
In 1980, the United Nations Convention for the International Sale of Goods (CISG) came into being as an attempt to create a uniform commercial sales law. This book compares two major restatements – the UNIDROIT Principles and the Principles of European Contract Law (PECL) – with CISG articles. In this work scholars and legal practitioners from twenty countries contribute analysis on the various issues covered in the articles of the CISG, comparing them with how each issue is treated in the UNIDROIT and PECL restatements. The introductory section of the book addresses theoretical and practical issues of the appropriate interpretive methodology as mandated in CISG Article 7, and it is followed by individual analyses of the Convention's provisions.

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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 trend toward unification that can be traced to the Middle Ages and that has given rise to

1See Ronald Harry Gnaecen, “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 law has been widely acknowledged, see e.g., Ronald David, “The International Unification of Private Law,” in J. P. Miiller, ed., Encyclopedia of Comparative Law (Oxford 2001) [hereinafter Miiller, Encyclopedia]; Ronald David, Unification of Private Law (Oxford 1983); and Ronald David, Uniform Law for International Trade under the United Nations Convention 1-18 (2001) [hereinafter David, Uniform Law for International Trade]. However, there has also been some criticism of this trend, see Gnaecen (1968),
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The 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) represents the most recent attempt to unify or harmonize international sales law. The Convention creates a uniform law for the international sale of goods, of the United Nations and the activities of specialized international organizations (such as UNCITRAL, UNIDROIT, and the International Chamber of Commerce), which aims to serve as a universal code to replace the existing patchwork of national laws and the diversity of rules that characterized the old "law merchant." The new general trend of transnational law is to move away from the national construction of law and toward the creation of an autonomous body of international private law. The Convention represents the result of careful negotiation and preparation by international organizations and diplomats. The repercussions of such actions are not always benign.


For conflicting views at the existence of the new law, and its service to Karl Peter Berger, ibid., "Lex mercatoria: A List of Mercatoria," in Lex mercatoria, a Distinct Legal System Considered, Complete Reference Chart: Banking Character, Probability, Authority, Commentary (Joachim Bone!! & Michael Joachim Bone!!, eds., Giuffre, Milan 1990 edition). The skepticism of the skeptics' point of view has not reached consensus.


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The second stage of the development of international trade law is marked by the inclusion of the "law merchant" into municipal systems of law in the nineteenth and twentieth 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 Cipriano, Schäffer: Schleyer: Schlegel: Lichtenstein: Lex mercatoria 55-60 (Chia-Chung Cheng ed. 1988) <http://www.lex-martius.org/writings/papers/1988/LM_june1988.pdf>. Also see Joachim Bone!! & Michael Joachim Bone!!, eds., Giuffre, Milan 1990 edition. The skepticism of the skeptics' point of view has not reached consensus.

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Part I. Introduction

This is clearly stated in the Preamble that introduces the Articles of the Convention.

The states parties to this Convention,

recognizing in view the broad objectives in the resolutions adopted by the third 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 decided as follows:

The Preamble to the CISG introduces the legal text that binds the signatory States of the Convention. Thus, the CISG attempts to unite 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 precautionary nature. 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 anomalous principles of private international law and the possible application of an unfamiliar system of foreign domestic law with the results brought about by the amorphous principles of private international law systems that exist in the field of sales.

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, contribute to the removal of legal barriers in international trade and promote the development of international trade.

"Contribute to the removal of legal barriers in international trade and promote the development of international trade." The CISG seeks to achieve such uniformity. 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 these same tribunals adopt a uniform approach to the filling of gaps in the law. The uniformity or harmonization of international commercial law is generally desirable because it can act as an "total conflict avoidance device." This, from a trader's point of view, is far better than conflict resolution devices, such as the choice of law clauses.

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 a 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 the CISG will be in reaching this unifying goal.


5. Professor James Gabor has concluded that only a uniform law could act as a "total conflict avoidance device." Cf. M. Schmitthoff, "Conflict Avoidance in Practice and Theory in the Present-day Law of Contracts," 21 Law & Contemp. Probs. 482 (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 judicial system such as ours is predicated on the idea that courts weigh different interpretations of the same code and find the one they believe is correct. If the law is not uniform, then we can never have a code as meaningful as ours.


9. See Gabor, "Uniform Law as a Possible Solution to the Conflict Problem," supra note 4, at 219-220.


11. Opinio juris: the law of contract, of movable property, and of such wrongs is merely of a nature.

12. Cf. Gabor, "Uniform Law as a Possible Solution to the Conflict Problem," supra note 4, at 14 ("This is one of the major achievements of our century. The creation of a uniform law applicable to the international sale of goods constitutes a major step forward in the field of goods and services within national boundaries.")
II. PROBLEMS OF INTERPRETATION OF UNIFORM LAW

Uniform law, by definition, calls for its common interpretation in different legal systems that have adopted it. 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, 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 a 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.

The importance of the wording of the Preamble's weight and the weight to be placed upon it cannot be fixed precisely. We can get some guidance from Article 31(2) of the CISG, which is uniform law binding parties transacting worldwide 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." It is this achievement of establishing an "international community" that is regarded by some as the true underlying purpose of the CISG and as the key to its eventual triumph or demise. It is also the focus of the most forceful criticism of the CISG, as it has been argued that achieving international consensus on significant legal issues is impossible.

