworth, *Ingredients in the Redaction of the Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1, 1 (1981). However, to the extent that the principles were drafted carefully and thoughtfully, this concern should be minimal. The courts, in effect, are likely to stumble upon the best rule.

45. The result is an article that repeats the pre-existing rule that the Principles are "concerned only with a contract infringing mandatory rules." INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2010), available at <http://www.unidroit.org/english/principles/contracts/main.htm>.

from a working group that did not have any need to replicate the concepts of illegality from their respective jurisdictions.⁴⁶ One can only imagine the difficulty this would pose if a convention attempted to accommodate the laws of over sixty jurisdictions.

IV. COULD THE UNIDROIT PRINCIPLES SERVE AS THE SOURCE OF A NEW CONVENTION?

If UNCITRAL moves forward with a project on global contract law, the UNIDROIT Principles may serve as a model and a starting point for the project. Although a global contract law project would not necessarily retain the scope in the Swiss proposal, it is important to remember that the possible scope set out in the Swiss proposal, for the most part, replicates the scope of the UNIDROIT Principles.⁴⁷

Furthermore, the UNCITRAL plenary, when considering the possibility of the proposal, expressly provided for coordination between UNCITRAL and UNIDROIT on the project.⁴⁸ Thus, UNCITRAL already recognizes the work of UNIDROIT and its importance for a possible project.

Moreover, the history of the CISG shows the long-term historical relationship between the work of UNIDROIT and UNCITRAL in the area of international sales law. In fact, the text of the CISG is derived to a large extent from the Hague Convention relating to a Uniform Law on the International Sale of Goods,⁴⁹ a convention drafted and promulgated by UNIDROIT.⁵⁰

But unlike the earlier transformation of one international convention—the Hague Convention on International Sale of Goods—to a revised convention—the CISG—what is proposed is the general adaptation of a non-binding set of principles into a binding convention. Thus, it is worth exploring whether there are distinct advantages to a binding convention that justifies this project as a supplement to the UNIDROIT Principles.

Soft law instruments, such as the Principles, generally fall into one of two categories: those that are intended as the basis for legislation, and those that are not. For those soft law instruments, such as model laws, that are specifically intended to be the basis for adoption by individual jurisdic-

46. This balancing of different legal traditions and domestic laws is not simply a distinction between common law and civil law. For example, the new provisions in the Principles on conditions are not only inconsistent with the common law, but also the law of Germany.

47. See *Proposal*, *supra* note 1, at 7.

48. See UNCITRAL Report, *supra* note 4, ¶ 131.

49. *Id.* ¶¶ 128–30.

50. For a discussion of the history of the CISG from its beginnings at UNIDROIT in 1929, see MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW 301–05 (3d ed. 2005).

tions, many⁵¹ have been most successful in setting international and domestic standards for legislation.⁵²

Moreover, as with a treaty or convention, those model laws that are intended to be adopted as drafted or with minor revisions are often subject to the same political pressures of harmonization and the same need to conform to specific legal traditions of domestic laws because the drafters of the model law have the same concerns of ratification and coordination.⁵³

Conversely, statements of principles such as the UNIDROIT Principles, the UNIDROIT and American Law Institute Principles of Transnational Civil Procedure, and the many American Law Institute Restatements of the Law have all been drafted without the express purpose of adoption and therefore were not drafted with the external demands of harmonization. For this reason they have often achieved a neutrality and balance that would not otherwise be possible with the demands for harmonization. This was the case with the UNIDROIT Principles, and it is not clear that this same level of drafting independence could be achieved in the political context of the drafting of a binding convention.

However, even with this limitation, the Principles could be highly influential in the drafting of a convention. Various soft law instruments, once completed, have often been influential in the further development of the positive law.⁵⁴ This can occur simply because they are a convenient and ready source of law and therefore eliminate the difficulty of drafting

51. For example, legislation based on the UNCITRAL Model Law on Electronic Commerce has been adopted in Australia, Bermuda, Canada, Colombia, France, Hong Kong Special Administrative Region of the People's Republic of China, Ireland, Philippines, Republic of Korea, Singapore, Slovenia, part of the United Kingdom, and the United States of America.

52. Of course, actual conventions can sometimes be useful for setting international commercial standards for further conventions. This was clearly the case with the UNIDROIT Convention relating to a Uniform Law on the International Sale of Goods in 1964, which was the basis for the CISG.

53. Thus, many model laws, such as the Model Law on Electronic Commerce, have been used for domestic legislation because they were determined to be well-drafted. Moreover, model laws can be used as a template for related legislation. Thus for example, the Model Law of Electronic Commerce was a source for the American Uniform Electronic Transactions Act, the Canadian Uniform Electronic Commerce Act, and the Australian Electronic Transactions Act.

The history and development of the UNCITRAL Model Law of Electronic Commerce differed from and influenced the American Uniform Electronic Transactions Act. See Henry Deeb Gabriel, *The New United States Uniform Electronic Transactions Act: Substantive Provisions, Drafting History and Comparison to the UNCITRAL Model Law on Electronic Commerce*, 5 UNIF. L. REV. 651, 651–64 (2000). The Model Law of Electronic Commerce also influenced the Canadian and Australian legislation. See Henry D. Gabriel, *The Fear of the Unknown: The Need to Provide Special Procedural Protections in International Electronic Commerce*, 50 LOY. L. REV. 307, 322–31 (2004).

54. That the Principles might be used as the basis for legislation has long been acknowledged. See, e.g., BONELL, *supra* note 50, at 243–48.

new law,⁵⁵ but there also can be a more conscious adoption because it is thought that soft law instruments represent the correct result.⁵⁶

A. *Benefits of a Binding Convention*

As to the specific advantages of a convention over the non-binding Principles, there are two significant drawbacks to soft law instruments. The first drawback is the inability to meet the need for certainty of enforcement, and the second is the concern that the soft law instruments have not been tested in the political process.

In some areas of international commercial law, certainty of the law and the enforcement of the specific rules is a necessity. Because international conventions are binding, once they are ratified they have the advantage of instant uniformity and enforceability. Thus, for example, the Cape Town Convention on International Interests in Mobile Equipment Convention⁵⁷ and the accompanying Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment⁵⁸ give an enforceable basis for secured financing of an aircraft in the international market. It would now be unreasonable to expect international financing of a multi-billion dollar aircraft without the level of certainty and protection afforded parties by the clear enforceable rules and remedies provided for by the convention.

Conversely, an agreement to use a particular set of rules, such as the UNIDROIT Principles, is not self-enforcing, but rather requires some domestic law for its enforcement. This, in many circumstances could lead to uncertainty because the parties may not know in advance whether the gov-

55. Describing the influence of the American Uniform Commercial Code and the Restatement Second of Contracts on the drafting of the UNIDROIT Principles, the late Professor Allan Farnsworth noted, “[U]nlike any other common lawyer, I came with texts in statutory form: the Uniform Commercial Code and the Restatement (Second) of Contracts. No decision of a common law tribunal—not even the House of Lords—was as persuasive as a bit of blackletter text.” Farnsworth, *supra* note 39, at 1990 (footnote omitted).

56. Of course some of the most successful soft law instruments, such as the Uniform Customs and Practices for Documentary Credits and the INCOTERMS, were specifically drafted for use by a large number of contracting parties because they reflect common well-established business practices, and for this reason they are in fact the de facto legal standards for the transactions they govern. Thus, although not designed as models for further legislation, they have in fact become such. For example, the letter of credit provisions of the American Uniform Commercial Code draw heavily from the Uniform Customs and Practice for Documentary Credits. See Katherine A. Barski, *Letters of Credit: A Comparison of Article 5 of the Uniform Commercial Code and the Uniform Customs and Practice for Documentary Credits*, 41 LOY. L. REV. 735, 736 (1996).

57. International Institute for the Unification of Private Law, Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285.

58. Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285.

erning terms of the agreement will be enforced according to their express wishes.⁵⁹

It may well be that a convention has some attractiveness over the Principles because it would be vetted in the political process and therefore it may reflect concerns that might not have surfaced or been articulated in the more isolated drafting process of the Principles. With the drafting of a convention, political forces will strongly influence the process at two stages—during the drafting, and during the ratification process. During the drafting, representative governments will have a strong sense of what is in their best interests, and these interests will be strongly argued, debated, and lobbied during the drafting process. Moreover, it is common in organizations, such as UNCITRAL, to have wide representation by industry and business organizations that will also press their concerns. This process of vetting, compromise, and ultimate acceptance usually reflects instruments that are acceptable to the various constituencies and therefore are likely to result in a wide acceptance.

It is too early to tell whether the Principles will have a wide level of acceptance and use, but the Principles did evolve through a more insular process than can be expected in a UNCITRAL working group. It may also be the case that a UNCITRAL convention, which would likely reflect practical, specific problems that call for fact-specific rules, as opposed to abstract principles, could lend more certainty and less divergence in interpretation.

However, because of the various compromises for acceptable results, a convention may not reflect the best practices but merely reflect acceptable practices. Moreover, irrespective of the quality of a convention, such an agreement has no force unless it is adopted. That of course, presupposes that the various constituencies do not bring the project to a standstill and death before the completion of the project because of an inability of the various stakeholders to agree upon a final text at all.

B. *UNIDROIT Principles as a Template for a Convention
on Global Contract Law*

If the proposal for a new global contract law convention proceeds at UNCITRAL, the UNIDROIT Principles may serve as an ideal template both for those areas covered by the CISG⁶⁰ as well as those areas outside the CISG's scope. The Principles have the advantage of being contemporary as well as having been drafted with a universal, and not a regional,

59. This problem should not be overstated. A large proportion of international legal disputes are resolved in arbitration, and generally the party's choice of law will control in arbitration irrespective of the underlying substantive domestic law. Moreover, absent some direct conflict with domestic policy, most domestic laws provide for a strong rule of party autonomy.

60. Presumably both the CISG and the UNIDROIT Principles would be possible sources for a new convention that covered the areas already covered by the CISG.

perspective. The gestation period for the Principles expanded over thirty years. During that time, not only did the various working groups⁶¹ have the luxury of time and reflection, but there have also been innumerable sources of scholarly and professional commentary as well as a growing body of judicial opinions and arbitral awards that have analyzed the Principles.⁶² The Principles have been tested and have been shown as clear, balanced, and reflective of contemporary international business practices.

Thus, if the project is viable, a realistic way forward is to replicate the creation of the CISG by relying on an initial product from UNIDROIT that provides for UNIDROIT's distinct working methods, and then use that work as the basis for a UNCITRAL convention on global contract law.⁶³ This would entail a close working relationship between UNIDROIT and UNCITRAL.

To the extent that a new convention would include and supersede the scope of the CISG, there is precedent for this, for as noted above, the CISG is based on a pre-existing UNIDROIT text, the 1964 Hague Convention on the International Sale of Goods. The growth of the law is cumulative, and as with the CISG, the law is often best served by expanding on its existing foundations and not by attempting to develop law as if it were from a blank slate.⁶⁴

61. The Principles were drafted in three versions: 1994, 2004, and 2010, with each new version adding to the work's prior version. Although with some overlapping membership, each version had its own working group.

62. These judicial opinions and arbitral awards are collected on the UNILAW database maintained by UNIDROIT. See *Instruments Adopted by UNIDROIT*, INT'L INST. FOR THE UNIFICATION OF PRIVATE L., <http://www.unidroit.info/program.cfm?menu=subject&file=convention&lang=en> (last visited Apr. 11, 2013).

63. This, of course, was the method for the drafting of the CISG.

64. It may be that UNCITRAL has already accepted the UNIDROIT Principles as the proper source of law in those areas where the scope of the CISG does not extend. For the 2010 Commission decision, see UNCITRAL Report, *supra* note 4, ¶ 140. For the 2007 Commission decision, see Rep. of United Nations Comm'n on Int'l Trade Law, June 25–July 12, 2007, ¶ 213, UN Doc. A/62/17 (Part I). The 2007 UNCITRAL Report states:

[The UNIDROIT Principles] shall be applied when the parties have agreed that their contract be governed by them,

They may be applied when parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like, . . . [and] when the parties have not chosen any law to govern their contract,

They may be used to interpret or supplement international uniform law instruments, . . . [and] to interpret or supplement domestic law,

They may serve as a model for national and international legislators.

Id. In this respect, it would appear to be redundant for UNCITRAL to embark on drafting law that already exists as far as UNCITRAL is concerned.

V. FEASIBILITY AND DESIRABILITY OF A CONVENTION
ON GLOBAL SALES LAW

Where does this leave us? The proposal asserts, but gives no evidence, that a global contract law is needed.⁶⁵ This alone is likely to be the most important consideration among the member states of UNCITRAL in the deliberations about whether to move forward.

It has been argued by some that the project merely replicates the work accomplished by the UNIDROIT Principles, and therefore would be an unnecessary waste of resources. To this, there may be the response that the benefits of a binding convention justify the new project. This has yet to be shown, but may well be the case.

What might be the major hurdles if the project moves forward? First, it is worth noting that the CISG took over thirty years to complete and it is very limited in scope. A new global contract law convention would inevitably have within its scope the coverage of the CISG. Second, there has been no serious discussion that the CISG itself needs to be revised. A revision of the CISG would entail a major disruption of existing international commercial law and would create the problem of inconsistent duplicate conventions when no substantial problems with the current CISG have been articulated. As noted above, this specific fear was the basis for the United Nations Convention on the Use of Electronic Communications in International Contracts⁶⁶ serving as a free-standing convention instead of an addendum to the CISG.

The broader scope of the proposed convention on global contract law would additionally expand into areas specifically avoided by the CISG. Although many of these areas of contract law are covered in the UNIDROIT Principles, as has been discussed above, these subjects are not necessarily subject to easy agreement in a binding convention. In fact, it is not clear that the working methods of UNCITRAL lend themselves to the level of detail needed for a convention along the lines set out in the proposal.

Before beginning any endeavor such as the one proposed, it may well be worth considering the difficulty in contract law revision that has occurred domestically and regionally. For example, in the United States, the revision of the sales provisions of the Uniform Commercial Code failed after thirteen years of work because various vested interests feared the effect of a new statute.⁶⁷ Conversely, the most contentious aspects of the

65. This is certainly the position proffered by the United States Department of State, as well as the National Conference of Commissioners on Uniform State Laws. See Keith Loken, *A New Global Initiative on Contract Law in UNCITRAL: Right Project, Right Forum?*, 58 VILL. L. REV. 509, 509 (2013).

66. United Nations Convention on the Use of Electronic Communications in International Contracts, Nov. 23, 2005, available at http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf.

67. These revisions should have been successful. See Henry Deeb Gabriel, *The Revision of the Uniform Commercial Code—How Successful Has It Been?*, 52 HASTINGS

revisions, those dealing with computer software contracts, were hardly noticed when they were incorporated into a non-binding instrument.⁶⁸

There have been difficulties at the regional level as well. For example, we need only look at the recent work in Europe to come up with a European contract law. Starting work in 1982, the Commission on European Contract Law began work on the Principles of European Contract Law. After twenty years of work, this project was completed in 2002. It has not been adopted as positive law. In 2009, another attempt at European contract law was created with the Draft Common Frame of Reference. At this time, the Draft Common Frame of Reference is considered too unwieldy and has been placed on the academic top shelf to collect dust. There is now the more recent Common European Sales Law that is presently being vetted. It has yet to gain any traction. All of these projects were in the context of a somewhat similar civil law framework. How this could be achieved across other legal traditions is not clear.

VI. CONCLUSION

UNCITRAL is now looking at the serious question of whether a revision or expansion of the CISG is a viable project that justifies the resources. Among the problems this project might encounter is a lack of resources, a clear articulation of the need for the project, the inability to define its scope, and the likelihood of widespread ratification within a reasonable time. Recent attempts to revise domestic and regional laws are instructive about the possible problems this project may have.

It may be that the barriers for a future convention on global contract law is not a realistic project, and the more recent path of soft law instruments, such as the UNIDROIT Principles, is a more viable method of providing global uniformity in contract. Alternatively, another path is to replicate the creation of the CISG by relying on an initial product from UNIDROIT that provides for UNIDROIT's distinct working methods, and then have that work as the basis for a UNCITRAL convention on global contract law. This would entail a close working relationship between UNIDROIT and UNCITRAL.

L.J. 653, 655-57 (2001). Unfortunately, the revisions were not successful. See Gabriel, *supra* note 40, at 489-91.

68. See AM. LAW INST., PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS (Tentative Draft No. 1, 2008).

CISG AND UPICC AS THE BASIS FOR AN INTERNATIONAL
CONVENTION ON INTERNATIONAL COMMERCIAL CONTRACTS

JAN RAMBERG*

I. INTRODUCTION

CONVENTION states tend to regard international conventions as exceptions from their domestic legal regimes which therefore, whenever possible, are preferred. Nevertheless, under Article 7 of the CISG, all convention states commit themselves to truthfully regard the international character of the CISG by abstaining from using concepts and variants of their domestic law. Also, in the application of the CISG, “[T]he general principles upon which it is based” should be used with respect to “matters governed” by it, although they have not been “expressly settled in it.”¹

Although the aim to achieve uniformity is expressed in Article 7, this does not ensure that all states develop their understanding of the CISG in the same manner. As a first step to establishing an internationally recognized understanding of the CISG, not only with respect to its detailed provisions but also general principles, awareness of court decisions and arbitral awards in the convention states is needed. For this purpose, reports are submitted to UNCITRAL for its Case Law on UNCITRAL Texts (CLOUT) and CISG Digest. In addition, UNIDROIT assembles CISG cases in its Unilex and an even more extensive case law report is provided by Pace Law School in New York in its database with more than 2,000 cases.² Awareness of decisions may be helpful but more is needed to determine to what extent cases are generally accepted as authoritative. UNCITRAL could not provide assistance in this respect as the convention states may take offense if their decisions would be downgraded or even criticized. Likewise, the understanding of legal scholars in some countries may not be regarded as internationally generally recognized.

In order to remedy the situation, the Advisory Council³ was inaugurated in 2001 and has now, as of January 2013, provided thirteen unani-

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1. JAN RAMBERG & JOHNNY HERRE, *INTERNATIONELLA KÖPLAGEN (CISG): EN KOMMENTAR* 114–115 (Norstedts juridik, 3d ed. 2009); JOSEPH LOOKOFSKY, *UNDERSTANDING THE CISG: A COMPACT GUIDE TO THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 38–42 (Kluwer Int'l Law, 3d ed. 2008); Jan Hellner, *Gap-Filling by Analogy: Art. 7 of the U.N. Sales Convention in Its Historical Context*, in *STUDIES IN INTERNATIONAL LAW: FESTSKRIFT TILL LARS HJERNER* 219 (Norstedts juridik, Jan Ramberg ed., 1990).

2. See Albert H. Kritzer, *CISG Database*, INST. OF INT'L COMMERCIAL LAW, www.cisg.law.pace.edu (last visited Mar. 6, 2013).

3. See *Welcome to International Sales Convention Advisory Council*, CISG ADVISORY COUNCIL, www.cisgac.com (last visited Mar. 6, 2013).

mous opinions on various articles and concepts of the CISG and a number of additional opinions are presently under preparation.

- Opinion 1 on Electronic Communications under the CISG.
- Opinion 2 on Examination of the Goods and Notice of Non-Conformity (Articles 38 and 39).
- Opinion 3 on the Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause under the CISG (Article 11).
- Opinion 4 on Contracts for Sale of Goods to be Manufactured or Produced and Mixed Contracts (Article 3).
- Opinion 5 on the Buyer's Right to Avoid the Contract in Case of Non-conforming Goods or Documents (Article 25).
- Opinion 6 on Calculation of Damages under the CISG (Article 74).
- Opinion 7 on Exemption of Liability for Damages under Article 79 of the CISG (Article 79).
- Opinion 8 on Calculation of Damages under the CISG (Articles 75 and 76).
- Opinion 9 on Consequences of Avoidance of the Contract (Articles 81–84).
- Opinion 10 on Agreed Sums Payable upon breach of an Obligation in CISG Contracts (Articles 6, 8, 9, 77, 79.1, 80, and 81).
- Opinion 11 on Issues Raised by Documents under the CISG Focusing on the Buyer's Payment Duty (Articles 7.2, 9, 30, 34, and 58).
- Opinion 12 on the Liability of the Seller for Damages Arising out of Personal Injuries and Property Damage Caused by Goods or Services under the CISG (Articles 3.2 and 5).
- Opinion 13 on Inclusion of Standard Terms under the CISG (Articles 8, 9, 14, 18, and 19).

The opinions are frequently referred to in scholarly writing and to an increasing extent used as guidance in court decisions and arbitral awards. Hopefully, in the long-term perspective, the opinions may contribute to turn the "homeward trend" in the application of the CISG towards an internationally recognized understanding, and thus to ensure uniformity not only in form but also in fact.

II. SPILL-OVER EFFECT OF FUNDAMENTAL CISG PRINCIPLES

The CISG has now been ratified by seventy-eight states and a further increase is expected following Japan's ratification, which will induce other states in the Far East to ratify. The same goes for South America, where Brazil has taken all necessary steps for ratification. No doubt, the CISG constitutes world law and it remains to be seen how long important states—such as the United Kingdom—will retain their position as outsiders.

The contract of sale is a dominant contract in every legal system. In the Scandinavian countries, where other important contracts (such as con-

tracts for services and erections of buildings and plants) are not generally subjected to statutory law, it is particularly important to assess whether the CISG could be used as guidance. In other words, would the provisions and principles of the CISG have any effect, not in form but in fact? Some fundamental approaches to be found in the CISG may well be recognized also for other types of contract than contracts of sale or, perhaps, for contract law generally.

III. DISAPPEARANCE OF THE CONCEPT OF NEGLIGENCE IN CONTRACT

It is expected that the removal of the concept of negligence from the CISG will influence the general attitude to breach of contract. An analysis would have to be made of the contractual promise as such, and on the basis of such analysis, it could be decided whether there is a breach. And, if there is a breach, liability follows automatically with the exception for impediments beyond control. While the obligations of sellers and buyers obviously entail that they must reach the result to deliver conforming goods and pay, it is equally obvious that contracts for services—such as the service of a lawyer—is limited to an obligation of best efforts under Article 5.1.4 of the UNIDROIT Principles of International Commercial Contracts (UPICC). Once it has been established that there has been a failure to exercise best efforts, it is unnecessary to perform yet another test, namely if the failing party has been guilty of negligence. Irrespective of the nature of the obligation, the breach as such suffices. The traditional reliance on remedies similar to those available in non-contractual relations (i.e., tort law) will probably be replaced by an analysis of the contractual obligation.

IV. DOWNGRADING SUBJECTIVE CRITERIA IN CONTRACT INTERPRETATION

The methods of interpretation of contracts traditionally used in most jurisdictions correspond to Articles 8 and 9 of the CISG. However, so far contract interpretation has been performed mainly as suggested in scholarly writing and there has been some reluctance to rely on other data than those assumed to have been in the minds of the contracting parties themselves. It is reasonable to expect that the objective criteria mentioned in Article 8 will invite a certain departure from the traditional over-reliance on the possibility to extract reliable data from what is referred to as the common intention of the parties or, alternatively, the intention of one party of which the other party could not reasonably have been unaware. In most cases, an objective test would have to be made on the basis of an analysis of the contractual situation relying upon how it is understood in the market place. Thus, the understanding of a “reasonable person of the same kind as the other party . . . in the same circumstances” would for all practical purposes replace an assumption of a subjective intention of a

party or, alternatively, an assumed awareness of such intention by the other party.⁴

The objective approach also appears in Article 14 of the CISG and is used to determine whether a party has given an offer to the other party. It follows from that article that it would be impractical to perform an analysis of the subjective intention of the prospective offeror and that it is sufficient to look for his *indication* of intention. Further, an analysis of the indication as such will rest upon whether it is sufficiently definite in indicating the goods, the quantity, and the price under Article 14.1 of the CISG.

V. OBJECTIVE METHODOLOGY IN DEALING WITH LATE AND NON-CONFORMING ACCEPTANCE

While a subjective approach based upon assumptions on what was in the minds of offerors and offerees is favoured in many jurisdictions, the objective approach of the CISG Article 21.2, which focuses on what could be reasonably concluded from the acceptance letter as such (appearance of abnormal transmission) and Article 19, which addresses whether the non-conformity is sufficiently material, is preferred. If so, the non-conformity must be regarded as a rejection of the offer and constitutes a counter-offer under Article 19.1. However, if the materiality test shows that the discrepancy was not sufficiently material, then the non-conformity does not constitute an immediate rejection of the offer. Instead, if there is no objection by the offeror without undue delay, the non-conforming acceptance will constitute the terms of the contract. The practical importance of Article 19 is rather limited in view of the extensive enumeration of material terms in Article 19.3. Nevertheless, the objective methodology is clear and is a more practical approach than the hopeless task of finding real contractual intent or awareness in the minds of any one of the contracting parties.

VI. LOSS OF POSSIBILITY TO WITHDRAW AN OFFER OR ACCEPTANCE

Another example of the subjective methodology follows from the Scandinavian Contracts Act that appears in Section 7, determining when an offer or acceptance can no longer be withdrawn. Here, reference is made not only to the time when the offer or acceptance reaches the other party but also to the time when the recipient becomes aware of it. Thus, under this principle, it is possible to withdraw the offer or acceptance if it could be proven that the message had not actually come to the knowledge of the addressee. It goes without saying that the definition of “reaches” in Article 24 of the CISG is the only practical possibility to deal with the problem.

4. See Jan Ramberg, *Avtalstolkningsmetoder*, in FESTSKRIFT TILL GOSTA WALIN 499, 511 (2002).

The recent (2012) withdrawal by Denmark, Finland, and Sweden of the Article 92 reservation, excluding Chapter II on formation of the contract, would undoubtedly also in this respect be a further step in the right direction.⁵

VII. IS THERE A LEGAL BASIS FOR EXPANDING THE PRINCIPLES OF CISG?

As a follow-up to the success of the CISG, general principles have been developed partly as a supplement to the CISG but also extending far beyond into the broad ambit of general contract law. On the global level, UPICC are well-known and frequently referred to in court decisions and arbitral awards.⁶ The same ambition to cover the whole field of contract law is evidenced by the Principles of European Contract Law (PECL).⁷ Would, in the distant future, PECL materialize into a European Civil Code? Or would, on the regional level, PECL function more or less as UPICC?

Although UPICC and PECL are similar, both in structure, form, and content, they should not be regarded as competitors. They contribute to the development of a common understanding of general contract law principles and their application in practice. Regardless of whether PECL will become law in form, they will remain as law in fact to the extent that they are actually used in decision-making. Also, they have formed the basis for further studies purporting to foster a common understanding within the European Union as demonstrated by the Draft Common Frame of Reference in the E.U.

But is use of UPICC and PECL really possible without solid contractual incorporation?⁸ I remember an interesting discussion with a former Judge of the House of Lords in England, and nowadays an experienced arbitrator, regarding the possibility to apply *lex mercatoria*. He had made an interesting presentation asking himself whether the *lex mercatoria* could be regarded in the same manner as statutory law. He concluded: “Of course, it cannot exist” and continued “yet, it is there.” I asked him whether I could apply it as an arbitrator and he answered “Of course you can . . . if you do not tell anybody.” Indeed, in this sense, UPICC, PECL, and the CISG outside their scope of application exist as rules of law in so far as they provide guidance to the judge or arbitrator, regardless of

5. See CISG PART II CONFERENCE STOCKHOLM, SEPTEMBER 4–5 2008 (Jan Kleineman ed., Stockholm Ctr. for Commercial Law Ser. No. 11, 2009).

6. See Michael Joachim Bonell, *The UNIDROIT Principles as a Means of Interpreting and Supplementing International Uniform Law*, in ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN, SPECIAL SUPPLEMENT 29–38 (2002).

7. See Michael Joachim Bonell & Roberta Peleggi, *UNIDROIT Principles on International Commercial Contracts and Principles of European Contract Law: A Synoptical Table*, 9 UNIF. L. REV. 315, 315–96 (2004).

