

# THE FAILURE OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND A PROPOSAL FOR A NEW UNIFORM GLOBAL CODE IN INTERNATIONAL SALES LAW

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Cross-border trade has become the new frontier, where opportunities abound for those able to adapt to the rules of international trade.<sup>1</sup>

The impulse to reduce diversity among the legal systems governing commerce has manifested itself for as long as people have traded across political boundaries.<sup>2</sup>

## I. INTRODUCTION

In an age of unprecedented globalization, the world has become an increasingly “small” place to conduct business.<sup>3</sup> The click of a button can now instantaneously create a contract for the transnational sale of goods.<sup>4</sup> As a result, when commercial disputes arise, it is often unclear in what manner international parties should resolve disagreements and, in doing so, what substantive law should apply.

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\* I want to thank Professor Curtis Pew for all his help regarding international sales law and international commercial arbitration.

<sup>1</sup> V. Susanne Cook, *CISG: From the Perspective of a Practitioner*, 17 J.L. & COM. 343, 343 (1998).

<sup>2</sup> Paul Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 744 (1999).

<sup>3</sup> John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, in REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 2000-2001 130 (Pace Int'l L. Rev. ed., 2002).

Today, information technology and Internet services are changing the face not only of consumer practices, but also that of commercial ones. The dynamic growth of business-to-business electronic commerce has opened wide the road to a single, truly global market like never before. Merchants can now buy and sell in a bigger market with greater speed.

*Id.*

<sup>4</sup> Transactions conducted over the Internet, even though not technically cross-border transactions, should still be considered international when involving parties who live in different countries. Michael Joachim Bonell, *Do We Need a Global Commercial Code?*, 106 DICK. L. REV. 87, 93 (2006) [hereinafter Bonell, *Global Commercial Code*].

International trade requires a separate regulatory scheme due to the fact that the contractual parties themselves are international in nature. Consequently, parties may be subject to any number of substantive laws that govern their contractual dealings. It is therefore necessary to harmonize a set of international rules specifically promulgated for international transactions.

Presently, the United Nations Convention on Contracts for the International Sale of Goods (“CISG” or “Convention”) is the most globally recognized international commercial code.<sup>5</sup> The CISG is a sales instrument created to govern international commerce and replace applicable domestic law governing transnational contracts.<sup>6</sup> However, disagreements regarding the CISG have undermined the drafters’ overall intentions, as the purpose of the Convention was the creation of a uniform law. In particular, disputes have arisen with respect to linguistic inconsistencies between the Convention’s multiple drafts, contradictions within provisions of the CISG,<sup>7</sup> and conflicting judicial interpretations.

The most problematic of these issues has been the variant judicial interpretations of Article 7—the result of ambiguous methodology with regard to the provision’s application.<sup>8</sup> In order to maintain a relatively flexible code, agreeable to various adopting states, the CISG was purposefully left incomplete in many respects.<sup>9</sup> The drafters included Article 7 to fill these “gaps,” stating

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<sup>5</sup> United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. NO. 98-9, 1489 U.N.T.S. 3 U.N. DOC. A/CONF. 97/18 [hereinafter CISG].

<sup>6</sup> The goal of uniformity is evidenced in the CISG preamble, which states that the purpose of the Convention is “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 . . . .” CISG Preamble, *available at* <http://cisgw3.law.pace.edu/cisg/text/preamble.html> (last visited Mar. 20, 2007).

<sup>7</sup> For example, with regard to the inclusion of price, Article 14(1) states that a proposal must be sufficiently definite in that it fixes or provides for a determination of the quality and the price. CISG, *supra* note 5. Article 55 states, however, that where price is not provided by the parties, the price will be that which is generally charged at the time of the contract; acceptable in the trade. *Id.* It is obvious from this conflicting wording that it would be impossible for a court to determine whether a stated price is required for a contract to exist where one part of the code says it must be included but another gives a remedy for a situation where parties fail to agree on that price. *Id.*

<sup>8</sup> See *infra* Part III.A.

<sup>9</sup> Anthony J. McMahon, Note, *Differentiating Between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining “Governed By” in the Context of Article 7(2)*, 44 COLUM. J. TRANSNAT’L L. 992, 999–1001 (2006).

that where the Convention has not addressed a particular issue, the Convention should be interpreted in conformity with the CISG's "international character and to the need to promote uniformity in its application and the observance of good faith in international trade."<sup>10</sup> Unfortunately, the interpretation of domestic law and traditions differs drastically depending on the jurisdiction, especially when good faith is interposed with the formal requirements of an enforceable contract.<sup>11</sup>

Proponents for development of a more stringent global commercial code argue that doing so would provide security and predictability in international litigation.<sup>12</sup> For example, the Uniform Commercial Code ("UCC"),<sup>13</sup> the domestic commercial law in the United States, respects the sovereignty of fifty independent states while preserving a uniform codification of law.<sup>14</sup> Critics, on the other hand, argue that flexible regulations permit the maintenance of international sovereignty,<sup>15</sup> citing the fact that many countries rule solely on the basis of their domestic legal traditions.<sup>16</sup> As such, many jurisdictions, rarely called upon to adjudicate international commercial disputes, will continue to misinterpret international commercial law regardless of any reformation.<sup>17</sup>

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<sup>10</sup> CISG, *supra* note 5, at art. 7

<sup>11</sup> See *id.* at art. 4 (indicating that the code does not address which formal requirements are necessary to complete an enforceable contract).

<sup>12</sup> Ole Lando, *CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law*, 53 AM. J. COMP. L. 379, 384–85 (2005).

<sup>13</sup> Produced by the National Conference of Commissioners for Uniform Sales Laws ("NCCUSL") and American Law Institute ("ALI"), the Uniform Commercial Code is the leading source of commercial law within the United States. It is divided into nine articles, respectively: (One) General Provisions; (Two) Sales; (Three) Negotiable Instruments; (Four) Bank Deposits; (Five) Letters of Credit; (Six) Bulk Transfer and [Revised] – Bulk Sales; (Seven) Warehouse Receipts, Bills of Lading and Other Documents of Title; (Eight) Investment Securities; and (Nine) Secured Transactions. See U. C. C. arts. 1-9 (1977), available at <http://www.law.cornell.edu/ucc/ucc.table.html> (last visited Mar. 20, 2007) [hereinafter UCC].

<sup>14</sup> John Murray, *The Neglect of CISG: A Workable Solution*, 17 J.L. & COM. 365, 366 (1998).

<sup>15</sup> "[I]t could be argued that the creation of international commercial law is the vanishing point of sovereignty in that nation states are becoming increasingly less important in the creation of international commercial law with the growth of regional organizations, non-state actors, and international arbitration." Sandeep Gopalan, *The Creation of International Commercial Law: Sovereignty Felled?*, 5 SAN DIEGO INT'L L.J. 267, 268 (2004). See also McMahon, *supra* note 9, at 1000.

<sup>16</sup> Lando, *supra* note 12, at 386.

<sup>17</sup> See *infra* Part III.D.

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To date, seventy-one nation states have adopted the CISG as the substantive law governing transnational commerce,<sup>18</sup> clearly demonstrating worldwide eagerness to maintain a system of rules and regulations for the sale of goods in international trade. Nevertheless, problems underlying the CISG have led more than thirty percent of these nations to opt out of certain provisions of the Convention, essentially creating a series of “mini codes” instead of a single applicable uniform rule.<sup>19</sup> Similarly, many attorneys have chosen to contractually opt out of the CISG in favor of more familiar laws, such as the UCC, further diluting the Convention’s authority over international trade.<sup>20</sup>

This absence of a consistent and acceptable set of international commercial laws is inimical to international development.<sup>21</sup> Fortunately, there is a “workable solution”<sup>22</sup>—a revolutionary Global Code governing the international sale of goods to harmonize the current state of commercial law. This Global Code would create

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<sup>18</sup> See Table of Contracting States, available at <http://www.cisg.law.pace.edu/cisg/countries/cntries.html> (Mar. 20, 2007) ((Argentina: Jan. 1, 1988) (Australia: April 1, 1989) (Austria: Jan. 1, 1989) (Belarus: Nov. 1, 1990) (Belgium: Nov. 1, 1997) (Bosnia- Herzegovina: March 6, 1992) (Bulgaria: Aug. 1, 1991) (Burundi: Oct. 1, 1999) (Canada: May 1, 1992) (Chile: March 1, 1991) (China (PRC): Jan. 1, 1988) (Columbia: Aug. 1, 2002) (Croatia: Oct. 8, 1991) (Cuba: Dec. 1, 1995) (Cyprus: April 1, 2006) (Czech Republic: Jan. 1, 1993) (Denmark: March 1, 1990) (Ecuador: Feb. 1, 1993) (Egypt: Jan. 1, 1988) (El Salvador: Dec. 1, 2007) (Estonia: Oct. 1, 1994) (Finland: Jan. 1, 1989) (France: Jan. 1, 1988) (Gabon: Jan. 1, 2006) (Georgia: Sept. 1, 2005) (Germany: Jan. 1, 1991) (Greece: Feb. 1, 1999) (Guinea: Feb. 1, 1992) (Honduras: Nov. 1, 2003) (Hungary: Jan. 1, 1988) (Iceland: June 1, 2002) (Iraq: April 1, 1991) (Israel: Feb. 1, 2003) (Italy: Jan. 1, 1988) (South Korea: March 1, 2005) (Kyrgystan: June 1, 2000) (Latvia: August 1, 1998) (Lesotho: Jan. 1, 1988) (Liberia: Oct. 1, 2006) (Lithuania: Feb. 1, 1996) (Luxembourg: Feb. 1, 1998) (Macedonia: Dec. 1, 1991) (Mauritania: Sept. 1, 2000) (Mexico: Jan. 1, 1989) (Moldova: Nov. 1, 1995) (Mongolia: Jan. 1, 1999) (Montenegro: June 3, 2006) (Netherlands: Jan. 1, 1992) (New Zealand: Oct. 1, 1995) (Norway: Aug. 1, 1989) (Paraguay: Feb. 1, 2007) (Peru: April 1, 2000) (Poland: June 1, 1996) (Romania: June 1, 1992) (Russian Federation: Sept. 1, 1991) (Saint Vincent & Grenadines: Oct. 1, 2001) (Serbia: April 27, 1992) (Singapore: March 1, 1996) (Slovak Republic: Jan. 1, 1993) (Slovenia: June 25, 1991) (Spain: Aug. 1, 1991) (Sweden: Jan. 1, 1989) (Switzerland: March 1, 1991) (Syria: Jan. 1, 1988) (Uganda: March 1, 1993) (Ukraine: Feb. 1, 1991) (United States: Jan. 1, 1988) (Uruguay: Feb. 1, 2000) (Uzbekistan: Dec. 1, 1997) (Yugoslavia: Jan. 1, 1988) (Zambia: Jan. 1, 1988)).

<sup>19</sup> *Id.*

<sup>20</sup> See *infra*, Part III.C.

<sup>21</sup> Disa Sim, *The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods* 19, 21, in *REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 2002-2003* 21 (Pace Int'l L. Rev. ed., 2004).

<sup>22</sup> The term “workable solution” was presented by Professor Murray in the context of reevaluating the interpretation of the CISG. See generally Murray, *supra* note 14.

predictability in litigation and provide the unification lacking under the current regime.