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. Article 7 is the provision that sets forth the Convention's interpretative standards. The provision in Art. 7(1) expressly provides that the interpretation 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, it is necessary that CISG exist on a 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 offsetting its values of internationalism and uniformity mandated in Article 7(1).

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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 arbitration 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." It is this achievement of establishing an "international community" that is regarded by some as the true underlying purpose of the CISG and as the key to its eventual triumph or demise. It is also the focus of the most forceful criticism of the CISG, as it has been argued that achieving international consensus on significant legal issues is impossible.

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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 assun that success or failure will determine the CISG’s eventual fate as an international treaty. 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 to be had to its international character and to the need to promote uniformity in its applications and the observance of good faith in international trade.” 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.”

See also Anderson, Global Jurisdictional Issues, supra note 21.

The essence of the problem of the CISG’s divergent interpretation lies with the interpreters themselves: its nature is substantive and not structural. The attention has been focused on the necessity for the various courts and arbitrations applying the CISG to understand and respect the commitment to uniformity and to interpret the text in the 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. 

The dynamic for developing a jurisprudence of international trade is established in Articles 7(1) and 7(2). These are arguably the most important articles in the CISG, not least because they are a reference to the emerging need to address some unresolvable, unsettled issues relating to the prevailing diversity of interpretation in the CISG. The CISG is based on the commitment to promote uniformity in its applications and the need to promote uniformity. In practical terms, the primary purpose of the CISG is to provide uniformity to the interpretation and application of the Convention. The Convention is a mechanism for settling disputes arising in the field of international trade. The CISG aims at achieving uniformity by producing divergent interpretive
tures, and thus complements Article 7(1) or gap-filling (Art. 7(2)) and further the search for the elusive goal of uniformity by producing divergent interpretive
results. An interpretative 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). It is arguable that the legal backdrop of 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) which 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, but that, in fact, the second "is a logical consequence of the first." 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. 20

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. 21

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

20See Audi, Lex Mercatoria, supra note 8, at 297, commenting on the ability of the Convention to generate "the need to promote uniformity in its application.


22For a discussion of the competing arguments, see Pelcmanz, Uniform Interpretation, supra note 24, at chapter 3.

23As 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 Ctas, like any other piece of domestic or international piece of legislation, must be based.

24See Haux, Uniform Law for Int'l Sales, supra note 1, at 142, stating, "The settlement of disputes would be complicated and litigants would be encouraged to engage in forum shopping if the courts of different countries persist in divergent interpretations of the Convention."


27Expressing support for this point is Boulton, General Principles, supra note 22, at 73. Instead of sticking to its literal and grammatical meaning, courts are expected to take a much more liberal and flexible attitude and to look, whenever appropriate, to the underlying purposes and policies of individual provisions as well as to the Convention as a whole. See also Renzi Zeller, "The UNCITRAL Convention on Contracts for the International Sale of Goods (CISG) -- A Leap Forward towards United International Sales Laws," 12 Pace Int'l L. Rev. 79, 105-106 (2000), available at http://www.paceu2.org/palr/contents/vol12/n2/zeller.html.

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The independent from the uniform Laws prerequisite for the existence of the other. The international, rather than national, interpretation of both, and they are interdependent because the existence of one is a functionally because an autonomous approach to interpretation is necessary for the enforcement of their position in the same jurisdiction. For the "legal barriers in international trade" to be removed successfully, a broad and liberal approach to the interpretation of the CISG is required. Only such an approach can demonstrate that the CISG is aiming to unite, at least in the field of sale of goods. The proper interpretation of the CISG must be broad and liberal, but not lax or abstract.

2. Uniformity of Application

At this point, the interaction between the first two parts of Article 7(1) becomes more apparent. The autonomous interpretation of the "international" characterization of the CISG, but also a necessity, if "the need to preserve "international" and "uniformity" are interrelated structurally and functionally because an autonomous approach to interpretation is necessary for the existence of the other. The international, rather than national, interpretation of the CISG is to be achieved, and to neutralize the danger of reaching divergent interpretations, if the parties should observe the principle's exact nature, scope, and function within the CISG. Scholarly opinion on the issue is divided. Some commentators insist on the literal meaning of the provision and conclude that the principle of good faith is nothing more than an additional criterion to be used by judges and arbitrators in the interpretation of the CISG. Under this approach, good faith is merely a tool of interpretation at the disposal of the judges to neutralize the danger of reaching incoherent results.

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

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

3. The Observance of Good Faith in International Trade

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

a. Good Faith as a Mere Instrument of Interpretation

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

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

However, there is academic opinion favoring a broader interpretation of the reference to good faith as contained in Article 7(1), pointing out that the duty to observe "good faith in international trade is also necessarily directed to the parties to each individual contract of sale."24 The main theoretical difficulty with the above suggestion is that, in effect, it implies that the interpreters of the CISG are not only the judges or arbitrators but the contracting parties as well.25 This point is counterbalanced, however, by the practical and theoretical objections to it. If Article 7 is addressed to the parties, then that provision might be excluded by them under Article 8. This would be an unwelcome result because, in practice, it would hinder the uniformity of interpretation. The theoretical objection is that the statement seems to obliterate the distinction between interpretation by the court and performance of the contract by the parties. One of the main practical objections to the inclusion of the CISG as a provision imposing on the parties a general obligation to act in good faith was that this concept was too vague and would inevitably lead to divergent interpretations of the CISG by national courts.