8. Incorporation may be made by the use of standard contract forms, such as those elaborated by the ICC. See FABIO BORTOLOTTI, *DRAFTING AND NEGOTIATING INTERNATIONAL COMMERCIAL CONTRACTS: A PRACTICAL GUIDE* (ICC Pub. No. 671, 2008).

whether they are referred to or appear from the decision.⁹ When the parties have not agreed on a national law, the ICC Rules of Arbitration, as well as the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, allow the arbitrators to by-pass choice of law rules and directly to choose any “rule of law” which they find “appropriate.”¹⁰ This provides a basis for using the provisions of UPICC, PECL, and the CISG outside their scope of application as internationally generally recognized principles of law and may encourage arbitrators to candidly disclose such use in the reasons for their awards. In some instances, arbitrators are particularly prone to do so.

So, is it true that the CISG will have an effect outside its scope of application? Will courts and arbitral tribunals continue to focus exclusively on national law chosen by application of choice of law rules or will they at least to some extent be influenced by the general principles of law appearing from UPICC, PECL, and the CISG? I had a particular reason to consider this problem because of the Article 94 reservation made by the Scandinavian states replacing the CISG with national law in intra-Scandinavian trade. The situation became further aggravated by Denmark retaining its Sale of Goods Act from 1906, while Finland, Iceland, Norway, and Sweden have introduced new Sale of Goods Acts based upon the main principles of the CISG.

Indeed, it can hardly be said that nowadays the sales law of Denmark is closely related to the sales law of the other Scandinavian states. Yet, the Article 94 reservation includes Denmark.¹¹ This being so, would a court of law in a dispute involving a Danish seller and a buyer in one of the other Scandinavian states uphold the *rigor commercialis* of the Acts from the early 1900s and allow the buyer in a commercial sale to avoid the contract immediately in case of a breach however insignificant? Or would a buyer lose the claim failing immediate notice to the seller? I have candidly disclosed that even if Danish law applied to the contract I would, as an arbitrator, at least in some cases, relax the *rigor commercialis* in favour of a decision influenced by the general principles of the CISG.¹²

My answer to the question of whether the principles of the CISG could also be applied outside its scope of application would therefore be in the affirmative. Regrettably, it is hard to prove to what extent this actually occurs in practice, because only a few judges and arbitrators have the courage to disclose in their reasons for the award to what extent they have

9. See Jan Ramberg, *The Creativity of Arbitrators in the Context of UNIDROIT Principles of International Commercial Contracts*, 3 UNIF. L. REV. 651, 656 (1998).

10. The International Chamber of Commerce, ARBITRATION AND ADR RULES art. 17.1 (2012); Stockholm Chamber of Commerce Arbitration Rules art. 24.1 (2010).

11. See RAMBERG & HERRE, *supra* note 1, at 652 (explaining views on validity of reservation suggesting that reservation should not be set aside even if contrary to requirements set forth in CISG).

12. See Jan Ramberg, *Sammordisk köprätt-finns den?*, in HYLDESTSKRIFT JØRGEN NØRGAARD 835, 844 (2003).

been influenced by other sources than those following from the applicable law.

VIII. THE RULE-MAKING APPROACH OF UPICC AS COMPARED WITH THE CISG

Needless to say, in elaborating UPICC, it became important to avoid unnecessary deviations from the pattern set by the CISG. Any differences can be explained by the mere fact that UPICC cover international commercial contracts generally and not merely contracts of sale and to a limited extent by the efforts to find better solutions. A comparison between UPICC Chapters 5 and 6 will show that only a few sections cover the same substance,¹³ while in other areas some differences deserve to be noted. One much debated issue concerns the rather strange formulation of CISG Article 7.1 which, like UPICC Article 1.7, refers to good faith but only “in the interpretation of this Convention.”¹⁴ Semantically, this expression is meaningless as, in the absence of these words, it cannot very well be that the convention should be interpreted otherwise than to give effect to the provisions as intended by the draftsmen.¹⁵ At least, the reference to good faith must mean not only in the “interpretation” but also in the “applica-

13. UNIDROIT Principles of International Commercial Contracts Article 5.1.7 (on open price) corresponds to CISG Article 55, and UPICC Article 6.1.1 (on time of performance) corresponds to CISG Article 33.

14. See C. MASSIMO BIANCA & MICHAEL JOACHIM BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 83 (1987); PETER SCHLECHTRIEM & INGBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 127–28 (2005); John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, in REVIEW OF THE CONVENTION ON INTERNATIONAL SALE OF GOODS (CISG) 115, 115–265 (Kluwer Int'l Law 2001); Franco Ferrari, *Interpretation of the Convention and Gap-Filling: Article 7*, in THE DRAFT UNCITRAL DIGEST AND BEYOND 138, 151 (Franco Ferrari et al. eds., 2004); Peter M. Gerhart, *The Sales Convention in Courts: Uniformity, Adaptability, and Adaptability*, in THE INTERNATIONAL SALE OF GOODS REVISITED 77 (Petar Sarcevic & Paul Volken eds., 2002); Sylvette Guillemard, *A Comparative Study of the UNIDROIT Principles and the Principles of European Contracts and Some Dispositions of the CISG Applicable to the Formation of International Contracts from the Perspective of Harmonisation of Law*, in REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 83, 100–13 (Kluwer Int'l Law 2001); Ole Lando, *Eight Principles of European Contract Law*, in MAKING COMMERCIAL LAW: ESSAYS IN HONOUR OF ROY GOODE 103 (Ross Cranston ed., 1997); E. Allan Farnsworth, *Duties of Good Faith and Fair Dealing Under the UNIDROIT Principles, Relevant International Conventions, and National Laws*, 3 TUL. J. INT'L & COMP. L. 47 (1995); Alexander S. Komarov, *Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: Some Remarks on Article 7(1)*, 25 J.L. & COM. 75 (2005); Fredrik Liljeblad, *The Status of Good Faith in the 1980 United Nations Convention on Contracts for the International Sale of Goods 263* (2002) (unpublished Master's Thesis, Lund University), available at <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1559579&fileId=1565031>; Peter Schlechtriem, *Good Faith in German Law and in International Uniform Laws*, Remarks at Saggi Conferenze e Seminari 24 in Rome (Feb. 1997).

15. See RAMBERG & HERRE, *supra* note 1, at 116.

tion” of the convention when choosing between applying the provisions strictly or in a manner maintaining a fair relationship between the interests of the contracting parties.¹⁶ Although the wording of Article 7.1 may be explained by an opposition to a general application of good faith, an understanding of Article 7.1 as suggested here would reduce the difference between UPICC Article 1.7 and CISG Article 7.1.

It follows from UPICC Article 1.9 that usages should not be applied unless “reasonable.” Although there is no reference to reasonableness in CISG Article 9, an application of the notion of good faith would lead to the same result as it could seldom be acceptable to apply an unreasonable usage to the detriment of one of the contracting parties.

Also, in UPICC Article 2.1.18, there is a reference to “reasonableness” so that a party may be precluded by his conduct from invoking an “in writing” requirement, if the other party has “reasonably” acted in reliance on such conduct. Again, there is no requirement in CISG Article 29(2) that the action in reliance must be reasonable but, in practice, there is no difference, because an unreasonable action must be qualified as an independent action rather than an action in reliance on the other party’s statement or conduct.

The word “reasonably” appears in the foreseeability test under UPICC Article 7.4.4 but not in CISG Article 74. Again, there is no difference in practice, because what a party “ought to have foreseen . . . as a possible consequence” allows an assessment of all relevant circumstances. Thus, it is not excluded that the consequence of a breach, although it may be generally difficult to foresee the consequences of a breach of the relevant kind, is nevertheless foreseeable if the party would have such special knowledge that it ought to have foreseen the possible consequence. If so, it would be unreasonable to relieve him from paying damages when the possible consequence materializes.

The wording of UPICC Article 7.4.4 differs from CISG Article 74. Semantically, there is a difference between consequences “being likely to result” and “possible” consequences. The former expression signifies a mere probability, while the latter could include “the worst case scenario.” Apparently, no difference is expected in the practical application of the respective provisions, as both allow an assessment considering all circumstances.¹⁷

The efforts to reach consensus on the right to specific performance under the CISG were unsuccessful. Although the CISG, in Articles 46 and 62, allows specific performance, this is modified by Article 28 stipulating:

16. *See id.* at 117.

17. *See* INT’L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 271 (2010) (noting comment suggests that principle of Article 7.4.4 “corresponds to the solution adopted in Article 74 CISG”).

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.¹⁸

There is no corresponding modification, and rightly so, under UPICC Articles 7.2.2 and 7.2.3.

UPICC Article 2.1.11 and CISG Article 19 both deal with the effect of a modified acceptance of an offer. Although a modified acceptance is insufficient for the creation of a contract, it would be unfortunate to leave it as a rejection signifying game over. The parties may fail to observe or react against the modification and simply continue as if there were a valid contract. An unwinding of what has been performed without a valid contract would normally be an impracticable and undesirable measure. As it is sometimes suggested, you cannot unscramble the eggs. Therefore, it is provided that the modified acceptance results in a contract including the modification provided there is no timely objection. However, the CISG has added a definition of materiality in Article 19.3 while UPICC Article 2.1.11 has not. Unfortunately, the definition of materiality, as one could expect from a definition, is sufficiently wide to include most modifications occurring in practice. Thus, in order to find that a contract has been validly concluded in spite of the modification, it would frequently be necessary to use another basis than failure to timely object, such as an implied consent to the contract but not necessarily on the terms of the modified acceptance.

Although there is disagreement whether the CISG Article 19 should be used to resolve the “battle of the forms” where the modified acceptance constitutes a reference to another standard form contract than the standard form referred to in the offer,¹⁹ an alternative often suggested would be to find an implied contract either on the basis of one of these standard forms or, perhaps even better, by using the “knockout” principle of UPICC Article 2.1.22 where both standard forms are recognized as con-

18. U.N. Comm’n on Int’l Trade Law, United Nations Convention on Contracts for the International Sale of Goods art. 35, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG], available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.

19. See John E. Murray, Jr., *The Definitive “Battle of the Forms”: Chaos Revisited*, 20 J.L. & COM. 1, 41–48 (2000); Maria del Pilar Perales Viscasillas, “Battle of the Forms” Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles, 10 PACE INT’L L. REV. 97 (1998); Peter Schlechtriem, Battle of the Forms in International Contract Law: Evaluation of Approaches in German Law, UNIDROIT Principles, European Principles, CISG; UCC Approaches Under Consideration, in Festschrift für Rolf Herber zum 70, 36–49 (Martin Eimer trans., 1999).

tract terms but only insofar as they are common in substance.²⁰ The surplus is simply “knocked out.”

The important matter of contract interpretation is addressed both in UPICC and the CISG where UPICC Chapter 4 conforms with CISG Articles 8 and 9. UPICC, however, give considerably more guidance in Article 4.4 (contract interpreted as a whole), Article 4.5 (all terms to be given effect), Article 4.6 (*contra proferentem*), Article 4.7 (linguistic discrepancies), and Article 4.8 (supplying an omitted term). I can see no reason not to accept the added guidance offered by UPICC, albeit the guidance offers many alternatives and does not require strict appliance.

IX. THE FEASIBILITY OF AN INTERNATIONAL CONVENTION BASED ON UPICC

Some may well feel that such a project stands little chance of success. But the gradual acceptance of general principles of commercial law as evidenced by UPICC and the CISG would at least enhance the chances of success to such an extent that efforts should indeed be made. Even if states would be slow in accepting a global convention on international commercial contracts, the project as such may have a considerable effect to unify and consolidate at least the fundamental principles on a global level. Nevertheless, it may be questioned whether it is wise already to proceed directly to launching the project. In any event, it may be worthwhile to consider, in addition to the endorsement by UNCITRAL, further measures in order to encourage judges and arbitrators to use the principles of UPICC whenever appropriate.

20. See RAMBERG & HERRE, *supra* note 1, at 166.

CISG AS BASIS OF A COMPREHENSIVE
INTERNATIONAL SALES LAW

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I. INTRODUCTION

THE articles presented in this symposium range from those that deal with specific issues relating to the Convention on Contracts for the International Sales of Goods (CISG), the CISG as an instrument of domestic law reform, the use of soft law (Unidroit Principles), and the “Swiss Project”¹ that aims at creating a uniform international contract or commercial law. This Article will analyze the idea of developing a more comprehensive international sales law using the CISG as its core, or, alternatively, as a starting point. Such an undertaking is valuable because the non-comprehensiveness of the CISG is universally acknowledged and the likelihood of an international commercial code or contract law is an unlikely proposition in the near future. The CISG’s lack of comprehensiveness remains its major shortcoming. This Article will pursue two lines of research—how best to internally broaden the comprehensiveness of the CISG and, after maximizing its comprehensiveness, how best to resolve the remaining shortcomings in CISG coverage. This Article will examine the idea of “CISG Plus”—the development of a more comprehensive hard-soft international sales law with the CISG at its core.

Part II will examine the shortcomings of the CISG’s scope and coverage. These “gaps” in the CISG’s coverage have been widely researched in the literature. This review will highlight some of the express and implied gaps found in the CISG. The express gaps are those in which the CISG expressly excludes its reach and are often referred to as “external gaps.” Other gaps are found in areas within the intended coverage of the CISG, but the CISG fails to provide specific rules. These gaps are referred to as “internal gaps.” The existence of internal gaps and how they should be solved is an ongoing problem.

The notion of an internal gap is a bit of a misnomer. If the interpreter is able to work within the CISG’s interpretive methodology to fill in the gap, then the gap was truly internal because it was filled through internal methodological means. However, when the gap is unable to be filled

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1. See UNCITRAL, *Possible Future Work in the Area of International Contract Law: Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law*, UN Doc. A/CN.9/758 (May 8, 2012) [hereinafter UNCITRAL].

by the CISG's interpretive methodology, the last resort of private international law is employed.² In this case, the internal gap (within coverage of the CISG) is, in essence, an external gap because recourse is made to sources found in national law to fill in the gap. In a more comprehensive code, the existence of such internal gaps is diminished by the code's comprehensiveness and the interpretive methodologies developed to ensure that the code is indeed comprehensive. Part III will explore theories of interpretation aimed at filling in the gaps found in the CISG. It will look briefly at the works of Karl Llewellyn³ and Ronald Dworkin⁴ to provide a theoretical base for a more aggressive interpretive methodology to extend the coverage of the CISG, or, less dramatically stated, to minimize instances of internally unsolvable gaps that lead to the use of domestic law solutions. Karl Llewellyn, the Reporter of the American Uniform Commercial Code (U.C.C.),⁵ worked on the crafting of rules throughout his career.⁶ His theory of rules will be examined given the similarities between the U.C.C. and the CISG. Ronald Dworkin's notions of the "integrity of law" and "law as interpretation" also provide a theory of rules that assert that rules are inherently flexible when viewed as part of a greater body of law. His idea of "rule-fit" provides a theoretical construct for dealing with the CISG's internal gaps. Llewellyn and Dworkin's ideas will be utilized in examining where CISG rules end and where a gap begins.

Part IV acknowledges that extending the comprehensiveness of CISG coverage through theories of gap-filling, although useful, can only be modestly successful. In the end, due to the existence of numerous external gaps and the limitations of the language of the CISG in totally eliminating internal gaps, the CISG will always be lacking because it falls short of being a comprehensive international sales law. From the perspective of businesspersons, and their transactional lawyers, efficiency, certainty, and lower transaction costs can best be achieved by the use of a comprehensive composite (hard-soft law) that can be recognized as a single source for all or most issues of international sales law. Part IV examines existing sources of content that can be utilized to craft a more comprehensive law of sales. The use of the Unidroit Principles of International Commercial Contract

2. U.N. Comm'n on Int'l Trade Law, United Nations Convention on Contracts for the International Sale of Goods art. 7(2), Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG], available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf> (explaining where gap cannot be filled by general principles it shall be filled "by virtue of the rules of private international law").

3. See Soia Mentschikoff, *Karl N. Llewellyn*, 9 INT'L ENCYCLOPEDIA SOC. SCI. 440 (1968) (providing biographical information and importance in American law); see also Grant Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813 (1962); THE OXFORD GUIDE TO AMERICAN LAW 534-35 (Kermit L. Hall ed., 2002).

4. See THE OXFORD GUIDE TO AMERICAN LAW, *supra* note 3, at 451-52 (discussing biographical information and importance in American law).

5. See William Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1967).

6. See generally KARL N. LLEWELLYN, COMMON LAW TRADITION: DECIDING APPEALS (1960).

Law (Principles)⁷ in the interpretation of the CISG has been extensively explored. But, this undertaking will focus on its use as a source for a more comprehensive sales law. The proposed Common European Sales Law (CESL)⁸ will also be reviewed as a complimentary source for a broadened CISG. In the end, a consensus over developing a single hard-soft law instrument is the best that can be done, at the present time, to remove law as an obstacle to international trade.

II. CISG AS CORE: RECOGNIZING ITS SHORTCOMINGS

The argument for retaining the CISG untouched is that it is the product of many years of work that is not likely to be replicated. Under this assumption, this Article will focus on two questions: (1) Is the CISG of sufficient quality to be the center of a broader sales law?; and (2) If so, what is the method by which the CISG can be “expanded” to become a more comprehensive sales law? The first question invites a pragmatic answer—the tremendous amount of scholarship and case law that has evolved relating to the CISG makes it the necessary core of a more comprehensive sales law. The answer to the second question is the undertaking of a hard-soft law project that will provide a single comprehensive legal regiment upon which businesspersons and their lawyers may structure, with greater certainty, their international sales transactions. The second question will be the focus of the later parts of this Article. The first question will be analyzed in the present part. First, an argument will be made that the CISG should be the core of any more comprehensive sales law project. Second, it will review its shortcomings—gaps in coverage. This Part lays the foundation for Parts III and IV’s exploration of methods and theories of interpretation that provide solutions to the problem of filling internal gaps.

A. *Argument in Favor of CISG as Core*

Before focusing on the shortcomings of the CISG, it is important to recognize the many things the CISG does well. There is much to like about the CISG’s substantive rules. On a whole, the CISG rules provide a fair balance between seller and buyer rights, as well as providing a coherent remedial scheme. The CISG blends the two foundational comparative law methodologies: the “common core” and “better rules” approaches. The common core approach was championed by Rudolf Schlesinger of Cornell University beginning in the 1960s,⁹ and more recently by Ole

7. INT’L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2004 (2d ed. 2004) [hereinafter UNIDROIT 2004], available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>.

8. *Proposal for a Regulation of the European Parliament on a Common European Sales Law*, COM (2011) 635 final (Nov. 11, 2011) [hereinafter CESL].

9. See RUDOLF B. SCHLESINGER, *COMPARATIVE LAW: CASES, TEXT, MATERIALS* (1980); UGO MATTEI ET AL., *SCHLESINGER’S COMPARATIVE LAW: CASES, TEXT, MATER-*

Lando¹⁰ in the Principles of European Contract Law.¹¹ Lando explains that the common core approach is a method to determine a common core among different legal systems.¹² Mauro Bussani and Ugo Mattei have described the aim of the common core approach as a means “to provide with the highest degree of precision a map of the relevant elements of different legal systems.”¹³ The fact that the CISG was a product of negotiations of representatives from the common and civil law countries necessarily resulted in the embracing of rules that met the common core criterion.¹⁴ The large amount of similar rules is not surprising given that the basic nature of commercial transactions is consistent across legal systems.

However, there were numerous incidents in which the different legal systems provided conflicting or different rules. In such situations, three alternatives presented themselves: selecting one of the rules, crafting a compromise rule, or abdicating coverage over the subject of the conflicting rules. For purposes of a comprehensive code, the first two alternatives need to be maximized. Failure to select or compromise on rule choice is what leads to external and internal gaps in the law. The quality of a specialized set of rules, such as sales law, is dependent on the quality of its rules and the comprehensiveness of the law taken as a whole. The common core approach is essentially a descriptive enterprise, while the better rules approach is a normative undertaking.

An evaluation of the CISG, based upon the better rules approach is mixed. When the drafters selected between preexisting common and civil law rules, they generally selected the most efficient rule.¹⁵ The classic example is the choice of rules for the effectiveness of an acceptance between the common law’s “mailbox” or dispatch rule¹⁶ and the civil law’s receipt rule. At the level of general rules, the drafters agreed to adopt the civil law

IALS (7th ed. 2009); Richard M. Buxbaum & Ugo A. Mattei, *Rudolph B. Schlesinger 1909–1996*, 45 AM. J. COMP. L. 1 (1997).

10. Ole Lando, *The Common Core of European Private Law and the Principles of European Contract Law*, 21 HASTINGS INT’L & COMP. L. REV. 809 (1998).

11. See THE COMMISSION ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW (Ole Lando & Hugh Beale eds., 2000).

12. See *supra* note 10, at 809.

13. Mauro Bussani & Ugo Mattei, *The Common Core Approach to European Private Law*, 3 COLUM. J. EUR. L. 339, 347 (1998).

14. See Sara G. Zwart, *The New International Law of Sales: A Marriage Between Socialist, Third World, Common, and Civil Law Principles*, 13 N.C. J. INT’L L. & COM. REG. 109, 109–10 (1988).

15. Larry A. DiMatteo & Daniel T. Ostas, *Comparative Efficiency in International Sales Law*, 26 AM. U. INT’L L. REV. 371 (2011).

16. See 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.22 (3d ed. 2004) (noting that justifications include offeror authorizing post office as its agent to receive acceptance, dispatching puts it out of the control of the offeree, and it limits offeror’s power to revoke). The mailbox rule is criticized because it places the risk of loss on the receiving party who is in the less favorable position to insure its delivery. See Ian Macneil, *Time of Acceptance: Too Many Problems for a Single Rule*, 112 U. PA. L. REV. 947 (1964).

rule.¹⁷ The civil law's receipt rule was the better rule because the risk of the acceptance being lost in transmission should be placed upon the most efficient insurer, that being the sender. The offeree is in the best position to ensure that its acceptance reaches the offeror. The common law's "mailbox" rule places the offeror in a curious position. The offeror, not receiving any communication from the offeree within a reasonable time period, proceeds to sell the goods to another party. In doing so, the offeror has breached its contract with the original offeree.

Interestingly, the CISG's rule was the product of compromise and not a wholesale adoption of a pure receipt rule. Article 16(1) provides an exception to the receipt rule. The right of the offeror to revoke its offer is frozen if an acceptance has been dispatched prior to the receipt of the revocation by the offeree. Thus, even if the revocation reaches the offeree before the acceptance is received by the offeror, a contract is formed. Under a pure receipt rule, the offer would have terminated upon the receipt of the revocation by the offeree. So under this scenario, a function of the "mailbox rule" is preserved. Although not effective on dispatch, the sending of the acceptance becomes critical to the formation of a contract in that it prevents a revocation of the offer upon receipt of the offeree. The exception to the receipt rule prevents an injustice when an offeree incurs expenses in relying on an offer and the expectations that a proper sending of an acceptance will bind the offeror to a contract. The placing of the burden on the offeror, who creates the expectations of a contract by acceptance, to ensure that its revocation is received prior to the sending of the acceptance is a fair and efficient compromise. This examination of the CISG's acceptance rules is an example of the integrity of the CISG rules as meeting the needs of certainty and fairness.

B. *CISG Rules and Shortcomings*

Due to divergences between the common and civil law legal traditions, concerns of lesser-developed countries, and the preservation of national sovereignty, compromises were not obtained in a number of areas that would be covered in many national sales law regimes. The result is the limited scope of the CISG (external gaps) and the somewhat uncertainty of scope within the CISG (internal gaps). The CISG's interpretive methodology, as provided in Article 7, seeks to fill in the internal gaps in the CISG.¹⁸ This section explores the non-comprehensiveness of the CISG as it relates to external and internal gaps. It then finishes with the more difficult issue of determining whether a gap is internal or external.

17. See CISG, *supra* note 2, art. 18(2) ("[A]n acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror.").

18. See Anthony J. McMahon, Note, *Differentiating Between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining "Governed by" in the Context of Article 7(2)*, 44 COLUM. J. TRANS-NAT'L L. 992, 993 (2006).

1. *External Gaps*

The first approach to the issue of the coverage of a legal instrument is to ask: What does the instrument intend to cover? The answer is provided in Article 4 of the CISG: "This 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."¹⁹ From this stark statement it can be implied that the scope of the CISG is narrow considering the many areas of sales law, such as pre-contractual and post-contractual liability, defects in consent, and validity of terms, that are outside its coverage. The statement of coverage is also vague and barren of specific content. What is the reach of the "rights and obligations" of the parties? In looking at the CISG rules, "rights and obligations" provides the foundation for a more comprehensive sales law than is indicated in Article 4. For example, the CISG covers formalities;²⁰ contract formation;²¹ performance and breach;²² conformity of goods;²³ buyer's duties of inspection;²⁴ notice of non-conformity;²⁵ mitigation;²⁶ passing of risk;²⁷ remedies²⁸ and damages;²⁹ rights to time extensions;³⁰ buyer's and seller's duties of preservation;³¹ excuse;³² and so forth.

The next step in the measurement of comprehensiveness is determining what the CISG expressly excludes. Unfortunately, the extent of subject matter excluded by the CISG is not insubstantial. The CISG does not apply to certain types of goods,³³ mixed transactions where a preponderant part of the contract is not for the sale of goods,³⁴ security interests in goods,³⁵ the validity of contracts or contract terms,³⁶ products liability

19. CISG, *supra* note 2, art. 4.

20. *Id.* arts. 11–13 (writing), 29 (modification).

21. *Id.* arts. 14–24.

22. *Id.* arts. 25 (fundamental breach), 47, 48, 63 (time extension), 71–73 (anticipatory breach).

23. *Id.* arts. 35 (conformity of goods), 41–42 (warranty against third-party claims).

24. *Id.* art. 38.

25. *Id.* art. 39.

26. *Id.* art. 77.

27. *Id.* arts. 66–70.

28. *Id.* arts. 46 (buyer's right to substituted goods), 49, 64 (avoidance) 50 (price reduction remedy), 81–84 (effects of avoidance).

29. *Id.* arts. 74–76, 78 (interest).

30. *Id.* arts. 47, 48, 63.

31. *Id.* arts. 85–88.

32. *Id.* art. 79.

33. *Id.* art. 2 (personal goods, consumer transactions, goods sold by auction, goods sold as collateral, ships, aircraft, and electricity).

34. *Id.* art. 3.

35. *Id.* art. 4(b).

36. *Id.* art. 4(a).

(personal injury),³⁷ and the remedy of specific performance.³⁸ The most problematic of the express exclusions of coverage is Article 4's reservation to national law all issues relating to "the validity of the contract or of any of its provisions."³⁹ In addition, the CISG does not cover the conclusion of the sales contract through an agent, set-off, assignment of rights, limitation periods, and the use of electronic communications.

2. *Internal Gaps*

An example of an internal gap is the CISG's failure to allocate the burden of proof between the parties to a contract dispute. In areas where the CISG provides substantive rules, it has been implied that the allocation of the burden of proof is covered in those substantive areas. Thus, the interpreter making the assumption that the burden of proof falls within the scope of the CISG must fill the internal gap by allocating the burden based upon general principles. The courts and scholarly literature have generally held that the burden of proof rests with the party that would benefit from the application of the rule.⁴⁰

Internal gaps may become external gaps if courts cannot imply a rule "in conformity with the general principles"⁴¹ of the CISG. Then recourse must be made to the applicable national law.⁴²

The determination of whether a gap is internal or external is difficult because it is beset by competing policy objectives. On the one hand, the more matters are found to be internal, the more the CISG's objective of uniformity is advanced. On the other hand, Member States have an interest in finding certain matters outside the purview of the Convention so that they can apply their own law and give effect to domestic policy choices. This friction emerges from the competing needs of uniformity and flexibility.⁴³

The task becomes the filling of internal gaps internally and thus preserving the autonomous nature of CISG interpretations and rule applications. The materials relating to Llewellyn and Dworkin's theories of gap-filling, presented in Part III, aim to show how the conversion of an internal gap to an external can be minimized.

37. *Id.* art. 5.

38. *Id.* art. 28.

39. *Id.* art. 4(a).

40. *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 9, 2002, CIVIL PANEL VIII ZR 304/00 (Ger.), *available at* <http://cisgw3.law.pace.edu/cases/020109g1.html>; Trib. di Vigevano, 12 luglio 2000, n. 405 (It.), *available at* <http://cisgw3.law.pace.edu/cases/000712i3.html>.