The CISG has six official language variations; under the new codification, a single “official version” should be enacted to ensure that the true intention of the drafters is not lost in translation. Second, similar to the committee established for the UCC, creating an international advisory council to govern and interpret the Global Code would ensure that current nation states adopt the changes proposed by this article.<sup>23</sup> This board, with representatives from each adopting nation, would re-evaluate the current Convention to establish an agreeable regulatory scheme for all states while being accountable for amending the Global Code when necessary. Third, just as the Restatements<sup>24</sup> and the comments to the Principles of European Contract Law (“PECL”)<sup>25</sup> are, respectively, the leading explanatory annotations for the United States and European Union, a similar form of systematic commentary should be developed to supplement the Global Code and assist with its interpretation.<sup>26</sup> Lastly, an amalgamation of current civil and common law systems should be implemented to enforce the Global Code in ways similar to an international civil law while ensuring judicial consistency by requiring courts to give deference to other jurisdictions and use previous cases as highly persuasive authority.<sup>27</sup> Such an approach would create a regulatory system respectful of national sovereignty, while also helping to ensure uniform application of the law for the international sale of goods.

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<sup>23</sup> See generally Michael J. Bonell, *A Proposal for the Establishment of a “Permanent Editorial Board” for the Vienna Sales Convention*, in *INTERNATIONAL UNIFORM LAW IN PRACTICE, ACTS AND PROCEEDINGS OF THE 3RD CONGRESS ON PRIVATE LAW HELD BY THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT, 1988)*.

<sup>24</sup> Published by the American Law Institute, the Restatements serve to assist in the interpretation of “black letter law.” Thus far, the Restatements have been published on twenty-two topic areas, including Agency, Torts and Contracts. See *RESTATEMENTS*, available at [http://www.law.harvard.edu/library/services/research/guides/united\\_states/basics/re-statements.php](http://www.law.harvard.edu/library/services/research/guides/united_states/basics/re-statements.php) (last visited Mar. 20, 2007).

<sup>25</sup> The Principles on European Contract Law (“PECL”) represent a scholarly restatement, produced by the Commission on European Contract Law, of the principles of contractual law within the European Union. See *Introduction to the Principles of European Contract Law (PECL)*, [http://frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law/PECL%20engelsk/engelsk\\_partI\\_og\\_II.htm](http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm) (last visited Mar. 20, 2007) [hereinafter PECL].

<sup>26</sup> See *infra* Part V.C.

<sup>27</sup> See *infra* B.

Although academics agree that the CISG is an overall success<sup>28</sup> scholars have continually contradicted themselves by acknowledging that the Convention has not produced the level of uniformity it sought to create.<sup>29</sup> Unlike most scholarly articles, which attempt to reach a uniform interpretation of the CISG, this Note posits that the aspirations of the Convention are an impossible feat under the current system. This article proposes the creation of a uniform Global Code by building upon the current state of the CISG and eliminating the noted flaws of the current Convention.

Part II of this article briefly provides historical background of international sales law and the universal appeal for uniformity. Part III offers an analytical perspective of the failure of the CISG, discussing the shortcomings of the current regulation as an impediment to the Convention's underlying purpose. Part IV establishes guidelines for the creation of a Global Code to regulate international sales law. Finally, Part V recommends various measures to ensure the success of the Global Code where the CISG has failed.

## II. HISTORY OF INTERNATIONAL SALES LAW

Uniform international sales law is not a new concept. As Lord Mansfield stated in 1757, "mercantile law . . . is the same all over the world. For the same premises, the sound conclusions of reason and justice must universally be the same."<sup>30</sup> In fact, the unification of sales law governing international commerce dates back to the Middle Ages and the concept of *lex mercatoria*, "a body of truly international customary rules [that governed] the cosmopolitan community of international merchants who traveled [sic] through the civilised world from port to port and fair to fair."<sup>31</sup>

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<sup>28</sup> See Monica Kilian, *CISG and the Problem with Common Law Jurisdictions*, 10 FLA. ST. J. TRANSNAT'L L. & POL'Y 217, 217 (2001).

<sup>29</sup> See generally Lando, *supra* note 12; Cook, *supra* note 1; Larry DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW J. INT'L L. & BUS. 299 (2004).

<sup>30</sup> *Pelly v. Royal Exchange Assurance Co.*, (1757) 97 Eng. Rep. 343, 346 (K.B.). For an extensive discussion of the history of the law merchant and *lex mercatoria*, see LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* (Fred B. Rothman & Co., 1983).

<sup>31</sup> See generally Clive M. Schmitthoff, *The Unification of the Law of International Trade*, in CLIVE M. SCHMITTHOFF'S SELECT ESSAYS ON INTERNATIONAL TRADE LAW 206 (Chia-Jui Cheng ed. 1968). There are four characteristics of *lex mercatoria* that distinguish the "concept" from other kinds of law. Kilian, *supra* note 28 at 220 (citing Gesa Baron, *Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?* Pace Univ. Website, June 1998, <http://www.cisg.law.pace.edu/cisg/biblio/baron>).

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The concept of *lex mercatoria* recently re-emerged, gaining acknowledgment not only from legal scholars, but by courts and legislatures as well.<sup>32</sup> In the last fifty years, numerous efforts have been made to create a uniform code to govern international commercial law. Ratified in 1964, the Uniform Law for the International Sale of Goods (“ULIS”)<sup>33</sup> and the Uniform Law on the Formation of Contracts for the International Sale of Goods (“ULF”)<sup>34</sup> represent early attempts to create a global code for the international sale of goods. However, because these were not widely adopted,<sup>35</sup> the United Nations Commission on International Trade Law (“UNCITRAL”)<sup>36</sup> combined the ULIS and ULIFS, adopted several changes and created the CISG.<sup>37</sup>

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html (last visited Mar. 20, 2007)). First, it must be transnational. *Id.* Second, it is based on common mercantile customs. *Id.* Third, it is provided by merchants and not judges or administrative bodies. *Id.* Fourth, it is expedient, informal, and final with an overriding principle of contractual freedom. *Id.*

<sup>32</sup> Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183, 187–88 (1994) (citing *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. R'as Al Khaimah Nat'l Oil Co.*, [1987] 3 W.L.R. 1023 (Court of Appeal)). See e.g., Rules Applicable to the Substance of the Dispute, 1 Rv. art. 1054, § 3 (Neth.).

<sup>33</sup> Convention relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 109, reprinted in 13 AM. J. COMP. L. 453 (1964), available at <http://www.unidroit.org/english/conventions/c-ulis.htm> (last visited Mar. 20, 2007) [hereinafter ULIS].

<sup>34</sup> Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 123, reprinted in 13 AM. J. COMP. L. 472 (1964), available at <http://www.cisg.law.pace.edu/cisg/text/ulf.html> [hereinafter ULF].

<sup>35</sup> Because these codes were seen to represent continental Western Europe and not the legal traditions of the rest of the world, the ULF and ULS were adopted by only nine countries: Belgium, Great Britain, Federal Republic of Germany, Gambia, Holland, Israel, Italy, Luxembourg, and San Marino. See Ferrari, *supra* note 32, at 192; see also JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES: THE STUDIES, DELIBERATIONS, AND DECISIONS THAT LED TO THE 1980 UNITED NATIONS CONVENTION WITH INTRODUCTIONS AND EXPLANATIONS (Kluwer 1989) [hereinafter HONNOLD, DOCUMENTARY HISTORY].

<sup>36</sup> Establishment of the United Nations Commission on International Trade Law, G.A. Res. 2205 (XXI), U.N. GAOR, 6th Comm., 21st Sess., 1497th plen. mtg. (Dec. 17, 1966) reprinted in 1 Y.B. UNCITRAL 65 (1966). UNCITRAL was established by the United Nations General Assembly in 1966 with the goal of creating international unification in commercial law. It is currently comprised of sixty member States, elected by the General Assembly, which are representative of the various socioeconomic and legal traditions of the world. In its current state, UNCITRAL has worked on various areas of international law, including: International Commercial Arbitration, the International Sale of Goods (“CISG”), Insolvency, International Payments, International Transport of Goods, Electronic Commerce, Procurement and Infrastructure Development, Penalties and Liquidated Damages, and other texts. See UNCITRAL, <http://www.uncitral.org/uncitral/en/index.html> (last visited Mar. 20, 2007).

<sup>37</sup> The CISG was adopted on April 11, 1980. See CISG, *supra* note 5.

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Outside the realm of international sales law, there have been other examples of international codifications validating a general global desire to create a uniform law for transnational commerce. In particular, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”),<sup>38</sup> the Brussels Convention for the Unification of Certain Rules Relating to International Transportation by Air (“1929 Warsaw Convention”)<sup>39</sup> and the International Chamber of Commerce International Rules for the Interpretation of Trade Terms (“INCOTERMS”)<sup>40</sup> are all considered relative successes in the field of international law.<sup>41</sup>

Effective unification of the law is a generally desirable goal.<sup>42</sup> When conducting international transactions, parties should not be concerned with the “vagaries” of another party’s legal system.<sup>43</sup> Instead, they ought to be subject to a single set of rules and principles. In addition to creating predictability for lawyers and commercial parties, this approach potentially reduces transactional

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<sup>38</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3. The New York Convention was implemented by the United Nations and entered into force on June 7, 1959. Its main purpose is to ensure that courts give effect and enforce arbitral awards issued in other Contracting States. See New York Convention, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html) (last visited Mar. 20, 2007).

<sup>39</sup> Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11. The Warsaw Convention regulates liability involving international air transportation of persons, luggage or goods. See Warsaw Convention, available at <http://www.jus.uio.no/lm/air.carriage.warsaw.convention.1929/doc.html> (last visited Mar. 20, 2007).

<sup>40</sup> International Rules for the Interpretation of Trade Terms 1990 (I.C.C. Publ. No. 560, 1990 ed.). First created in 1936 by the International Chamber of Commerce, the INCOTERMS aid in defining international commercial terms regarding transfer of risk, cost, and the obligations of buyers and sellers. See INCOTERMS, available at <http://www.iccwbo.org/incoterms/id3040/index.html> (last visited Mar. 20, 2007).

<sup>41</sup> Other notable successes include the: Uniform Customs and Practice for Documentary Credits 1993 (International Chamber of Commerce Uniform Customs for Documentary Credits 1993 (I.C.C. Publ. No. 500, 1993 ed.); The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965 20 U.S.T. 361, 658 U.N.T.S. 163); The Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters (Convention on Taking Evidence Abroad in Civil and Commercial Matters, Oct. 26, 1968, 23 U.S.T. 2555, 847 U.N.T.S. 231).

<sup>42</sup> Cf. Stephan, *supra* note 2, at 744 (stating that the benefits of uniform commercial law are minimal).

<sup>43</sup> Philip Hackney, *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?*, 61 LA. L. REV. 473, 475 (2001).