The possibility of imposing additional obligations on the parties is clearly not supported by the legislative history of the CISG. Article 7(1), as it now stands in the CISG's text, is the result of a drafting compromise between two diverging views: it reflects the political and diplomatic maneuvering necessary for the creation of an International Convention. This cannot now be given the meaning originally suggested by those advocating the imposition of a positive duty of good faith on the parties, as doing so would reverse the intent of the compromise. On the other hand, this does not mean that the opposite view (i.e., that good faith represents merely an instrument of interpretation) should be adopted instead. That interpretation would unnecessarily deny the value of good faith and its potential function within the CISG. It is submitted that "good faith," like all the other terms in the CISG, must be approached afresh and be given a new definition that will describe its scope and meaning within the CISG, separate from the peculiar tools that it carries in different, and often within, legal systems. It may take some time for the principle of good faith to develop naturally and to crystallize in the case law, in the spirit of continuing deliberation and discourse that characterizes the community of the CISG members.

V. REMEDIES AGAINST DIVERGENT INTERPRETATIONS

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


Interpretations of an international convention by sister signatories should be taken into account in a comparative manner and with the "integrative force of a judgment . . . based on the persuasive reasoning which the decisions of the Court bring to bear on the problem at hand." A judge ought to be "obliged to search for and to take into consideration foreign judgments . . . at least the judgments from other Contracting States, when he is faced with a problem of interpretation of an international convention." Access to foreign decisions has become a lot easier than it used to be. UNCITRAL has taken many steps to ameliorate any practical difficulties relating to access, including the establishment of CLOUT, through which the original texts of decisions and other materials may be obtained from the UNCITRAL Secretariat. In recognition of the importance of foreign decisions to the uniform interpretation of the CISG, many international organizations and law schools have made efforts to collect, translate, and provide commentary to relevant decisions. An updated and growing collection of CISG jurisprudence, including English translation and relevant commentary, can be found on the CSG database maintained by the Pace Law School.

2. Doctrine (Scholarly Writings; Commentaries)

Another "antidote to the danger of divergent interpretations of the CISG is the use of doctrine (i.e., academic writing). The literature on the CISG is voluminous and still growing. The value of scholarly writings and international commentaries in the promotion of a principle similar to precedent consists, from a Civil Code legal system. This principle holds that law is not a binding source of law, but a persuasive source of law. This would mean that, when interpreting the Convention, a court should look to other court interpretations of the Convention, including the interpretations of courts from other countries. These interpretations, however, would not be binding, but only persuasive."

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of an autonomous, international interpretation of the CISG and its uniform application cannot be overstated. 66

The rule played by doctrine in the interpretation of legislation varies in different legal systems. In civil law countries, recourse to doctrine as an instrument of interpretation for domestic and foreign law has never been doubted. On the other hand, common law jurisdictions have traditionally given little effect to scholarly writings. But even in common law countries, such as England, where judges traditionally have been reluctant to have recourse to scholarly writings, the need for uniformity in interpreting international conventions has led to a more liberal approach and the use of doctrine has become increasingly common. 67

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

3. Travaux Préparatoires (Legislative History)

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

The CISG directs interpreters to have regard to the "international character" of its provisions and requires, in addition to the international experience that will be developed through jurisprudence and doctrine, that the Convention be placed in the broader international setting of its legislative history. 68

During the formative stages of the Convention, numerous difficulties arose and were resolved through debate and compromise among the diplomatic delegates to the Vienna Conference. 69

66 See Edgar Bodenheimer, "Doctrine as a Source of the International Uniformity of Law," 34 Am. J. Comp. L. 97 (1966) Supp. 7, at 11, where the author examines from a comparative point of view and in detail the question of "whether doctrinal writings may be considered primary authorities of law on par with legislative sources.

67 In the United States, academic writing is still firmly in judicial opinion, and there was very similar reliance in England, in Fettig & v. Howarth Airways Ltd., [1961] A.C. 381 (House of Lords). The latest divergence in use scholarly writing and regularly cites materials, law reviews, and other scholarly literature. According to Honnold, "the same commentators who in the past contended that the Legislator was not obliged to consult the travaux préparatoires, now accept the argument that the travaux préparatoires are not only a source of information but a substantial source of law." Honnold, Uniform Laws for the Sale of Goods, supra note 31, at 186. It is interesting to note that in the context of the CFC and its model texts application.

68 See Honnold, Uniform Laws for Int'l Sales, supra note 1, at 126-130. See also Axel L. Overend, supra note 8, at 157-158.

The international character of the Convention should encourage courts to refer to the conventional legislative history and prior instruments (i.e., the UCC and ULP) in order to reinforce the most likely meaning underlying the wording of a given provision. Reference should also be made to the various official texts of the Conferences, which are often essential when the wording of a provision is ambiguous. For example, the Conferences were the summaries of the main issues of the Conferences and the official texts of the Conferences are often the definitive texts in the documents. In addition, although delivery of documents is clearly stated in the Convention itself, the Convention is not an exhaustive tool in all situations of sale.