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

42. *See id.* ("[I]n conformity with the law applicable by virtue of the rules of private international law.").

43. McMahon, *supra* note 18, at 994.

3. *Reservations*

Another form of gap found in the CISG is its enunciated reservations. There is a deep literature on the problems of countries opting out of provisions or parts of the CISG. But, reservations are more a problem for harmonization than of comprehensiveness. CISG reservations are found in Articles 92 to 96. They allow contracting states to opt out of a single provision (Article 96's authorization to opt out of the no writing requirement of Article 11) to opting out of entire parts of the CISG (Article 92 allows for opting out of Part II—contract formation—and Part III—sale of goods provisions). The other important reservations allow for a state to opt out of one of the two primary grounds of CISG jurisdiction found in Article 1 (Article 95—application of CISG through operation of international private law) and the ability to opt out in relationship to countries that have closely related domestic laws of sales (Article 94). Although these reservations are detrimental to the overall impact of the CISG,⁴⁴ they do not pertain to the coverage of this Article—filling in internal gaps through interpretive methodologies and dealing with external gaps through the development of a comprehensive hard-soft sales law with the CISG at its core.

4. *Core-Periphery Analogy*

Whether an internal gap actually exists is a function of the rule itself and the interpreter of the rule. Llewellyn often saw the scope of rules as being more like a field or a zone and not as “a surveyor’s line.”⁴⁵ Another metaphor for the reach of the CISG rules would be that rules in general have a core and a periphery. The determination of where the periphery ends is the place where a gap begins. The closer one is to the core, the easier the application; the farther afield one goes from the core, the greater the importance of creativity and context. The most demanding part of applying rules is the ability of the court or arbitral tribunal to craft a rule application (interpretation) at the periphery of a rule that is true to the rule’s core. Another way of looking at some rules is that in easy or clear cases, the rule acts as a fixed, hard rule. In more difficult cases, the rule is more open-ended and the rule application (adjustment) needs to be guided by the core reasons behind the rule. Part III examines where such guidance can be procured within the text of the CISG.

III. LLEWELLYN’S AND DWORKIN’S THEORIES OF RULES: FILLING IN INTERNAL GAPS

It is important to understand that non-comprehensiveness and the problem of using rules to provide answers to novel fact patterns or real

44. See generally, Laurence R. Helfer, *Response: Not Fully Committed? Reservations, Risk, and Treaty Design*, 31 YALE J. INT’L L. 367 (2006) (discussing problem of reservations in design of treaties).

45. See LLEWELLYN, *supra* note 6, at 183.

world developments are an inherent part of commercial law. This Part will provide some theoretical insights—represented by Karl Llewellyn and Ronald Dworkin’s theories of rules—in which to place the CISG, as a body of rules, into the context of the role and shortcomings of any body of private law rules. Llewellyn’s work is unique in that he was first a rule skeptic, or at least a severe critic of the sales and commercial law rules of the early twentieth century. His rule skepticism and realistic brand of legal philosophy made him the founder of the 1930s legal realist movement.⁴⁶ Subsequently, he was given the “keys to the kingdom” as the Chief Reporter of the Uniform Commercial Code Project, and as the drafter of Article I (General Provisions) and Article II (Sale of Goods). It is rare to have a jurist and critic of the law of the time to be allowed to apply his ideas to what amounted to America’s largest and most successful uniform law project. Ultimately, this dissonance can be explained by the term of the “later Llewellyn.”⁴⁷ The later Llewellyn was merely a critic of the anachronistic rules represented by the Sales Act of 1904, and to a lesser extent, the First Restatement of the Law of Contracts. Llewellyn was a critic of the existing rules, but he believed that the rules could be made to work. This brief analysis of Llewellynian thought will look at the “working rules” of Article II of the U.C.C. as a tool for analyzing the rules of the CISG.

The work of Ronald Dworkin is much more abstract and will be used not so much to analyze CISG rules, but to examine CISG interpretive methodologies. Dworkin’s view of “law as interpretation” is an idealistic view of law where rules can be interpreted to “fit” the law as a whole and, at the same time, provide a correct answer to novel fact patterns or “hard cases.” His theory will be used to gain insight on how internal gaps should be filled in the CISG and ultimately how the CISG can be used as core international sales law and be fitted into a more comprehensive international soft law of sales. Alternatively stated, the theories of rules presented by Llewellyn and Dworkin can be used to fabricate an international soft law that can be used to expand the comprehensiveness of a uniform international sales law with the CISG at its core.

46. See Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931); see also WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

47. Llewellyn scholars generally have divided his work between his more radical work of the late 1920s and 1930s (legal realist movement) and the “later Llewellyn”—his more idealistic work, including serving as Reporter for the U.C.C. One scholar refers to Llewellyn’s early work as being authored by a “lucid realist” and his later work by a “mystical idealist.” Takeo Hayakawa, *Karl N. Llewellyn as a Lawman from Japan Sees Him*, 18 RUTGERS L. REV. 717, 733 (1964). Martin Golding asserts that: “I suspect, though, that Llewellyn became friendlier toward rules as time went on; the leading spirit behind the Uniform Commercial Code could hardly be a rule denier.” Martin P. Golding, *Jurisprudence and Legal Philosophy in the Twentieth-Century America—Major Themes and Developments*, 36 J. LEGAL EDUC. 441, 472 (1986).

A. *The CISG and Llewellyn's Theory of Rules*

Karl Llewellyn's quest for a functional sales law was heavily influenced by the civil law, most directly by the German Civil Code.⁴⁸ For our purposes, his theory of commercial law was that it needed to be dynamic in nature. This dynamism was to be found in real world commercial practice that would be used to continuously refresh the rules of Article II (U.C.C.). In order to be true to common law legal development the change would be incremental in nature, but it would be in a consistent state of flux so that the U.C.C. would not become a creature of obsolescence. The rule that would make this possible is the "open-textured" rule. The repeated use of the "reasonableness" standard throughout Article II was the means by which real world "law" would be used to refresh its rules.

Refresh, of course, implies change. So, Llewellyn's theory of rules had another feature that allowed the rule to guide its own change or adjustment. The rule confronted with real world change was not to be considered a passive, empty vessel subject to the whim of business practice. The guidance to the rule adjustment would be the reason behind the rule. This is what has been referred to as the "singing rule."⁴⁹ Llewellyn's view of the "singing rule"—one that sings with the reason behind the rule—was also an indication of a broader view of how the rules of the U.C.C. should be interpreted and applied:

In drafting the Code, Llewellyn continuously . . . employed policy and purpose as the central device to convey and clarify statutory meaning. As a result, purpose, policy, and reason are major determinants of what the language of the text means The patent reason principle also assigns a definite role to the courts in interpreting and applying the open-ended principles of the Code.⁵⁰

Each section of the U.C.C. should be read, "in the light of the purpose and policy of the rule or principle in question, as also of the [U.C.C.] as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved."⁵¹

The important point is that Llewellyn's understanding of the judicial process led him to draft in the language of principle and to

48. See Michael Ansaldi, *The German Llewellyn*, 58 BROOK. L. REV. 705 (1992); Shael Herman, *Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code*, 56 TUL. L. REV. 1125 (1982).

49. See Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN ST. L. REV. 397, 479–82 (2004) (discussing relationship between singing rule and contextualism in Llewellynian thought).

50. John L. Gedid, *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 385 (1988).

51. U.C.C. § 1-102 cmt. 1 (2002).

use policy, purpose, and reason to convey meaning. Faced with that statutory architecture, courts should not and probably cannot avoid using policy and purpose in interpreting the Code.⁵²

Under his theory, what made rules anachronistic was the form of the rule that is characterized as closed and fixed. This closeness prevented the introduction of contextual information, such as the creation of novel transaction types and leads to the creation of a gap between the law in the books and the law in action. Such rule formulation quickly resulted in the rules no longer being in touch with commercial reality. The solution was the open-ended rule.

However, Llewellyn understood that the constant changing of rules would lead to uncertainty and unpredictability in the law. Such uncertainty is an anathema for business transactions. Thus, the change had to be guided within the law. He saw as the main reason for rules being obsolete, and ultimately irrelevant, is when over time the rule becomes detached from its underlying reason. Fixed, closed rules eventually are applied as a matter of authority or historical accident. The judicial arbiter no longer is informed by the reason behind the rule, but mechanically applies the rule as precedent, despite the rule application leading to an irrational result. But, a different source of detachment of rule from reason can occur from the unfettered influx of new commercial practice resulting in sudden changes to the law. To balance the need for rule flexibility and rule certainty, the changes in the rules have to be anchored in reason.

The court or arbitral panel should first determine the reason for a rule and use that reason to direct a rule change in a predictable fashion. For U.C.C. Article II, the reasons are found in the rules themselves and in the Official Comments to the rules. An example would be Article II, Section 2-206, "Offer and Acceptance." Section 2-206(1)(a) provides the rules for determining a reasonable means of accepting an offer. It states that the acceptance, unless stipulated otherwise by the offer, can be made "by any medium reasonable in the circumstances."⁵³ This is a quintessential example of the open-textured rule. Section 2-206(1)(b) expands the notion of a reasonable medium of acceptance to include the unilateral contract: an offer for "prompt or current shipment" may be accepted by a return promise or "by the prompt or current shipment" of the goods.⁵⁴ The acceptance by performance (sending the goods) is effective upon the sending whether the goods are subsequently deemed to be non-conforming. It further provides that the sending of non-conforming goods will not be construed as an acceptance, but as an accommodation, if "the

52. Gedid, *supra* note 50, at 386.

53. U.C.C. § 2-206(1)(a) (2012).

54. *Id.* § 2-206(1)(b).

seller seasonably notifies the buyer that the shipment is offered only as an accommodation.”⁵⁵

Section 2-206 further deals with the issue of acceptance by performance, where prompt or current shipment is not possible.⁵⁶ In this case, the beginning of performance is a “reasonable mode of acceptance”⁵⁷ and not the actual performance itself. However, if the offeree fails to notify the offeror within a reasonable time of the beginning of performance, then the offeror “may treat the offer as having lapsed before acceptance.”⁵⁸

Thus, the rather short length of Section 2-206 provides numerous rules and questions relating to the proper means of acceptance. It is worth diagramming the section to better understand the rules of acceptance. After providing such a schematic for Section 2-206, the reasons for the framework of rules embedded in this section will be explored. Finally, a comparison to the acceptance rules of CISG will be undertaken.

1. *Section 2-206 Diagram*

Rule 1: Master of Offer, “unless otherwise unambiguously indicated” by offer. (Section 2-206(1)).

Rule 2: Offeree may accept “by any medium reasonable in the circumstances.” (Section 2-206(1)(a)).

Rule 3: Medium of acceptance may be expanded by offeror to include performance. If offer implicitly allows acceptance by performance, then offeree has option to accept by “prompt or current shipment.” (Section 2-206(1)(b)).

Rule 3.1: Prompt or current shipment of either conforming or non-conforming goods is an acceptance. (Section 2-206(1)(b)).

Rule 3.2: Offeree may change acceptance (by sending non-conforming goods) as an accommodation by “seasonably” notifying the offeror. (Section 2-206(1)(b)).

Rule 3.3: If prompt or current shipment is not possible, the beginning of performance (invited in the offer) constitutes acceptance. (Section 2-206(2)).

Exception to Rule 3.3: Offeree must preserve acceptance by beginning performance, by providing notice to offeror within a reasonable time; if not, then the offer shall be treated as lapsed before acceptance. (Section 2-206(2)).

2. *Questions Presented by Section 2-206*

What does Section 2-206(1) mean by “unambiguously indicated”?

55. *Id.*

56. *Id.* § 2-206(2).

57. *Id.*

58. *Id.*

How does one construe an offer that invites acceptance by any means under Section 2-206(1)(a)?

What is a “reasonable medium” under Section 2-206(1)(a)?

How does one determine if a notification is “seasonable” under Section 2-206(1)(b)?

What is an “accommodation” under Section 2-206(1)(b)?

When is a “beginning of performance” deemed to be a reasonable mode of acceptance under Section 2-206(2)?

What does “beginning of performance” mean as used under Section 2-206(2)?

What is a reasonable time for notice by offeree after beginning performance to prevent a lapse of the offer under Section 2-206(2)?

Given the numerous rules and sub-rules, as well as the questions they present, is Section 2-206 a reasonable approach to determining the effectiveness of the mode of acceptance? Under Llewellyn’s theory of rules, the use of open-textured terms, such as “reasonable” and “seasonably,” allows for the ability to adjust the rule based upon the circumstances, including technological changes relating to the means of acceptance. This is the exact reasoning provided by the Official Comment, which states: “This section is intended to remain flexible and its applicability to be enlarged as new media of communication develop or as the more time-saving present day media come into general use.”⁵⁹ The word “enlarged” envisions the rule being adjusted to real world developments. In this case, the notion of a reasonable medium of acceptance will need to change to reflect technological developments in the means of transmission.

Section 2-206 includes an express rule of interpretation that an offer requesting prompt shipment will be construed as inviting an acceptance by performance (prompt shipment). Again, the Official Comment provides the reason behind the incorporation of this rule of interpretation. It states that it is intended to reject “the artificial theory that only a single mode of acceptance [express words of acceptance] is normally envisaged by an offer.”⁶⁰ This is a clear recognition of real world practice in which commercial parties are often more concerned with prompt delivery, than binding a contract through an express promise of acceptance.

The meaning of beginning of performance and the importance of notification of beginning of performance are the most confusing of Section 2-206’s rules. On its face, Section 2-206(b) is an extension of prompt or current shipment as a means of acceptance found in Section 2-206(1)(a). One interpretation would be that the beginning of performance that leads to a reasonably prompt shipment creates a binding contract. Alternatively, it can be interpreted that as long as the goods are delivered within a reasonable period of time, then the beginning of performance constitutes an acceptance. But, the Official Comment makes

59. *Id.* § 2-206 cmt. 1.

60. *Id.* cmt. 2.

clear that Section 2-206(2) contains two inseparable requirements—beginning of performance and notification of the beginning of performance.⁶¹ Thus, the beginning of performance can be a reasonable mode of acceptance only if followed by notice to the offeror within a reasonable period of time.

What is the reason for this performance-notice rule? If the offer invites the offeree to begin performance immediately, then the rule allows acceptance by beginning performance as a true reflection of the intent of the offeror. However, the difference between immediate performance (sending the goods) and beginning of performance (manufacturing the goods) needs to be dealt with in any acceptance by performance rule. The problem with the beginning of performance as the means to bind a contract is the lag, sometimes considerable, between the “acceptance” and the actual sending or delivery of the goods. The general rule for offers is that they self-terminate after a reasonable lapse of time.

Thus, hinging acceptance to the beginning of performance brings two policies into conflict—the offeree’s reasonable reliance on the offer’s invitation to begin performance and the offeror’s reliance that the power of another party to bind them to a contract only exists for a reasonable period of time. The solution or compromise is the notice requirement of Section 2-206(2). The beginning of performance is not really an acceptance because it does not bind the offeror to the contract. It really works to convert the offer to a firm offer that is irrevocable from the time of the beginning of performance to the expiration of a reasonable time to give notice of the beginning of performance. It is the sending of the notice of the beginning of performance, in conformity to the mailbox rule that is the acceptance. The question remains of what is a reasonable time for giving the notice of the beginning of performance. It would seem that the best criterion for determining the reasonableness of the notice is found within Section 2-206. In Section 2-206(1)(b), it notes that an offer may invite acceptance by prompt shipment of the goods. The contract is bound upon the shipment of the goods, but the offeror may not know of the acceptance until the goods are actually delivered. From this template, one can argue that the notice of the beginning of performance would be considered reasonable if it is received by the time the goods would have been delivered under the prompt shipment scenario of Section 2-206(1)(b).

The problem with the above rule interpretation is that the paradox of the mailbox or dispatch rule presents an obstacle to such a reasoned solution. If acceptances are good upon dispatch, then a rule that requires the notice of beginning of performance to be received by the offeror by the time goods would have been received under prompt shipment does not “fit” the overall body of offer-acceptance rules, which is required under Dworkin’s theory of rule interpretation. There are a number of possible

61. *Id.* cmt. 3.

responses to the issue of reasonable notice. First, Section 2-206(2) is an implicit exception to the mailbox rule. Its exact language is that the offeror must be “notified of acceptance within a reasonable time.” The use of the word “notified” can be construed as meaning “actual” notice that only a receipt rule can give. Second, reasonable time could mean nothing more than a reasonable time that offers of its kind can reasonably be expected to remain open. The unanswered question is whether an invitation to begin performance extends the time for giving reasonable notice beyond what would normally be a reasonable time to accept through a reciprocal promise.

The offeree’s ability to convert an acceptance by performance to an accommodation responds to a number of issues. First, in the haste to respond as directed by the offer, through prompt shipment increases, the likelihood of sending non-conforming goods (defective product or improper packaging) increases. Does the time urgency implied by the offer provide the basis for a reasonable belief in the offeree that speed is more important to the offeror than complete conformity of goods? Section 2-206 provides the offeree the choice of sending non-conforming goods as an acceptance or as an accommodation. In the first instance, the offeree believes that the non-conforming goods will not be rejected by the offeror. If the offeree judges wrongly and the offeror rejects the goods, then the sending of the non-conforming goods serves both to bind the contract and as the basis of a breach of contract. Section 2-206(1)(a) provides an innovative solution to the offeree’s dilemma. The offeree can elect to send the non-conforming goods and give notice that the sending of the goods is not an acceptance of the offer, but that the goods are being sent as an accommodation.⁶² Hence, the sending of the non-conforming goods is a counteroffer that the original offeror is free to accept or reject. At the same time, the offeree is able to respond to the prompt shipment request of the offeror without being liable for breach of contract.

Finally, the CISG acceptance rules will be compared to the rules embodied in U.C.C. Section 2-206. CISG Article 18 rejects the common law’s dispatch rule in favor of the receipt rule. It states that an acceptance “becomes effective at the moment the indication of assent reaches the offeror.”⁶³ As discussed earlier, the CISG’s receipt rule is an example of the drafters’ selection of the more efficient of the two competing rules—dispatch (common law) and receipt (civil law).⁶⁴ Like Section 2-206, the acceptance must be received “within a reasonable time.”⁶⁵ The reasonableness of the time of acceptance, like under the common law, is a contextual determination. However, the CISG provides a bright line rule not found in the U.C.C.: “An oral offer must be accepted immediately

62. *See id.* cmt. 4.

63. CISG, *supra* note 2, art. 18(2).

64. *See supra* notes 15–17 and accompanying text.

65. CISG, *supra* note 2, art. 18(2).

unless the circumstances indicate otherwise.”⁶⁶ The reasonableness of such a bright-line rule is open to debate. In its favor, it provides a measure of certainty to whether there has been an effective acceptance and whether the offer has lapsed. However, the oral acceptance truncates the courts’ ability to determine the reasonableness of an acceptance that is provided by the open-ended rule of Article 18(2). Thus, the general rule is that the timeliness of an acceptance is determined by the reasonableness standard, while the immediate acceptance rule for oral offers is the exception. But, note that the immediate acceptance rule is conditioned by the subsequent language that the immediate acceptance may not be required if “the circumstances indicate otherwise.”⁶⁷ Despite the oral offer exception, the superiority of the receipt rule is preserved.

Article 18(3) is the counterpart of U.C.C.’s Section 2-206⁶⁸ rules that allow acceptance by prompt shipment or the beginning of performance. Article 18(3) provides that if provided for in the offer or through practices developed between the parties, then “the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror.”⁶⁹ It further states that the acceptance becomes effective “at the moment the act is performed”⁷⁰ provided it is performed within a reasonable period of time as determined under Article 18(2). Note, Article 18(3) only deals with the scenario of prompt performance and does not deal with the issue of an offer that invites acceptance by the beginning of performance. The language of Article 18(3) is the language of complete performance—“dispatch of goods or payment of price”—and not the language of the beginning of performance. Therefore, just like Section 2-206(1)(b), Article 18(3) does not require the offeree to give notice. All that is required is that the goods or payment be sent within a reasonable period of time.

Article 18(3) appears to neglect the situation where prompt shipment is not possible, such as in the case where the goods need to be manufactured. Under Article 18(3), the beginning of performance is not recognized as an acceptance. This can easily lead to the injustice in which the offeree begins performance and the offeror revokes the offer before completion of the performance (shipment of the goods). Section 2-206(2) prevents such an injustice by recognizing the beginning of performance as an acceptance as long as the offeree follows up by providing notice of the beginning of performance within a reasonable time. If the story ended here, then the CISG looks to be inferior to the U.C.C. in this area. If the measure is how well sales rules realize the aims of promoting private ordering and preventing contractual injustice, then CISG Article 18 fails on

66. *Id.*

67. *Id.*

68. U.C.C. § 2-206(1)(b), (2) (1977).

69. CISG, *supra* note 2, art. 18(3).

70. *Id.*

both accounts. The ability to promptly respond at the offeror's invitation by performance is diminished by Article 18's failure to use the beginning of performance as a benchmark. It would be foolhardy for a party to begin performance without binding the contract with an express acceptance. However, this may be precluded if the offer allows for acceptance only by performance. This retards the free facilitation of contracting. If the offeree goes forward and begins performance without a binding contract it runs the risk of incurring damages if the offeror timely revokes its offer. This is surely a case of contractual injustice.

This exercise of comparing the acceptance rules of the U.C.C. and the CISG shows the difficulty in interpreting and comparing rules in isolation to the overall body of rules. The breadth of the CISG's firm offer rule ameliorates the potential injustice produced by Article 18(3). But, before looking at the CISG's firm offer rule to see how it prevents the inefficiency and injustice of Article 18(3), the firm offer rule of the U.C.C. will first be examined. The firm offer rule of the U.C.C. is an exercise in formality.⁷¹ As such, it is narrow in scope and precludes the use of judicial discretion in crafting a just result. It provides that an offer is only irrevocable for the stated time or a reasonable time, not to exceed three months.⁷² Further, the offer must be in writing and signed by the offeror. In contrast, CISG Article 16(2) allows almost any offer to be construed as an irrevocable firm offer in certain circumstances. It states that an offer cannot be revoked "if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer."⁷³ Thus, the scenario in which an offer invites acceptance by performance and the offeree begins performing would almost always be considered as a firm offer. As long as the offeree performs within a reasonable period of time, then the offer is irrevocable and the contract will be bound at the time of complete performance.

This exercise of finding the reasons for rules within the context of the entire body of law—U.C.C. or CISG—is the central tenet in Dworkin's notion of theory building. In the area of rule application or rule adjustment, Dworkin again requires the application be performed within the context of the entire body of law and not just the rule in isolation. This provides insight into how to properly interpret and apply CISG rules.

The CISG can be linked to Llewellynian thought through its use of open-textured rules. The open-textured rule recognizes that in commercial law the content of a rule is not internally provided by the law, but is provided through induction from real life commercial practice. In contrast, rule application from a Dworkinian approach sees the rule application as internally driven. The need to adjust a rule to a change in commercial practice is guided by an internal, deductive reasoning process

71. See U.C.C. § 2-205 (1977).

72. See *id.*

73. CISG, *supra* note 2, art. 16(2)(b).

in which the rule application must fit the body of law in its entirety. Alternatively stated, when a court is presented with two reasonable rule interpretations, it should apply the one that best fits the CISG as a whole. For Llewellyn the fit is guided by the determination of the reasons behind the rule; for Dworkin the fit is determined by the general principles—express or implied—that provide the underlying foundation for the integrity of a given body of law. This principle-led approach to rule application has a close affinity to the CISG's interpretive methodology found in CISG Article 7.

B. *CISG and Dworkinian Theory Building*

Ronald Dworkin provided a theory of interpretation that focused on filling in gaps in the law. Llewellyn attempted to do the same thing by contextual interpretation and through open-textured rules. Dworkin starts with the premise that the conceptual or internal part of law can, through deduction from principles, fill in gaps in the law. Both approaches provide a theoretical basis for filling in the gaps found within the CISG.⁷⁴

In Dworkinian terms, the integrity of law provides, if not a right answer, then at least a correct answer, to fact situations that illuminate a gap, previously seen or unseen, in the formal rules of law. The answer to filling in the gap comes from within the "entire" structure of the law.⁷⁵ Dworkin's principle-based approach to interpretation⁷⁶ is very much akin to CISG Article 7's mandate that the CISG is to be interpreted through the "general principles on which it is based."⁷⁷ Although the CISG is not a comprehensive sales law (external gaps), it is meant to provide a comprehensive body of rules in the areas that it does cover—contract formation, rights and obligations of buyers and sellers, and remedies for breach.⁷⁸ It is in these areas that a Dworkinian mindset is of value.

In the case of a CISG rule application, the application (interpretation) needs to be done within the entire structure of the CISG. A rule application that appears reasonable within the confines of a single CISG Article may actually be an improper application due to its inability to be harmonized within the CISG as a whole. A certain rule application can only be justified if it provides a proper fit relating to the specific CISG Article or Articles, as well as the CISG as a whole. For example, in applying the CISG's contract formation Articles, due regard must be given to the interpretive template provided by Articles 7, 8, and 9.

74. See DiMatteo, *supra* note 49 (exploring conceptual and contextual aspects of Llewellynian thought relating to interpretation).

75. See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1981); see also RONALD DWOR- KIN, *LAW'S EMPIRE* (1986).

76. See RONALD DWOR- KIN, *A MATTER OF PRINCIPLE* (1985).

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

78. See *id.* art. 4.

Dworkin's theory of law as interpretation sees the idea that an internal gap in the CISG cannot be filled internally as implausible. Dworkin believes that the solution to filling in a gap can always be found by "moving up the pyramid of abstraction or principles."⁷⁹ Therefore, any ambiguities or gaps in the CISG is filled by working within the body of rules in which the gap or ambiguity is found, guided by general principles, to find the best possible interpretation that increases the overall integrity and value of the entire body of law: "[A]n interpretation of any body or division of law . . . must show the value of that body of law in political terms by demonstrating the best principle or policy it can be taken to serve."⁸⁰

It is important to note that Dworkin's pyramid of principles sees the recourse to meta-principles as the final step or last resort. Thus, if an ambiguity or gap is found in one of the CISG's formation rules the interpretation process would begin with determining the implied principles or purposes that underlie the specific rule. If that search fails to provide a reasonable solution (rule-adjustment), then the interpreter would look for implied principles that underlie the set of closely aligned rules of which the specific rule is a part. If that fails, then recourse is to the implied rules that underlie the entire area of law, such as Articles 14–24 (formation of contract). Only then is recourse made to the general meta-principles—express or implied—of the entire CISG.

The CISG's express general principles are modest in number—good faith interpretation, international character of the rules, the need to promote uniformity, and international trade usage. The more interesting proposition is how an interpreter finds and recognizes implied general principles. One response is that the interpreter is confined to the express general principles and the implication of general principles is precluded. The alternative approach is that nothing prevents an interpreter in implying other general principles as long as they do not conflict with the express principles.

The second approach is more reasonable due to a number of reasons. First, the express general principles are so broad in scope that they offer the means to imply narrower or ancillary general principles. Second, due to the lack of rule density, additional general principles are needed to fill in the internal gaps and ambiguities found in the CISG. A number of implied principles have been offered by the courts—some have been widely accepted, while others have not been universally accepted. A tentative list of implied principles, default rules, or factors analyses⁸¹ include:

79. Larry A. DiMatteo, *A Theory of Interpretation in the Realm of Idealism*, 5 DEPAUL BUS. & COMM. L.J. 17, 43 (2006).

80. DWORKIN, *supra* note 76, at 160.

81. Factors analyses refer to the idea that rules often do not provide a definition or criteria to aid in its application. Over time, the jurisprudence shows that certain factors are recognized as important to the interpretation and application of a given rule.