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costs and promotes international cooperation among Contracting States.<sup>44</sup>

### III. THE FAILURE OF THE CISG AS A UNIFORM CODE

In an attempt to substitute one law for the diverse judicial systems of the world, the CISG represents a momentous attempt to create a system of uniformity in international trade.<sup>45</sup> The CISG represents the culmination of over thirteen years of diplomatic negotiations and drafting by representatives wherein sixty-two states worked toward addressing the shortcomings of the ULIS and ULF.<sup>46</sup> However, “[t]he wide participation in drafting the CISG and its wide adoption rate are not sufficient elements for the achievement of uniformity in sales” law.<sup>47</sup> The CISG is very “thin legislation” and there are numerous “gaps” not addressed by the Convention.<sup>48</sup> More importantly, the CISG provides only minimal theoretical guidance as to how the Convention should be interpreted<sup>49</sup> resulting in inconsistent interpretations among adopting states<sup>50</sup>. Thus, commercial parties are routinely opting out of the CISG due to the uncertainty created by the Convention, as gov-

<sup>44</sup> Felemegas, *supra* note 3, at 220; Lars Meyer, *Soft Law for Solid Contracts? A Comparative Analysis of the Value of the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law to the Process of Contract Law Harmonization*, 34 DENV. J. INT'L L. & POL'Y 119, 122–23 (2006) (stating that “more compatible or even uniform laws will create more ‘legal certainty’ among businesses, consumers, lawmakers and legal professionals. This will in turn reduce transaction costs and legal risks, enabling and encouraging more participants to step onto terra incognita and benefit from the economic advantages of global business activity.”).

<sup>45</sup> Felemegas, *supra* note 3, at 167.

<sup>46</sup> Camilla Baasch Andersen, *The Uniform International Sales Law and the Global Jurisconsultorium*, 24 J.L. & COM. 159, 161 (2005) “‘At the United Nations Diplomatic Conference which adopted the CISG, [ ]62 states took part: 22 European and other developed Western states, 11 socialist, 11 South-American, 7 African and 11 Asian countries; in other words, roughly speaking, 22 Western, 11 socialist and 29 third world countries’” (citation omitted).

<sup>47</sup> Felemegas, *supra* note 3, at 221.

<sup>48</sup> “If national law, for example, requires sales prices to be states [sic] in local currency and a contract covered by the Convention refers only to U.S. dollars, does local law invalidate the agreement or may we consider this an acceptable formulaic price provision under the Convention?” Stephan, *supra* note 2, at 776.

<sup>49</sup> See David Balovich, *Time for an International Code*, CREDITWORTHY NEWS (May 12, 2005), <http://www.creditworthy.com/3jm/articles/cw51205.html> (last visited Mar. 20, 2007).

<sup>50</sup> “A review of the recent international case law indicates that many tribunals have missed the mark and have contributed to inconsistent results.” Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 MINN. J. GLOBAL TRADE 105, 129 (1997).

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erning contractual law.<sup>51</sup> Consequently, questions regarding the effectiveness of the Convention have emerged, prompting some scholars to conclude that the CISG actually increases “legal risk” and harms the unification process.<sup>52</sup>

A. Article 7 of the CISG as an Impediment to Uniformity

Article 7 of the CISG is considered the most important provision of the Convention; in fact, some believe that the success of the CISG depends on Article 7.<sup>53</sup> However, because of the provision’s ambiguity and the absence of a clear hierarchal methodology of interpretation, Article 7 has been at the center of challenges to the Convention’s uniformity.<sup>54</sup>

Article 7(1) of the CISG states that “[i]n 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.”<sup>55</sup> Although the purpose of the inclusion of Article 7(1) was to achieve the most expansive level of uniformity,<sup>56</sup> the provision is continually misinterpreted, especially in terms of the definition of good faith.<sup>57</sup>

Legislative history indicates that the inclusion of the good faith principle was a compromise struck between representatives

<sup>51</sup> Cook, *supra* note 1, at 351; Stephan, *supra* note 241, at 776. See also James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales*, 32 CORNELL INT’L L.J. 273, 276 (1999).

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<sup>52</sup> See Steven Walt, *Novelty and the Risks of Uniform Sales Law*, 39 VA. J. INT’L L. 671 (1999). See also Stephan, *supra* note 241, at 779 (calling the CISG a “hollow accomplishment”).

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<sup>53</sup> Koneru, *supra* note 50, at 106.

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<sup>54</sup> See Bailey, *supra* note 51, at 294; see also Andersen, *supra* note 46, at 165; see also Sim, *supra* note 21, at 25. It is inferred that the structure of interpretation under the CISG proceeds as follows: 1) express language of provision; 2) use of general principles to fill any “gaps;” and 3) resort to domestic law. However, even commentators who consider the CISG an overall success acknowledge that a structure of analogical reasoning is only theoretically mentioned by the code and therefore must be inferred from the structure of the Convention. See DiMatteo, *supra* note 29, at 313–14.

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<sup>55</sup> CISG, *supra* note 5, art. 7(1).

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<sup>56</sup> See V. Susanne Cook, Note, *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, 216 (1988). But see Larry DiMatteo, *INTERNATIONAL SALES LAW: A CRITICAL ANALYSIS OF CISG JURISPRUDENCE* 11 (2005). “The fact that Article 7 prefaces its uniformity mandate with ‘regard has to be had’ implies that a standard below strict uniformity in application was envisioned. The uniformity mandate itself indicates that strict uniformity is not a realizable goal.” *Id.*

<sup>57</sup> See Sim, *supra* note 21, at 21.

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who insisted that parties respect a standard of good faith and fair dealing in contracts and those who argued that such an undefined term would lead to inconsistent interpretations.<sup>58</sup> Because the Convention does not provide an express definition of good faith, the concept is varyingly applied based on the circumstances of a particular contract or, more commonly, the needs of a national legal system.<sup>59</sup> For example, attorneys trained in Canadian or British law rarely comprehend the notion of good faith as a result of being accustomed to detailed legal rules.<sup>60</sup>

Similarly, despite the definition of good faith provided under the UCC,<sup>61</sup> American scholars and courts have struggled to apply the term consistently. For example, Professor Farnsworth postulated that the concept should be used simply as a basis to imply various terms contained within a contract.<sup>62</sup> Professor Summers, on the other hand, argued that good faith should be applied to situations where parties themselves have acted in a manner that would be considered “improper.”<sup>63</sup> Finally, Professor Bailey offered a third interpretation, providing that the reference to good faith under Article 7 should serve as a cautionary note to courts to exercise due care before the application of domestic principles when “gap filling” under the CISG.<sup>64</sup>

<sup>58</sup> For a drafting history of Article 7, see HONNOLD, DOCUMENTARY HISTORY, *supra* note 35, at 298–99 (1989). See also Legislative History to Article 7, available at <http://cisgw3.law.pace.edu/cisg/chronology/chrono07.html> (last visited Mar. 20, 2007).

<sup>59</sup> Felemegas, *supra* note 3, at 180.

<sup>60</sup> See Michael G. Bridge, *Does Anglo-Canadian Law Need a Doctrine of Good Faith?*, 9 CANADIAN BUS. L.J. 385 (1987). Compare *Walford v. Miles*, [1992] 2 A.C. 128 (H.L.), where the House of Lords refused to implement a concept of good faith in contractual dealing, with Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 1, 1900, as amended § 242 (stating that parties are bound by a duty of good faith in the performance of contracts), available at [http://bundesrecht.juris.de/englisch\\_bgb/englisch\\_bgb.html#Section%20242](http://bundesrecht.juris.de/englisch_bgb/englisch_bgb.html#Section%20242) (last visited Nov. 25, 2007).

<sup>61</sup> The UCC actually defines the principle of good faith in two ways. Under UCC § 1-201(20) “[g]ood faith” . . . means honesty in fact in the observance of reasonable commercial standards of fair dealing.” Under UCC § 2-103(1)(b) “[g]ood faith” . . . means honesty in fact and the observance of reasonable commercial standards of fair dealing.” See UCC, *supra* note 13.

<sup>62</sup> See E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 679 (1963).

<sup>63</sup> Robert Summers, “Good Faith” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 200 (1968).

<sup>64</sup> Bailey, *supra* note 51, at 295–96. The term good faith itself has also “been variously defined as ‘fairness,’ ‘fair conduct,’ ‘reasonableness,’ ‘reasonable standards for fair dealing,’ ‘good faith and fair dealing,’ ‘community standards of decency, fairness, or reasona-

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Even the plain language of Article 7(1) invites multiple interpretations. If the article is read as, “regard is to be had to . . . the observance of good faith in international trade[,]” it is implied that a court is to impose a standard of good faith directly on the parties.<sup>65</sup> Conversely, if one reads Article 7(1) as “regard is to be had . . . to the need to promote . . . the observance of good faith in international trade[,]” such an interpretation indicates that a court should promote good faith in international trade as a whole, not only under circumstances of the individual case.<sup>66</sup> Although many CISG experts, such as Professors Bonell and Schlechtriem, opine that the principle of good faith is to apply to the conduct of the parties,<sup>67</sup> until an express definition is provided by the Convention and adopted by courts and scholars alike, the term and the CISG will continually be interpreted inconsistently.

In addition, Article 7(2) states,

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.<sup>68</sup>

UNCITRAL included this provision so as to avoid the implication of diverse domestic principles that courts were apt to apply alongside the Convention.<sup>69</sup> After several proposals, the current language of Article 7(2) was adopted, over the objections of numerous delegates; they argued that the use of a “general principles” approach would be impossible to apply due to the

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bleness,’ ‘honesty in fact,’ ‘decent behavior,’ ‘a common ethical sense’ and as a ‘spirit of solidarity.’” Sim, *supra* note 21, at 29 (citations omitted).

<sup>65</sup> Koneru, *supra* note 50, at 139 (reading CISG, art. 7(1)).

<sup>66</sup> *Id.* at 138 (reading CISG, art. 7(1)). “[T]here are basically four possible roles for the doctrine of good faith in the CISG: as a practice of the parties, as a trade usage, as a substantive general principle or as an interpretive tool.” Sim, *supra* note 21, at 51.

<sup>67</sup> See generally Michael Joachim Bonell, *Article 7*, in COMMENTARY ON THE INTERNATIONAL SALES LAW (Cesare Bianca & Michael Bonell, eds., 1987) [hereinafter Bonell, *Article 7*], available at <http://cisgw3.law.pace.edu/cisg/biblio/bonell-bb7.html>; COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 95 (Peter Schlechtriem & Ingeborg Schwenzer eds. 2d ed. 2005) [hereinafter Schlechtriem, COMMENTARY]. See also Carolina Saf, *A Study of the Interplay Between the Conventions Governing International Contracts of Sale: Analysis of the 1955 Hague Convention on the Law Applicable to Contractual Obligations, the 1980 Rome Convention on Contracts for the International Sale of Goods* (1999) (on file with author).

<sup>68</sup> CISG, *supra* note 5, art. 7(2).

<sup>69</sup> See Secretariat Commentary, *Article 7*, available at <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-07.html>; Schlechtriem Commentary, *supra* note 67, at 93–94.

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impracticality of defining such ideologies.<sup>70</sup> Consequently, whether a particular issue is actually governed by the CISG is intrinsically difficult to determine.