70 The material found in the Convention's legislative history adds depth to the international understanding that underlies the Convention's text. Honnold, Documentary History of the Uniform Law for International Sales (Kluwer, 1988) reproduces the relevant documents and provides reference, thereby making it easier to trace the legislative history and development of the Convention's provisions.


73 Honnold, Uniform Laws for Int'l Sales, supra note 31, at 131-133; Bonsell, General Provisions, supra note 36, at 90.
4. Neutral Language - A New Linguistic Framework

The quality of the international character attributed to the CISG has yet a further dimension. Such a characterization denotes that the terms and concepts of the CISG must be interpreted autonomously of meanings that might traditionally be attached to them within national legal systems. To have regard to CISG's international character it must mean that the interpreter should not apply domestic law to solve the interpretative problems raised to the CISG. The recognition of the CISG in light of the concepts of the interpreter's domestic legal system would be a violation of the requirement that it be interpreted with regard to its international character.69 The terms of the CISG must be interpreted "as looks at the background of the CISG.

The CISG is a code that contains a defined set of topics (formation of contract, rights and obligations of parties, remedies), and its provisions regulate issues relating to which the Convention is based. The Convention has adopted a new common language to express those rules and general principles that operate throughout the various commercial transactions. The rules on risk of loss provide good examples of the use of event-oriented words. CISG Art. 67(1) provides that "the risk passes to the buyer when the goods are handed over to the first carrier for transportation to the buyer in accordance with the contract of sale." In a similar tone, Art. 69(1) states that in contracts that do not involve carriage, "... the risk passes to the buyer when he takes over the goods." The drafters of the Convention opted for the use of plain language to refer to domestic legal systems. Such words as "delivery" and such concepts as "property" which are loaded with peculiar domestic importance, have been intentionally avoided. The form and content of the CISG are the outcome of prolonged deliberations among lawyers representing a multitude of diverse legal and social systems and cultural backgrounds. The provisions of the CISG had to be formulated in sufficiently neutral language to reach a consensus that would not be vitiated by misunderstanding among its drafters. An important decision that the drafters of the CISG had to make regarding this issue was whether to include in the CISG detailed definitions of significant terms. The eventual choice was to include some definitions as needed within the text of particular provisions, but not to have definitions of key terms at a separate part of the CISG. This decision on drafting style is a further indication of the wisdom of the drafters to produce a law that promotes international cooperation in its application.69

It has to be conceded that, despite the diverse composition of the drafting team and the attention given to all official language versions of the CISG, the drafting debate tended to focus on legal concepts drawn from either the civil law or common law traditions.69 As a result, most of the words and concepts used in the CISG are Anglo-American or Western European in origin, but the ramifications of this origin must not be overestimated. It may be that, in creating this modern uniform legal regime for the international sale of goods, certain concepts or words were borrowed from developing legal systems, but such words or concepts do not (and should not) bring with them to the CISG the special depth of meaning that they have in their original context. The choice of one word rather than another represents the process of a compromise, rather than the acceptance of a concept peculiar to a specific domestic legal system. The drafters attempted to avoid terms that have been enshrined and shaped by diverse historical, social, economic, and cultural structures in the various legal systems. They employed neutral, "a-national" language to avoid such distortions. The neutrality of the words chosen for the CISG promotes the CISG's autonomy and advances UNCITRAL's objectives of internationality and uniformity of interpretation and application.

Any interpretation of the CISG's terms that relies on specific national connotations will be calamitous because what is required is an interpretation of the CISG that is not only uniform but truly international as well. Interpreters of the text must not violate the spirit of the law that is embodied in the Preamble and the interpretation provisions of the Convention. The meaning of any words imported from domestic legal systems must be circumscribed by their new legal context. The Preamble expressly acknowledges the cultural, social, and legal diversity that characterizes its member States. The remedial provisions of the CISG are also structured to reflect the commitment to equality in the formal parallelism between buyer and seller.69 The commitment to equal treatment and respect for the different cultural, social, and legal backgrounds of its international members is consistent with other important values underlying the CISG, such as commitment to keeping the contract alive, forthright communication between parties, reasonable expectations, etc. The interpretation of the text of the Convention must be guided by these encapsulated principles.

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69Kemly argues that this choice of drafting style has rhetorical significance because detailed definitional sections "encourage the reader to understand the words in a technical and limited way, and to perceive the text as self-contained. The reader is led to interpret such a text as limited to its specifically defined terms and to disregard its broader implications or implicit significance." On the other hand, Kemly notes that "interpretation, contextual definitions, ... encourage a broad and contextual interpretation of the words of the text, leading to greater depth and complexity in the interpretation of individual provisions." Kemly, "Problems of Uniform Law on Formation of Contracts for the International Sale of Goods," 27 J. Comp. L. 315-323 (1979).