- As discussed previously, a widely accepted implied principle is that a party making a claim or who would benefit from a CISG rule application has the burden of proof.⁸²
- CISG Article 38(1): inspection “within as short a period as is practicable in the circumstances.” What are the relevant circumstances or factors in determining the reasonable promptness of the inspection? Courts have recognized a matrix of implied factors, including number of items to be examined, type of inspection required, nature or uniqueness of the goods, nature of the packaging, method of delivery, experience of employees receiving goods, if goods are delivered in installments, and the sophistication and location (remoteness, developing country) of the buyer.⁸³
- Particularized consent, especially in the area of derogation, may be needed to opt out of the CISG or to derogate from a CISG provision. For example, an Austrian court rejected a derogation from the “no writing” requirement of CISG Article 11; it held that such a derogation required an informed consent from the non-derogating party.⁸⁴
- Implied general principle of the need to give fair notice as a general practice can be implied from the numerous notice provisions found in the CISG.⁸⁵
- Implied duty of cooperation has been derived from CISG Article 80: “A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party’s act or omission.”⁸⁶
- A Helsinki Court of Appeals recognized an implied principle of loyalty: “The so-called principle of loyalty has been widely recognized in scholarly writings. According to this principle, the parties to a contract have to act in favour of the common goal; they have to reasonably consider the interests of the other party.”⁸⁷ In that case, the court held that the principle of loyalty required a seller-manufacturer to continue a sales relationship beyond the last formal, dis-

82. A highly-regarded Italian case asserted that the “Convention’s general principle on the burden of proof seems to be *ei incumbit probatio qui dicit, non qui negat*: The burden of proof rests upon the one who affirms, not the one who denies.” Trib. di Vigevano, 12 luglio 2000, n. 450, ¶ 23 (It.), available at <http://cisgw3.law.pace.edu/cases/000712i3.html>.

83. See LARRY A. DiMATTEO ET AL., INTERNATIONAL SALES LAW: A CRITICAL ANALYSIS OF CISG JURISPRUDENCE 78–84 (2005).

84. Oberster Gerichtshof [OGH] [Supreme Court] Feb. 6, 1996, docket No. 10 Ob 518/95 (Austria), available at <http://cisgw3.law.pace.edu/cases/960206a3.html>.

85. See CISG, *supra* note 2, arts. 19, 21, 26, 27, 32, 39, 43, 46, 47–49, 63, 65, 67, 71, 72, 88.

86. *Id.* art. 80; see also THOMAS NEUMANN, THE DUTY TO COOPERATE IN INTERNATIONAL SALES: THE SCOPE AND ROLE OF ARTICLE 80 CISG (2012)

87. Helsingin hovioikeus [HO] [Helsinki Court of Appeals], Oct. 26, 2000, docket No. S 00/82, available at <http://cisgw3.law.pace.edu/cases/001026f5.html>.

crete sales contract. It stated, “the operation cannot be based on a risk of an abrupt ending of a contract.”⁸⁸ The implied principle here may be extrapolated from a combination of the good faith principle and trade usage.

- An implied general principle can be gleaned from a number of CISG Articles. One such principle is that CISG rules, contracts, and contractual obligations should be interpreted in favor of preserving the contract and the contractual relationship—*favor contractus*. This principle has been derived from CISG Articles 25, 34, 37, 39, 43, 47–49, 63, 64, and 82.⁸⁹

Finally, it should also be noted that Dworkin’s allusion to the “political” refers to the integrity of the law or body of law and not to the external politics of society. Dworkin’s theory of interpretation as it would apply to the CISG partially breaks down because he assumes that the need for rule adjustments to fill in gaps is infrequently presented because of the “density” of law. One of the perceived shortcomings of the CISG is that it lacks density in its coverage creating numerous internal gaps. Nonetheless, Dworkin’s fixation on the use of internally-derived principles offers a similar framework as is found in the principles-driven CISG interpretive methodology of Article 7.

IV. FILLING IN GAPS: ROAD TO A COMPREHENSIVE SALES LAW

Part III, examined different theoretical approaches to filling in internal gaps in the CISG. This Part examines the major external gaps in the CISG. It then proposes a modest project to deal with the non-comprehensive nature of the CISG. Developing a “CISG plus” or “Restatement of International Sales Law Project” is the next logical step in developing a more comprehensive, international sales law. This is especially true given the unlikelihood of a formal revision of the CISG or the adoption of a broader international contract or commercial code in the near future. This Part will focus on two soft law projects—the Unidroit Principles of International Commercial Contracts (Principles)⁹⁰ and the proposed Common European Sales Law (CESL).⁹¹ The author fully realizes that

88. *Id.*

89. André Janssen & Sörren Claas Kiene, *The CISG and Its General Principles*, in *CISG METHODOLOGY* 261, 273–74 (André Janssen & Olaf Meyer eds., 2009).

90. *See generally* UNIDROIT 2004, *supra* note 7; *see also* MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (3d ed. 2005).

91. *See generally* CESL, *supra* note 8; REINER SCHULZE, COMMON EUROPEAN SALES LAW (CESL): COMMENTARY (2012) (providing comprehensive commentary on CISG); REINER SCHULZE & JULES STUYCK, TOWARDS A EUROPEAN CONTRACT LAW (2011) (detailing history and analysis of development of optional (contract law) instrument that eventually became CESL); *see also* GUIDO ALPA ET AL., THE PROPOSED COMMON EUROPEAN SALES LAW—THE LAWYER’S VIEW (2013) (analyzing positive and negative implications of CESL).

the CESL is being proposed as a European Union regulation and has been more recently reduced in scope, and would be considered a hard law if enacted. But, it is being used here as a proposed law under the assumption that even if it fails to be enacted, the instrument would remain a valuable source of soft law.

A. *External-Internal Gap Dichotomy*

Part III provided a theoretically based approach to filling in the internal gaps of the CISG. The approaches of two major legal philosophers—Karl Llewellyn and Ronald Dworkin—were briefly reviewed. The purpose of this review was to support the point that when the scope of the CISG's coverage is not at issue, then all attempts at filling in a gap within its scope need to be exhausted to prevent the gap being treated as an external gap requiring resort to private international law rules.⁹² Llewellyn's open-textured rules (reasonableness standard) exist throughout the CISG. The main vehicle for filling in gaps when such rules are being applied is through induction from the case facts and commercial practice. In the case of express and implied principles which centers CISG interpretive methodology, Dworkin's theory of interpretation emphasizes the need to work up a pyramid of abstraction to find express or implied principles that through deduction can be employed to fill in any gap in the overall body of rules. Thus, the first directive of this Part is to recognize the importance of aggressively seeking solutions to internal gaps without resorting to private international law.

B. *CISG and Unidroit Principles*

The rules of the CISG provided the template for correlating rules in the Principles. The temptation is to use the commentary on the Principles in the interpretation of the CISG, especially in areas of internal gaps and ambiguity.⁹³ But, this would be a misapplication and would contradict the

92. Camilla Baasch Andersen appropriately notes the conflation of the terms hard and soft law:

The utility of this classification in modern commercial law is negligible. Not only because these labels belie the political and practical contexts of the instruments so labeled, but because they are not useful in a functional context . . . [R]egardless of the classification of an instrument or non-law standard, if it becomes part of commercial practice, then it is an important part of uniform commercial law.

Camilla Baasch Andersen, *Macro-Systematic Interpretation of Uniform Commercial Law: The Interrelation of the CISG and other Uniform Sources*, in CISG METHODOLOGY 224 (André Janssen & Olaf Meyer eds., 2009)

93. See, e.g., Bojidara Borisova, *Remarks on the Manner in Which the UNIDROIT Principles May Be Used to Interpret or Supplement Article 6 of the CISG*, 9 VINDOBONA J. INT'L COM. L. & ARB. 153 (2005); Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG—Alternatives or Complementary Instruments?*, 26 UNIF. L. REV. 229 (1996); Alejandro M. Garro, *The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG*, 69 TUL. L. REV. 1149 (1995) (noting UNIDROIT princi-

CISG's interpretive methodology that requires autonomous interpretation of CISG provisions. However, the Principles provide a more comprehensive coverage and should be used as a source in the formulation of a comprehensive sales law. In fact the father of the Principles, Michael Joachim Bonell, noted that the adoption of the CISG served as an impetus for the drafting and for the broader coverage of the Principles:

Both the merits and the shortcomings of the CISG prompted the International Institute for the Unification of Private Law (UNIDROIT) to embark upon a project as ambitious as the preparation of the UNIDROIT Principles. In other words, but for the world-wide adoption of an international uniform sales law like the CISG, any attempt at formulating rules for international commercial contracts in general would have been unthinkable. At the same time, it was precisely because the negotiations leading up to the CISG had so amply demonstrated that this Convention was the maximum that could be achieved on the legislative level, that UNIDROIT decided to abandon the idea of a binding instrument and instead proceeded merely to "restate" . . . international contract law and practice.⁹⁴

Professor Gabriel looks at another possibility for developing a more comprehensive international sales law. In his article, *UNIDROIT as a Source for Global Sales Law*,⁹⁵ he explores the use of the well-received commercial contract soft law, Principles, as the basis of a comprehensive sales law. This is an attractive idea for a number of reasons. First, as a general contract law and as a soft law, free of political compromises, it is inherently a more comprehensive law. Second, it is a well-established, respected instrument that has been thoroughly researched and vetted. Third, many of its rules track those of the CISG, but are more detailed in nature. The Principles have been used to interpret CISG rules, mostly by arbitral tribunals.⁹⁶

Despite the arguments in favor of using the Principles as the foundation for a comprehensive international sales law, this would be a mistake. The CISG is the better starting point for such a project. First, it is a hard law that has been widely adopted. Second, the depth of CISG case law and breadth of scholarly research on the CISG provides a strong base of knowledge to center any such project. In the words of Michael Joachim Bonell: "Still, on the whole there can be no doubt that the CISG provides a most

ples are more suitable to international commercial contract than domestic contract rules).

94. Michael Joachim Bonell, *The CISG, European Contract Law, and the Development of a World Contract Law*, 56 AM. J. COMP. L. 1, 16 (2008).

95. See generally, Henry Deeb Gabriel, *UNIDROIT as a Source for Global Sales Law*, 58 VILL. L. REV. 661 (2013).

96. See Jan Ramberg, *Creativity of Arbitrators in the Context of UNIDROIT Principles of International Commercial Contracts*, 3 UNIF. L. REV. 651 (1998).

valuable and fairly innovative normative regime for international sales contracts.”⁹⁷ Nonetheless, it is true that the drafting of the Principles was unrestrained by the need for political compromise, as characterized the CISG project. As a result, the Principles project was able to cover areas not broached by the drafters of the CISG. The Principles cover such areas as authority of agents, validity, third party rights, hardship, set-off (counter-claims), assignment of rights, transfer of obligations, and assignment of contracts and limitation periods.⁹⁸ In the end, the portions of the Principles not covered in the CISG should be mined in the fabrication of a comprehensive sales law document.

C. *CISG and CESL*

The proposed Common European Sales Law (CESL) presents a number of issues that will be briefly discussed here. First, how will such an E.U. Regulation interrelate with the CISG which is the law of twenty-three of twenty-seven E.U. countries?⁹⁹ Second, how do interpreters deal with the dilemma posed by parallel laws having numerous similar or identical rules? The first issue questions the usefulness of the CESL in relationship to the role currently played by the CISG. The answer to this question is multifaceted. If the CESL was purely a sales law, then the CESL would be merely redundant and be more problematic than useful due to the interpretive issue presented by the second question. The only purpose a narrowly focused E.U. sales law would serve is to bring the four outlying E.U. countries, which are not contracting states to the CISG, into a uniform sales law regime with the other E.U. countries. A simpler solution would be for the four countries to adopt the CISG, which would unify inter-E.U. sales law.

However, the CESL title is a bit of a misnomer because it covers much more ground than a sales law-only proposal. It is this broader scope that makes the CESL unique. The CESL provides general contract law provisions that could be used as a basis of further harmonization efforts for other types of contracts. The most interesting part of the CESL is its specialized bodies of rules for the supply of digital content and service related to the sale of goods. Thus, the greater comprehensiveness of the CESL makes it more attractive than the CISG, at least in these areas. For purposes of this Article, the CESL provides a source for building a soft law periphery to the CISG core.

The CISG and CESL have been seen as potential competitors. If the CESL becomes E.U. law, then parties opting into the CESL would implicitly be opting out of the CISG, even when both parties are from CISG countries. This is not, itself, a problem for the parties are free to opt in or

97. Bonell, *supra* note 94, at 4.

98. See BONELL, *supra* note 90, at 305–08.

99. The four current E.U. countries that have failed to adopt the CISG are Ireland, Malta, Portugal, and the United Kingdom.

opt out of most commercial laws, domestic or international. The problem results from the fact that many of the CESL rules, especially in the area of contract formation and rights and obligations of the parties, are duplicative of CISG rules. This becomes a problem if those similar provisions are interpreted differently in the applications of the CISG and the CESL. The result would be complexity and chaos, as a party using the CESL within Europe and the CISG internationally would be confronted with different meanings for identical terms and rules.

Professor Ulrich Magnus sees the creation of such divergent meanings as a real possibility. The reason is that the CISG employs an international interpretative methodology and European law follows distinctively European-based interpretive methodologies.¹⁰⁰ In addition, both the CISG and the CESL require autonomous interpretations of their provisions.¹⁰¹ Nonetheless, Magnus rightly asserts that where the CISG and CESL have parallel provisions, the pre-existing meanings found in the in-depth CISG case law and scholarly literature should be applied to the CESL. This type of “inter-conventional interpretation” is necessary to keep order in European and international sales law. If the CESL passes into law, it is best for the legal and business communities’ interests that the CISG and CESL work as complimentary instruments. However, they would likely devolve into competition if parallel provisions were interpreted differently under the two instruments. This would be a disaster for national courts in the countries having both the CISG and the CESL as the law of the land.

For the current undertaking, the use of the CESL as soft law is valuable because it covers areas, such as the supply of digital content¹⁰² and trade-related services¹⁰³ that can be used to fill in the gaps found in the CISG. Interestingly, it is plausible that the supply of digital content and trade-related services may be either an internal or an external gap in the CISG. CISG Article 3 states that the CISG does not apply to “contracts” where the “preponderant part” of a party’s obligations are the supply of labor or services.¹⁰⁴ Notice that the provision simply refers to contracts and not to contracts for the sale of goods. So, there is a plausible argu-

100. For a discussion of the differences between European interpretive and CISG-international style interpretive methodologies, see Ulrich Magnus, *Interpretation and Gap-filling in the CISG and in the CESL*, 11 J. INT’L TRADE L. & POL’Y 266, 272–77 (2012).

101. The mandate of autonomous interpretation is implied from CISG Article 7(1), which directs the interpreter to pay due regard to the “international character” and the need to “promote uniformity in its application” when interpreting CISG provisions. CESL Article 4(1) expressly states that the CESL “is to be interpreted autonomously.”

102. See CESL, *supra* note 8, pt. IV: Obligations and remedies of the parties to a sales contract.

103. See *id.* pt. V: Obligations and remedies of the parties to a related service contract.

104. CISG, *supra* note 2, art. 3(2).

ment that the CISG covers trade-related services, as long as they are not a preponderant part of the contract. However, it is more difficult to argue that the CISG would cover the supply of digital content. The CISG would cover such contracts if the digital content is determined to be a “good” and the transaction involves a “sale.” Most often such transactions involve licensing of the right to use digital content. It would be implausible to argue that the CISG covers such decidedly non-sale transactions. Nonetheless, whether covered under the CISG or not, the CESL provides a dense body of detailed rules in these areas that can be used directly or by analogy in developing a more comprehensive instrument.

In addition, the CESL covers other areas not covered by the express rules under the CISG, such as standard form contracting,¹⁰⁵ conflicting standard terms,¹⁰⁶ duty to disclose (pre-contractual information),¹⁰⁷ defects in consent,¹⁰⁸ unfair terms,¹⁰⁹ rate of interest,¹¹⁰ prescription periods,¹¹¹ and the excuse of hardship.¹¹²

D. *Other Sources*

There are other conventions that can be used in constructing a composite international sales law doctrine, including the 1974 U.N. Convention on the Limitation Period in the International Sale of Goods as amended by the 1980 Protocol, the 1983 Geneva Convention on Agency in the International Sale of Goods, the 2001 U.N. Convention on Assignment of Receivables in International Trade, and the 2005 U.N. Convention on the Use of Electronic Communications in International Contracts. Finally, a number of Civil Codes have gone through modern revisions, such as the German Civil Code (*Bürgerliches Gesetzbuch* or “*B.G.B.*”) and the Dutch Civil Code (*Burgerlijk Wetboek* or “*B.W.*”), and should be reviewed as a source for a comprehensive international sales document. These laws, as well as the International Chamber of Commerce’s model agreements, such as its Model Sales Contract, may provide a menu of alternative rules that commercial parties can choose from in negotiating and drafting their contracts.

Resorting to well-respected national commercial or contract laws will be necessary in some areas where national laws vary widely. This would be

105. See CESL, *supra* note 8, arts. 7, 62, 70.

106. See *id.* art. 39.

107. See *id.* art. 23.

108. See *id.* arts. 48–57.

109. See *id.* arts. 9–81, 86, 170.

110. See *id.* art. 168.

111. See *id.* pt. VIII: Prescription.

112. See *id.* art. 89 (covering “excessively onerous” and “duty to enter into negotiations”).

in the areas of defects in consent,¹¹³ validity,¹¹⁴ and agency contracts.¹¹⁵ In these areas, it is best to provide a number of options that the parties may select. Use of national laws, international soft laws, and trade practice materials should be reviewed in crafting optional rules that parties may select under the principle of freedom of contract.

E. *Comprehensive International Sales Law Project*

1. *Fusion of Hard and Soft Laws*

A comprehensive sales law, as proposed here, would be a combination hard-soft law instrument. This Section will provide a brief analysis of the nature and characteristics of hard and soft laws. First, the hardness of hard laws varies across legal subject matters, with the broad range of public law (constitutional, criminal, tax, and so forth), regulatory, and consumer protection laws as very hard laws. Contract and sales law, anchored in the principle of freedom of contract, are inherently “soft” hard laws. Despite the existence of mandatory rules, the overwhelming bodies of such laws are made up of default rules that the parties can expressly or implicitly opt out of. On the other end of the spectrum, soft law is viewed as completely voluntary in nature. Parties may choose to utilize soft laws or courts and arbitral panels may use them to guide or support their decisions. However, there are some soft laws that are so universally accepted that they take on a hard law edge. The International Chamber of Commerce’s Incoterms (trade terms) and Uniform Customs and Practices for Documentary Credit Transactions (rules for international letters of credit) manuals are examples of such “hard” soft laws.

Soft law can be best understood “as a continuum, or spectrum, running between fully binding treaties and fully political positions.”¹¹⁶ Guzman and Meyer note that there are so many types of soft law that it is best to think of soft law as a variety of categories. They argue that, despite many types of soft laws, soft law comes in two general forms—agreements

113. Negotiations over providing rules on mistake were scuttled because of the variety of rules on the subject found in various domestic laws. See *Report of the Secretary-General: Formation and Validity of Contracts for the International Sale of Goods*, 8 U.N.Y.B. Comm’n Int’l Trade, A/CN.9/128, annex 11 (1977), available at <http://www.uncitral.org/pdf/english/yearbooks/yb-1977-e/vol8-p90-109-e.pdf>.

114. See *Rep. of the Working Group*, 9 U.N.Y.B. Comm’n Int’l Trade, A/CN.9/142, ¶¶ 48–69 (1978), reprinted in [1978] IX Y.B. UNCITRAL 61, 65–66, available at http://www.uncitral.org/pdf/english/yearbooks/yb-1978-e/yb_1978_e.pdf (noting decision to exclude specific rules on validity).

115. Similarly, efforts to address issues related to agency were not successful. See *Rep. of the Working Group*, 6 U.N.Y.B. Comm’n Int’l Trade, A/CN.9/100, ¶ 47, reprinted in [1975] VI Y.B. UNCITRAL 49, 53, available at http://www.uncitral.org/pdf/english/yearbooks/yb-1975-e/yb_1975_e.pdf.

116. Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 173 (2010). Prosper Weil once stated that soft law obligations “are neither ‘soft law’ nor ‘hard law’: they are simply not law at all.” Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 414 n.7 (1983).

and “international common law.”¹¹⁷ Ultimately, Guzman and Meyer offer a very interesting definition of soft law “as those nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct.”¹¹⁸ This definition can act as the mantra for a comprehensive hard-soft international sales law project.

2. *Determining Comprehensiveness*

Exactly what constitutes a comprehensive international sales law? The answer is that it reaches the many issues that are found in a comprehensive national sales law, as well as the terms found in international sales contracts. The totality of sales law in a given national legal system is generally found in a number of statutory instruments and case decisions. In the U.S., at the minimum it would include Article II of the U.C.C., common law of contracts, and various statutory interventions, such as terminations of franchises, usury, form of warranties, and so forth.

The proposed Swiss Law Project provides a non-exhaustive list of contract law subjects including:

[F]reedom of contract, freedom of form; formation of contract, among others: offer, acceptance, modification, discharge by assent, standard terms, battle of forms, electronic contracting; agency, among others: authority, disclosed/undisclosed agency, liability of the agent; validity, among others: mistake, fraud, duress, gross disparity, unfair terms, illegality; construction of contract, among others: interpretation, supplementation, practices and usages; conditions; third party rights; performance of contract, among others: time, place, currency, costs; remedies for breach of contract, among others: right to withhold performance, specific performance, avoidance, damages, exemptions; consequences of unwinding; set-off; assignment and delegation, among others: assignment of rights, delegation of performance of duty, transfer of contracts; limitation; joint and several obligors and obligees.¹¹⁹

This would be a good place to start, but should also include negotiations and pre-contractual instruments, interest damages, consignment, retention of title, warranties and disclaimer of warranties, and post-contractual obligations. However, for a functioning and practical instrument of sales law, it is necessary to avoid too broad of a scope. The project should focus only on international commercial sales transactions, such as is the case with the CISG and Unidroit Principles. This will help maintain a level of simplicity that the inclusion of consumer transactions would

117. See Guzman & Meyer, *supra* note 116, at 173–74.

118. *Id.* at 174.

119. See UNCITRAL, *supra* note 1, at 4.

complicate. Second, any such document should maintain the private nature of contract law. The infrequency of mandatory rules found in the CISG should be retained, but the rest of the document should be subservient to the principle of private autonomy.

3. *Approaches to Developing a Comprehensive International Sales Law*

There are a number of options or methodologies that can be employed in developing a comprehensive sales law: (1) the restatement approach, (2) the compendium approach, and (3) the combined approach. The “restatement” approach would work off a template, consisting of four parts: (1) Statement of rule or definition (2) Comments (3) Illustrations, and (4) Notes. The restatement approach is both descriptive and prescriptive in nature. It provides the rule and its meaning based upon the review of the jurisprudence. It notes whether there is a consensus in the case law on a particular meaning. If not, it elucidates the majority and minority views or the multiple minority views. It then takes a position on the best of the existing rules. The choice of a best rule helps simplify chaotic bodies of rule interpretations that are often in conflict. The prescriptive dimension of restatement approach is also forward-looking by suggesting what the law “should” be by anticipating future developments.

The compendium approach would entail the sketching of an outline of all possible issues, rules, or terms relating to international sales transactions. It would provide the relevant CISG provision with commentary. If there are no such provisions, then the document would suggest a provision. The sources for the “gap-fillers” could be both hard and soft laws—CESL, Unidroit Principles, U.C.C., B.G.B., and commercial practice or customary international law. This format would likely not entail the providing of a best rule or a model provision, but would supply alternative provisions that reflect the characteristics of different contracting parties and the context of their transactions. The compendium approach is purely a descriptive enterprise, while the restatement approach possesses an important normative element. Ultimately, the two approaches may work out to be the same depending on how they are implemented. The best method would be to start with the compendium approach for sketching out a framework, but use the restatement format for determining content. This combined approach is likely to be more helpful to the practitioner. It starts under the presumption that the CISG is a good foundation for an international sales law, but offers complimentary materials and approaches to make the CISG more comprehensive and useful.

Both the compendium and restatement approaches could follow a rule-exception format. Instead of listing a menu of rule and term options, each rule could be immediately followed by an exception. The earlier coverage of the CISG acceptance rule (Article 18) was an example of a rule-exception approach. However, in the interest of certainty, the non-CISG provisions of a comprehensive sales law should require the contracting

parties to expressly choose between the rule and its exception. If not, a rule followed by an overly broad exception essentially leaves “the question open as to which of the two alternatives will ultimately prevail” in a contract dispute.¹²⁰ This approach as a vehicle of compromise is preferable to the use of ambiguous language that masks the failure to reach a consensus view.

4. *Restatement First of International Sales Law*

Given the previous section, the restatement approach would play the dominant role in drafting a comprehensive sales law. The CISG is viewed as the core document because it has been widely adopted, but the fact remains that transactional lawyers often opt out. So, any restatement project using the CISG as its core should ask how could it be made better and more comprehensive?

The restatement approach makes it relatively easy to interweave the CISG with soft law sources. The final product would be viewed as a soft law instrument, the impact of which can be judged by its use in practice and citations from courts. The most ambitious expectation is that it would be viewed as a “manual” that is recognized as customary international law. Henry Deeb Gabriel’s statement on soft law offers encouragement:

[P]rinciples and restatements, have been widely used by courts and arbitrations as a basis for forging new legal rules as well as interpreting existing ones. In the common law world, particularly the United States, courts have long relied upon the various Restatements of the Law produced by the American Law Institute as a source of law. Moreover, arbitration tribunals, which are generally not bound by domestic choice of law restrictions, often adopt legal rules, such as the UNIDROIT Principles of International Commercial Law, because of the presumed neutrality of the rules.¹²¹

A comprehensive international sales law project recognizes that the CISG lacks the comprehensiveness found in domestic sales laws or codes. Because of the shortcomings of the CISG and the inspirational quest for a broader international code, a more robust use of the CISG as the beginning and not the end of the “uniform sales law project” has been neglected. This Article tries to move the focus on expanding the CISG from both the theoretical and practical levels to make a comprehensive sales law. The goal of such a project is not to reform or amend the CISG, because that is politically impractical. Its purpose is to use the CISG as a core

120. Bonell, *supra* note 94, at 3–4.

121. Henry Deeb Gabriel, *Universalism and Tradition: The Use of Non-Binding Principles in International Commercial Law*, in LIBER MEMORIALIS PETAR ŠARČEVIĆ: UNIVERSALISM, TRADITION AND THE INDIVIDUAL 471, 479 (Vesna Tomljenovi et al. eds., 2006).

and base document and develop a widely accepted body of customary international law to overcome its limited scope. The CISG, as the only uniform law that we have to work with for the foreseeable future, can be made better by analyzing and applying by analogy other laws including, domestic and international hard and soft laws.

V. CONCLUSION

This Article travels through the levels of doctrinal analysis of the Convention on Contracts for the International Sales of Goods (CISG), as well as documenting its limited scope and its other shortcomings. The middle part of the Article moves to the level of theory by examining the theories of interpretation advanced by Karl Llewellyn and Ronald Dworkin. These theories are mined for insights on how best to close the internal gaps of the CISG. The third part of the Article proposes a new project—the development of a hard-soft law document that provides a single place for parties, lawyers, judges, and arbitrators to go for a comprehensive international sales law.¹²²

122. A team of scholars, led by Ulrich Magnus, Reiner Schulze, André Jansen, and Larry A. DiMatteo, will convene a meeting (September 27–28, 2013) of a group of scholars to plan the undertaking of the project described in this Article.

WHO NEEDS A UNIFORM CONTRACT LAW, AND WHY?

INGEBORG SCHWENZER*

CONTRACT law, especially commercial contract law, has always been at the forefront of harmonization and unification of private law. The reason is that different domestic laws are perceived as an obstacle to international trade.¹ This has always been true and still holds true nowadays as proven by many recent field studies around the world.² In the 19th century this prompted unification at the nation-state level all over Europe, in the 20th century the Uniform Commercial Code in the United States is another prominent example, as well as endeavours not only on the European level³ but also in Africa.⁴ Most recently we witnessed similar movements in East Asia with the Principles of Asian Contract Law (PACL).⁵

Let me briefly discuss who is in need of a uniform contract law and why. In general, on the international level we may roughly distinguish three different scenarios of contracting parties.

In the first group we find parties from countries where the same language is spoken. In general, these countries also belong to the same legal family with differences between their legal systems being minor if not neg-

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1. See Ewan McKendrick, *Harmonisation of European Contract Law: The State We Are In*, in THE HARMONISATION OF EUROPEAN CONTRACT LAW: IMPLICATIONS FOR EUROPEAN PRIVATE LAWS, BUSINESS AND LEGAL PRACTICE 5, 14–15 (Stefan Vogenauer & Stephen Weatherill eds., 2006) (noting that “differences in national contract law do act as a barrier to trade”).