Some general principles are expressly provided by the Convention. For example, parties' freedom to contract<sup>71</sup> and the notion that agreements are not subject to any formal requirements are both clearly established principles.<sup>72</sup> However, most general principles are not explicitly articulated and must be inferred through an analysis of specific provisions or the CISG as a whole.<sup>73</sup> Such examples include a duty to mitigate damages<sup>74</sup> and an inherent standard of reasonableness in commercial transactions.<sup>75</sup>

While civil law systems commonly apply general principles to fill "gaps,"<sup>76</sup> common law jurisdictions typically opt for a more definitive approach, choosing to fill "gaps" with legislative history and legal precedent.<sup>77</sup> Such conflicting ideologies have resulted in discrepancies as to which approach should be used, contributing to further inconsistent judgments as courts refuse to break from domestic tradition.

<sup>70</sup> See Report of the Working Group on the International Sale of Goods, 1st Sess., ¶¶ 56–72, U.N. Doc. A/CN.9/35 (Jan. 1970).

<sup>71</sup> Koneru, *supra* note 50, at 117. The principle of the freedom of contract is analogous to the freedom resulting from the mercantile philosophy of *laissez-faire*. Trakman, *supra* note 30, at 62.

<sup>72</sup> CISG, *supra* note 5, arts. 11, 29(1). See also Bonell, *Article 7, supra* note 67, at 79.

<sup>73</sup> Commentators have gone so far as to state that Article 7(2) creates the possibility that there are no general principles on which the Convention is based. See Amy Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, 8 Nw. J. INT'L L. & BUS. 574, 606 (1988); DiMatteo, *supra* note 29, at 315–16.

<sup>74</sup> JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 155 (2d ed. 1991) [hereinafter HONNOLD, *UNIFORM LAW*].

<sup>75</sup> The standard of reasonableness is a particularly vague term and has been defined differently by courts. See Andersen, *supra* note 46, at 162, n.12 (comparing the "noble month" standard of reasonableness used by the German Supreme Court in Bundesgerichtshof 8 March 1995, BGH VIII 159 (German), with the 14 day standard articulated by the Austrian Supreme Court in Oberster Gerichtshof on 15 October 1998, S2 191/98 (Austria)). Despite the fact that the CISG mentions a standard of reasonableness on 38 separate occasions throughout the Code, no definition or guidance is given as to how the term is to be interpreted. See DiMatteo, *supra* note 29, at 317–18.

<sup>76</sup> HONNOLD *UNIFORM LAW, supra* note 70, at 149; Bonell *Article 7, supra* note 64, at 75–76 (recognizing that the Civil Codes of Austria, Italy, Spain and Egypt all utilize a general principles approach).

<sup>77</sup> Michael Bonell, *General Provisions, in COMMENTARY ON INTERNATIONAL SALES LAW: THE 1980 VIENNA CONVENTION* 3 (Cessare Massimo Bianca & Michael Joachim Bonell eds., 1987) [hereinafter Bonell, *General Provisions*]; Peter Winship, *Commentary on Professor Kastely's Rhetorical Analysis*, 8 Nw. J. INT'L L. & BUS. 623, 635 (1988).

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Moreover, since these principles are open to interpretation, the only way to ensure uniform application is the utilization of other international decisions. Unfortunately, nothing in Article 7, the legislative history or the language of the CISG as a whole provides any guidance as to how much weight to give such “precedent.”<sup>78</sup> Without any regulatory guidance, Article 7 has been applied with extreme flexibility, making it unlikely to contribute to uniform interpretation of the Convention.<sup>79</sup>

### B. *Language Problems*

In an effort to ensure maximum adoption of the CISG among nation states, the Convention was published in six official languages: Arabic, Chinese, English, French, Russian and Spanish—each version considered equally authentic.<sup>80</sup> Although publication in multiple languages both strengthened the Convention’s political internationality and facilitated the passage of the Convention itself,<sup>81</sup> multiple drafts greatly complicate the goal of uniformity as well.

It is impossible to expect that each version of a multi-language treaty precisely corresponds to others.<sup>82</sup> Replicating terms consistently in two languages, let alone six, is a difficult feat.<sup>83</sup> This is exemplified by the Argentinean version of the CISG, which, at adoption, contained a typographical omission in Article 2, that would have made the CISG applicable to consumer sales and other transactions expressly excluded under the Convention.<sup>84</sup>

These problems are further complicated because many terms have different meanings and levels of significance when translated

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<sup>78</sup> Bailey, *supra* note 51, at 293.

<sup>79</sup> *Id.* at 294.

<sup>80</sup> Conference on Contracts for the International Sale of Goods, Vienna, Austria, Mar. 10 to Apr. 11, 1980, *Final Act of the U.N. Conference on Contracts for the International Sale of Goods*, U.N. Doc. A/CONF.97/18 (Apr. 10, 1980), reprinted in 19 I.L.M. 668, 671 (1980). The Pace website provides access to the CISG in both “official” and “unofficial” languages, including Persian and Danish. See Pace Law School, Texts of the CISG, available at <http://www.cisg.law.pace.edu/cisg/text/text.html> (last visited Oct. 1, 2007).

<sup>81</sup> Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & Com. 187, 189–90 (1998) [hereinafter Flechtner, *Several Texts of the CISG*].

<sup>82</sup> Felemegas, *supra* note 3, at 213.

<sup>83</sup> See Blair Crawford, *Drafting Considerations Under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & Com. 187, 189–91 (1988).

<sup>84</sup> Felemegas, *supra* note 3, at 213.

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into other languages. Consider, for example, Professor Volken's description of the adoption of the German language translation of the CISG:

After the international adoption of a new multilateral convention, the German-speaking countries usually meet in order to prepare a common German-language version of the new instrument. Since the French version always serves as the official text in Switzerland, Swiss delegates to the translation meetings must be especially careful to avoid unacceptable discrepancies between the French and the German versions.

With respect to the Vienna Sales Convention, the translation meeting was held in January 1982 in Bonn, and the preparatory draft of the translation was drawn up on the basis of the official English text. At the meeting, three out of four Swiss interventions were raised against deviations from the French version that were considered too far-reaching. The meeting made it clear that in most instances the deficiencies were not due to the basic German draft, but to the fact that the original English and French texts contained discrepancies.<sup>85</sup>

Even Professor Flechtner, an authoritative scholar on the CISG inadvertently misinterpreted Articles 71 and 72 due to linguistic inconsistencies between the French and English texts.<sup>86</sup> If an expert such as Professor Flechtner is capable of such mistakes, it is reasonable to assume that parties less familiar with the intricacies of the CISG will have difficulty interpreting the Convention in a consistent and coherent manner.

### C. "Opting Out" of the CISG

At the outset, CISG also aimed to provide a substantive international law on the formation of contracts that would appeal to both potential signatories and future commercial parties.<sup>87</sup> As a

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<sup>85</sup> Flechtner, *Several Texts of the CISG*, *supra* note 81, at 190 (quoting Paul Volken, *THE VIENNA CONVENTION: SCOPE, INTERPRETATION, AND GAP-FILLING*, IN *INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES* 19, 41 (Petar Sarcevic & Paul Volken eds., 1986)). *See also* Felemegas, *supra* note 3, at 213–14 ("This point is best illustrated when we consider the terms 'offer' and 'acceptance'. These two words are well known legal terms of the common law jurisprudence and carry special weight of legal doctrine in that legal system. . . . When these words are translated in the other official versions, such as Chinese and Arabic, however, their translation only operates on the linguistic level and misses the doctrinal depth of their legal heritage.").

<sup>86</sup> Flechtner, *supra* note 77, at 191–92 (addressing the different standards of constituting fundamental breach under the French and English versions of the CISG).

<sup>87</sup> *See* CISG Preamble, *supra* note 5.

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result, the Convention included various provisions authorizing parties and participating states to exclude certain requirements or the CISG as a whole. Such a system makes uniformity impossible when adopting states and contractual parties are given the ability to choose when and how the governing law will be applicable.

For instance, Article 6 of the CISG states that, “parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.”<sup>88</sup> Obviously, with the goal of creating uniformity in mind, this presents a theoretical conflict with the underlying purpose of the Convention. Similarly, the plain language of Article 6 provides unlimited exclusionary authority under the provision. It is plausible then, that parties could exclude the application of a duty of good faith or even exclude Article 7 in its entirety, which, as previously noted, is considered to be the most important provision in achieving uniformity under the Convention.<sup>89</sup>

Further complications arise in Articles 92 through 96, which permit signatories to make reservations to exclude various portions of the Convention at the time of adoption.<sup>90</sup> Such reservations are especially problematic in reaching uniformity in that over thirty percent of Contracting States have made declarations (some multiple) and Article 92 permits Contracting States to exclude two-

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<sup>88</sup> Article 12 of the CISG states:

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

CISG, *supra* note 5, art. 12.

<sup>89</sup> But see UNIDROIT Principle 1.7, which forbids the exclusion of the duty of good faith and fair dealing in international trade and UCC § 1-301 which precludes parties from disclaiming good faith, diligence, reasonableness and care. See UNIDROIT, Principles of International Commercial Contracts, available at <http://www.unidroit.org/english/principles/contracts/main.htm> (last visited Mar. 20, 2007); UCC, *supra* note 13 § 1-301.

<sup>90</sup> Countries that have made declarations under Articles 92 through 96 include: Denmark, Estonia, Finland, Norway, and Sweden (Article 92); Australia, Canada and Denmark (Article 93); Denmark, Estonia, Finland, Iceland (remarks made), Norway, and Sweden (Article 94); China, Singapore, Slovak Republic, and the United States (Article 95); Argentina, Belarus, Chile, China, Hungary, Latvia, Lithuania, Paraguay, the Russian Federation, and Ukraine (Article 96). See CISG Table of Contracting States, *supra* note 18.

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thirds of the Convention.<sup>91</sup> These reservations obscure interpretation to the extent that courts must not only understand the CISG itself, but also, each contracting state's individualized version of the Convention. As a result of these permissible exclusions, a series of "mini codes" have emerged, creating variations in applicable case law for the interpretation of the CISG. Such measures further diminish the authority of the Convention and contradict the underlying uniformity that the drafters clearly so clearly aspired to create.

#### D. Misapplication of the CISG by Courts

Due to the CISG's ambiguity and deficiency in providing for a hierarchical structure of interpretation, many courts refuse to acknowledge the decisions of their international counterparts, opting instead for a "homeward trend" approach, applying familiar domestic law.<sup>92</sup> For example, although the Court, in *Italdecor SAS v. Yiu Industries*,<sup>93</sup> recognized that the CISG governed a dispute between an Italian buyer (Italdecor) and a Chinese Seller (Yiu Industries), the Italian court examined only domestic case law in rendering its decision and improperly interpreted what would have constituted a fundamental breach under the CISG.<sup>94</sup> Similarly, in *Delchi Carrier S.P.A v. Rotorex Corp.*,<sup>95</sup> the U.S. court rejected the application of international case law and instead looked to the UCC and its domestic interpretations for guidance.<sup>96</sup>

Despite the voluminous amount of international trade and early support for the CISG, the United States has been one of the leading countries in misapplications of the Convention's provisions.<sup>97</sup> In particular, problems have emerged from: the U.S.

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<sup>91</sup> Under Article 92, Contracting States may "opt out" of either Part II (Articles 14–24) or Part III (Articles 25–88) of the Convention, which mainly govern contract formation and obligations arising from contract. See CISG, *supra* note 5, art. 92.

<sup>92</sup> Kilian, *supra* note 28, at 226.