70For example, a party may be noted having an additional legal period for performance of the other party's obligations, make time of the essence, where it is not clear from the contract itself or from the surrounding circumstances whether failure to make timely performance amounts to a fundamental breach, see CISG Art. 47(1) and Art. 63(1). It has been commented that "Art. 63(1) is based on the German concept of 'Nichtliefert' but it has a well-known counterpart in equity in contracts for the sale of land (referring to,); James S. Wcisyl. Report to the Uniform Law Conference of Canada on Uniform Law on Formation of Contracts for the International Sale of Goods (July 1983), University of Toronto, excepted available at <http://www.ualaw.law.utoronto.ca/HLThelker/report.pdf>.</ref>

71Hellier has observed that "the terminologies in the rules as the remedies for the seller's and the buyer's breach of contract incurly, supra note 26, at 353-54c.

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See Peter H. Schlechtriem, "20 Years CIsG - An International Lexicon Project for Drafting Uniform Law on Sale of Goods, Drafting Principles, Domestic Legislation and Transnational Contracts," 2 CILSA Studia. The CIsG and the argument in favor of the CIsG as a 'ungenaue' form of international commercial law.

2See Ronald, Uniform Law for Int'l Sales, supra note 1, at 120, where the author also states, "[c]ool read the words of the Convention in regard for those 'international character' requires that they be preserved against an international background."
VI. GAP-FILLING IN THE CONVENTION: ARTICLE 7(2)

The CISG does not constitute an exhaustive body of rules and that does not provide solutions for all the problems that can originate from an international sale transaction. Indeed, the issues governed by the Convention are limited to the formation of the contract and the rights and obligations of the parties resulting from such a contract.74

This limitation gives rise to problems relating to the need to fill gaps that exist in any type of incomplete body of rules.75

It is to comply with such a need that Article 7(2), designating the rules for filling any gaps in the CISG, was drafted. The justification for such a provision lies in the fact that it is hardly possible for an international group to draft a voluminous and complicated piece of legislation without leaving gaps behind,76 especially in the field of contract, as contracts have infinite variety.

The legislative history of this provision is informative because it reveals the drafting compromise that is Art. 7(2)77.

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, with the law applicable by virtue of the rules of private international law.

74 See CISG Art. 6, stating "This Convention governs only the formation of the contract and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise provided in its provisions or as may be agreed between the parties, it does not govern (a) the validity of the contract or any of its provisions or any matter related thereto, (b) the effect which the contract may have on the property in the goods sold."

75 For further evaluation to the applicability of CISG, see CISG, supra note 1, art. 5 (definition of certain goods), art. 6 (form and consideration of contracts and labor contracts), and art. 5 (liability for death or personal injury). In addition, the Convention does not govern rights based on family or agency law. See International Uniform Law for Facts, supra note 1, at 11-14.16.

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

77 E.g., General Provisions in International Sales, supra note 51, at 2-11. See also Audit, Lex Mercatoria, supra note 8, at 188, commenting on issues of gap-filling in the CISG.

Although the Convention is intended to be an all-encompassing framework, unambiguous circumstances do not exist to fill the gaps immediately by reference to an applicable domestic body of law. The reference to such a domestic law is only subsidiary. Initial reference will be made to the Convention's "general principles." The Convention is not an omnibus treaty; it is not to be regarded as one source among others.

Furthermore arguments in favor of gap-filling provisions exclude the use of the rules of private international law (i.e., in terms similar to those in Article 7(1) Ulia). The opposing view was that the uniform law could not be considered as readily adopted from the various national laws — as the uniform law did not deal specifically to construct many subdivided laws contained in the CISG without having recourse to national law. See "Legislative History of Art. 7(2)" in Felgenhauer, Uniform Contracts Interpretation, supra note 34, ch. 4.

78 See, e.g., Audit, Lex Mercatoria, supra note 8, at 188-94, where the author writes, "The relationship between the Convention and the lex mercatoria can be summarized by outlining the hierarchy of sources that may apply in case of conflict between the Convention and the lex mercatoria, to the uniformity and autonomy of the Convention: If a conflict is found, the Convention shall prevail over domestic law. Instead, if the Convention is silent or ambiguous, interpretation must be based on lex mercatoria rules as well as national law. In any case, the Convention is not intended to be a code, but a means of solving specific problems that arise in international trade." Further, interpretation must be based on lex mercatoria rules, which are elaborated in the lex mercatoria codes and in national law. More specifically, the lex mercatoria should be applied to fill gaps in the Convention, unless there is a specific provision in the Convention that precludes such an application.

79 E.g., General Provisions in International Sales, supra note 51, at 2-9.

80 See, e.g., General Provisions in International Sales, supra note 51, at 2-9.
1. Gaps in Private Law

Before the gap-filling rule in Article 7(2) can be put into operation, the matters to which the rule applies must first be identified. The starting point of the gap-filling analysis is the observation that the gaps to which the rule refers are not gaps "intra legem" (i.e., matters that are excluded from the scope of the application of the Convention -- such as the matters discussed in CISG Articles 2(2), 4(1) and 5) rather, they must be gaps "propter legem" (i.e., matters that are governed but are not expressly resolved by the CISG). The absence of a uniform law provision dealing with such issues cannot be regarded as a lacuna.

2. Gap-Filling Methodology

Three different approaches exist to fill gaps propter legem. The first approach is based on the application of the general principles of the statute and is known as the "true Code" approach. The drafters of the 1964 Hague Conventions chose that approach. U.L.S.S. purport of absolute independence from domestic law failed the test of acceptance.