2. See Stefan Vogenauer & Stephen Weatherill, *The European Community’s Competence to Pursue the Harmonisation of Contract Law—An Empirical Contribution to the Debate*, in THE HARMONISATION OF EUROPEAN CONTRACT LAW: IMPLICATIONS FOR EUROPEAN PRIVATE LAWS, BUSINESS AND LEGAL PRACTICE, *supra* note 1, at 125–27.

3. See, e.g., THE COMM’N OF EUR. CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW, PARTS I & II (Ole Lando & Hugh Beale eds., 2000) [hereinafter PECL]; THE COMM’N OF EUR. CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW, PART III (Ole Lando et al. eds., 2003) [hereinafter PECL III].

4. See, e.g., Acte Uniforme portant sur le Droit commercial général [*Uniform Act on General Commercial Law*], Dec. 15, 2010, ORGANIZATION POUR L’HARMONISATION EN AFRIQUE DU DROIT DES AFFAIRES [ORGANIZATION FOR THE HARMONIZATION OF BUSINESS LAW IN AFRICA] [hereinafter OHADA], available at <http://www.ohada.org/presentation-generale-de-lacte-uniforme/telechargements1.html>.

5. For further information on PACL, see Shiyuan Han, *Principles of Asian Contract Law: An Endeavor of Regional Harmonization of Contract Law in East Asia*, 58 VILL. L. REV. 589 (2013); see also *Harmonization of Regional Laws on Obligations*, FONDATION POUR LE DROIT CONTINENTAL, http://www.fondation-droitcontinental.org/jcms/c_7718/projet-commun-de-droit-des-contrats-en-asie-du-sud-est (last visited Apr. 15, 2013).

ligible.⁶ This first of all applies to parties from English-speaking common law countries, like parties from the United States and Canada, from Australia and New Zealand, or from India and the United Kingdom. But it also holds true for other scenarios like those of parties from France and Cameroon, from Argentina and Mexico, or from Germany and Austria. First, it is possible that the parties can agree on one of their respective legal systems. If this is not the case they can be expected to choose the law of a third country with the same language and belonging to the same legal tradition. In any case, the outcome of a possible dispute—be it litigated or arbitrated—will be more or less predictable. This group comes close to purely domestic contracts and there is hardly any need for a unification of contract law as the parties would still prefer the law that is more familiar to them than any unified law.

In the second group a—most probably western—company with overwhelming bargaining power contracts with an economically weaker party. The powerful company usually will be able to impose anything that it wants on its contract partner. It has sophisticated in-house lawyers who carefully draft the contract preferably with a choice of law clause designating its own domestic law. If this is combined with a forum selection clause designating the domestic courts of the economically stronger party usually there will be no problems, at least not for the powerful party, and thus no need for a uniform contract law. The domestic courts apply their domestic law, which in general will yield predictable and satisfactory results for the company seated in that country. The picture may immediately change, however, if the other party brings suit in the domestic courts of its own country and there the forum selection clause and/or the choice of law clause is not honoured.⁷ But even if these courts accept the choice of law, it is a totally different question of how the courts will apply this foreign law. By agreeing on arbitration many of the aforementioned imponderabilities may be circumvented. Still, problems of ascertaining and proving the chosen law—as will be described below—can be encountered.

The third group is probably by far the largest one. It consists of parties from countries where different languages are spoken, be they from a common law and a civil law country or from two civil law countries. If none of the parties has the economic power to impose its own law upon the other party, i.e., where the parties are dealing at arm's length with one another, more often than not they will agree on a third law. This might be a law that appears to be closely related to both parties because it influ-

6. For an overview of the legal families with regard to domestic sales laws, see INGBORG SCHWENZER ET AL., *GLOBAL SALES AND CONTRACT LAW* paras. 2.01–135 (2012).

7. A prominent example is Brazil, where the validity of choice of law and choice of forum clauses is highly controversial. For more information, see Dana Stringer, Note, *Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging Third Way*, 44 *COLUM. J. TRANSNAT'L L.* 959 (2006).

enced the law of both parties' countries in one way or the other, like is true for German law, for example, in relation to Italian and Japanese or Korean law.⁸ If no such common background exists, more often than not, the parties think to solve their problems by resorting to what they believe is a "neutral law," thereby often confusing political neutrality with suitability of the chosen law for international transactions.⁹ In particular, this seems to be the case with Swiss law.

In such a case the first hurdle that the parties have to take, at least once it comes to litigation or arbitration, is the language problem. The parties have to investigate a foreign law in a foreign language. If the language is not the one of the litigation or arbitration in question then all the legal materials—statutes, case law, and scholarly writings—must be translated into the language of the court or of the arbitration. Legal experts are required to prove the content of the law that is chosen by the parties. In some countries the experts may be appointed by the court, in others as well as generally in arbitration each party will have to come forward with sometimes even several experts.¹⁰ Needless to say, these procedures can be very expensive and may be prohibitive for a party who does not have the necessary economic power to invest these monies in the first place. This may even be harsher under a procedural system where each party bears its own costs regardless of the outcome of the proceedings, as is especially the case under the so-called "American Rule" as it applies not only in the United States, but also in Japan.¹¹ However, even if a party is willing to bear all these costs to prove a foreign law in court or arbitration the question as to how this law is interpreted and applied can be highly unpredictable.

Second, the parties will very often be taken by surprise when they realize the true content of the law that they have chosen. Just to give you one example that in my view is rather typical for an international contract be-

8. For German influences in the East Asian region see SCHWENZER ET AL., *supra* note 6, ¶¶ 2.123–127. For German influences on Italian civil law, see KONRAD ZWIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW, 102–04 (Tony Weir trans., 3d ed. 1998).

9. Cf. Christiana Fountoulakis, *The Parties' Choice of 'Neutral Law' in International Sales Contracts*, 7 EUR. J.L. REFORM 303, 306–07 (2005).

10. Cf. Michele Taruffo, *Evidence*, in 16 INT'L ENCYCLOPEDIA COMP. L. ch. 7, 7.65–66 (Mauro Cappelletti ed., 2010) (regarding court proceedings); cf. Siegfried H. Elsing & John M. Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, 18 ARB. INT'L 59, 63–64 (2002) (regarding arbitration proceedings); INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION art. 25(3) (2012); UNITED NATIONS COMM'N ON INT'L TRADE LAW [hereinafter UNCITRAL], ARBITRATION RULES art. 27(2) (2010); Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1330 (2003).

11. For a comparative overview of how litigation costs and attorney fees are allocated between the parties in civil litigation, see Mathias Reimann, *Cost and Fee Allocation in Civil Procedure: A Synthesis*, in COST AND FEE ALLOCATION IN CIVIL PROCEDURE: A COMPARATIVE STUDY, 11 IUS GENTIUM: COMPARATIVE PERSPECTIVE ON LAW AND JUSTICE (Mathias Reimann ed., 2012).

tween two small and medium enterprises (SMEs); a sales contract between a Chinese seller and an Italian buyer. As German law has had great influence on both Chinese and Italian law,¹² the parties—although none of them speaks German—believe to have a rough idea of German law and agree on German law to govern their contract. The Chinese seller, for its standard form contract, copies a form it finds on the Internet including a limitation of liability clause. Whereas the clause may well live up to the standards of the United States' Uniform Commercial Code, it is totally invalid under German law that provides for substantive control of standard terms even in business-to-business (b2b) relationships.¹³ This is certainly not what both parties wanted and expected in choosing German law.

Third, the outcome of the case under the law chosen may be highly unpredictable. This especially holds true if the parties choose Swiss law. As Switzerland is such a small country, the Swiss Supreme Court has not yet decided many central questions of contract law or if so, the decision may have been rendered decades ago and is disputed by scholarly writings. This often makes the outcome of the case rather unpredictable; another reason that may well prevent a party from pursuing its rights under the contract.

Furthermore, especially Swiss domestic contract law in core areas is not suitable for international contracts. This can be demonstrated by reference to only two examples. First, the Swiss Supreme Court distinguishes between *peius*, i.e., defective goods, and *aliud*, i.e., different goods;¹⁴ the latter giving the buyer the right to demand performance during ten years after the conclusion of the contract notwithstanding whether it gave notice of non-performance or not,¹⁵ while the former requires the buyer to give prompt notice of defect according to Article 201 OR to preserve any remedies for breach of contract. Where the line between *peius* and *aliud* will be drawn in a particular case can be extremely difficult to predict.¹⁶ The second example is compensation of consequential losses.¹⁷ Whether there is a claim for damages without fault depends on the number of links

12. For further discussion on the influence of German law on Italian law, see ZWIEGERT & KÖTZ, *supra* note 8.

13. Cf. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, BUNDESGESETZBLATT, Teil I [BGBL. I], as amended, §§ 305–310 (Ger.).

14. See Bundesgericht [BGer] [Federal Supreme Court] Dec. 5, 1995, 121 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 453 (Switz.).

15. Cf. OBLIGATIONENRECHT [OR] [CIVIL CODE] Dec. 10, 1907, SR 210, art. 127 (Switz.). For an English translation, see *id.*, available at <http://www.admin.ch/ch/e/rs/2/210.en.pdf>.

16. See Fountoulakis, *supra* note 9, at 308–09. For more information on the differentiation between *peius* and *aliud*, see BASLER KOMMENTAR, OBLIGATIONENRECHT I art. 206, ¶¶ 2–3 (Heinrich Honsell et al. eds., 5th ed. 2011) [hereinafter OBLIGATIONENRECHT I].

17. See OBLIGATIONENRECHT [OR] [CIVIL CODE] Dec. 10, 1907, SR 210, art. 208(2) (Switz.). For a translation, see *id.*, available at <http://www.admin.ch/ch/e/rs/2/210.en.pdf>.

in the chain of causation.¹⁸ Extremely short periods for giving notice of defects¹⁹ further militate against domestic Swiss law in the international context. Similar examples can also be drawn from many other domestic legal systems.

This background illustrates the urgent need to further harmonize, if not unify, general contract law. The United Nations Commission on International Trade Law (UNCITRAL) would be the most appropriate place for such a project. Whereas any regional endeavor might mainly focus on the laws of the respective countries involved, UNCITRAL has the chance to embark upon a more truly global reflection. Indeed, UNCITRAL is the only forum with universal participation, i.e., all the regions of the world have a chance to contribute on equal footing.²⁰ This is the reason why, in 2012, Switzerland made a proposal for the 45th Session of UNCITRAL on possible future work by UNCITRAL in the area of international contract law.²¹ However, this proposal did not suggest how the possible future work should be conducted; especially what kind of instrument should be aimed at if one were to come to the conclusion that such future work is desirable and feasible. Let me give some thoughts to this question, emphasizing that I am speaking entirely for myself and in no way voicing the official Swiss opinion.

In principle, there is the choice between a convention and a model law. “A convention is designed to unify law by establishing binding legal obligations.”²² Its aim is to achieve a very high level of harmonization.²³ Although there may be the possibility of having some reservations allowing state parties a certain, but very limited degree of choice, such reservations are easily discernible without the need to have recourse to the respective

18. See Bundesgericht [BGer] [Federal Supreme Court] Nov. 28, 2006, 132 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 257, 271 (Switz.); see also OBLIGATIONENRECHT I, *supra* note 16, art. 208, ¶¶ 7–8.

19. Cf. OBLIGATIONENRECHT [OR] [CIVIL CODE] Dec. 10, 1907, SR 210, art. 201(1) (Switz.). For an English translation, see *id.*, available at <http://www.admin.ch/ch/e/rs/2/210.en.pdf> (according to which notice must be made immediately (“sofort”)); see also Bundesgericht [BGer] [Federal Court] June 27, 1950, 76 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 221, 225 (Switz.) (notice within four days was in time as these included Sunday).

20. UNCITRAL’s membership comprises states from Africa, Asia, Eastern Europe, Western Europe, Latin America, and the Caribbean, thereby ensuring that the main economic and legal systems of the world are represented. For an overview of the today 60 member states, see UNCITRAL, *A Guide to UNCITRAL: Basic Facts About the United Nations Commission on International Trade Law* 37–41, Annex II (2013), available at <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf> [hereinafter *A Guide to UNCITRAL 2013*].

21. See UNCITRAL, June 25–July 6, 2012, *Possible Future Work in the Area of International Contract Law: Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law*, U.N. Doc. A/CN.9/758 (May 8, 2012) [hereinafter *Swiss Proposal*], available at <http://www.uncitral.org/uncitral/commission/sessions/45th.html>.

22. *A Guide to UNCITRAL 2013*, *supra* note 20, at 13.

23. See *id.* at 14.

domestic law.²⁴ Thus, a convention provides the highest level of predictability for private parties. In contrast, a model law only provides for a legislative text that is recommended to state parties.²⁵ It is used where state parties want to retain flexibility in implementation “or where strict uniformity is not necessary or desirable.”²⁶

Furthermore, a model law may be finalized and approved by UNCITRAL at its annual session whereas a convention still, in principle, necessitates a diplomatic conference.²⁷ Although, at the political level it may be certainly easier to convince state governments to agree to a model law allowing them more leeway, the needs of international commerce clearly militate in favor of a convention. Even if states were to implement a model law they could still deviate from the text of such a model law, which would make it difficult to ascertain the content of the applicable law in a specific case.

Moreover, there is no obligation for courts of a state that has implemented a model law to regard its international character and the need to promote uniformity in its interpretation, as it is nowadays provided for in all recent international conventions.²⁸ Thus, a statute implementing a model law is purely domestic law and is legitimately interpreted against the respective domestic background. If a model law may bring about some harmonization at the beginning this will soon be lost after some time. This can especially be expected in a traditional field such as contract law where firm dogmatic conceptions and convictions prevail that have been shaped over centuries and that every lawyer has internalized from the very first day in law school.

The scope of the envisaged instrument on general contract law should be similar to the one of the United Nations Convention on Contracts for the International Sale of Goods (CISG), except that it should apply to all kinds of contracts and not just to sales. This means, in the first place, that the instrument should only be concerned with international contracts and not with purely domestic ones. There is no reason, and it is not the mandate of UNCITRAL to interfere with domestic relationships.²⁹ If a state feels the need to simplify the situation for its citizens by having the same law applied to domestic as well as to international contracts, it is free to do so and implement corresponding domestic legislation as some states already have chosen in relation to the CISG.³⁰

24. See, e.g., U.N. Comm'n on Int'l Trade Law, United Nations Convention on Contracts for the International Sale of Goods arts. 92–96, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG], available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.

25. See *A Guide to UNCITRAL 2013*, *supra* note 20, at 14.

26. *Id.*

27. See *id.* at 15.

28. See CISG, *supra* note 24, art. 7(1).

29. Cf. *A Guide to UNCITRAL 2013*, *supra* note 20, at 1–2.

30. Cf. Ingeborg Schwenzer & Pascal Hachem, *The CISG—Successes and Pitfalls*, 57 AM. J. COMP. L. 457, 462–63 (2009).

Like the CISG, the instrument on general contract law should be confined to b2b contracts without touching business-to-consumer (b2c) relationships. Except for Internet transactions that become more and more international, b2c contracts, to this very day, are mostly domestic contracts. Consumer protection asks for mandatory rules, which stands in sharp contrast to the need for freedom of contract in b2b contracts. It is not possible to juggle the needs of both—consumers and businesses—in one single instrument. The futility of such an endeavor has been demonstrated lately by the draft of a Common European Sales Law.³¹ Furthermore, the level of consumer protection still differs considerably around the world; an international *consensus* in this field probably cannot be achieved during the decades to come.

In regard to the different areas of contract law that should be addressed, it is clear that the future uniform contract instrument should cover as many areas as possible. However, there are some fields where unification is more urgent than in others. The most important area where the gaps left by the CISG are most unfortunate, because they endanger uniformity already reached, are questions of validity. Although, it is now unanimously held that the CISG itself defines what is a question of validity left to domestic law and what is not,³² many day-to-day contract problems are issues of validity. To name but a few: questions of consent, such as mistake, undue influence, or fraud; and validity of individual clauses and standard terms, such as gross disparity, burdensome obligations, exclusion and limitation of liability clauses, as well as fixed sums, i.e., penalty and liquidated damages clauses.³³ It is extremely burdensome to have these questions answered by domestic law, which might well lead to frictions with unified law. Also very important are issues relating to consequences of unwinding of contracts³⁴ and set-offs.³⁵ Other areas of contract law, on the other hand, such as third party rights, assignment and delegation, or

31. See Ingeborg Schwenzer, *The Proposed Common European Sales Law and the Convention on the International Sale of Goods*, 44 UCC L.J. 457 (2012). The draft forms Annex I of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. See *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* COM (2011) 635 final (Oct. 11, 2011), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:EN:PDF>.

32. See SCHLECHTRIEM & SCHWENZER, COMMENTARY ON THE CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) art. 4, ¶ 31 (Ingeborg Schwenzer ed., 3d ed. 2010) (with references).

33. For an overview on how the issues of formation and validity of sales contracts are dealt with in the different legal systems see SCHWENZER ET AL., *supra* note 6, ¶¶ 9.01–22.25.

34. For an overview on how the unwinding of contracts is dealt with in the different legal systems see *id.* ¶¶ 50.01–.36.

35. For a comparative discussion on set-offs, see CHRISTIANA FOUNTOLAKIS, SET-OFF DEFENCES IN INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE ANALYSIS 7–128 (2011).

joint and several obligors and obligees, might not be at the forefront of desirability for unification.

If one considers working on further unification of contract law the route to be followed seems to be pretty clear. The starting point must be the CISG. It has received such tremendous acceptance that anything that might interfere with it must be refrained from.³⁶ Other UNCITRAL instruments, such as the 1974 Limitation Convention³⁷ or the 1983 Uniform Rules on Contract Clauses for an Agreed Sum Due Upon Failure of Performance³⁸ should be taken into consideration, and it should be discussed whether they should be amended. Certainly, of utmost importance are the Principles of International Commercial Contracts (PICC).³⁹ The most valuable work has been completed by the International Institute for the Unification of Private Law (UNIDROIT) and any duplication of efforts must be prevented. In essence, we face a similar situation as in 1968 when UNCITRAL started working on the CISG, drawing heavily on the previous work done by UNIDROIT that had led to the Hague Conventions on the sale of goods, the Convention relating to a Uniform Law for the International Sale of Goods (ULIS), and the Convention relating to Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), respectively.⁴⁰ However, there are certain contradictions between CISG and PICC that need to be eliminated;⁴¹ in other areas the possible acceptance of PICC rules at a global level must be carefully scrutinized and discussed.

Considering what has already been achieved at the international level, global contract law appears to be feasible within a reasonable amount of

36. The CISG now has seventy-eight member states with the number continuously increasing. Recently, the Brazilian Senate approved the text of the CISG. Upon completing the accession process Brazil will become the 79th contracting state. For a list of the current contracting states to the CISG, see UNCITRAL, *CISG Status*, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html; see also Ingeborg Schwenzer & Pascal Hachem, *The CISG—A Story of Worldwide Success*, in CISG PART II CONFERENCE 119 (Jan Kleinemann ed., 2009), available at https://ius.unibas.ch/uploads/publics/9587/20110913164502_4e6ff66e5b746.pdf.

37. See UNCITRAL, *Convention on the Limitation Period in the International Sale of Goods*, June 14, 1974, 1511 U.N.T.S. 3, available at http://www.uncitral.org/pdf/english/texts/sales/limit/limit_conv_E_Ebook.pdf.

38. See UNCITRAL, *Texts on Liquidated Damages and Penalty Clauses*, U.N. Doc. A/CN.9/243, Annex I, June 29, 1983, available at <http://www.uncitral.org/pdf/english/texts/sales/contract/vol14-p272-273-e.pdf>.

39. See UNIDROIT, *UNIDROIT Principles of International Commercial Contracts* (PICC) (2010), available at <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>.

40. For more information on the drafting history of the CISG, see PETER SCHLECHTRIEM, *UNIFORM SALES LAW—THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 5, 17–21 (1986).

41. For a comparison of the two instruments, see Michael Joachim Bonell, *UNIDROIT Principles of International Commercial Contracts and the United Nations Convention on Contracts for the International Sale of Goods—Alternatives or Complementary Instruments?*, 2000 BUS. L. INT'L 91, 94–96 (2000).

time and without consuming too many resources needed elsewhere. How would the global picture for internationally contracting parties change if we had an UNCITRAL instrument on general contract law?

First, this instrument—just like the CISG—could be expected to represent a good compromise between common and civil law.⁴² It would be acceptable to any party regardless of its own legal background. It would be a truly neutral law.

Second, it would be drawn up in the six United Nations languages and it would be translated into the languages of the states adopting this instrument, and thus be readily available in court and arbitral proceedings rendering costly translations and expert testimony superfluous. Similar to the CISG, it could serve as a model for further harmonization of contract law, also on a domestic level.⁴³ Furthermore, it could be used to teach traders, who cannot afford in-house counsel or legal advice, the basics of contract law.⁴⁴

Third, it would lead to much more predictability in international contracts. It can be expected that the same mechanisms that now support and enhance the uniform application and interpretation of the CISG will also play a decisive role for such an instrument. It must be recalled that by now we have about 3,000 published cases on the CISG,⁴⁵ we count about 4,000 publications freely accessible on the Internet,⁴⁶ we have CLOUT⁴⁷—Case Law on UNCITRAL Texts, we have the UNCITRAL Digest,⁴⁸ and further institutions worldwide such as the CISG Advisory Council,⁴⁹ that strive to guard uniformity. Commentaries with article-by-article comments will be published in different languages. Uniform standard forms that facilitate contracting will soon emerge on the basis of such an instrument and further add to its predictability.

42. Cf. Ulrich Magnus, *The Vienna Sales Convention (CISG) Between Civil and Common Law—Best of All Worlds?*, 3 J. CIV. L. STUD. 67, 74 (2010) (comparing to CISG).

43. Cf. SCHLECHTRIEM & SCHWENZER, *supra* note 32, at 462–63 (comparing CISG as role model for domestic legislators).

44. As it is true with regard to the CISG; cf. SCHWENZER ET AL., *supra* note 6, ¶ 3.21.

45. For cases on the CISG, see CISG online case database, GLOBAL SALES LAW, <http://www.globalsaleslaw.org/index.cfm?pageID=29> (last visited Apr. 16, 2013); see also *CISG Database*, PACE LAW SCHOOL, <http://www.cisg.law.pace.edu>.

46. For publications freely accessible on the Internet, see *CISG Database*, PACE LAW SCHOOL, <http://www.cisg.law.pace.edu/>.

47. See UNCITRAL, *Case Law on UNCITRAL Texts (CLOUT)*, http://www.uncitral.org/uncitral/en/case_law.html (last visited Apr. 16, 2013).

48. See UNCITRAL, *Digests*, http://www.uncitral.org/uncitral/en/case_law/digests.html (last visited Apr. 16, 2013).

49. For more information on the CISG Advisory Council and for the CISG Advisory Council Opinions, see *Welcome to International Sales Convention Advisory Council (CISG)*, CISG ADVISORY COUNCIL, <http://www.cisgac.com/> (last visited Apr. 16, 2013).

All in all it can be expected that an UNCITRAL instrument on general contract law may considerably save transaction costs. It may also help companies with fewer funds to be able to pursue their legal rights under an international contract and thus further promote international trade. Finally, it can support the rule of law worldwide.

APPLICABLE LAW, THE CISG, AND THE FUTURE CONVENTION
ON INTERNATIONAL COMMERCIAL CONTRACTS

PILAR PERALES VISCASILLAS*

I. INTRODUCTION: A CONVENTION ON INTERNATIONAL
COMMERCIAL CONTRACTS

THERE is no question that the debate on international commercial contract law has grown following the adoption and subsequent success of the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG). The merits of the CISG can be measured not only in terms of the high number and the economic weight of the countries that have ratified the Convention, but also by the quality and novelty, of the worldwide solutions it achieved from a pure technical and legal perspective.¹ However, the CISG's status as an international treaty has some drawbacks. First of all, as an international treaty, it might be quite difficult to amend or modify it;² second, despite the wide substantive coverage of the CISG, there are important areas of sale of goods contracts left to domestic law; third, the CISG only covers international sale of goods contracts, and thus some other important international commercial contracts do not have an international uniform law regime.

After the success of the CISG, several different instruments, mostly with a material or a territorial scope different as to the CISG, have tried to contribute *soft law* that either can be applied in conjunction with the CISG, or as an alternative to it if specified by a contract. These contractual instruments are mostly based on or inspired by the CISG solutions because, despite the fact that the CISG is restricted to international sale of goods contracts, it governs those contracts by regulating areas that belong to general contract law. The most well-known instrument of this sort is the UNIDROIT Principles of International Commercial Contracts (UPICC, 1994, 2004, and 2010) that might be seen as a complementary tool to the

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1. See U.N. Comm'n on Int'l Trade Law, United Nations Convention on Contracts for the International Sale of Goods art. 35, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG], available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>. The list of contracting states is now seventy-eight. Brazil has to be added to the list since it recently adopted the CISG.

2. Notwithstanding the above, there are some indirect mechanisms to update an International Treaty. See UNCITRAL, Recommendation Regarding the Interpretation of Article II (2), and Article VII (1), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc. A/6/17 (July 7, 2006); see also United Nations Convention on the Use of Electronic Communications in International Contracts, G.A. Res. 60/21, art. 20, U.N. GAOR, 60th Sess., Supp. No. 17 U.N. Doc. A/RES/60/21 (Nov. 23, 2005) [hereinafter Electronic Communications Convention].

CISG to the extent that it supplements, aids in its interpretation, and even covers certain areas excluded from the CISG.³ The UNIDROIT Principles have a wider field of application as compared to the CISG because they cover international commercial contracts in general. One of the most recent instruments, is however, in more direct competition with the CISG because, as a regulation, it will be incorporated into the legislation of the EU member states, although for the contractual parties it will be an opting-in instrument: the European Union Proposal for a Regulation on a Common European Sales Law (CESL) of October 11, 2011⁴ whose antecedents might be found in the Draft Common Frame of Reference (DCFR, 2009) and the European Principles in Contract Law (PECL, 1995, 1999, and 2003).⁵ There are also several other regional initiatives such as in Africa (Organization for the Harmonization of Business Law in Africa, OHADA),⁶ Asia (Principles of Asian Contract Law, PACL), or Latin America being the last two still under development.

These instruments have produced a worldwide, intense debate on general commercial contract law, more generally on private law, on regional versus universal harmonization of the law, as well as on the role of soft law instruments in regard to hard instruments. Furthermore, at the core of the discussion is the role of the CISG, its limits, and its drawbacks, in the framework of an international commercial contract law instrument.⁷

3. In fact the 2004 and 2010 editions cover general contract law institutions that are not covered by the CISG: authority of agents, contracts for the benefit of third parties, set-off, limitation periods, assignment of rights and contracts, transfer of obligations, conditions, plurality of obligors and obligees, unwinding of contracts, and illegality.

4. See European Commission, *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 Final (Oct. 11, 2011), available at http://ec.europa.eu/justice/contract/files/common_sales_law/regulation_sales_law_en.pdf.

5. See Pilar Perales Viscasillas & Rafael Illescas Ortiz, *The Scope of the Common European Sales Law: B2B, Goods, Digital Content and Services*, 11 J. INT'L TRADE L. & POL'Y 241 (2012) (offering critical view); see also Ingeborg Schwenzer, *The Proposed Common European Sales Law and The Convention on the International Sale of Goods*, 44 UCC L.J. 457 (2012).

6. See Organization for the Harmonization of Business Law in Africa, *The Uniform Act on General Commercial Law*, available at <http://www.ohadalegis.com/anglais/tableaudrtcomgb.htm>.