<sup>93</sup> *Italdecor SAS v. Yiu's Industries (H.K.) Ltd.*, Corte app. di Milano [Regional Court of Appeals][CA] Mar. 20, 1998 (It.), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980320i3.html#ct> (last visited Mar. 20, 2007).

<sup>94</sup> For a detailed analysis of the *Italdecor SAS* decision, see Angela Maria Romito & Charles Sant'Elia, *Italian Court and Homeward Trend*, 14 PACE INT'L L. REV. 179 (2002).

<sup>95</sup> *Delchi Carrier S.P.A v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995).

<sup>96</sup> *Id.* at 1028 (stating that "[c]aselaw [sic] interpreting analogous provisions of Article 2 of the Uniform Commercial Code . . . may also inform a court where the language of the relevant CISG provisions tracks that of the UCC.").

<sup>97</sup> Many European courts have interpreted the CISG in a "correct" manner as most CISG cases originate in central Europe due to the region's prior experience with the ULIS and UFLIS. A study of the United States case law, on the other hand, has shown that in

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courts' continued insistence on the application of UCC principles not relevant to the CISG; misuse of the parol evidence rule; and failure to acknowledge that the Convention applies in a specific case.<sup>98</sup> For example, in *Beijing Metals & Minerals v. American Business Center, Inc.*,<sup>99</sup> a Chinese party (Beijing) entered into a contract with an American company (American Business Center) to supply weightlifting equipment. At trial, American Business Center offered that the contract had been orally modified as a defense to its failure to pay. The Court, however, applied the American parol evidence rule without any analysis of the CISG and thereby incorrectly rejected the oral modification, despite the fact that the CISG expressly permits such amendments under Article 29.<sup>100</sup>

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evaluating forty American decisions, thirty-six were incorrectly decided. Ole Lando, Case Comment, *Principles of European Contract Law and UNIDROIT Principles: Moving from Harmonisation to Unification?* 8 UNIF. L. REV. N.S. 123, 125 (2003). See also John O. Honnold, *The Sales Convention: From Idea to Practice*, 17 J. L. & COM. 181, 181–86 (1998) [hereinafter Honnold, *From Idea to Practice*]; Felemegas, *supra* note 3, at 340–47; Hackney, *supra* note 43, at 480.

<sup>98</sup> The CISG's regulation of U.S. trade is readily apparent when one considers that the United States, Canada, and Mexico have all adopted the CISG, making it the applicable law to international sales under the North American Free Trade Agreement ("NAFTA"). Harry M. Flechtner, Recent Development, *Another CISG Case in the U.S. Courts: The Pitfalls for the Practitioner and the Potential for Regionalized Interpretation*, 15 J.L. & COM. 127, 133 (1995).

<sup>99</sup> *Beijing Metals & Minerals Imp./Exp. Corp. v. American Bus. Ctr., Inc.*, 993 F.2d 1178 (5th Cir. 1993).

<sup>100</sup> See *id.* at 1182–83. The Court acknowledged in a footnote that the CISG might apply to the dispute but decided that the application of the parol evidence rule would apply regardless of whether the case fell under the Convention. *Id.* at n.9. Other examples of U.S. courts misconstruing or misapplying the CISG include: *Zapata Hermanos v. Hearthside Baking Co.*, 313 F.3d 385 (7th Cir. 2002) (incorrectly interpreting attorneys' fees under CISG, art. 79); *Raw Materials Inc. v. Manfred Forberich GmbH*, No. 03 C 1154, 2004 U.S. Dist. LEXIS 12510 (E.D. Ill. July 6, 2004) (misinterpreting CISG art. 79 by applying principles of the UCC); *Calzaturificio Claudia, S.n.c. v. Olivieri Footwear, Ltd.*, No. 96 Civ. 8052, 1998 WL 164824 (S.D.N.Y. Apr. 7, 1998) (stating that "Article 2 of the [UCC] may . . . be used to interpret the CISG where the provisions in each statute contain similar language."); *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, No. 95 CIV. 10506, 1997 U.S. Dist. LEXIS 11916 \*15 n.8 (S.D.N.Y. August 11, 1997) (stating that "[e]ven if the Sale of Goods Convention were applicable, it would very likely lead to the same result reached below, insofar as its provision regarding acceptance by performance is similar to the [UCC] adopted in New York."); *GPL Treatment v. Louisiana-Pacific Corp.*, 894 P.2d 470 (Or. Ct. App. 1995) (applying exceptions applicable to the UCC but not permissive under the CISG). For a non-U.S. example of misinterpretation of the CISG, see *Nova Tool & Mold Inc. v. London Industries, Inc.*, [1998] 84 A.C.W.S. (3d) 1089 (Can.) (applying domestic law for interpretation of fundamental breach).

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Furthermore, as a consequence of CISG's ambiguity and resulting misinterpretations, parties and lawyers consistently exclude the CISG as applicable law due to its unpredictability in favor of more definite standards.<sup>101</sup> As one commentator stated:

Even if counsel with such familiarity finds CISG provisions generally desirable, the unreliability of potential interpretations by courts of his own or other Contracting States may suggest that the safest course is to opt for domestic law. . . . [T]he temptation to insist upon the tried, true and familiar UCC may be irresistible.<sup>102</sup>

As a result, unpredictability and divergent interpretations not only continue to make use of the Convention impractical, undermining uniformity in international sales law, but also make it impossible to achieve the goals of the CISG.<sup>103</sup>

#### IV. THE CREATION OF A GLOBAL CODE

In response to increased globalization and foreign investment, reform of the current international sales law is necessary to protect international rights, consistently enforce foreign judgments, and reduce transaction costs in commercial operations.<sup>104</sup> Despite the failure of the CISG in achieving international uniformity in sales law, the Convention provides an invaluable basis for development of a Global Code. However, because the CISG contains no mecha-

<sup>101</sup> "In theory, two identical cases interpreting CISG, one of which is before a U.S. court and the other before a French court, should both reach similar conclusions. There is, however, no mechanism in place that would ensure that they do." Cook, *supra* note 1, at 343.

<sup>102</sup> Murray, *supra* note 14, at 372. See, e.g., Hackney, *supra* note 43, at 480; Kilian, *supra* note 28, at 227.

<sup>103</sup> Although beyond the scope of this article, some commentators have suggested that the Convention's lack of a formal writing requirement is another major complication in international sales law. See Winship, *supra* note 77, at 635. However, a writing requirement must be excluded to ensure maximum adoptability for those Contracting States who have abandoned the statute of frauds. See generally Jacob S. Ziegel & Claude Samson, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods, (Difference with Law of Common Law Provinces)* (July 1981), <http://www.cisg.law.pace.edu/cisg/wais/db/articles/english2.html> (last visited Mar. 20, 2007).

<sup>104</sup> "Globalization of world markets and communication mandates modernization of teaching materials and methodologies particularly in the field of 'Sales.'" LOUIS F. DEL DUCA ET AL., SALES UNDER THE UNIFORM COMMERCIAL CODE AND THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS xxi (1993); Jose Angelo Estrella Faria, *The Relationship Between Formulating Agencies in International Legal Harmonization: Competition, Cooperation, or Peaceful Coexistence? A Few Remarks on the Experience of UNCITRAL*, 51 LOY. L. REV. 253, 272 (2005); BRUNO ZELLER, DAMAGES UNDER THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 9 (2005).

nism for revision or amendment, a new codification is necessary to advance regulatory commercial law in accordance with modern needs.<sup>105</sup>

A. *The Use of the UCC as a Guide in the Creation of the Global Code*

In the United States, fifty independent jurisdictions have enacted the UCC “to simplify, clarify and modernize the law governing commercial transactions . . . [and] to permit the continued expansion of commercial practices through custom, usage and agreement of the parties.”<sup>106</sup> The UCC is considered a relative success and its achievements represent encouraging precedent in the formation of an international Global Code.<sup>107</sup>

The purpose of the UCC and a Global Code are similar: both are designed to aid in the interpretation of commercial contracts and to overcome differences in the law—the UCC among the fifty U.S. states and the Global Code among the countries of the world.<sup>108</sup> Thus, the UCC can serve as an effective guide for a new Global Code in three ways. First, although no court is bound by a decision in a separate sovereign state, courts interpreting the UCC often defer to other jurisdictions that have interpreted the Code. As the Alaska Supreme Court stated:

Although precedent from other jurisdiction is, of course, not binding upon us, we nonetheless are mindful of the fact that a basic objective of the Uniform Commercial Code is to promote national uniformity in the commercial arena and that this objective would be undermined should we decline to follow the stated intent of the Code’s drafters and the reasoned decisions of a number of other jurisdictions.<sup>109</sup>

Such respect for persuasive authority not only ensures consistent commercial regulation, it creates predictability in the law, which is one of the main contributing factors to the success of the UCC.

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<sup>105</sup> It is necessary for the Global Code to contain language delegating authority as to how the Code can be amended or revised if needed.

<sup>106</sup> UCC, *supra* note 13, § 1-102.

<sup>107</sup> Bonell, *Global Commercial Code*, *supra* note 4, at 88.

<sup>108</sup> See Honnold, *From Idea to Practice*, *supra* note 97, at 182; HENRY GABRIEL, PRACTITIONER’S GUIDE TO THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) AND THE UNIFORM COMMERCIAL CODE (UCC) 28 (1994).

<sup>109</sup> *Escrow Closing and Consulting ABM, Inc. v. Matanuska Maid, Inc.*, 659 P.2d 1170, 1172 (Alaska 1983).

Second, in order to avoid any ambiguity in the Code, the UCC contains an official, systematic commentary to aid in its interpretation. A similar approach should be used in the creation of a Global Code, especially considering the relative ease of creating such comments with organizations such as the International Institute for the Unification of Private Law (“UNIDROIT”)<sup>110</sup> having already established similar principles in the international context.<sup>111</sup>

Finally, when the UCC was adopted by individual states, each jurisdiction was free to adopt the law as a whole or modify it. Although these reservations impede uniformity,<sup>112</sup> most of the declarations made under the UCC were only slight variations from the overall code and were mostly insignificant.<sup>113</sup> Due to the reality of diverse legal traditions of the world, the Global Code should take the same approach. If countries refuse to adopt the proposed regulatory scheme, there is little hope in achieving uniformity in international commerce. Nevertheless, it is necessary that any variation permitted under the Global Code is minimal and does not rise to the level of reservations acceptable under the CISG.

### B. *The Creation of an International Advisory Council*

Without an international legislative body to govern international sales law, questions regarding interpretation, modification and accountability would go unanswered. While it would be impossible to establish a truly “official” legislature similar to that of

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<sup>110</sup> International Institute for the Unification of Private, Principles of Commercial Contracts (1994), available at <http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf>. Headquartered in Rome, UNIDROIT is a private organization with the primary purpose of studying and harmonizing international commercial law between States. Since its creation in 1926, UNCITRAL has developed such noteworthy regulations as the Convention on Agency for the International Sale of Goods (1983), the Convention on International Financial Leasing (1988), and the Convention on Stolen or Illegally Exported Cultural Objects (1995). See UNIDROIT, *supra* note 89

<sup>111</sup> Although the UNIDROIT Principles are not actually binding law, the Principles have been widely adopted by both the academic and legal community, providing guideline rules for individual countries to adopt into their own laws for the international sale of goods. See generally Michael Bonell, *UNIDROIT Principles 2004: The New Edition of the Principles of International Commercial Contracts Adopted by the International Institute for the Unification of Private Law*, 2004 UNIF. L. REV. 5 (2004), available at <http://www.unidroit.org/english/publications/review/articles/2004-1-bonell.pdf> (last visited Mar. 20, 2007) [hereinafter UNIDROIT Principles 2004].