CISG Art. 5 states that the Code does not apply to consumer sales, to insurance, or to sales of shares, vessels, and electricity.

CISG Art. 5 includes the application of the Convention in cases of "supply and manufacture" contracts and labor contracts.

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

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

The terms "true legem" and "propter legem" are discussed in Ferranti, Uniform Interpretation, supra note 54, at 317. For the distinction between gaps "infra legem" and gaps "propter legem," see Ferranti, Uniform Interpretation, id. at 40. See, e.g., H. D. Binswanger, Uniform Commercial Code Methodology, 12 U. Fla. L. Rev. 201, 202 (1961), for a discussion of the terms "true code" and "propter code" and a consideration of the general principles of the Code and the principles underlying the Code, and its application to the application of specific provisions of the Code.

The drafters of the 1964 Hague Conventions chose that approach. For a discussion of the three approaches, see supra note 36, at 107.

The solution adopted by the drafters of the UN Convention on the International Sale of Goods is the "true Code" approach.

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

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

It is these comments that are covered in the United Nations form. For further references to the three approaches, see generally Kettner, Guide to Private International Law, supra note 10, at 129.

2See supra note 58, at 117.


4For the purpose of this paper, it is assumed that "true Code" means the Code as it exists in its current form, and not the one that might have been adopted had that Code been adopted in the first instance.

5For both references to the three approaches, see generally Kettner, Guide to Private International Law, supra note 10.

6A simple approach of the general principles is considered in the Kettner, Guide to Private International Law, supra note 58, at 117.

7Ibid., at 117.

8See Kettner, Guide to Private International Law, supra note 58, at 117, for further references to the three approaches.

9See supra note 58, at 117.

10This approach is based on the idea that the general principles of the Code should supplement its specific provisions. For a discussion of the three approaches, see supra note 36, at 107.

11Ibid., at 117.

12"Meta-Code" means the Code as it exists in its current form, and not the one that might have been adopted had that Code been adopted in the first instance.

13Therefore, in theory, when a matter is governed by the Convention but is not expressly settled in it, Article 7(2) offers a solution by (i) internal analogy, when the Convention's other provisions contain an applicable general principle or (ii) reference to external legal principles (the rules of private international law) when the Convention does not contain an applicable general principle.

14This is the approach that was adopted by the drafters of the Convention.

15For further references to the three approaches, see generally Kettner, Guide to Private International Law, supra note 10.
principles underlying the CISG as a whole, when the gap cannot be filled by analogical application of specific provisions. Analogical application has also been accepted as a method of gap-filling by many other scholars in this area.** An explanation of this method is provided by Enderlein and Markov, who, in exploring a broad interpretation of Article 7(2), state that "gap-filling can be done, as we believe, by applying such interpretation methods as specific interpretation, analogy, and distinction. The admixture of analogy is directly addressed to the wording contained in the CISG because it is aimed at obtaining, from several comparable rules, one rule for a not expressly covered fact and/or a general rule under which the fact can be subsumed.**

3. Gap-filling by Analogy

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

There is some diversity in academic opinion on the exact test to be applied in such cases. Ferrari, using a criterion similar to that offered by Boswell, states that where the matters expressly settled in the Convention and the matters in question are related so closely that it would be "unjustified to adopt a different solution," one can fill the gap by analogy. Honnold offers a different test, placing the focus of the inquiry on whether the cases were so analogous that the drafters "would have deliberately chosen discordant results." Only in such circumstances, according to Honnold, would it be reasonable to conclude that the rule embracing the analogous situation is authorized by Article 7(2) of the CISG.

It is important to note that gap-filling by analogy is concerned with the application of general provisions or solutions, taken from specific CISG provisions to be applied in analogous cases to resolve legislative gaps. This method should not be confused with the application of general principles that are expressed in the CISG or upon which the CISG is founded. It is my contention that gap-filling by analogy to primary gap-filling is the only method where no analogous solution can be found in the CISG's provisions should the interpreter resort to the application of the CISG's general principles—internal and external—which is secondary gap-filling. This is a fine, but clear, distinction. If there were no analogous solutions to be maintained, although there may ultimately not be a lot of practical importance attached to maintaining it because of the tendency of commentators to blur the distinction by focusing on the use of general principles in gap-filling and the potential of general principles to dominate the CISG's gap-filling function. However, the value of recognizing its existence lies in the theoretical clarity and legitimacy that this distinction adds to the consistent and systematic examination of the interpretative structure embedded in the CISG.

4. General Principles and the CISG

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

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


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

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

Some general principles can be identified easily because they are expressly stated in the provisions of the CISG itself. One such principle is the principle of good faith.** The principle of autonomy** is another general principle expressly outlined in the CISG. Most
general principles, however, have not been expressly provided by the CISG. Therefore, they must be deduced from its specific provisions by analyzing the contents of such provisions. If it can be concluded that they express a more general principle, capable of being applied also to cases different from those specifically regulated, then they could also be used for the purposes of Article 7(2).

There is a notable divergence of opinion as to the exact nature of such an analysis of specific CISG provisions. Bonnell states that just as in interpreting specific terms and concepts adopted in the text of the Convention, also in specifying "general principles" courts should, in accordance with the basic criteria of Article 7(1), avoid resorting to standards developed under their own domestic law and try to find the particular solutions "autonomously", i.e., within the Convention itself or, should this not be possible, by using standards which are generally accepted at a comparative level.