7. The idea of elaborating a "Global Commercial Code" was put forward by Gerold Herrmann. See Gerold Herrmann, *Law, International Commerce and the Formulating Agencies—The Future of Harmonisation and Formulating Agencies: The Role of UNCITRAL* (June 1, 2000) (unpublished paper presented at the Schmitthoff Symposium: Law and Trade in the 21st Century, Centre of Commercial Law Studies, London) (on file with author). Before that, it was suggested that UNCITRAL should embark on an international convention related to the general part of contract law. See Ole Lando, *Principles of European Contract Law and UNIDROIT Principles: Moving from Harmonisation to Unification?*, 8 UNIF. L. REV. 123 (2003) (arguing in favor of international convention by UNIDROIT); SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES, Festschrift for Albert H. Kritzer on the Occasion of His Eightieth Birthday (Camilla B. Andersen &

It is not a surprise that on the occasion of the last Commission session of UNCITRAL in 2012⁸ a proposal on possible future work by UNCITRAL in the area of international contract law was put forward by Switzerland.⁹ The proposal tries to initiate a debate on two areas:¹⁰

- (i) whether UNCITRAL can undertake an assessment of the operation of the 1980 Convention on Contracts for the International Sale of Goods and related UNCITRAL instruments in light of practical needs of international business parties today and tomorrow, and
- (ii) To discuss whether further work both in these areas and in the broader context of general contract law is desirable and feasible on a global level to meet those needs.¹¹

This proposal was well received by the Commission; however there were several words of caution,¹² and so the decision is still pending on the

Ulrich G. Schroeter eds., 2008); Michael Joachim Bonell, *Towards a Legislative Codification of the UNIDROIT Principles?*, 12 *UNIF. L. REV.* 233 (2007). *But see* Michael Joachim Bonell, *Do We Need a Global Commercial Code?*, 106 *DICK. L. REV.* 87 (2001).

8. *See* U.N. Comm'n on Int'l Trade Law, Rep. on its 45th Sess., June 25–July 6, 2012.

9. *See* UNCITRAL, *Possible Future Work in the Area of International Contract Law: Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law*, U.N. Doc. A/CN.9/758 (May 8, 2012) [hereinafter *Swiss Proposal*].

10. *See id.* at 1.

11. The areas identified in the Swiss Proposal are in particular: general provisions (i.e., freedom of contract, freedom of form), formation of contract (i.e., offer, acceptance, modification, discharge by assent, standard terms, battle of forms, electronic contracting), agency (i.e., authority, disclosed/undisclosed agency, liability of the agent), validity (i.e., mistake, fraud, duress, gross disparity, unfair terms, illegality), construction of contract (i.e., interpretation, supplementation, practices and usages), conditions, third party rights, performance of contract (i.e., time, place, currency, costs), remedies for breach of contract (i.e., right to withhold performance, specific performance, avoidance, damages, exemptions), consequences of unwinding; set-off; assignment and delegation (i.e., assignment of rights, delegation of performance of duty, transfer of contracts), limitation, joint and several obligors and obligees. *See id.*

12. *See* Rep. of the U.N. Comm'n on Int'l Trade Law on its 45th Sess., U.N. GAOR, 67th Sess., Supp. No. 17, ¶ 130, U.N. Doc. A/67/17 (2012) [hereinafter Report of the 45th Session]. The Report stated:

In reply, it was said that it was not evident that existing instruments were inadequate in actual practice, that the proposal seemed unclear and overly ambitious and that it could potentially overlap with existing texts, such as the Unidroit Principles of International Commercial Contracts. It was added that lacunae in existing texts, such as the United Nations Sales Convention, were a result of the impossibility of finding an agreed compromise solution and that there were significant doubts that that could be overcome in the near future. Concerns were also expressed about the implications of such a vast project on the human and financial resources available to the Commission and to States. For those reasons, it was urged that the proposed work should not be undertaken, at least not at the present time. It was added that the Commission might reconsider the matter at a future date in the light of possible developments.

Commission level.¹³

It seems that some part of the criticism derives from a misunderstanding on the scope of the Swiss Proposal that it might be perceived as an intention to create a new instrument that will modify the CISG. There is indeed no need to touch the CISG, or to modify it. A different issue is where a new instrument would be able to complement the CISG by either covering areas outside the scope of the CISG, or filling internal gaps in the CISG. At the same time, and because of the intended general nature of the future instrument, it will be applicable to other international commercial contracts as well.

It seems to us that this is the correct approach to assess the viability of a new instrument on the area of contract law as a project to be undertaken by UNCITRAL. One might say that UNIDROIT Principles already do so, since the Principles touch upon issues outside the scope of the CISG, and also implement the regulation of areas that are covered by the CISG. Yet, that is the case only if parties choose to have the UNIDROIT Principles govern their contract. There is no legitimacy behind the UNIDROIT Principles to be considered in all and any case as the general principles on which the CISG is based.¹⁴ The Principles, although a very useful text, are not an international treaty accepted worldwide. This legitimacy issue is a very important one to consider in favor of a general contract law instrument in a form of a binding instrument. To this regard, the endorsement of UPICC by UNCITRAL is by no means a declaration of intention by UNCITRAL to consider UPICC in the same foot as the CISG or to consider that they are the general principles of which the CISG is based.¹⁵

The Swiss Proposal has been recently endorsed by the CISG Advisory Council (CISG-AC) Declaration No. 1: The CISG and Regional Harmonization,¹⁶ where it considers some of the shortfalls of regional unification as opposed to global unification. The present author, who supported that declaration as a member of the CISG-AC, did recently consider the idea of UNCITRAL undertaking a leading role in the area of international commercial contracts.¹⁷ If finally a working group within UNCITRAL were to

Id.

13. *See id.* ¶ 132. The Report stated:

[I]t was determined that there was a prevailing view in support of requesting the Secretariat to organize symposiums and other meetings, including at the regional level and within available resources, maintaining close cooperation with Unidroit, with a view to compiling further information to assist the Commission in the assessment of the desirability and feasibility of future work in the field of general contract law at a future session.

Id.

14. *See* Pilar Perales Viscasillas, *The Role of the UNIDROIT Principles and the PECL in the interpretation and Gap-Filling of CISG*, in *CISG METHODOLOGY* 287–317 (André Janssen & Olaf Meyer eds., 2009).

15. *See* Report of the 45th Session, *supra* note 12, ¶¶ 141–44.

16. *See* CISG Advisory Council, *Welcome to International Sales Convention Advisory Council (CISG-AC)*, available at www.cisg-ac.org (last visited Apr. 7, 2013).

17. *See* Perales Viscasillas & Illescas Ortiz, *supra* note 5, at 243.

be established one of the most important questions would be the specific form the instrument will finally take, an issue which is usually related to the degree of compromise the states are willing to accept in regard to the substance of the instrument.

Although the unification through a model law could be as successful as an international treaty,¹⁸ but with a less degree of uniformity since it is an indirect way of unification by which the states can depart as much as they wish from the rules of the model law, I am of the opinion that a model law would not be a good tool for a general contract law instrument mainly for two reasons. First, UPICC is already a “model law” available for the states.¹⁹ Second, a General International Commercial Contract Model Law would not be enough to achieve a desired level of unification because there still would be a high degree of uncertainty in regard to the applicable law and its influence on domestic laws, particularly since there would not be a mechanism to ensure international and uniform interpretation.

In regard to a possible soft law instrument, i.e., an optional instrument for the parties, the same reservations as mentioned before applies: there is again an instrument that from my point of view offers the parties good solutions, i.e., UPICC.²⁰ In fact, the need for another optional instrument is unconvincing given the variety of options available to businesses. Also, an optional instrument might be problematic in regard to its effects, particularly if we think of some countries or even regions of the world where soft law instruments would not be considered a real choice of law.²¹

There is, however, no international treaty in the area of international commercial contracts, and thus there is no risk of competing instruments; furthermore, UNCITRAL, preferably in conjunction with UNIDROIT, would need to take the leading role as an international organization with enough legislative experience and legitimacy behind it, and with the capacity to create a universally accepted set of rules through a worldwide representation during the negotiation of the instrument.²² Furthermore,

18. Indeed one of the most successful model laws is the 1985 UNCITRAL Model Law on International Commercial Arbitration, where nearly seventy jurisdictions all over the world have drafted domestic and/or international arbitration rules based upon the 1985 Model Law.

19. As considered by the Preamble, UPICC “may serve as a model for national and international legislators.” INT’L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS art. 1.6(2), pmbl. 1 (2010) [hereinafter UNIDROIT PRINCIPLES], available at <http://www.unidroit.org/english/principles/contracts/main.htm>.

20. UPICC Preamble states that: “They shall be applied when the parties have agreed that their contract be governed by them.” See *id.*

21. See Rome I Regulation 593/2008, 2008 O.J. (L 177) 6 (EC) [hereinafter Rome I Regulation].

22. See UNITED NATIONS COMM’N ON INT’L TRADE LAW, THE UNCITRAL GUIDE: BASIC FACTS ABOUT THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 1 (2007), available at http://www.uncitral.org/pdf/english/texts/general/06-50941_Ebook.pdf. The UNCITRAL Guide states:

the fact that UNCITRAL works in the six official languages of the UN (Arabic, Chinese, English, French, Russian, and Spanish), and thus that its texts are equally official in those languages, also offers a tremendous advantage.

Therefore, from my point of view, if UNCITRAL were to be helpful in the efforts of harmonizing and unifying international commercial contract law, it is probably the time to undertake a more ambitious project that should take the form of an international convention.²³

However, a final consideration—a plan B—if such a project finally fails: a less ambitious project is also possible. UNCITRAL might focus its work on specific contracts such as international distribution contracts. To a certain extent, international distribution contracts are covered by the CISG.²⁴ However several factors make them an ideal subject for an international convention: the CISG does not cover certain important aspects of these contracts, they are being used more and more in international trade, and finally, there is a need to adjust some of the Vienna rules in this context, particularly in regard to remedies, but also the formation of contract provisions.

These instruments are negotiated through an international process involving a variety of participants, including member States of UNCITRAL, which represent different legal traditions and levels of economic development; non-member States; intergovernmental organizations; and non-governmental organizations. Thus, these texts are widely acceptable as offering solutions appropriate to different legal traditions and to countries at different stages of economic development. In the years since its establishment, UNCITRAL has been recognized as the core legal body of the United Nations system in the field of international trade law.

Id.

23. The international treaty reservations by states should be kept to the minimum possible since the effect of reservations is to diminish the degree of uniformity. One has to remember here the famous “British reservation” that was an “opt-in” mechanism chosen for ULF and ULIS (Convention relating to a Uniform Law on the International Sale of Goods and Convention relating to a Uniform Law for the Formation of the Contract (The Hague, July 1, 1964)) and that were adopted by the UK. The evolution of the CISG has shown that the reservations are being withdrawn by the states, and so very recently the four reservation states in regard to Article 92 CISG (Norway, Finland, Denmark, and Sweden) have withdrawn it, and China has done so in regard to the written declaration (Article 96 CISG) on the 16th of January 2013.

24. For a treatment of international distribution contracts under CISG, see Pilar Perales Viscasillas, *Los contratos de distribución internacional a la luz de la Convención de Viena de 1980 sobre compraventa internacional de mercaderías*, in HOMENAJE AL PROF. FRANCISCO VICENT CHULIÁ (Tirant lo blanch ed., 2013). See also Pilar Perales Viscasillas, *Contratos de distribución internacional y arbitraje*, in DISTRIBUCIÓN COMERCIAL Y DERECHO DE LA COMPETENCIA 44–102 (Aristides Jorge Viera González & Joseba Aitor Echevarría Sáenz eds., 2011).

In terms of the determination of the applicable law, note that even unified private international law instruments such as Rome I Regulation can be problematic since it provides for different criteria depending on whether the contract is characterized as a sale of goods (place of the habitual residence of the seller) or as a distribution contract (place of the habitual residence of the distributor). See Rome I Regulation, *supra* note 21, arts. 4.1(a), (f).

II. PRIVATE INTERNATIONAL LAW AND PARTY AUTONOMY WITHIN CISG

One of the most important features of the uniform international law instruments that take the form of a convention is that they provide the applicable law to the contract, and thus displace the otherwise applicable domestic law. Therefore, the majority of the international uniform law conventions contain a direct way of application, i.e., when both parties have their place of business in contracting states, the treaty is directly applicable to the contract.

As a result, an international treaty will be applied directly, avoiding recourse to the rules of private international law. However, the rules of private international law still play an indirect role in the application of international uniform law instruments by way of an indirect application, i.e., when only one of the parties has its place of business in a contracting state and the rules of private international law, i.e., the conflicts of law rules of the forum, lead to the application of the law of the contracting state. The indirect way of application when the conflict of laws points to the state that has ratified the treaty is a mechanism that extends its application, although it brings a certain degree of uncertainty for the parties as it depends upon the application of the rules of private international law.

Both ways of application, direct and indirect, have been uniformly adopted in international treaties, such as the CISG,²⁵ and so Article 1.1 states that:

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.²⁶

International uniform legal instruments also clearly recognize the principle of freedom of contract which means that the parties might exclude the application of an international treaty as a whole or partially derogate or vary the effects of any of its provisions. CISG Article 6 states that: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."²⁷

Furthermore, the predominant view in legal literature, as well as in case law, is that choice of law analyses in CISG contracting states, or in provinces or territories of CISG contracting states, must apply the CISG,²⁸

25. For an example of similar rules, see Convention on the Limitation Period in the International Sale of Goods art. 3, June 14, 1974, 13 I.L.M. 952 (1974) [hereinafter Limitation Convention].

26. CISG, *supra* note 1, art. 1.1.

27. *Id.* art. 6.

28. See Michael Bridge, *Choice of Law and the CISG: Opting in and Opting Out*, in DRAFTING CONTRACTS UNDER CISG 78 (Harry M. Flechtner et al. eds., 2008); Loukas Mistelis, *Article 6*, in COMMENTARY ON THE UN CONVENTION ON CONTRACTS FOR

and furthermore, that for a valid exclusion of the CISG there ought to be a clear indication of its exclusion.²⁹ This proposition derives from a systematic interpretation of the CISG, which applies *ex officio*, and it ought to be considered the default applicable law. Therefore an exclusion should be clearly expressed.

As is clear when analyzing Articles 1.1(b) and 6 of the CISG, the Convention fails to recognize party autonomy in regard to the choice of the law, as well as the role of arbitration in the determination of the applicable law.

A. *Party Autonomy in Regard to the Choice of the Law*

Article 6 of the CISG fails to recognize that the parties may opt into an international convention—a choice that might be more problematic if the treaty is not yet in force or that might have not yet been ratified by the states concerned. The lack of this kind of recognition by the CISG is due to the fact that for many uniform international instruments the issues regarding applicable law, validity of the choice, and effects of such election,

THE INTERNATIONAL SALE OF GOODS (CISG) 18 (Ingeborg Schwenzer ed., 2011); Ingeborg Schwenzer & Pascal Hachem, *Article 6*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 14 (Ingeborg Schwenzer ed., 3d ed. 2010). See also *Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Technical Fabrics Canada Ltd.*, 474 F. Supp. 2d 1075 (D. Minn. 2007); *St. Paul Guardian Ins. Co. & Travelers Ins. Co. v. Neuromed Med. Sys. & Support, GmbH*, No. 00 Civ. 9344(SHS), 2002 WL 465312 (S.D.N.Y. Mar. 26, 2002). *But see Hanwha Corp. v. Cedar Petrochemicals, Inc.*, 760 F. Supp. 2d 426 (S.D.N.Y. 2011).

29. It is considered that only an express exclusion would be valid. See JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION art. 6., 77 (2009); Schwenzer & Hachem, *supra* note 28, at 19. Note that Article 3.2 of the Limitation Convention provides that: “This Convention shall not apply when the parties have expressly excluded its application.” Limitation Convention, *supra* note 25, art. 3.2.

Some authors advocate at least for a conscious decision that “the parties have knowingly consented to the exclusion of the Convention.” See Filip De Ly, *Opting Out: Some Observations on the Occasion of the CISG’s 25th Anniversary*, in QUO VADIS CISG?: CELEBRATING THE 25TH ANNIVERSARY OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 35–36 (Franco Ferrari ed., 2005); Franco Ferrari, *CISG Rules on Exclusion and Derogation*, in THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 122 (Franco Ferrari et al. eds., 2004) (“There must be clear indications that the parties really wanted such an exclusion, that is, there must be a real—as opposed to the rhetorical, fictitious or hypothetical—agreement on exclusion.”); Mistelis, *supra* note 28, at 19; see also Jorge Oviedo Alban, *Autonomía conflictual en los Contratos de Compraventa Internacional de Mercaderías*, in COLECCIÓN DE ESTUDIOS DE DERECHO PRIVADO 23 (2012).

A few cases have also addressed this issue. See *Cedar Petrochemicals Inc. v. Dongbu Hannong Chem. Co.*, 769 F. Supp. 2d 269 (S.D.N.Y. 2011); *BP Int’l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333 (5th Cir. 2003) (“Where parties seek to apply a signatory’s domestic law in lieu of the CISG, they must affirmatively opt-out of the CISG.”).

are left to the specific instruments of private international law and thus to domestic law.³⁰

B. *The Role of Arbitration in the Determination of the Applicable Law*

Article 1.1(b) is directed to the judges, but not to arbitrators. It is true that the UNCITRAL Model Law on International Commercial Arbitration did not exist at that time, but it is interesting to note that the CISG did consider arbitration in some provisions,³¹ and that the ICC Arbitration Rules applied at that time (1975) recognized that the arbitrators were not bound by any conflict of law system, not even the one of the place of arbitration:

“The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply *the law designated as the proper law by the rule of conflict which he deems appropriate.*”³²

Furthermore, the concept of private international law within CISG is not an autonomous concept that ought to be interpreted within the boundaries of the CISG, but a concept that is to be found in domestic law.

Apart from this obvious drawback of the CISG,³³ it is important to mention that since the CISG’s adoption, the developments in the area of the applicable law have been significant, and thus if a new instrument were to be created it would be time to reconsider the solutions typically provided in international instruments that follows the system articulated by Article 6 (*infra* III) and 1.1 CISG (*infra* IV). Common to both of them in our proposal is that this issue of party autonomy in regard to the applicable law as well as to the concept of private international law would be “transformed” into uniform concepts, i.e., autonomous concepts within the future instrument that will be exclusively covered by it to the maxi-

30. In fact, Rome Convention—the precedent to Rome I Regulation—on the law applicable to contractual obligations was also approved in 1980.

31. Pilar Perales Viscasillas & David Ramos Muños, *CISG & Arbitration*, in PRIVATE LAW: NATIONAL—GLOBAL—COMPARATIVE: Festschrift for Ingeborg Schwenzer on the Occasion of Her 60th Birthday 1355–74 (2011).

32. See INTL’L CHAMBER OF COMMERCE, RULES OF ARBITRATION (1975).

33. One might need also to mention art. 95 CISG, which contains a reservation limiting the indirect application of the CISG. In order not to limit the application of the future instrument, the recommendation should be not to include a provision similar to art. 95 CISG, which is a reservation that should be withdrawn. See Gary F. Bell, *Why Singapore Should Withdraw its Reservation to the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 2005 SINGAPORE Y.B. INT’L 55. For an example of the classical application of art. 95 CISG, see *Princesse D’Isenbourg et CIE Ltd. v. Kinder Caviar, Inc.*, CIV.A. No. 3:09-29-DCR, 2011 WL 720194, at *4 n.3 (E.D. Ky. Feb. 22, 2011).

num extent possible and thus with no interference from domestic concepts or laws.³⁴

The proposal that we will put forward intends to expand the scope of application of an international convention in the area of general contract law with an aim to provide recognition to the freedom of choice of the parties, and also to provide more tools for judges and arbitrators in their finding of the applicable law. This is particularly important in light of the variety of contracts that might be covered under the new instrument.³⁵

34. Having said so, one has to recognize the legal implications for UNCITRAL dealing with this area of the law that we cannot cover in this paper, but it will be pointed out. First, a political issue in terms of the relationship between UNCITRAL and The Hague Conference on Private International Law, and second, in regard to the implications upon domestic legal conflict of law rules or arbitration laws if the Convention were to depart from them. The first issue is an easy one to solve through intense cooperation and coordination. The second is a more difficult one. However, it is interesting to note that there are some uniform international conventions that deal, at least partly, with choice of law issues such as the UNIDROIT Convention on International Interests in Mobile Equipment. *See* UNIDROIT, Convention on International Interests in Mobile Equipment, art. 5 (Nov. 16, 2001), <http://www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf> (providing interpretation and applicable law). Article 5 states that:

3. References to the applicable law are to the domestic rules of the law applicable by virtue of the rules of private international law of the forum State.

4. Where a State comprises several territorial units, each of which has its own rules of law in respect of the matter to be decided, and where there is no indication of the relevant territorial unit, the law of that State decides which is the territorial unit whose rules shall govern. In the absence of any such rule, the law of the territorial unit with which the case is most closely connected shall apply.

Id. Other uniform substantive law conventions also deal with arbitration or jurisdiction issues, such as Chapters 14 and 15 of the 2008 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (“Rotterdam Rules”)—although in that case states have the ability to opt into the regulation. *See* United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Dec. 11, 2008, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html (last visited Apr. 7, 2013).

35. Compare the geographical field of application of the CISG with other international conventions such as the UNIDROIT Conventions on Factoring (art. 2) or Leasing (art. 3) where a formula similar to art. 1 CISG is used but further complicated because of the participation of a third party in the contractual scheme and the presence of an underlying contract. *See* Convention on International Factoring, art. 2, May 28, 1988, 27 I.L.M. 943 [hereinafter Factoring Convention]; Convention on International Financial Leasing art. 3, May 28, 1988, 27 I.L.M. 931 [hereinafter Leasing Convention]. Article 3 of the Leasing Convention states:

This Convention applies when the lessor and the lessee have their places of business in different States and: (a) those States and the State in which the supplier has its place of business are Contracting States; or (b) both the supply agreement and the leasing agreement are governed by the law of a Contracting State.

Id. Article 2 of the Factoring Convention states:

1. This Convention applies whenever the receivables assigned pursuant to a factoring contract arise from a contract of sale of goods between a sup-

Although, one has to be aware that the issue of the applicability of the new instrument would greatly depend on its material scope of application. If, for example, the future instrument were to be only a complementary instrument to the CISG, then a similar technique to that used on the 2005 UNCITRAL Convention is a possibility.³⁶

For the sake of clarity, we will assume that the future instrument is a convention in the area of general contract commercial law with only two contracting parties.

III. THE ROLE OF PARTY AUTONOMY IN A FUTURE INSTRUMENT ON INTERNATIONAL COMMERCIAL CONTRACTS

One of the most important developments in the area of party autonomy towards the choice of the applicable law is a progressive recognition of the freedom of the parties to choose as the governing law of the contract not only the “law” but also the “rules of law.”³⁷ Although this possibility is fully recognized in arbitration laws and rules,³⁸ it is not yet so in some conflict of law systems. However, there are important developments in this area that invite wider recognition of party autonomy.

In our opinion, a wider approach towards the concept of law should be adopted so as to reflect the possibilities for the parties to choose not only the law but also the rules of law. For this reason, our proposal in regard to the field of application of the new instrument would be to specif-

plier and a debtor whose places of business are in different States and: (a) those States and the State in which the factor has its place of business are Contracting States; or (b) both the contract of sale of goods and the factoring contract are governed by the law of a Contracting State.

Factoring Convention, *supra* note 35, art. 2. *See also* Convention on Independent Guarantees and Stand-by Letters of Credit art. 1, Dec. 11, 1995, 2169 U.N.T.S. 190, 35 I.L.M. 735. Article 1 states:

This Convention applies to an international undertaking referred to in article 2: (a) If the place of business of the guarantor/issuer at which the undertaking is issued is in a Contracting State, or (b) If the rules of private international law lead to the application of the law of a Contracting State, unless the undertaking excludes the application of the Convention.

Id.

36. Article 1.1 of the United Nations Convention on the Use of Electronic Communications in International Contracts states that: “This Convention applies to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States.” *See* Electronics Communications Convention, *supra* note 2, art. 1.1.

37. The concept of “rules of law” implies not only the law that is in force domestically or internationally in a state but also the so-called *soft law* instruments which are applicable to international commercial contracts, such as the UNIDROIT Principles on International Commercial Contracts (2010). *See* Catherine Kessedjian, *Determination and Application of Relevant National and International Law and Rules*, in *PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION* 74 (Loukas A. Mistelis & Julian D.M. Lew. eds., 2006).

38. *See* UNCITRAL, Model Law on International Commercial Arbitration, 40 U.N. GAOR Supp. No. 17, U.N. Doc. A/40/17, art. 28.1 (Dec. 11, 1985) [hereinafter Model Law].

ically recognize the principle of party autonomy in the selection of the applicable law which means also the future international convention as rules of law.³⁹

To this regard, a good starting point for drafting the proposal is actually reflected in the current work of the Draft Hague Principles on the Choice of Law in International Contracts as approved by the November 2012 Special Commission meeting on choice of law in international contracts, November 12–16 2012.⁴⁰ Assuming that the new instrument were to take the form of a convention⁴¹ and taking also into consideration the

39. Note that under Rome I Regulation, this kind of choice would not be considered as a choice of the applicable law but as an incorporation by reference. In fact Preamble 13 Rome I Regulation states that: “This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.” See Rome I Regulation, *supra* note 21, at pmb. 13. For a contrary discussion, see *infra* note 40 and accompanying text.

40. See *Draft Hague Principles as Approved by the November 2012 Special Commission Meeting on Choice of Law in International Contracts and Recommendations for the Commentary* (Nov. 12–16, 2012) [hereinafter *The Hague Draft*], available at http://www.hcch.net/upload/wop/contracts2012principles_e.pdf. The Draft Principles intend to create a universal model of conflict of rules applicable to international commercial contracts on the basis of reinforcing the principle of party autonomy. The Preamble of the Draft Principles that uses a similar technique to that of UNIDROIT Principles states that:

1. This instrument sets forth general principles concerning choice of law in international commercial contracts. They affirm the principle of party autonomy with limited exceptions.
2. They may be used as a model for national, regional, supranational or international instruments.
3. They may be used to interpret, supplement and develop rules of private international law.
4. They may be applied by courts and by arbitral tribunals.

Id. at pmb. 13.

41. See *id.* arts. 2–5. The Draft Hague Principles state that:

Article 2—Freedom of Choice

1. A contract is governed by the law chosen by the parties.
2. The parties may choose (i) the law applicable to the whole contract or to only part of it and (ii) different laws for different parts of the contract.
3. The choice may be made or modified at any time. A choice or modification made after the contract has been concluded shall not prejudice its formal validity or the rights of third parties.
4. No connection is required between the law chosen and the parties or their transaction.

Article 3—Rules of law

In these Principles, a reference to law includes rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.

Article 4—Express and tacit choice

A choice of law, or any modification of a choice of law, must be made expressly or appear clearly from the provisions of the contract or the circumstances. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law.

state of affairs developed under the opting in/out of the CISG as the applicable law, our draft proposal would be as follows:

Freedom of Choice of Law

1. *A contract is governed by this convention if chosen by the parties as the law applicable to the contract either to the whole contract or only part of it.*
2. *The choice of law of a state (or one of its territorial units) that is part of this convention implies also its application if the rest of the conditions for its applicability are met.*
3. *A choice of law of this convention, any modification of a choice of law, or its exclusion, must be made expressly or appear clearly from the provisions of the contract or the circumstances.*
4. *A choice of law is not subject to any requirement as to form unless otherwise agreed by the parties.*⁴²
5. *A choice of law does not refer to rules of private international law of the law chosen by the parties unless the parties expressly provide otherwise.*⁴³

As mentioned before, the proposal is to deal with applicable law issues within the uniform international convention as to make it an autonomous concept to the maximum extent possible. It would not be however a completely autonomous concept from domestic law and so it has to be recognized that in certain circumstances resort is to be had to the domestic concepts of private international law rules, particularly in case one of the offered models where a national judge whose state has not ratified the convention has to assess the validity of the choice by the parties. However, if the judge were to be in a contracting state but the convention were not to be yet in force, or where the parties choose the convention to relations not covered by it, this choice would be considered as a valid and real choice of the applicable law. The convention as part of the domestic law would be automatically binding upon the judge who will be bound by the choice of law by the parties as mandated by it.

Article 5—Formal validity of the choice of law

A choice of law is not subject to any requirement as to form unless otherwise agreed by the parties.

Id.