<sup>112</sup> See discussion *supra* Part III.C

<sup>113</sup> Bonell, *Global Commercial Code*, *supra* note 4, at 92.

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the English Parliament or the United States Congress,<sup>114</sup> a private international council should be created with the ability to issue advisory opinions and rectify ambiguities within the Global Code.<sup>115</sup>

Critics of this approach have highlighted three objections. First, they argue that getting approval from each member state of the United Nations, to authorize such a body, would be unlikely. Second, they claim that structural complexities seem insurmountable. Third, they assert that because the council would not be politically accountable, there would be no authoritative body to ensure that representatives advance only the principles of the international code and not the goals of private individuals or nation states.<sup>116</sup> Yet, these criticisms ignore the results yielded from similar institutional bodies such as UNIDROIT and the Hague Conference on Private International Law ("Hague Conference"),<sup>117</sup> both considered to be successful as international regulatory authorities.<sup>118</sup>

More importantly, a limited council for international sales law is already in existence and has been issuing advisory opinions for a number of years under the guidance of UNCITRAL.<sup>119</sup> As the creator of the CISG, UNCITRAL is the predominant authority in the field of international sales law, comprised of members of many

<sup>114</sup> See Stephan, *supra* note 2, at 752. One of the benefits of the creation of an "unofficial" council is that it would be "free" from political influence, permitting members to focus on the development of well-reasoned decisions unfettered by outside influence.

<sup>115</sup> This advisory council would not have appellate jurisdiction, *per se*, but would have the ability to provide opinions to influence future decisions. This is especially important as many adopting states would be reluctant to agree to a system that might jeopardize the state's sovereignty. See Sim, *supra* note 21, at 86–87.

<sup>116</sup> Felemegas, *supra* note 3, at 263; Meyer, *supra* note 44, at 134.

<sup>117</sup> The Hague Conference was established in 1893. Like UNCITRAL and UNIDROIT, the purpose of the Hague Conference is to unify the rules of private international law. It is currently comprised of over sixty member States including the United States and all members of the European Union. Recent accomplishments include the Convention of 25 October 1980 on International Access to Justice, the Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods, and the Convention of 5 July 2006 on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary. See Hague Conference on Private International Law, [http://www.hcch.net/index\\_en.php](http://www.hcch.net/index_en.php) (last visited Mar. 20, 2007).

<sup>118</sup> See Stephan, *supra* note 2, at 753–54. Other organizations that have instituted permanent advisory councils into their procedure include the International Monetary Fund and the Commission on Banking Technique and Practice of the International Chamber of Commerce. Sim, *supra* note 21, at 86.

<sup>119</sup> To date, the CISG Advisory Council has only issued six advisory opinions. See Loukas Mistelis, *CISG-AC Publishes First Opinions*, <http://cisgw3.law.pace.edu/cisg/CISG-AC.html> (last visited Mar. 20, 2007).

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contracting nation states. Nevertheless, because UNCITRAL has other duties outside the realm of international sales law, it would be necessary to expand the current council and establish a “Permanent Editorial Board,” akin to that established under the UCC.<sup>120</sup> Not only could national authorities petition this board for clarifications of the Global Code, but the board would have the ability to propose amendments at UNCITRAL’s yearly meeting to ensure uniform interpretation of the global international sales law.<sup>121</sup>

### C. *The Establishment of an International Court*

Although the goal of an international court is rather ambitious, such a possibility should not be abandoned.<sup>122</sup> The axiomatic advantage of establishing a centralized judiciary would be the development of a unified system to add consistency in the interpretation of the Global Code.<sup>123</sup> However, the creation of such an institution is generally dismissed as an impossible goal, due to the diverse legal traditions of Contracting States, recognition of certain geographical impracticalities, and the immense financial resources required in developing such an institution.<sup>124</sup>

Despite such criticism, it should be noted that countries within the European Union have successfully operated in this manner under the jurisdiction of the European Court of Justice (“ECJ”). When petitioned by national courts of member states, the ECJ has the authority to interpret and administer binding decisions regarding treaties and other European Community law.<sup>125</sup> Similarly, the International Court of Justice (“ICJ”) operates in adjudicating in-

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<sup>120</sup> Murray, *supra* note 14, at 374 (citing Michael Bonell, *A Proposal for the Establishment of a “Permanent Editorial Board” for the Vienna Sales Convention*, in INTERNATIONAL UNIFORM LAW IN PRACTICE, 241 (1988)). However, UNCITRAL has also expressly rejected the creation of a permanent editorial board. See UNITED NATIONS, REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON THE WORK OF ITS TWENTY-FIRST SESSION, U.N. DOC. A/43/17 (1988).

<sup>121</sup> Another possible scenario for an international advisory council would be a compilation of representatives from both adopting Member States and private regulatory bodies such as UNIDROIT, UNCITRAL, and the Hague Convention. Faria, *supra* note 104, at 284.

<sup>122</sup> See generally R. H. Graveson, *The International Unification of Law*, 16 AM. J. COMP. L. 4, 12 (1968).

<sup>123</sup> See Zeller, *supra* note 104, at 5–6.

<sup>124</sup> Felemegas, *supra* note 3, at 262.

<sup>125</sup> See The Court of Justice of the European Communities, <http://curia.europa.eu/en/instit/presentationfr/cje.htm> (last visited Oct. 2, 2007). See also Felemegas, *supra* note 3, at 261 (citing Treaty Establishing the European Community, Nov. 10, 1997, O.J. (C 340) 3 (1997)).

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ternational disputes between Nation States and provides advisory opinions on questions referred by appropriate international agencies.<sup>126</sup> Although the ICJ is not authorized to decide international sales disputes, successes of other international bodies of law support the contention that an International Court could settle commercial law disputes.

#### D. *One Language*

Due to the nationalistic approach of many countries, it is imperative that Contracting States not feel that they are being treated as inferior to their international counterparts to ensure wide implementation of the Global Code. Nevertheless, as noted in Part III, inconsistencies within the multiple language codifications of the CISG have resulted in conflicting interpretations of the Convention.<sup>127</sup> While it is necessary to publish the Global Code in multiple official languages, in order to rectify the current situation, the Global Code must contain language to the effect of: "Should discrepancies arise between official versions of the Code, the English text shall prevail." It has been noted that English is the best form of expression for the Convention due the fact that that negotiations and drafting are essentially carried out in this form.<sup>128</sup> Therefore, to guarantee that the true intent of the drafters consistently prevails, it is crucial that the English version be used to interpret any ambiguities.

#### E. *UNIDROIT Principles*

The UNIDROIT Principles of International Commercial Contracts were created by many of the same individuals who were directly involved in the drafting of the CISG and previous international commercial codes.<sup>129</sup> Under the auspices of

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<sup>126</sup> See International Court of Justice, available at <http://www.icj-cij.org/court/index.php?p1=1> (last visited Oct. 3, 2007).

<sup>127</sup> See *supra* Part III.B.

<sup>128</sup> See Bundesgericht [BGer] [Federal Supreme Court] Nov. 13, 2003 (Switz.), available at <http://cisgw3.law.pace.edu/cases/031113s1.html> (last visited Mar. 20, 2007). Since the negotiations under the CISG took place in English, the same should be true for drafting under the Global Code.

<sup>129</sup> Further, the members of the Working Group who established the UNIDROIT Principles were "chosen with a view to ensuring, on the one side, the widest possible representation of all the major legal systems and regions of the world, and on the other hand, the highest professional qualifications." Bonell, *supra* note 111, at 5. The UNIDROIT principles are available in English, French, German, Italian, Spanish, Chinese, Korean,

UNIDROIT, these scholars constructed principles specifically tailored to international sales law, consistent with the general philosophies of “all legal systems.”<sup>130</sup> The success of such an approach was confirmed by the 15th International Congress of Comparative Law of the Académie Internationale de Droit Comparé, which included twenty “National Reporters” from various countries and regions with intrinsically diverse legal traditions and socio-economic structures.<sup>131</sup> After an analytical evaluation of each system and the UNIDROIT Principles as a whole, the council concluded that “relatively few provisions of the UNIDROIT Principles openly conflict with the respective domestic laws, while the remainder are perfectly consistent . . . and in a number of cases represent a useful compliment or clarification.”<sup>132</sup>

Similarly, the UNIDROIT principles have been widely designated as the “inspiration” of various legislative codifications and were officially declared by the Estonian government to be one of the “most important and authoritative sources of interpretation in the drafting of new law obligations.”<sup>133</sup> Corresponding reliance has occurred within the Civil Code of the Russian Federation of 1995, Hungarian Civil Code, Chinese Contract Law, German Law of Obligations, and the UCC.<sup>134</sup>

Likewise, because of the current, uncertain state of international sales law, commercial parties and courts alike have increasingly chosen the UNIDROIT principles as their governing law for

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Romanian, Russian, Portuguese, Serbian, Turkish and Vietnamese. *See* UNIDROIT, *supra* note 89).

<sup>130</sup> Bonell, *Global Commercial Code*, *supra* note 4, at 97; Zeller, *supra* note 104, at 23. *Cf.* Meyer, *supra* note 44, at 134 (stating that “the Principles attempt to harmonize international law through the comparison and collection of many legal systems, but . . . can never lead to sufficiently practical provisions.”).

<sup>131</sup> The “National Reporters” included representatives from Australia, Belgium, Canada, People’s Republic of China, Denmark, France, Germany, Iran, Israel, Italy, Japan, Mexico, the Netherlands, Romania, Sweden, Switzerland, England, United States, and Vietnam. UNIDROIT Principles 2004, *supra* note 111, at 7.

<sup>132</sup> *Id.*

<sup>133</sup> Felemegas, *supra* note 3, at 297–98.

<sup>134</sup> For example Comment 2 of UCC § 1-302 states that “parties may vary the effect of [the UCC’s] provisions by stating that their relationship will be governed by recognized bodies of rules or principles applicable to commercial transactions. Such bodies of rules or principles may include, for example, those that are promulgated by intergovernmental authorities such as UNCITRAL or UNIDROIT.” UNIDROIT Principles 2004, *supra* note 111, at 8 (citations omitted).