Bonnell's argument relies on the premise that, although there are principles, such as that of "good faith" and the concept of "reasonableness", need further specifications to offer a solution for a particular case. The question that arises here relates to the Convention itself or at least on the basis of standards which are currently adopted in other legal systems. On the other hand, there is strong academic opinion that comparative law should not be used to identify such general principles. Endress and Maselli are of the opinion that it is not possible to obtain the Convention's general principles from an analysis prepared by comparison of the laws of the most important legal systems of the Contracting States... as it was supported, in some cases, in regard to Article 17 (a) ULIS... The wording of the Convention does in no way support the application of this method.

In addressing this issue, interpreters of the CISG must be conscious of the mandate in Art. 7(1) to have regard to the Convention's international character and to promote uniformity in its application. Although Bonnell's model is not the same as resorting to rules of private international law, the temptation to adopt a domestic law analysis of the problem should be resisted. Tribunals must recognize the uniquely international perspective, in International Sale of Goods: Del Rochar, Lecture 04 (P. Sunaric & P. Vollen eds., 1998), arguing that "the rules contained in the Convention are only supplementary for those cases where parties did not provide otherwise in their contracts." Id.

According to this premise, it is logical to conclude that in case of conflict between the parties' autonomy and any other general principle of the Contracting States, the future always prevails. See E. Albers, Franz Steiner - "Rights and Obligations of the Seller" in Wouter van Baren (ed.), 1998 Interim Commentary on the Uniform Law for International Sales (London: Kluwer), at 33, 34, where the author draws the same conclusion: "In case of a conflict between the contract and the Convention, it is contract - not the Convention - that controls." Id. Note that this result is "consistent with the Uniform Commercial Code where principles of 'good faith' and 'reasonableness' prevail over party autonomy." U.C.C. § 1-203(4). See also Krieger, Guide to Practical Applications, supra note 58, at 115.

Bonell, General Provisions, supra note 38, at 81.

111Id., at 92.

112See Id. & Maselli, International Sales Law, supra note 19, at 86. See also Sinner, Uniform Interpretation, supra note 54, at 85.
b. General Principles of Comparative Law on Which the CISG Is Based

As was noted earlier, an important distinction must be drawn between those principles extratracted from within specific CISG provisions and the general principles of comparative law on which the CISG is based. The first can be considered as constituting the theoretical framework for the introduction of elements of the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law — as part of the “general principles” on which the CISG is based — into the gap-filling function of Article 7(2).

The CISG is the world’s uniform international sales law. Two more recent documents — the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law (PECL) (revised version 1998) —

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

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

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can be shown that their respective provisions share a common interest. 135

Thus, the UNIDROIT Principles and the PECL could and should help reduce the need to resort to rules of private international law for gap-filling, thus helping maintain the integrity of the CISG's uniform and international application and interpretation.

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

131 See also Peter Schlechtriem, “25 Years CISG – An International Lexicon Frame for Bridging Uniform Law, Legal Principles, Domestic Legislation and International Practice,” 3 Caro-Stud. The CISG and the UNIDROIT Principles and the Uniform Sales Law came from the same well, and there was also some identity of thinkers, for a number of experts who had worked on the Code later joined UNIDROIT working teams. Thus, it is small wonder that key solutions and central concepts of the Code and the UNIDROIT Code share a close relationship. “In his footnote to the above, Schlechtriem states, “It could be assumed that the great tradition of comparative law solutions that went into the sales project.”

132 Restatements can help interpret a law. For instance, the Uniform Commercial Code is the U.S. uniform domestic law and the Restatement has served as its companion. The U.S. enactment of Contracts (second) has a broader scope than the U.C.C., it takes cognizance of insights derived from the text of the U.C.C., from scholarly commentaries on the U.C.C., from cases that have interpreted the U.C.C., Uniform Commercial Code, references to the Restatement of Contracts are frequently encountered. Its examples and explanations of the meaning of terms and concepts are useful. In U.C.C. proceedings, courts and arbitrators refer to the Restatement of Contracts as it helps them reason through the applicable law. See Observations on the use of the PECL, as on and aid to Court research, on the Peace Law Web site at ahttp://pecl.jur.jmu.edu/insight/REPORTS.html.


135 An important caveat to recite to the Principles to fill gaps in the CISG is pointed out by Bessell: “For it has been emphasized that although in this context the relative weight that is given to the general principles and from the primary to the general principles to derive the solution for the specific question to be settled. This latter task could be facilitated by resorting to the UNIDROIT Principles. The only conclusion which needs to be satisfied is that one can apply to either. Which Bessell provides the conceptual framework for resort to the UNIDROIT Principles as expressions of general principles underlying CISG.” Moreover, observations are usually made, especially concerning the role of general principles underlying CISG. It states that these are based on the UNIDROIT Principles, for the purposes of filling gaps. In general, any general principles existing outside of the CISG are not to be considered. In this, in fact, the “Principles” as seen above, their author, among other things, have designated the “Principles” for the purpose of providing a guide to jurisprudence and for

136 This includes, along with the “general” theory that is used here, belongs to Albert H. Kreiner.

137 See Observations on the use of the PECL, as on and aid to Court research, on the Peace Law Web site at http://pecl.jur.jmu.edu/insight/REPORTS.html.

