PART ONE. INTRODUCTION

Introduction

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I. UNIFORM LAW FOR THE INTERNATIONAL SALE OF GOODS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. PROBLEMS OF INTERPRETATION OF UNIFORM LAW

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

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

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

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

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

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

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

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

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

III. ISSUES OF INTERPRETATION IN THE CISG

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

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

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

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

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

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 7 expressly directs that in the interpretation of CISG "regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."[30] Interpreters of the CISG are further instructed that questions concerning matters governed by the CISG that are not expressly settled in it "are to be settled in conformity with the general principles" on which the CISG is based or, in the absence of such principles, "in conformity with the law applicable by virtue of the rules of private international law."[31]

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

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

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

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

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

[30] CISG Art. 7(1).

[31] CISG Art. 7(2).

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

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

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

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

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

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

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

1. The International Character of the Convention

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

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

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

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

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

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

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

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