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contractual negotiations.<sup>135</sup> For instance, in 1999, the Center for Transnational Law (“CENTRAL”)<sup>136</sup> conducted an evaluation of legal professionals involved in commercial transactions. CENTRAL concluded that two-thirds of those practitioners who responded had used the UNIDROIT Principles during contractual “negotiati[ons] and drafting”<sup>137</sup> Of that group, one third had used the UNIDROIT Principles to overcome linguistic difficulties, another third for guidance in complex legal disputes, and the remaining third as a model for drafting individual contractual provisions.<sup>138</sup>

The UNIDROIT Principles encompass a wide variety of issues currently unaddressed by the current Convention, which are necessary if uniformity is to be achieved. For example, Article 3.1 of the Principles addresses validity requirements for contracts such as incapacity and illegality. Similarly, Articles 3.8 and 3.9 address issues regarding fraud and duress.<sup>139</sup> Without the inclusion of such necessary legal standards, domestic courts are free to institute what they consider appropriate remedies under their own contractual legal traditions. The adoption of such express and internationally accepted rules would preclude courts from resorting to domestic law for interpretation and greatly facilitate fairness within commercial contracts.<sup>140</sup> Nonetheless, even if recourse to the UNIDROIT Principles is not officially adopted as an interpretive measure, the creators of the Global Code should use the Principles for guidance

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<sup>135</sup> Michael Bonell, *Creating International Legislation for the Twenty-First Century: Do We Need a Global Commercial Code?*, 106 DICK. L. REV. 87, 98 (2001) (citing *The Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 29 F. Supp. 2d 1168 (S.D. Cal. 1998)).

<sup>136</sup> CENTRAL is the research facility attached to the University of Cologne School of Law, Germany. The organization focuses on transnational law as well as alternative dispute resolution in the international context. CENTRAL also maintains a comprehensive website offering access to various international conventions, principles, and case law. See CENTRAL Research Facility Information, [http://www.central.uni-koeln.de/content/e13/e7036/index\\_ger.html](http://www.central.uni-koeln.de/content/e13/e7036/index_ger.html).

<sup>137</sup> Michael Bonell, *UNIDROIT Principles 2004—The New Edition of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law*, UNIF. L. REV. 5, 9 (2004).

<sup>138</sup> *Id.* The UNIDROIT Principles have also been used frequently in both judicial and arbitration proceedings. See, e.g. ICC Award No. 8817 of December, 1997, in ICC International Court of Arbitration Bulletin, 10/2 (1999), 75; ICC Award No. 7110 of April, 1998, in ICC International Court of Arbitration Bulletin, 10/2 (1999), 54; *GEC Marconi Sys. Pty. Ltd. v. BHP Info. Tech. Pty. Ltd.* (2003) 128 F.C.R. 1.

<sup>139</sup> Currently, under the CISG, there are no articles that address similar defenses. See generally CISG, *supra* note 5.

<sup>140</sup> See Bonell, *Global Commercial Code*, *supra* note 4, at 98–99.

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in drafting, to increase consistency within the international legal field.

V. THE INTERPRETATION OF A GLOBAL  
CODE TO ENSURE SUCCESS

One of the leading factors contributing to the failure of the CISG is ambiguity in its methodology of interpretation. Without a strict hierarchical structure of analysis, courts will continue to apply domestic legal principles in their reasoning.<sup>141</sup> Thus, to guarantee the overall success of the Global Code, a more definitive approach for its application must be established.

Like any statutory analysis, the first analytical step requires an examination of the plain language of the provisions. Second, if ambiguities arise, legislative history should be examined to ensure compliance with the true intent of the drafters.<sup>142</sup> Third, to maximize uniform interpretation of international sales law, courts must analyze and defer to relevant decisions from other jurisdictions. Fourth, commentary or something like an official restatement must be consulted to handle any unforeseen difficulties or ambiguities in interpretation. Finally, courts should evaluate academic opinion, not only to further educate themselves in unfamiliar or complex areas of the law, but also to determine which cases were correctly decided in order to give them persuasive effect.

A. *Plain Language and Legislative History*

It is well settled that “[a] benevolent lawmaker’s first objective should be predictability and stability in international commercial relations.”<sup>143</sup> As such, fundamentally, any assessment of statutory interpretation must begin with the plain language of the provision to be supplemented, when necessary, with the legislative history of the drafters.<sup>144</sup> This approach is widely accepted by courts and aca-

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<sup>141</sup> See, e.g., discussion *supra* Part III.A (noting that the use of gap-filling principles is generally accepted in civil law jurisdictions but is not frequently applied under common law systems).

<sup>142</sup> Legislative history is known in the international context as travaux préparatoires. See Zeller, *supra* note 104, at 20–21.

<sup>143</sup> Stephan, *supra* note 2, at 746; see Cook, *supra* note 1, at 349.

<sup>144</sup> Zeller, *supra* note 104 at 22–23 (citing *Fothergill v. Monarch Airlines*, 1977 3 All E.R. 616).

demic commentators alike as a significant resource for ensuring accurate application of the law.<sup>145</sup>

Effective evaluation of the Global Code's express language and legislative history is imperative for two reasons. First, it ensures that the court's interpretation of the Global Code is consistent with the ideals of the drafting council. Second, adopting states have significantly relied on the language articulated by the drafting convention. Without reliance on the express language and legislative history, Contracting States may feel misguided by the existence of conflicting interpretations, undermining confidence in international sales law.

In order to avoid these complications, it is necessary that the drafters take into consideration the failures of the CISG and attempt to clarify any ambiguities. In doing so, a general definition section should be adopted to provide definitive meaning to terms such as "good faith" and "reasonableness."<sup>146</sup> Similarly, the vagaries of Article 7 must be avoided and replaced by the more consistent considerations of interpretation outlined within this section. This would provide significant guidance for courts and commercial parties alike, greatly supporting predictability in litigation and uniformity in international sales law.

#### B. *Use of Case Law as Highly Persuasive Authority*

As stated by the House of Lords in *Scruttons Ltd. v. Midland Silicones Ltd.*, "it would be deplorable if the nations, after protracted negotiations, reach agreement . . . and that their several courts should then disagree as to the meaning of what they appeared to do."<sup>147</sup> The goal of any international commercial code is

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<sup>145</sup> See *id.* at 20; HONNOLD, *UNIFORM LAW*, *supra* note 74, at 136; *Fothergill v. Monarch Airlines*, [1981] A.C. 251 (H.L.); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *Air France v. Saks*, 470 U.S. 392, 396 (1985).

<sup>146</sup> Definitions sections have been utilized by other commercial codes such as the UCC and the PECL. For example, in defining reasonableness, the PECL states that,

[R]easonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trades or professions involved should be taken into account.

PECL, *supra* note 25, §§ 1:301–302, <http://www.cisg.law.pace.edu/cisg/text/reason.html>. See UCC, *supra* note 13, § 1-201. The CISG, on the other hand, does not contain such an informational section, thus prompting courts to use domestic legal traditions in interpreting terms under the Convention. See *Sim*, *supra* note 21, at 79.

<sup>147</sup> *Scruttons Ltd. v. Midland Silicones Ltd.*, 1962 App. Cas. 446, 471 (H.L. 1961)

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to govern the field of international sales law and replace domestic regulatory authority within the field.<sup>148</sup> Should domestic legal principles be applied to transnational sales disputes, substantive uniformity of the Global Code will be unattainable.<sup>149</sup> Thus, the establishment of a significant body of international case law, reflecting notions of compatible international jurisprudence, is essential for the Global Code's success.<sup>150</sup>

Although some commentators argue that divergent interpretations are inevitable due to geographic and administrative impracticalities,<sup>151</sup> such arguments have become moot due to current technological advancements.<sup>152</sup> UNCITRAL, in its twenty-first working session, instituted a system of "national correspondents" to gather and publish international sales decisions from each adopting state in the Case Law Under UNCITRAL Texts (CLOUT) standardized reporting system.<sup>153</sup> Similarly, The Centre

<sup>148</sup> See Bonell, *General Provisions*, *supra* note 77, at 3; Bailey, *supra* note 51, at 286; DiMatteo, *supra* note 29, at 308.

<sup>149</sup> "Where, for instance, there are three equally plausible autonomous interpretations, and two interpreters who construe the same provision independently, the chance that there will be a uniform result only amounts to 33%, or, in other words, the probability of diverging interpretations is 67%." Ferrari, *supra* note 32, at 204.

<sup>150</sup> When courts give deference to other international decisions, they are more likely to interpret international sales law correctly. See, e.g., *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino SPA*, 144 F.3d 1384 (11th Cir. 1998); *Shuttle Packaging Systems v. Jacob Tsonakis*, No. 1:01-CV-691, 2001 US Dist. LEXIS 21630, at \*22 (W.D. Mich. Dec. 17, 2001); *Medical Mktg. Int'l, Inc. v. Internazionale Medico Scientifica, SRL*, No. 93-0380, 1999 U.S. Dist. LEXIS 7380 (E.D. La. May 17, 1999); *Claudia v. Olivieri Footwear Ltd.*, No. 96 Civ. 8052 (HB) (THK), 1998 US Dist. LEXIS 4586, at \*18 (S.D.N.Y. Apr. 6, 1998); *Usinor Industeel v. Leeco Steel Prod.*, 209 F. Supp. 2d 880, 886 (N.D. Ill. 2002); *Sport d'Hiver di Genevieve Culet v. Ets. Louys et Fils*, Trib. Civile of Cuneo [District Court], Sez. 45/96, Jan. 31, 1996 (It.), available at <http://cisgw3.law.pace.edu/cases/960131i3.html> (last visited Mar. 21, 2007); *Gaec des Beauches B. Bruno v. Societe Teso Ten Elsen GmbH & Co KG, CA Grenoble* [Appeals Court] [CA], 94/3859, Oct. 23, 1996 (Fr.), available at <http://cisgw3.law.pace.edu/cases/961023f1.html> (last visited Mar. 21, 2007).

<sup>151</sup> See Murray, *supra* note 14, at 373 (stating "[e]xpecting courts to develop an international perspective by analyzing CISG applications around the world borders on the absurd."). See also Michael F. Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 VA. J. INT'L L. 729, 738 (1986).

<sup>152</sup> Cf. Sim, *supra* note 21, at 89-90 (stating that the "homeward trend" approach will not be eliminated simply by providing greater access to case law using CLOUT and UNILEX.).

<sup>153</sup> REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON THE WORK OF ITS TWENTY-FIRST SESSION 98 (1988). See U.N. Comm. on Int'l Trade Law ("UNCITRAL"), Case Law on UNCITRAL TEXTS (CLOUT), A/CN.9/SER.C/GUIDE/1/Rev. 1 (Feb. 4, 2000). The purpose of CLOUT is to,

[P]romote international awareness of such legal texts elaborated or adopted by the Commission, to enable judges, arbitrators, lawyers, parties to commercial

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for Comparative and Foreign Law Studies in Rome maintains UNILEX, providing access to both case law and an international bibliography concerning international commercial law.<sup>154</sup> Finally, Pace University Law School provides noteworthy access to voluminous research and academic publications regarding the CISG.<sup>155</sup>

This accessibility to international case law would impose a duty on courts to utilize such information in judicial application of the Global Code. Furthermore, courts may access the analytical reasoning behind rendered decisions so that the interpretive methodology of previous courts can be evaluated. The emerging difficult questions are: to which decisions and to what extent should courts give deference in terms of international rulings?

While some scholars have extended the principle so far as to argue for a system of binding precedent under the scheme of a “supernatural stare decisis,”<sup>156</sup> such an approach would more likely

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transactions and other interested persons to take decisions and awards relating to those texts into account in dealing with matters within their responsibilities and to promote the uniform interpretation and application of those texts.