42. This provision can be merged into a more general provision applicable to the contracts covered by the future convention in a similar fashion to art. 11 CISG. See CISG, *supra* note 1, art. 11.

43. The clause is derived from Article 8 of The Hague Draft, which states: “A choice of law does not refer to rules of private international law of the law chosen by the parties unless the parties expressly provide otherwise.” See *The Hague Draft*, *supra* note 40, art. 8. The same solution is usually considered in arbitration laws and rules. See *Model Law*, *supra* note 38, art. 28.1 (“Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.”).

IV. THE APPLICABLE LAW BY THE JUDGE OR THE ARBITRATOR IN THE
FUTURE INSTRUMENT ON INTERNATIONAL
COMMERCIAL CONTRACTS

The relationship between uniform law instruments and the conflict of law rules is more important at the beginning of the implementation of a new treaty. As it is well known the process of entries into force of a convention is usually a long one, and the same can be said until the convention gets enough state parties so as to make the conflict of law analysis less important for the application of the treaty. Therefore, from my point of view, it is worthwhile to consider mechanisms to improve and enhance the ways in which an international treaty might be applied in the light of the discussion on a future instrument of contract law. This is more so, since the approach adopted in Article 1.1(b) is a very traditional one.

When a state ratifies an international convention such as the CISG, it becomes part of the internal domestic legal system, that is, in contracting states, the CISG is not a foreign law, but a part of the law of the forum.⁴⁴ It is not, however, to be considered a purely domestic law since its origin, making-process, interpretation, and application is truly international.⁴⁵

Taking into account the advantage of (re)examining this provision after more than thirty years of its approval and considering the developments in the determination of the applicable law, we believe that the provision can be improved in several ways. In order to do so, it is necessary to first consider the classical way in which international treaties such as CISG find their application by analyzing Article 1.1 of the CISG, which at a first glance is a provision that is problematic for several reasons: the determination of the conflict of law by the judge relies on the concept of private international law which is to be found in domestic law; the provision does not expressly recognize the possible application of the rules of law, i.e., a concept that includes the law but also soft law instruments or international conventions not applicable to the specific transaction; and the provision fails to recognize the more flexible way to determine the law/rules of law applicable to the contract in international commercial arbitration.

A. *Automatic Application of the CISG by Virtue of Art. 1.1(a)*

This provision is considered a uniform and unilateral conflict of laws rule,⁴⁶ and thus domestic conflict of law rules should be disregarded.

44. See *Georgia Pacific Resins, Inc. v. Grupo Bajaplay*, Cuarto Tribunal Colegiado del Decimoquinto Circuito [TCC] [Federal Court of Appeals], Amparo proceeding No. 225/2007, Aug. 9, 2007 (Mex.), available at <http://cisgw3.law.pace.edu/cases/070809m1.html>.

45. See, e.g., CISG, *supra* note 1, art. 7.1 (“(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.”).

46. See *Mistelis*, *supra* note 28, art. 1, 1.

Where both parties have their place of business in contracting states to the Convention, the CISG directly applies.

B. *Application of the CISG by Virtue of Article 1.1(b)*

According to this provision, the Convention will extend its application when only one of the states is a contracting state if the rules of private international law lead to the application of the law of the contracting state. On the contrary, if the judge or the arbitral tribunal were to find that the conflicts of law rules points out to the law of the “non-contracting state” then CISG will not be applicable. However, the method of finding the applicable law would be different depending on the organ entrusted with its application.

1. *The Application of the Rules of Private International Law by a Judge*

Article 1.1(b) of the CISG usually finds its normal application when a judge applies its private international law rules, since it is generally acknowledged that it is the conflicts of law rules of the forum.⁴⁷ This is a traditional analysis that would be made by a judge. For example, in the case of a judge in an EU country, Rome I Regulation on the Law Applicable to contractual obligations⁴⁸ would provide the judge with the legal framework to point out to the applicable law. Generally, it would be the law where the seller has his habitual residence because the seller is considered to affect the characteristic performance of the contract (Art. 4.1(a) Rome I).

As a consequence it is clear that the concept of private international law is not an autonomous concept under CISG but a concept that will find its meaning under the domestic rules of the forum. As a consequence, the applicable law would depend upon the judge and its conflict of law system making the result quite unpredictable and unsatisfactory.

Take the following example based with some departures on a real case: a CISG dispute between a buyer in Mexico and a seller in Hong Kong (PRC China) through an independent agent in Mexico. Payment through letter of credit (UCP 600, ICC) with an issuing bank in Houston, Texas, but confirming bank in Hong Kong, China. Delivery of Goods from Venezuela, Mexico being the place of discharge of the goods. CFR INCOTERMS, ICC (2010) agreed by the parties. No agreement on the applicable law or the tribunal competent to hear the dispute. To shorten

47. See *id.* at 10, 51. See Peter Schlechtriem, *Article 1*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 10, 34 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2005); Schwenzer & Hachem, *supra* note 28, art. 1, 30; Franco Ferrari, *Homeward Trend: What, Why and Why Not*, in INTERNATIONALE HANDELSRECHT 13 (Herber et al. eds., 2009). It is to be noted that besides art. 1, art. 7.2 CISG refers to the rules of private international law and so it also has to be amended. Art. 7.2 is, however, outside the scope of this work.

48. See Rome I Regulation, *supra* note 21, art. 3.

the discussion, we assume that Hong Kong is not a contracting state in regard to CISG application.⁴⁹

If a judge were to make a typical conflict of law analysis, it will tend to apply its own conflict of law rules, i.e., those of the forum. Usually, the domestic laws will use connecting factors to point out to the specific applicable rule. One of the most well-known “connecting factors” in the area of contract law is the “most significant relationship” or “real connection test,” which is just an undetermined and flexible formula to lead the judge in its finding of the applicable law. Other similar formulas are used in conflict of law rules such as the “closest connection test”⁵⁰ or the “most closely connected,”⁵¹ etc. In our example, it is logical to assume that for the seller the most relevant relationship in the transaction is Hong Kong while for the buyer it is Mexico.

It is undeniable that the transaction has in our example connecting factors with both places—Mexico and Hong Kong—apart from the fact of the parties’ respective places of business. What is important to consider for the judge or an arbitral tribunal is the weight and relevance to be given to these connecting factors. Let’s first approach the issue using the prevalent doctrine under conflicts of law rules, which is to be found in several domestic or international laws on applicable law.

For example, the Law of the People’s Republic of China on the Laws Applicable to Foreign-related Civil Relations adopted on October 28, 2010 states in Article 41 that “Absent any choice by the parties, the law of the habitual residence of a party whose *performance of obligation is most characteristic of the contract or the law that most closely connected with the contract* shall be applied.”⁵² It does not state, however, which of the parties’ performance obligations is to be considered the most characteristic one.

The Inter-American Convention on the Law Applicable to International Contracts, signed in Mexico, D.F. Mexico, on March 17, 1994, at the Fifth Inter-American Specialized Conference on Private International Law (CIDIP-V) is part of the Law of Mexico by virtue of its ratification and enactment on December 5, 1996. Article 9 of the CIDIP-V states that:

49. An issue which is frequently discussed by scholars and case law, although in our opinion it is to be considered as a CISG contracting State. See, e.g., Ulrich Schroeter, *The Status of Hong Kong and Macao Under the United Nations Convention on Contracts for the International Sale of Goods*, 16 PACE INT’L L. REV. 307, 317–18 n.2 (2004); Fan Yang, *Barriers to the Application of the United Nations Convention on Contracts for the International Sale of Goods (1980)*, in THE PEOPLE’S REPUBLIC OF CHINA (Jan. 2011) (unpublished Ph.D. dissertation, Center for Commercial Law Studies, Queen Mary Univ. of London), available at <https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/2483/YANGBarriersTo2011.pdf?sequence=1>.

50. Contract Law of the People’s Republic of China art. 142 (promulgated by the Nat’l People’s Cong. effective Mar. 15, 1999), available at http://www.novexcn.com/contract_law_99.html.

51. See Rome I Regulation, *supra* note 21, art. 3.1.

52. *Law of the People’s Republic of China on the Laws Applicable to Foreign-related Civil Relations* art. 41 (promulgated by the Nat’l People’s Cong. effective Oct. 28, 2010).

If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by *the law of the state with which it has the closest ties*. The Court will take into account all objective and subjective elements of the contract to determine the law of the state with which it has the closest ties. It shall also take into account the general principles of international commercial law recognized by international organizations.⁵³

As part of Mexican law, the Inter-American Convention states that the applicable law to the contract would be the law chosen by the parties and the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted (see Articles 7 and 10).

Rome I Regulation also follows the *characteristic performance principle* to assess the choice of law considering that in the case of sale of goods the governing law is that of the country where the seller has his habitual residence (art. 3.1 Rome Regulation). The basis of this rule lies on the reasonable presumption that in a contract of sale when comparing the main obligations of the parties under the contract (the obligation to deliver the goods by the seller and the obligation to pay for them by the buyer), the obligation to deliver the goods is considered the characteristic performance and thus its connection with the place of business of the seller. However, this presumption and connection might be of no importance when the origin of the goods is in a third country, Venezuela in our example, which is also the place where the risk is passed from the seller to the buyer according to the CFR INCOTERMS, and thus there is no connecting point with Hong Kong.⁵⁴

53. Inter-American Convention on the Law Applicable to International Contracts art. 7, Mar. 17, 1994, O.A.S.T.S. no. 78, available at <http://www.oas.org/juridico/english/treaties/b-56.html>.

54. See Convention on the Law Applicable to Contracts for the International Sale of Goods art. 8 (Dec. 22, 1986) (stating place of business of seller is to be disregarded in certain circumstances). Article 8 states:

(1) To the extent that the law applicable to a contract of sale has not been chosen by the parties in accordance with Article 7, the contract is governed by the law of the State where the seller has his place of business at the time of conclusion of the contract.

(2) However, the contract is governed by the law of the State where the buyer has his place of business at the time of conclusion of the contract, if—

a) negotiations were conducted, and the contract concluded by and in the presence of the parties, in that State; or

b) the contract provides expressly that the seller must perform his obligation to deliver the goods in that State; or

c) the contract was concluded on terms determined mainly by the buyer and in response to an invitation directed by the buyer to persons invited to bid (a call for tenders).

(3) By way of exception, where, in the light of the circumstances as a whole, for instance any business relations between the parties, the con-

Furthermore, according to CFR term, it is not only the place of delivery which is important but also the place of taking delivery. This is so, because in C terms as opposed to F terms, the delivery and the taking of delivery are not performed in the same place.⁵⁵ As is clear from the case under consideration those places diverge: the place of delivery is Venezuela and the place of taking delivery is Mexico. It is also to be noted that the price of the contract is calculated including the transportation costs to the port of discharge of the goods in accordance with the CFR term where the seller is obliged to arrange the transportation of the goods to the place of discharge.

Therefore, in terms of the characteristic performance of the contract, the place of discharge of the goods, i.e., the place of taking delivery, might be considered to shift the presumption that the obligation to deliver the goods is connected with the place of business of the seller when, as it happens in the example under consideration, this place is situated in a third country, when the goods have no connection at all with the place of business of the seller, and when the seller undertakes obligations connected to the place of discharge: the seller has the obligation to contract the transportation of the goods from the place of delivery (Venezuela, Port of Origin) to the place of taking delivery by the buyer (Mexico, Port of Discharge). In fact, usually when using a C term, the place of delivery is not named, but the relevant destination of the main transport is.⁵⁶

In regard to the place of payment for the goods, this is not a prevalent connecting factor under a conflict of law analysis. As mentioned earlier, the characteristic performance in a sales contract is considered to be tied to the delivery of the goods.⁵⁷ The fact that the parties might have agreed on a documentary credit does not change this fact. The payment by a letter of credit refers only to the payment obligation of the buyer and this does not change the nature of the contract as a sale of goods. Therefore, the characteristic performance of a contract of sale when a payment by letter of credit is also agreed upon is still related to the goods itself.

This is not to say that the place of payment is of no importance. On the contrary, it might be important in order to determine other issues, such as the currency of payment or the jurisdiction of state courts. However, as considered in this work, it is not the dominant factor to consider in a conflict of law analysis.

tract is manifestly more closely connected with a law which is not the law which would otherwise be applicable to the contract under paragraphs 1 or 2 of this Article, the contract is governed by that other law.

Id.

55. See INT'L CHAMBER OF COMMERCE, ICC GUIDE TO INCOTERMS A5, B5 (2010).

56. See Burghard Piltz, *Article 31*, in COMMENTARY ON THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 65 (Stefan Kröll et al. eds., 2011).

57. See Ferrari, *supra* note 29, at 44–45 (“The monetary obligation is generally not the characteristic one.”).

Even if the place of payment were to be considered under a conflict of law analysis, resort is to be had to the terms to which the parties agreed. In the example given, there are two relevant places to consider: Houston (Texas) and Hong Kong. According to UCP, the issuing bank is also the place for presentation of the documents, but the confirmation of the L/C is with a bank in Hong Kong.⁵⁸

This means that the connecting factor is either Texas or Hong Kong depending on whether the seller requires confirmation, i.e., a definite undertaking of the confirming bank, in addition to that of the issuing bank, to honor or negotiate a complying presentation (art. 2 UCP 600). As is clearly stated by Article 8(a) UCP, the confirming bank may or may not exist: “*Provided that the stipulated documents are presented to the confirming bank or to any other nominated bank and that they constitute a complying presentation, the confirming bank must . . .*”⁵⁹

Finally, among the connecting factors mentioned in the example, the place where negotiations took place should also be mentioned. Probably the buyer will consider that Mexico is the real connection place because it was in Mexico where it was negotiating the contract with the agent. This is a connecting factor that might be of importance if the parties are discussing the conclusion of the contract and if the main obligations of the sale of goods contract by the parties were never performed.

The above analysis means that depending upon the circumstances of the case and the interpretation made by the judge several results are possible, including the selection of connecting factors that points to either the law of Mexico or the law of Hong Kong as the parties will probably allege in court or an arbitral proceedings.⁶⁰

The conclusion to be derived is that judges are too constrained by the application of conflict of law rules that at the end might point artificially to a domestic law which might not be suitable for the parties and their transaction.⁶¹ The use of connecting factors makes the choice of law still

58. See ICC Uniform Customs and Practice for Documentary Credits, 2007 revision (UCP 600), art. 6(d)(ii) (2006).

The place of the bank with which the credit is available is the place for presentation. The place for presentation under a credit available with any bank is that of any bank. A place for presentation other than that of the issuing bank is in addition to the place of the issuing bank.
Id. Then, the connecting factor is Texas.

59. *Id.* art. 8(a).

60. But also as shown in the example the laws of Texas and Venezuela. Those laws should also be disregarded by the arbitral tribunal for a different reason: the choice made by the arbitral tribunal should not surprise the parties.

61. See, e.g., Rome I Regulation, *supra* note 21, pmb1. Under Rome I Regulation although it provides a flexible way for the judge to determine the applicable law is an artificial method as shown by Preamble 21:

In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorized as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of

unpredictable for the parties. We are aware that the same can be said in regard to the freedom of the judge and the arbitral tribunal in the application of the rules of law they consider to be most appropriate, but the final determination of the applicable law must be guided by the appropriateness of the law or rules of law and their content as we will consider below.

2. *The Determination of the Conflicts of Law Rules by the Arbitral Tribunal*

The arbitral tribunal's freedom under the arbitration system is wide enough to allow it to consider the determination of the conflict of law rule without being bound by the rules of the forum. The wide discretion of the arbitrators is derived from the fact that they are not organs of a given state and are not bound by any rules of private international law, for example Rome Regulation in the case of Europe.

The determination of the rules of private international law is not, however, a simple task when an international contract submitted to international arbitration is considered.

First, the arbitral tribunal does not have a "forum."⁶² Although the place of arbitration determines the arbitration law applicable to the arbitration, this is not to be equivalent to the place of the forum in art. 1.1(b) CISG, and particularly the conflict rules of the place of arbitration should be disregarded.⁶³

Second, as pointed out by several authors,⁶⁴ arbitration tribunals have applied various different conflicts of law systems including:

- Conflict rules of the place of arbitration.
- Conflict rules most closely connected with the subject matter of the proceedings.
- Conflict rules the tribunal considers appropriate.
- Converging conflicts of law rules.
- General principles of conflicts of laws.

the contract, the contract should be governed by the law of the country with which it is most closely connected. In order to determine that country, account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts.

Id.

62. See ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 122 (2004).

63. It is generally considered in modern arbitration practice that the application of the conflicts of rules of the place of arbitration is illogical. See JULIAN D. M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 428 (2003). See also Arbitration Institute of the Stockholm Chambers of Commerce, UNILEX No. 117/1999 (2001), SCC n°117/1999, Arbitral Award 2000, available at <http://www.unilex.info/case.cfm?id=793> (considering it inappropriate to resort to law of seat).

64. See LEW ET AL., *supra* note 63, at 428. See also REDFERN & HUNTER, *supra* note 62, at 47.

Among these systems, the application of the conflict rules the tribunal considers appropriate is the most followed today in arbitration practice.⁶⁵

What is considered to be the most appropriate conflict of law rule is of course an issue to be decided on a case-by-case basis. The arbitral tribunal has discretion to point to the conflict of law rules of a given state in order to further determine the applicable law, or to apply the connecting factor it considers more appropriate, for example the one derived from international conventions, academic writings, or even a rule which the arbitrators consider otherwise appropriate.⁶⁶

However, this kind of analysis, even when considering a more simplified analysis under the most appropriated conflict of law rules, and even if one were to consider that arbitrators will follow a pragmatic approach to make the determination of the choice of law, and thus they will be able to choose the conflict of law rules which they prefer,⁶⁷ is not the one to be followed by an arbitral tribunal under modern arbitration rules or laws. Take the example of Article 21 ICC Rules (2012) (Applicable Rules of Law),⁶⁸ which states that:

1. The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.
2. The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.

65. See Georgios C. Petrochilos, *Arbitration Conflict of Laws Rules and the 1980 International Sales Convention*, 52 *REVUE HELLENIQUE DE DROIT INTERNATIONAL* 191–218 (1999); GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 530 (2002). See also ICC Court of Arbitration—Paris, UNILEX, No. 7375/1995, June 5, 1996, available at <http://www.unilex.info/case.cfm?id=625> (“The conflict rule which, beyond doubt, has received on a worldwide basis, the strongest support, is the so-called ‘closest connection rule,’ which leads to the application of the law where the most characteristic performance of the contract is performed.”).

66. See LEW ET AL., *supra* note 63, at 431.

67. See *id.* at 426.

68. A rule very similar to the old International Chamber of Commerce Rules art. 17:

1. The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.
2. In all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages.
3. The Arbitral Tribunal shall assume the powers of an *amiable compositeur* or decide *ex aequo et bono* only if the parties have agreed to give it such powers.

INT’L CHAMBER OF COMMERCE, *RULES OF ARBITRATION* (1998).

3. The arbitral tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such powers.⁶⁹

In order for the arbitral tribunal to consider the application of art. 1.1(b) CISG, it has to be clear that it is not subject to any conflict of law system, as it is evident from art. 21.1 ICC Rules which directs the arbitral tribunal for a direct application of the law (*voie directe*), as opposed to the conflict of law system which is an indirect application of the law (*voie indirecte*). In fact, Article 21.1 ICC Rules offers the arbitral tribunal the possibility to apply directly the rules of law that it considers appropriate.

Therefore, the arbitral tribunal is neither obliged to find the conflicts of law rules, and certainly it is not convenient for it to do so when the effort in making this analysis is dispensed by the arbitration rules agreed upon by the parties and those rules ought to be followed by the arbitral tribunal. In fact, the traditional analysis of the conflict of law rule, that derived from the judicial system, when used in old arbitration was more a way to justify the decision-making process in choosing the applicable law and to preserve a conservative method than an appropriate, reasonable, or convenient way to decide on this issue.⁷⁰ Precisely the dissatisfaction with this kind of analysis and the desire to free the arbitrators of the restraints with a conflict of law analysis was the reason behind the ICC abandoning the conflict view approach in the 1998 Arbitration Rules; a decision that has been ratified in the 2012 ICC Rules.

From what we have just explained it is clear that in our opinion a conflict of law analysis by the arbitral tribunal is not only unnecessary but probably inconvenient in so far that it does not respond to the agreement of the parties when choosing arbitration as a method of solving disputes and in fact it is to a certain extent going back to the past.⁷¹

However, there are still arbitration laws and rules that rely on a more traditional approach towards the application of the law by the arbitral tribunal as shown by art. 28.2 UNCITRAL Model Law on International Commercial Arbitration: "Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the *conflict of law rules which it considers applicable*."⁷²

69. See INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION (2012).

70. See LEW ET AL., *supra* note 63, at 426.

71. Compare with INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION, art. 13.3 (1988).

The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply *the law designated as the proper law by the rule of conflict which he deems appropriate*.

Id. (emphasis added). It was also the provision under ICC Rules of 1975, 15.2 INT'L LEGAL MATERIALS 395, 395-406 (Mar. 1975).

72. See also UNCITRAL, Arbitration Rules, art. 25 (as revised in 2010).

Under both systems (ICC Rules and UNCITRAL Model Law) it is important to note that usages of trade should be taken into account by the arbitral tribunal, and so an important lesson might be derived from the way in which the CISG was applied before it entered into force or whether only one of the parties was in a state that was a contracting state. The almost universal recognition of the CISG as a suitable set of rules to govern international sale of goods contracts between traders with different legal systems has led some arbitral tribunals to consider the application of the CISG as trade usages under art. 17.2 ICC Arbitration Rules (1998) particularly when the conditions for the CISG applicability were not met. We consider that this kind of consideration is useful particularly for arbitral tribunals as an aid into its finding of the future international convention as the most appropriate rules of law. Examples of this kind of application might be found in several cases: ICC 5713/1989;⁷³ and ICC 8502/1996.⁷⁴

73. See ICC Court of Arbitration—Paris, UNILEX, No. 5713/1989 (1989), <http://www.unilex.info/case.cfm?id=16>. The ICC stated:

The Arbitrators, in accordance with the last paragraph of Art. 13 of the ICC rules [1988, now ICC Rules 1998], will also take into account the ‘relevant trade usages’ [. . .]. The Tribunal finds that there is no better source to determine the prevailing trade usages than the terms of the United Nations Convention on the International Sale of Goods of 11 April 1980, usually called ‘the Vienna Convention. This is so even though neither [Buyer’s country] nor [Seller’s country] are parties to that Convention. If they were, the Convention might be applicable to this case as a matter of law and not only as reflecting the trade usages. The Vienna Convention, which has been given effect to in 17 countries, may be fairly taken to reflect the generally recognized usages regarding the matter of the non-conformity of goods in international sales.

Id.

74. See *id.* The relevant part of the decision is:

The application of the relevant trade usages is consistent with Article 13(5) of the ICC Rules (now article 17.5) and with the arbitral practice [. . .]. For the foregoing reasons, the Arbitral Tribunal finds that it shall decide the present case by applying to the Contract entered into between the parties trade usages and generally accepted principles of international trade. In particular, the Arbitral Tribunal shall refer, when required by the circumstances, to the provisions of the 1980 Vienna Convention on Contracts for the International Sale of Goods (Vienna Sales Convention) or to the Principles of International Commercial Contracts enacted by Unidroit, as evidencing admitted practices under international trade law [. . .]. The Arbitral Tribunal is of the opinion that the principles embodied in the Vienna Convention reflect widely accepted trade usages and commercial rules. Although the Vienna Sales Convention is not as such directly applicable to the Contract (Vietnam has not ratified this Convention), the Arbitral Tribunal finds that it may refer to its provisions as the expression of usages in the world of international commerce.

Id. See also ICC Court of Arbitration—Paris, UNILEX No. 7331 (1994), <http://www.unilex.info/case.cfm?id=140>; ICC Court of Arbitration—Paris, UNILEX No. 8502 (1996), <http://www.unilex.info/case.cfm?id=395>; ICC Court of Arbitration—Paris, UNILEX No. 9333 (1998), <http://www.unilex.info/case.cfm?id=400>.

As a conclusion: the application of art. 1.1(b) CISG by the arbitral tribunal bound by a provision similar to art. 21.1 ICC Rules means that the tribunal might be able to get around the conflict of law analysis and *directly* apply the CISG as the rules of law it considers appropriate. Therefore, by choosing ICC Rules the parties have empowered the tribunal to determine the applicable rules of law without the need to resort to a conflict of law analysis and applying a liberal and flexible approach toward its determination.⁷⁵ This makes the analysis under art. 1.1(b) CISG redundant since a direct application of the law the arbitral tribunal can directly apply the CISG.⁷⁶

3. *The Determination of the Rules of Private International Law in the Future Convention on General Contract Law*

Turning to the design of a specific provision for the scope of application of the future international convention, our proposal will recognize both the traditional as well as the more modern way for arbitrators to determine the applicable law to the contract. Furthermore, it will consider the feasibility of judges and arbitrators to apply the future instrument as the appropriate applicable law.

The rule that we propose is as follows:

Article 2 Scope of Application

Absent a choice of law by the parties, this Convention applies to contracts between parties whose places of business are in different states:

- (a) *when the states are contracting states; or*
- (b) *when the rules of private international law of the forum lead to the application of the law of a contracting state; or*
- (c) *when the rules of private international law considered to be applicable by the arbitrators lead to the application of the law of a contracting state; or*
- (d) *when the judge or the arbitral tribunal consider this Convention to be the appropriate applicable law.*

Subparagraph (d) is the one that deserves further consideration. The application of the future convention as the most appropriate rule of law by the arbitrators or judges would be in itself justified under a test of legiti-

75. See Kessedjian, *supra* note 37, at 26 (“Indeed, it may be said that by choosing an ICC Arbitration, the parties have chosen Article 17 of the ICC Rules and have taken the risk that the arbitral tribunal interpret that text in the most liberal way.”).

76. See Jeffrey Waincymer, *The CISG and International Commercial Arbitration: Promoting a Complimentary Relationship Between Substance and Procedure*, in SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: Festschrift for ALBER H. KRITZER ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY 596 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008) (“It has been suggested that it is easier for an arbitrator with a discretion to get to the CISG via direct approach than via a conflict approach, so it is preferable to pick a direct procedural model.”).

macy derived from the negotiation process undertaken under UNCITRAL.

Furthermore, the arbitrator and the judge might take further criteria into consideration in order to justify the application of the (future) convention despite the fact that a more conservative method would point out to a domestic law. The factors that might lead the arbitral tribunal to decide on the appropriateness of the convention would be those derived from the particular circumstances of each case. Examples of such kind of circumstances are the following:

First. The possibility that none of the connecting factors pointed out by a traditional conflict of law analysis, is decisive or prevalent, might lead the judge or the arbitrator to disregard the method of finding the law applicable by virtue of the rules of private international law in favor of a direct application of the rules of law considered to be most appropriate. Therefore, the judge or the arbitral tribunal should also consider the result when pointing out to the applicable law by operation of a conflict of law analysis,⁷⁷ particularly when none of the connecting factors is found to be decisive or fully prevalent.

Second. In this situation to apply a domestic law would probably make an unjust imbalance between the parties and will defeat the parties' expectations in international contracts when neither of them is ready to accept the application of the domestic regime or a close domestic regime of the other party, particularly if there are other factors that point out to the application of international rules.

Third. The silence of the parties in regard to the lack of a choice of law clause might be indicative of their intention of not to be bound by a pure domestic law particularly that of the counterparty.⁷⁸ An *implied negative choice of law* by the parties is to be found when the absence in the contract of a choice of law clause is considered to be intentional, i.e., where the parties were not able to agree on any law or rules of law to be applied.⁷⁹ This is a rather frequent situation in international commercial

77. The same can be said in order to decide the law applicable by operation of the direct application of the rules of law.

78. As pointed out by Petrochilos in regard to CISG but the same might be said for a future international Convention:

The Convention is a set of tailored-made rules for international sales, acceptable to and applicable as between a significant part of the international community of trading nations. Thus, when in doubt, the Convention is reasonably the most appropriate and neutral substantive law—in any event, clearly more appropriate than any domestic law.

Georgios C. Petrochilos, *Arbitration Conflict of Laws Rules and the 1980 International Sales Convention*, 52 REVUE HELLENIQUE DE DROIT INTERNATIONAL 191, 191–218 (1999), available at <http://cisgw3.law.pace.edu/cisg/biblio/petrochilos.html>.