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139 It has been observed that the factors that are set forth in the general principles and from the primary to the general principles to derive the solution for the specific question to be settled. This latter task could be facilitated by resorting to the UNIDROIT Principles. The only conclusion which needs to be satisfied is that one can apply to either. Which Bessell provides the conceptual framework for resort to the UNIDROIT Principles as expressions of general principles underlying CISG. It states that these are based on the UNIDROIT Principles, for the purposes of filling gaps. In general, any general principles existing outside of the CISG are not to be considered. In this, in fact, the “Principles” as seen above, their author, among other things, have designated the “Principles” for the purpose of providing a guide to jurisprudence and for...
would reduce, if not eliminate, the need for recourse to conflict of laws rules in that context.13

The wide recognition of the Principles as a clear expression of "general principles" of private law16 adds legitimacy to the argument for their inclusion in gap-filling

mechanism laid out in CISC Art. 7(2). Fours such a position, and assuming that they satisfy the formal requirements for their use in conjunction with the CISG, the Principles could offer considerable assistance in enabling the uniform interpretation and application of the Convention that the drafters of the CISG had intended.18

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

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

On the other hand, while not invalidating the need to invoke the rules of private international law in the context of Article 7(2), it goes a long way toward strengthening the unification effort. This approach requires reliance upon and an aggressive search for general principles that underlie the Convention. Such principles can (often) be found in international instruments, such as the UNIDROIT Principles and the PECL. These two instruments belong, together with the CISG, to a new international legal order that their respective drafters had envisaged. The interpretative and supplementary functions of these instruments concerning the proper application of the CISG best reflect the objectives of the United Nations, as they were stated in the United Nations, General Assembly Resolution 33/174. The interpretative and supplementary functions of these instruments (e.g., in the UNIDROIT Principles or the PECL) answers to such unresolved matters). Conversely, recourse to the rules of private international law for the same purpose hinders and harrows uniformity. I have argued elsewhere,139 as did many delegates present at the 1990 Vienna Diplomatic Conference, that recourse to rules of private international law should not have been made a part of Article 7(2).

I have argued elsewhere,139 as did many delegates present at the 1990 Vienna Diplomatic Conference, that recourse to rules of private international law should not have been made a part of Article 7(2). Nonetheless, the text is there for all to peruse. The various academic and theoretical objections to this inclusion have been recorded and
have been themselves discussed further, but the main question remains essentially the same: ultimately, can the CISG unify the law of international sales?

The answer to this question is twofold. The CISG indeed has the potential to achieve uniformity and universality. But its potential (and the specific reference to conflict the evidence (i.e., the text and its legislative history) points to a strong, common desire in favor of uniformity, despite evidence of compromise in the final form of the CISG, as found in the relevant compromise in Art. 7(2). The traces of the political differences that remain in the text are, however, important ones in terms of the CISG’s goal of achieving uniformity in the law of international sales. This is because they are arguably capable of turning the CISG into little more than an improved — but ultimately disappointing — guide.

The interpreter called upon to apply the CISG now (and in the future) has a clearly defined, albeit difficult task — to apply the provisions of the Convention according to the specific rules of interpretation contained in Article 7. The relevant textual reference in the absence of general principles, the solution is to be provided in conformity with the that endangers the uniformity of the Convention’s interpretation and application. The Convention’s fundamental general principle of “reasonableness” has a strong bearing on the proper interpretation of all provisions of the CISG, as per Article 7(2). Ketteler148 and Kovecses149 regarding reasonableness as a fundamental principle of the CISG and reading reasonableness into every article of the CISG, whether specifically mentioned in the article or not, is required by virtue of the good faith and uniform law mandate vested in Article 7(1) of the CISG.

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

From what has been written so far, one main conclusion can be drawn: ultimately, it is the interpreter’s task to decide whether the CISG can really become a uniform law that is essentially universal over nationalities and whether any progress has been made since the enactment of the national codes that would have been possible for a new law on sales. Unlike the 1964 Hague Conventions, the 1980 Vienna Convention provides an ideal framework that should permit a positive answer to that question.

148 See Ketteler’s general remarks on “reasonableness,” which include further citations and references, available online at the Parts Web site at https://www.westlaw.com/Philadelphia.html.
149 See Kovecses, supra note 36, at 223.
The relevant textual reference in Article 7(3) loss of the CISG prone to divergent gap-filling (i.e., in conformity with the relevant domestic law applicable according to the rules of private international law). In resolving gaps praeter legem, the proper interpretation of the Convention requires preference to be given to a comprehensive search for a solution provided by the general principles underlying the CISG, rather than the ready application of a domestic law applicable by virtue of the rules of private international law. Only such an approach pays proper regard to the international character of the CISG and can promote uniformity in the Convention’s application.

VIII. CISG — UNIDROIT PRINCIPLES — PECL COMPARATIVE ANALYSIS

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

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

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

PART TWO. CISG—UNIDROIT PRINCIPLES COMPARATIVE EDITORIALS

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

Bojidara Borisova