*Id.* at 2. Currently, CLOUT contains information covering the Convention on the Limitation Period in the International Sale of Goods (1974), the United Nations Convention on Contracts for the International Sale of Goods (1980), the UNCITRAL Model Law on International Commercial Arbitration (1985), the United Nations Convention on the Carriage of Goods by Sea (1978), the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1995), the UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994), the UNCITRAL Model Law on Electronic Commerce (1996), the UNCITRAL Model Law on Cross-Border Insolvency (1997), the United Nations Convention on International Bills of Exchange and International Promissory Notes (1988), the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (1991), and the UNCITRAL Model Law on International Credit Transfers (1992). *Id.*

<sup>154</sup> UNILEX provides a detailed collection of international case law covering both the CISG as well as the UNIDROIT Principles. See UNILEX, available at <http://www.unilex.info> (last visited Mar. 21, 2007).

<sup>155</sup> Of all the available online resources, Pace Law School offers the most comprehensive information regarding international sales law, including scholarly articles, advisory opinions, the drafting history of the Convention and interpretive guides for parties. See Pace Law School, CISG Database, <http://www.cisg.law.pace.edu> (last visited Mar. 21, 2007).

<sup>156</sup> See Larry A. DiMatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 *YALE J. INT'L L.* 111, 133 (1997). In creating a code for maximum adoptability by nation states, it should be taken into account that some civil jurisdictions expressly forbid notions of binding precedent. For example, Dutch law expressly forbids binding authority and there has been little, if any, reliance by courts on previously rendered decisions. Felemegas, *supra* note 3, at 254.

undermine than advance the unification effort.<sup>157</sup> Without a hierarchical international court system, it is difficult to determine which courts shall have binding authority.<sup>158</sup> Further, a system of stare decisis would bind other courts to both properly as well as improperly reasoned opinions.<sup>159</sup>

Instead, under the Global Code, courts should analyze a variety of international decisions, determine which were accurately decided, and accord them high deference.<sup>160</sup> Such an approach concurrently maintains respect for international sovereignty while encouraging international comity among adopting nations.<sup>161</sup> This not only furthers the goal of uniformity within commercial sales law, but also potentially creates a “landslide” of international decisions, currently lacking under the CISG.<sup>162</sup>

### C. Supplemental Commentary

Supplemental commentary can offer one of the “most useful aids to interpretation and construction”<sup>163</sup> of statutes. Unfortu-

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<sup>157</sup> See Schlechtriem, COMMENTARY, *supra* note 67, at 98–99; Zeller, *supra* note 104, at 10. R

<sup>158</sup> Certainly, it would not make sense for the Supreme Court of France to be bound by a state court decision in the United States. See Franco Ferrari, *Ten Years of the U.N. Convention: CISG Case Law—A New Challenge for Interpreters?*, 17 J. L. & COM. 245, 259 (1998).

<sup>159</sup> It would also create considerable problems where two, equally authoritative, court opinions contradict each other. Such a situation would force a court interpreting international sales law to choose the reasoning of one jurisdiction over another. Not only does this obviate a lack of uniformity, the political ramifications may undermine notions of international comity.

<sup>160</sup> Due to linguistic obstacles and quantitative difficulties in determining which cases should be addressed, it would be impossible for courts to evaluate each case and opinion. Instead, courts must simply conduct comparative analysis sufficient to support their judicial interpretation.

<sup>161</sup> “[H]armonious international trade is doubtlessly an asset to harmonious relations between states . . .” Kilian, *supra* note 28, at 242. For an extensive discussion regarding international judicial cooperation, see Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191 (2003). R

<sup>162</sup> “[W]hen CISG was first enacted, many observers immediately expected to see a landslide of decisions under CISG. The landslide never occurred since most practitioners and merchants routinely opt out of CISG. To most practitioners and merchants, CISG continues to evoke the general sense of discomfort that stems from the unknown.” Cook, *supra* note 1, at 351. R

<sup>163</sup> Murray, *supra* note 14, at 375 (quoting James J. White & Robert S. Summers, UNIFORM COMMERCIAL CODE 12 (3d ed. 1988)). See also Bailey, *supra* note 51, at 300 (stating that “[i]ncluding this commentary would provide [sic] needed guidance for U.S. courts and lawyers when attempting to understand a legislative scheme with so many civil law elements.”). R

nately, there is currently no form of consistent, *official*, systematic commentary within the field of international sales law.<sup>164</sup> However, “experience has shown that courts defer, and . . . *ought* to defer to the guidance [that] [c]omments offer as to the proper application of Code provisions.”<sup>165</sup>

Commentary provides an invaluable resource for interpreting and understanding the underlying policy considerations of the provision so that the rule can be appropriately applied.<sup>166</sup> This understanding is extremely important for regulations, such as the Global Code, which are created to foster uniformity while remaining malleable. In such codifications, official commentary provides the necessary component to achieve consistency in interpretation—to “bridge” complex statutory language and fact-specific circumstances.<sup>167</sup>

Such an approach is exemplified by various international conventions in their methodology of interpretation, including the 1964 Hague Conventions (ULF and ULIS)<sup>168</sup> and the 1974 Convention on the Limitation Period in the International Sale of Goods (“Limitations Convention”).<sup>169</sup> Similarly, under the PECL, the first tier of interpretation of the regulation is an analysis of the provision itself. The language of the provision is then supplemented with “comments explaining the rule’s purpose and systematic context.”<sup>170</sup> Finally, the comments provide reference to the authority on which the law is based and a comparative analysis of the provision to other legal systems.<sup>171</sup>

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<sup>164</sup> Although the Secretariat Commentary to the CISG exists, it was created a year before the 1980 Vienna Convention and, therefore, is not based on the final text of the Code. As such, the Secretariat Commentary was not officially adopted by the drafters. See *Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat*, U.N. Doc. A/CONF.97/5, reprinted in UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, U.N. Doc. No. A/CONF. 97/19 (E.81.IV.3) (1980).

<sup>165</sup> Sean Michael Hannaway, *The Jurisprudence and Judicial Treatment of the Comments to the Uniform Commercial Code*, 75 CORNELL L. REV. 962, 962 (1990) (discussing the application of the UCC Comments in the interpretation of the Code).

<sup>166</sup> *Id.* at 966.

<sup>167</sup> *Id.* at 967.

<sup>168</sup> See *supra* Part II.

<sup>169</sup> See Convention on the Limitation Period in the International Sale of Goods, available at <http://cisgw3.law.pace.edu/cisg/text/limitation-text.html> (last visited Mar. 21, 2007).

<sup>170</sup> Meyer, *supra* note 44, at 133.

<sup>171</sup> *Id.*

Despite an emphasis on the need for development of an official commentary to supplement the current Convention, it is unclear why this approach has not been more widely adopted.<sup>172</sup> Yet, because the Global Code would contain concepts of interpretation somewhat “unfamiliar” to certain jurisdictions, the development of a certified commentary promises necessary guidance and the tools for uniform application.<sup>173</sup>

D. *Use of Scholarly Articles*

Among civil law jurisdictions, reliance on scholarly articles has long been utilized in interpretation of the law.<sup>174</sup> Conversely, under common law, courts have been reluctant to confer the same weight to academic opinion when resolving disputes.<sup>175</sup> Despite this reservation, there is evidence that common law courts are beginning to shift their approach, especially when faced with legal complexities involving international disputes.<sup>176</sup> Reliance on scholarly opinion is especially useful considering that many authors, such as Professor Bonell, served as active delegates in the drafting of the CISG and can provide useful insight in understanding the principles on which global law is based.

Finally, scholarly opinion is an invaluable asset for providing critical analysis of international sales case law. Should a court misapply the statutory analysis or come to an improper decision, scholars will be quick to flag these rulings. This will serve as a “policing” function to alert future courts that these decisions should be considered less persuasive. Such an approach would not only assist the courts in providing consistent interpretation, but would also concurrently provide the necessary support for practitioners and students eager to understand the intricacies of international sales law.

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<sup>172</sup> Some commentators believe that the decision to forgo adoption of the official commentary is based on the fact that the drafters feared that the textual provisions would be ignored in favor of a more easily read commentary. Winship, *supra* note 77, at 637; Sim, *supra* note 21, at 83 (citing U.N. Doc. A/CONF.97/8 (Jan. 11, 1980)).

<sup>173</sup> Sim, *supra* note 21, at 83.

<sup>174</sup> Ferrari, *supra* note 32, at 208.

<sup>175</sup> Felemegas, *supra* note 3, at 259.

<sup>176</sup> See, e.g., *Usinor Industeel v. Leeco Steel Products, Inc.*, 209 F.Supp.2d 880 (N.D. Ill. 2002) (citing Richard Speidel, *The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 Nw. J. INT’L L. & BUS. 165, 166 (1995) and HONNOLD, UNIFORM LAW, *supra* note 74. See also Ferrari, *supra* note 32, at 209–10.

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## VI. CONCLUSION

In the increasingly global and technologically advanced society in which we live, commercial dealings can cross international borders instantaneously. Regrettably, due to unfamiliarity with international sales law, most commercial parties remain unaware that the CISG is the substantive law governing their transaction. Those who are familiar often opt out of the Convention in favor of a more consistent commercial law such as the UCC or other familiar domestic law.

The CISG has been unsuccessful in reaching its goal of uniformity. This failure can be directly attributed to the ambiguous nature of the Convention, textual inconsistencies within the Convention, and the resulting misapplication by courts.

Thus, it is necessary that a Global Code be promulgated to harmonize the international community. In creating this Global Code, the “general principles” approach must be abandoned in favor of a stricter hierarchical structure of interpretation. If courts continue to utilize domestic legal principles, the Global Code will be short lived.

Many of the necessary components for the creation of a Global Code already exist. The CISG is a perfect starting point for an international commercial code; it simply must be reformed. With UNCITRAL in a position to act as a regulatory council, it can easily issue advisory opinions and provide guidance for interpretation. UNIDROIT has already drafted what could be the official commentary to accompany the new statutory text. Finally, websites such as CLOUT and UNILEX make international decisions easily accessible to both courts and scholars, permitting the evaluation of prior decisions to render well-reasoned, uniform judgments with highly persuasive authority.

For the harmonization of international law to have any effect, courts and practitioners must look beyond the scope of their own domestic traditions and approach law with an international perspective.<sup>177</sup> Fortunately, the academic trend has begun to educate prospective lawyers in legal principles that transcend national bor-

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<sup>177</sup> “It has long been suggested that the common preference of judges for the law of their own country . . . might be explained by a sincere recognition of their not having been trained to cope with foreign law.” Felemegas, *supra* note 3, at 257.

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ders.<sup>178</sup> It is time that the regulatory authority did the same, and a Global Code is the most efficient and effective way to achieve critical uniformity in international commercial law.

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<sup>178</sup> For example, Harvard Law School has recently changed its first-year Juris Doctor curriculum to include classes targeting global legal systems, public international law, international economic law, and comparative law. *See HLS Faculty Unanimously Approves First-Year Curricular Reform*, Oct. 6, 2006, [http://www.law.harvard.edu/news/2006/10/06\\_curriculum.php](http://www.law.harvard.edu/news/2006/10/06_curriculum.php); *cf.* Trakman, *supra* note 30, at 101 (stating that “[n]ational adjudicators are trained primarily in domestic law; they are not necessarily equipped to appreciate the usages of the international community of merchants”).