79. As pointed out in ICC 7375/1996, the silence of the contract in regard to the applicable law:

[T]his must be viewed as a “shouting silence,” at least an “alarming silence,” “un silence inquiétant;” thus, a silence which must ring a bell and requires the Tribunal to look “behind” so as to understand why the Par-

contracts when neither of the parties is ready to accept the law proposed by the other, usually its own domestic law. This kind of intention can be presumed from the mere silence of the parties in the contract or it might be ascertained through an analysis of the negotiation process of the contract where the parties clearly rejected the legal systems that were the own legal system or a familiar system to its counterparty.

In some circumstances this negative choice of law has been considered by some arbitral tribunals and courts as to imply an *agreement* of the parties towards the application of an international system of law and obviously the exclusion of any domestic law. At a minimum, the intention of the parties is a valid criterion to be considered in order to analyze whether a negative agreement might be found so as to exclude any domestic law. To this point, the intention of the parties in regard to the applicable law might be ascertained taking into consideration a variety of factors such as the negotiations between the parties, usages, or the conduct of the parties.⁸⁰

Furthermore, the intention of the parties to exclude purely domestic law might be supported by other factors, for example, if the parties were able to accept other international rules to be applied to their contract, and thus making very clear the desire to have neutral and suitable rules for an international contract,⁸¹ such as the agreement on INCOTERMS, ICC,

ties have failed to include “the obvious.” In the case at hand the arbitral tribunal considered that the parties were not ready to accept the other party’s own law, and thus “[t]he Contract should not, according to the implied negative choice of the Parties, be governed by any of the Parties” national laws.

ICC International Court of Arbitration—Paris, UNILEX No. 7375 (June 5, 1996), <http://www.unilex.info/case.cfm?id=625>. See also ICC International Court of Arbitration (First Partial Award), UNILEX No. 7110 (June 1995), <http://www.unilex.info/case.cfm?id=713>; ICC Court of Arbitration—Paris, UNILEX No. 8502 (Nov. 1996), <http://www.unilex.info/case.cfm?id=395>; ICC International Court of Arbitration, UNILEX No. 9875 (Jan. 1999), <http://www.unilex.info/case.cfm?id=675>; ICC 10422/2001; ICC International Court of Arbitration, UNILEX No. 10422 (2001), <http://www.unilex.info/case.cfm?id=957>; International Centre for Settlement of Investment Disputes (ICSID) UNILEX No. ARB/06/18, ILC 424 (Jan. 2010), <http://www.unilex.info/case.cfm?id=1533>. See also Marc Blessing, *Choice of Substantive Law in International Arbitration*, 14 J. INT’L ARB. 19 (1997).

80. See UNIDROIT PRINCIPLES, *supra* note 19; CISG, *supra* note 1, art. 8.3, 4.3. Of course one has to avoid the circular argument that the intention of the parties is a matter to be decided in accordance with the applicable law. There is no need to complicate the matter further, and so general principles of interpretation might be used without first finding the applicable law to the interpretation of the contract, or as with the case here, the statements of the parties during negotiation. See Kessedjian, *supra* note 37, at 26.

81. In fact arbitral tribunals have sometimes concluded that the absence of a choice of law clause in the contract coupled with a choice of other international trade terms such as INCOTERMS meant the parties intended to have general international rules to be applied as to the substantive law. See, e.g., ICC Court of Arbitration—Paris, UNILEX No. 8502 (Nov. 1996), <http://www.unilex.info/case.cfm?id=395>.

or an agreement to submit the dispute to international commercial arbitration.

Fourth. The arbitrators and the judges might consider other criteria in order to find the future convention as the most appropriate rule of law to be applicable. For example, the parties' expectations under the contract, or their particular situation, i.e., where they are sophisticated business players or not, where they belong to different systems of law, so the convention would be the most appropriate set of rules drafted for international contracts that takes into account the interest of both parties, that provides a fair balance between civil and common law systems to which both parties might belong to, and that enjoys wide international consensus.

All these factors, in our view, might lead reasonably to assume that the parties expectations would be that the eventual law chosen by the judge or the arbitral tribunal would be one that protects their interests in the way that any reasonable business person doing international business with partners from a different legal background would consider adequate, fair, and reasonable, and without any surprise that could result from the application of domestic laws that are purely local, unknown to the other party or whose application is purely accidental. This would necessarily conduct the arbitral tribunal and the judge to the application of the rules of law of the future instrument as such rules that have found their way into an international codification under the auspices of UNCITRAL, and that enjoy worldwide consensus and recognition among countries that approved it.⁸²

82. The basic reasoning is to be found in some arbitral awards such as Arbitration Institute of the Stockholm Chamber of Commerce, UNILEX No. 117/1999 (2001) in regard to the CISG. The arbitral award also considered the wide recognition of the CISG among scholars and other legal systems that have found the CISG as a legal model to other contract codifications due to its high quality, fairness, appropriateness, neutrality, capacity to be adapted to different transactions, and the fact that it reflects the basic principles of commercial relations in most if not all developed countries. See Stefan Kröll et al., *Introduction to the CISG, in UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)* (Stefan Kröll et al. eds., 2011); Franco Ferrari, *CISG and Private International Law, in THE 1980 UNIFORM SALES LAW: OLD ISSUES REVISITED IN THE LIGHT OF RECENT EXPERIENCES: VERONA CONFERENCE 2003* 19–55 (2003).

ATTORNEYS' FEES—LAST DITCH STAND?

BRUNO ZELLER*

I. INTRODUCTION

MILENA Đorđević, in an excellent article, advances very compelling arguments that attorneys' fees are not governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG).¹ It is correct to say that arguments for and against the CISG governing attorneys' fees only go so far, but not all the way—otherwise, there would be no debate on this point.² The question that comes to mind after reading the article is not which of the arguments is correct, but which one goes the furthest and hence, can potentially resolve the issue. The fact that this is an important issue has been noted by Eric Schwartz: “When an international commercial dispute arises, the cost of resolving it may be as important to the parties as the merits of the claims themselves.”³ Furthermore, as Đorđević correctly states:

The possibility of recovering attorneys' fees as damages is particularly important in countries where legal costs are not recoverable under the pertinent procedural rules, but it is also important in “loser pays” countries since such a possibility would require change of their long established practice of awarding legal costs under the procedural code and rules (and not as part of the damages claim).⁴

If the issue of attorneys' fees could be resolved, it would enhance the harmonisation effort of international trade. The fact that in the majority of jurisdictions the recovery of legal costs is part of civil procedure does not render the CISG inapplicable. It is admitted that the CISG in general

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1. See generally Milena Đorđević, “Mexican Revolution” in *CISG Jurisprudence and Case-Law: Attorneys' Fees as (Non)Recoverable Loss for Breach of Contract*, in PRIVATE LAW REFORM IN SOUTH EAST EUROPE: LIBER AMORCORUM CHRISTA JESSEL-HOLST 199 (Mirko S. Vasiljevic, Rainer Kulms, Tatjana Josipovic & Maja Stanivukovic eds., 2010).

2. For an excellent article summarising and discussing the issues emanating from the debate, see Keith William Diener, *Recovering Attorneys' Fees Under CISG: An Interpretation of Article 74*, 2008 NORDIC J. COM. L. 1, 1 (2008), available at http://www.njcl.utu.fi/1_2008/article3.pdf.

3. Eric A. Schwartz, *The ICC Arbitral Process, Part IV: The Costs of ICC Arbitration*, 4 ICC INT'L CT. OF ARB. BULL. 8, 8 (1993).

4. Đorđević, *supra* note 1, at 203.

is only applicable to resolve substantive issues, but equally well, it is obvious that if procedural issues are within the four corners of the CISG, these issues will also be resolved. The words of Peter Schlechtriem ring true especially in relation to this debate, as he notes: “The question is often phrased as a problem of the borderline of substantive (CISG) rules and the procedural law of the forum, but this is avoiding the real issue in favor of a conceptual approach, resulting in solutions quite different from country to country.”⁵ It is of value to first note all the points that are not in dispute. The arguments in this Article can therefore concentrate on the points of diversion. There are, in general, two issues that seem to be the sticking points. First, and hence the question, is Article 74 applicable? Second, because attorneys’ fees are part of a procedural rule, are attorneys’ fees not covered by the CISG? However, the real question is if Article 74 was applicable, would it draw an otherwise applicable procedural rule into the now-substantive issues of Article 74?

First, it is acknowledged that Article 74 is based on the principle of full compensation, and hence, it can be concluded that “all kinds of losses, suffered by the party and caused by the breach, are recoverable *in principle* under the CISG.”⁶ Furthermore, it is also not in dispute that the CISG does not expressly exclude attorneys’ fees from the category of losses. The most serious challenge against an Article 74 argument has been advanced by Đorđević, who argues in brief that:

[T]he causal link between the breach and the claim for attorneys’ fees [is] interrupted. Consequently, in my view, once the litigation is instituted the incurred attorneys’ fees become a loss that is too distinct from the usual loss suffered as a consequence of breach of contract thus not allowing for its recovery under Article 74 of the CISG.⁷

This issue will be addressed in detail in Part III. This Article will argue that only two arguments have a valid claim to be seriously considered to resolve the issue of attorneys’ fees. Part II will lay out the main argument for an inclusion of the fees via Article 74 and Part III will address the issues brought up by Đorđević, supporting her claim that attorneys’ fees are not included in the regime of the CISG.

II. ARGUMENTS AGAINST INCLUSION OF ATTORNEYS’ FEES

In essence, Đorđević, after examining the arguments of other authors, lists five major objections against the inclusion of attorneys’ fees, of which only the first two issues are discussed in this Article. The other

5. Peter Schlechtriem, *Non-Material Damages—Recovery Under the CISG?*, 19 PACE INT’L L. REV. 89, 96–97 (2007).

6. Đorđević, *supra* note 1, at 205.

7. *Id.* at 216.

three points are not of prime importance and can be subsumed into the first two points. The objections are advanced by:

1. “[T]hose who are basing their argument on the drafter’s intent” (or lack thereof);
2. “[T]hose who find recovery of attorneys’ fees . . . against the equality of the parties to the sales contract”;
3. “[T]hose who find the CISG principles not well-suited to deal with the calculation of attorneys’ fees as recoverable loss”;
4. Those who combine one or two of the above reasons; and
5. The majority of case law is against a recovery under the CISG.⁸

The first two points arguably can be dismissed without great effort. Just because the drafters are silent on a point does not automatically suggest that attorneys’ fees are excluded. The words within the four corners of any legislation, including the CISG, must be consulted first. If there is a gap, or if the words or meaning are not clear, extrinsic material such as the *travaux préparatoires* can be consulted. As the drafters did not comment on this particular issue of inclusion, it does not mean that the question of attorneys’ fees has been decided in the positive or negative form.

It is left to the interpreter to come to a conclusion and to make sense of the text of the conventions. In the case of the CISG this inquiry is guided by Article 7, which states that the CISG’s general principles should assist in coming to a conclusion. It is argued that the full compensation argument is more compelling in this case than the lack of authority in the *travaux préparatoires*, as an argument cannot be simply based on a lack of the drafters’ intent. The opinion of the CISG Advisory Council supports this point:

The issue of whether litigation expenses should be considered as damages for purposes of Article 74 cannot be resolved through a substance/procedure distinction. Whether a matter is considered substantive or procedural may vary from jurisdiction to jurisdiction and may depend on the circumstances of a particular case. Relying upon such a distinction in this context is outdated and unproductive. Instead, the analysis should focus on whether the payment of litigation expenses is deliberately excluded from the Convention and, if not, whether the issue may be resolved “in conformity with the general principles on which [the Convention] is based or, in the absence of such principles, in conformity with law applicable by virtue of the rules of private international law.”⁹

8. *See id.* at 206.

9. Int’l Sales Convention Advisory Council, Calculation of Damages Under CISG Article 74, Advisory Council Opinion No. 6, cmt. 5.2 (2006) (footnotes omitted), available at <http://cisgw3.law.pace.edu/cisg/CISG-AC-op6.html>.

Closely connected to a lack of the drafters' intent is the observation made by the Advisory Committee in relation to the substantive and procedural distinction within the CISG. This is topical considering that *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*¹⁰ in the end was decided on the procedural issue. As Judge Posner stated: "The Convention is about contracts, not about procedure. The principles for determining when a losing party must reimburse the winner for the latter's expense of litigation are usually not a part of a substantive body of law, such as contract law, but a part of procedural law."¹¹

However, it is important to draw some parallels to the substantive and procedural distinction in association with the general principles as noted in Article 7(2). A very good example is the burden of proof, and it is of value to address this issue by analogy.

The question of attorneys' fees and the burden of proof have in common that there is no clear "in or out" evidence within the four corners of the CISG. However, the distinguishing feature is that the *travaux préparatoires* are very clear on this point. In relation to the burden of proof, the express exclusion of the burden of proof from the text of the CISG is in itself a deliberate move by the drafters of the CISG to ensure that the burden of proof is dealt with on a domestic law level.¹²

In this respect, it has been contended that:

[D]elegations speaking on the burden of proof . . . were all quite definite that it was not the intention to deal in the Convention with any questions concerning the burden of proof. The consensus was that such questions must be left to the court as matters of procedural law.¹³

Peter Schlechtriem and Franco Ferrari argue that the burden of proof issues are governed by the Convention and that, as it is not mentioned expressly, there is an "internal gap" which should be resolved with reference to the two-step methodology in Article 7(2), referring first to the general principles underlying the CISG, and only in the absence of such principles, private international law.¹⁴ Most compelling are the arguments put forward by Ulrich Magnus, who strongly argues that the burden of proof is governed by general principles.¹⁵ John Gotanda also argues:

Applying national laws to determine the level of proof needed to recover damages under article 74 can lead to differential treat-

10. 313 F.3d 385 (7th Cir. 2002).

11. *Id.* at 388.

12. See Stefan Kröll, *The Burden of Proof for the Non-Conformity of Goods Under Art. 35 CISG*, 3 BELGRADE L. REV. 162, 168 (2011).

13. Harry M. Flechtner, *Selected Issues Relating to the CISG's Scope of Application*, 13 VINDOBONA J. INT'L COM. L. & ARB. 91, 102 (2009) (citation omitted).

14. See *id.* at 103.

15. See generally Ulrich Magnus, *General Principles of UN-Sales Law*, 3 INT'L TRADE & BUS. L. ANN. 33 (1997).

ment of similarly situated parties. This is because national laws differ not only on the level of proof needed to recover damages, but also on whether the matter is governed by substantive or procedural law.¹⁶

The conclusion is that, in relation to the burden of proof—and no doubt any procedural issues where a general principle can be found—the observation can be made that the issue is “so closely connected with the application of the substantive provisions that it would be impracticable to separate the two.”¹⁷ If the argument made by many scholars, that the burden of proof is governed within the CISG, is accepted, then it becomes difficult to reject the argument that attorneys’ fees cannot potentially be included as well.

The whole argument hinges on Article 7(2), namely, the gap-filling function. It is universally accepted that in order to have a gap, the issue in question cannot be explicitly governed within the CISG nor explicitly excluded. That said, both the burden of proof and attorneys’ fees would qualify as potentially falling under general principles. The point is that the burden of proof has been rejected in the *travaux préparatoires*, whereas attorneys’ fees have not. From that point of view alone, the burden of proof should be excluded and governed by domestic law, which it is not.

The simple fact is that the CISG has not only included substantive legal issues, but also perhaps inadvertently included procedural issues. Hence, the argument that an issue is procedural in nature and therefore must be excluded from the CISG is simply not sustainable. Stefan Kröll correctly noted in relation to the burden of proof that it is “not a mere rule of procedure with no or only limited influence on material justice. Quite to the contrary it resolves about material considerations which are comparable to those underlying the substantive requirements for the creating and existence of rights.”¹⁸ The same argument also holds for the inclusion of attorneys’ fees to be governed by the CISG. In relation to the drafters’ intention, Schlechtriem should have the last word on this issue as he notes: “Codes age. So do Conventions promulgating Uniform Law. Provisions on interpretation and gap-filling, like the CISG’s Article 7 . . . may be used to prevent petrification.”¹⁹

The second issue set forth by Đorđević also does not have any merits, as the issue of attorneys’ fees is a breach of contract and not a question of equality. Admittedly, Articles 45 and 61 provide very similar remedies to buyers and sellers. However, the important aspect of both articles is that the remedies are directly linked to a breach of contract by either buyer or

16. John Y. Gotanda, *Awarding Damages Under the United Nations Convention on the International Sale of Goods: A Matter of Interpretation*, 37 GEO. J. INT’L L. 95, 109 (2005).

17. Kröll, *supra* note 12, at 169 (footnote omitted).

18. *Id.*

19. Schlechtriem, *supra* note 5, at 89 (footnote omitted).

seller. If the respondent wins the legal issue, then the court in essence decides that there was no breach. In this case specifically, the question of the applicability of Article 74 does not arise. What has happened is that now a gap exists which needs to be filled by domestic law. This is so because the remedy of claiming attorneys' fees is not contemplated within both Articles 45 and 61, and hence falls outside the sphere of the CISG. Does it create an inequality? The answer is no. In the first place, if there is a breach, then the CISG potentially applies. If there is no breach—that is, the defendant wins—the remedy must be sought under the applicable domestic law, as the CISG is silent on attorneys' fees. Equality is guaranteed not entirely via the CISG, but by the applicable governing law.

III. ARGUMENTS FOR INCLUSION OF ATTORNEYS' FEES

The following main arguments are listed in support of the inclusion of attorneys' fees under the CISG:

- The plain meaning of Article 74;
- The principle of full compensation;
- The principle of foreseeability;
- The duty to mitigate;
- The general principle of reasonableness; and
- The reading of the preamble that is the endeavour to promote uniformity.

The district court's decision in *Zapata* correctly notes that the harmonisation of sales law, being a cornerstone of the CISG, must, where possible, overcome variations in domestic laws.²⁰ The best tool to do so is Article 7 combined with Article 8.²¹

It is admitted that court judgements are not a clear indication as to the recovery of attorneys' fees under the CISG and hence, it is not a persuasive argument to rely on court decisions.²² Case law arguably cannot fully support one or the other side of the argument, including *Zapata*. As Đorđević quoted a maxim,²³ the liberty is taken here to do so as well, namely that "one Swallow does not a summer make."²⁴ David Dixon put it succinctly when he noted:

20. See *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, No. 99 C 4040, 2001 WL 1000927, at *3 (N.D. Ill. Aug. 29, 2001) (quoting *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino, S.F.A.*, 144 F.3d 1384, 1391 (11th Cir. 1998)).

21. It should not be forgotten that Article 8, in effect, excludes the parol evidence rule and hence, to exclude the "American rule" does not create a precedent.

22. See Đorđević, *supra* note 1, at 214.

23. See *id.* at 219.

24. ARISTOTLE, *NICOMACHEAN ETHICS* bk. I, ch. 7 (W.D. Ross trans., Oxford Univ. Press 9th ed. 1954).

Regardless whether scholars are supporters or opponents of Judge Posner's opinion, they all agree on three things. First, that Judge Posner did not follow the rules of analysis of CISG article 7. Though some supporters believe that attorneys' fees are not governed by the CISG, and the opponents believe that they are, both sides agree that Judge Posner misapplied the rules of article 7. Second, though somewhat related to the first, both sides agree that Judge Posner was careless in not attempting to analyze the general principle of the CISG. If attorneys' fees are governed by the CISG, then there is an abundance of authority to suggest the general principle of full compensation would apply, leading to the conclusion that attorneys' fees should be included in loss. Third, both sides agree that Judge Posner improperly cited exclusively to U.S. cases and completely ignored case law from other CISG state parties.²⁵

Given the above and ignoring the weaknesses in Judge Posner's judgment, the argument can be boiled down to the fact that the main objection against attorneys' fees is that the loss is not a consequence of the breach of the contract, and the very nature of the recovery of attorneys' fees speaks against a consequential loss.²⁶ However, it must be noted that the payment of attorneys' fees is closely linked to the breach of the contract and is solely caused by that breach. In other words, but for the breach, there would be no cost, as this author states:

To put a party into a position—it would have been financially—is simply asking the question, has the balance sheet changed? If the asset base is diminished as a consequence of the breach, then those items diminishing the asset base must be understood to fall under the principle of full compensation pursuant to Article 74.²⁷

Đorđević does agree with the fact that attorneys' fees constitute a financial loss.²⁸ Prevailing opinion notes that Article 74 limits the recovery to material losses emanating from the breach of contract. Financial losses fulfil this requirement.

The question that needs to be looked at is: what is included within "material losses" and is it directly linked to the breach as well? This is so because the main argument against attorneys' fees being covered by Article 74 is that there is no direct link to the breach. It is argued that the question which needs to be asked is did the balance sheet change because

25. David B. Dixon, *Que Lastima Zapata! Bad CISG Ruling on Attorneys' Fees Still Haunts U.S. Courts*, 38 U. MIAMI INTER-AM. L. REV. 405, 428 (2007).

26. See Đorđević, *supra* note 1, at 215–16.

27. BRUNO ZELLER, DAMAGES UNDER THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 151 (2005).

28. See Đorđević, *supra* note 1, at 215.

of, or but for, the breach and was such a loss foreseeable? It is argued that, as an example, goodwill has been recognised as falling under Article 74 as it fulfils the above requirements.²⁹ In the end, the question is: was the damage foreseeable? This can be answered in the positive.

It is of value to briefly look at the question of whether breaches of ethical standards give rise to a demand of damages under Article 74. This is so because those “who [are] interested in compliance with ethical standards—want[] to claim damages from the buyer who does not use the goods in an ethical way.”³⁰ This is an interesting point because the loss is not directly attributed to a physical fault of the goods, but rather, a philosophical fault that taints the goods. Ingeborg Schwenzer and Benjamin Leisinger argue that:

In this regard, it is submitted that the loss of the seller equals the eventual difference between the contractual value of the goods—i.e. the purchase price—and the real value of the goods, taking into account the unethical use that is intended and the possible consequences arising there from. Such claims for damages serve two functions. First, the equilibrium of the contract is reestablished. The seller’s unethically generated profit is transferred to the buyer who—hypothetically—either would not have concluded the sales contract or would have bought the goods at a much lower price.³¹

The authors argue that the balance sheet has been disturbed; hence, Article 74 will re-establish the necessary equilibrium. In relation to attorneys’ fees, the same argument can be mounted on the grounds that the buyer would not have bought the goods had he known that they were unsuitable.

IV. DISCUSSION

Đorđević indeed advances a very powerful argument, namely:

[T]he recovery of attorneys’ fees incurred in litigation indeed differs from recovery of such fees before litigation. The difference results from the nature of litigation itself, since its initiation (filing a claim in the court and delivering the claim to the defendant) transforms the two-party relationship i.e. sales contract (buyer-seller) into a three party relationship i.e. litigation (plaintiff-court/arbitration tribunal-defendant).³²

29. See ZELLER, *supra* note 27, at 125.

30. Benjamin Leisinger & Ingeborg Schwenzer, *Ethical Values and International Sales Contracts*, in *COMMERCIAL LAW CHALLENGES IN THE 21ST CENTURY—JAN HELLNER IN MEMORIAM* 249, 275 (Ross Cranston, Jan Ramberg & Jacob Ziegel eds., 2007).

31. *Id.*

32. Đorđević, *supra* note 1, at 216.

The argument, therefore, is that the three-party relationship shifts the costs onto the court-plaintiff relationship that is focused on the litigation and not the breach. Therefore, it is argued that the causal link between breach and loss is interrupted.³³ The point that is made is that a tripartite relationship has now been created because the court has, at the same time, a relationship not only with the buyer but also with the seller. This observation is correct, and it also supports the argument that awarding attorneys' fees is against the equality of the parties to the sales contract.

However, the problem with the above argument is that it relies on the fact that the causal link between breach and loss has been interrupted. Indeed, but for the breach, such a tripartite relationship would not have been created and attorneys' fees would not have been incurred. In other words, the tripartite relationship is causally linked to the breach of the contract.

It is obvious that a breach will trigger many tripartite relationships. As an example, the party suffering the damages must mitigate the losses pursuant to Article 77. If the party relying on the breach enters into a contract with a warehouse to store the goods, putting them at the seller's disposal creates a three party relationship. The three parties are the seller, buyer, and the warehouse owner. There is no debate that the buyer can recover the costs he incurred as part of the Article 74 argument. It is also not disputed if the court finds against the buyer, that he cannot recover any mitigation costs. The contract has been confirmed and the buyer must bear all the costs he incurred. No inequality arguments have been raised in this context.

Furthermore, the law often creates inequalities. As an example, a seller supplies defective goods, clearly breaching Article 35. The buyer, however, does not examine the goods in a timely fashion and hence did not notify the seller of the defect within a reasonable time. The CISG would, in such a case, deny the buyer a right to claim damages. If it is asked whether justice has prevailed, the answer is yes, because the buyer did not follow the law. Simply put, both parties are in breach of the CISG, but the breach of Articles 38 and 39 negate the breach of Article 35 because of policy considerations that are not in dispute. The difference between the relationship of breach and notification is akin to the relationship between breach and costs, particularly with attorneys' fees. The exception being, of course, in the latter case, the CISG is not clear.

V. CONCLUSION

The argument of Đorđević in relation to a tripartite relationship is very convincing and powerful. However, it is also argued that the balance sheet approach is equally convincing because it shows that there is a potential break between the legal action of breach and the court action.

33. *See id.*

Đorđević supports her argument by citing a maxim that reflects the guiding idea: "If it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck."³⁴ However, it is only "probably a duck," and in retort, there is an animal called the wood duck.³⁵ It looks like a duck, swims like a duck, and also quacks like a duck, but in fact belongs to the family of geese.

Where does this leave the debate, or would the real duck please stand up? A court could follow either argument, which of course is not conducive to a uniform application of the CISG. It is argued that the solution lies in the reading of the CISG preamble. The object of the CISG is to establish "a New International Economic Order."³⁶ The parties to the Convention were also of the opinion that the adoption of the CISG "would contribute to the removal of legal barriers in international trade and promote the development of international trade."³⁷

John Gotanda notes specifically in relation to procedural issues:

The practice of determining whether an issue is governed by applicable procedural law instead of the Convention is outdated, counterproductive, and should be abandoned. Instead, tribunals should try to fill gaps by trying to find a solution within the Convention itself, through an analogical application of specific provisions or on the basis of principles underlying the Convention as a whole, before turning to domestic law. This approach would lead to more consistent and predictable awards of damages and would ultimately further the goal of the Convention to create uniform commercial law.³⁸

The conclusion is that, arguably, only two arguments are viable. First, the balance sheet approach, and secondly, the break in causation as advocated by Đorđević. Which one is the better one? It depends whether the court believes that the fundamental underlying principle of Article 74 is full compensation, namely, the balance sheet approach, or whether, procedurally, the causation of the breach is broken. In the end, unfortunately, there are still two competing arguments, and if harmonisation is the deciding factor, the preamble would lean towards full compensation. Hence, attorney's fees are governed by the CISG.

However, it is recognised that the above academic view might be at odds with the application of Article 74 by courts and tribunals, and will not find favour. Unfortunately, the preponderance of case law shows that the

34. *Id.* at 219.

35. It is an Australian native species of geese, but commonly called a wood duck.

36. United Nations Convention on Contracts for the International Sale of Goods pmbl., Apr. 11, 1980, 1489 U.N.T.S. 3, available at <http://www.cisg.law.pace.edu/cisg/text/preamble.html>.

37. *Id.*

38. Gotanda, *supra* note 16, at 140.

courts deal with attorneys' fees pursuant to the relevant domestic procedural rules and not under the CISG. The same can be said in arbitration proceedings, as arbitrators refer to the relevant applicable arbitration rules to determine the issue of attorneys' fees. The possibility to achieve unification on this issue arguably can come from other sources such as the American Law Institute and the International Institute for the Unification of Private Law's Principles on transnational civil procedure. However, the problem with development of soft law instruments is that they seldom achieve harmonisation. To that end, time will tell whether the courts and arbitral tribunals will include attorneys' fees into the regime of Article 74, as indicated in this Article.

