Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales

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Introduction

The Convention on Contracts for the International Sale of Goods (CISG)[1] endeavors to increase international trade through the creation of a uniform law of international sales.[2] By all counts, the CISG represents the international community's most ambitious effort to promote efficiency and sustained growth of international trade.[3]

The CISG entered into force for the United States on January 1, 1988.[4] It currently governs the sale of goods between the United States and six of

1. *See* U.N. Doc. A/Conf./97/18 Annex I (Apr. 10, 1980), GAOR, 33d Sess., Supp. 35 (A/35/35) at 217; 52 Fed. Reg. 40 6262-6280 (Mar. 2, 1987); *reprinted in* 19 I.L.M. 668-99 (1980). The United Nations Convention on Contracts for the International Sale of Goods, 15 U.S.C.A. App. (West 1998) [hereinafter CISG or Convention].

2. These goals are evident in the Preamble to the CISG which states in part:

> Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade, [the parties have agreed to the CISG].

Id.

See also Amy A. Kirby, *Punitive Damages in Contract Actions: The Tension Between the United Nations Convention on Contracts for the International Sale of Goods and U.S. Law*, 16 J.L. & COM. 215, 224 (1997) (observing that "[t]he CISG was drafted with the underlying policy of unifying the diverse commercial law systems of the world in an attempt to foster increased international trade and economic growth."). *See generally* Maureen T. Murphy, *United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law*, 12 FORDHAM INT'L L.J. 727 (1989).

The uniform rules of the CISG cover formation of contracts, the obligations of buyer and seller, the passage of risk, and remedies available to both parties in case of breach of contract. *See generally* CISG, *supra* note 1.

3. *See, e.g.*, the North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 [hereinafter NAFTA]; European Union, Single European Act, O.J.L. 169/1 (1987), [1987] 2 C.M.L.R. 741 (amending the Treaty establishing the European Economic Community, Mar. 25, 1957, 28 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-11), in Treaties Establishing the European Communities (E.C. Off'l. Pub. Off. 1987)); Central American Common Market, General Treaty on Central American Integration, Dec. 13, 1960, 455 U.N.T.S. 3; Southern Common Market, Treaty of Ascuncion, Mar. 26, 1991, 30 I.L.M. 1041; Caribbean Community, Treaty Establishing the Caribbean Community, *opened for signature*, July 4, 1973, 947 U.N.T.S. 17 (entered into force Aug. 1, 1973); Andean Pact, Official Codified Text of the Cartegena Agreement Incorporating the Quito Protocol, 28 I.L.M. 1165 (1989); Association of Southeast Asian Nations, *see* Peter Kenevan & Andrew Winden, *Flexible Free Trade: The ASEAN Free Trade Area*, 34 HARV. INT'L L.J. 224 (asserting that although ASEAN began as a political union, modern trends have moved it toward an economic one).

4. *See infra* notes 33-37.

its top ten trading partners,[5] including Canada, Mexico, China and the European Union.[6] Despite the CISG's political and economic significance to the United States, for the past decade, U.S. courts and attorneys have overlooked, misconstrued, and misapplied the terms of the Convention. Most commentators, however, have dismissed the U.S. legal system's recalcitrance and agree that the CISG brings general uniformity to the law of international sales.[7]

5. The CISG governs all the members of NAFTA, as well as most members of the European Union. The CISG governs transactions involving three of the top five trading partners of the United States and six of its top 10 trading partners (this includes Singapore which has also ratified the CISG). Office of Trade & Economic Analysis, *U.S. Aggregate Foreign Trade Data – Table 9* (last modified July 1998) <http://www.ita.doc.gov/industry/otea/usfth/t09.prn>. *See infra* note 34 for a list of all nations which have ratified the CISG.

6. Mexico ratified the CISG on December 29, 1987 (took effect January 1, 1989); Canada ratified the CISG on April 23, 1991 (took effect May 1, 1992). The People's Republic of China ratified the CISG December 11, 1986 (took effect January 1, 1988). The European Union nations that have ratified the CISG are: Austria, December 29, 1987 (took effect January 1,1989); Belgium, October 31, 1996 (took effect November 1, 1997); Denmark, February 14, 1989 (took effect March 1, 1990); Finland, December 15, 1987 (took effect January 1, 1989); France, August 6, 1982 (took effect January 1, 1988); Germany, December 21, 1989 (January 1, 1991); Italy, December 11, 1986 (took effect January 1, 1988); Luxembourg, January 30, 1997 (took effect February 1, 1998); Netherlands, December 13, 1990 (took effect January 1, 1992); Spain, July 24, 1990 (took effect August 1, 1991); Sweden, December 15, 1987 (took effect January 1, 1989). *CISG Contracting States and Declarations Table*, 16 J.L. & COM. 371 (1997) [hereinafter *Table*] (including information on the participants to the CISG and their ratification dates).

7. *See, e.g.*, Volker Behr, *The Sales Convention in Europe: From Problems in Drafting to Problems in Practice*, 17 J.L. & COM. 263, 264 (1998) (stating that "[f]rom the point of view of legislation as well as from the point of view of practical application, the Convention seems to be a success. Moreover, this success may fuel further uniformity as it is already influencing other fields of international trade law."); Ronald A. Brand & Harry M. Flechtner, *Recent Development: CISG: Arbitration And Contract Formation in International Trade: First Interpretations of The U.N. Sales Convention*, 12 J.L. & COM. 239, 239 (1993) (observing that "[t]he acceptance of the rules of CISG by nations with widely differing domestic legal systems located on every inhabited continent holds the promise of a quantum jump in the uniformity of legal rules governing sales transactions, with significant benefits for international trade."); V. Susanne Cook, *CISG: From the Perspective of the Practitioner*, 17 J.L. & COM. 343, 349 (1998) (concluding that "[the] CISG has been a tremendous international success. . . . It has clearly achieved one of its main goals and objectives: the creation of a uniform body of international sales law with almost universal acceptance."); Franco Ferrari, *General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDRIOT Conventions on International Factoring and Leasing*, 10 PACE INT'L L. REV. 157, 157 (1998) (observing that "[a]mong the most important conventions on uniform commercial law in force . . . [is] the 1980 United Nations Convention on Contracts for the International Sale of Goods . . . . The CISG assumes importance due to its great success [at unifying commercial law]"); Francis A. Gabor, *Emerging Unification of Conflict of Laws Rules Applicable to the International Sale of Goods: UNCITRAL and the New Hague Conference on Private International Law*, 7 J. INT'L L. BUS. 696, 725 (1986) (stressing that "[e]ffective unification of international commercial law may only be accomplished on a worldwide basis. . . . One of the most successful accomplishments of this legal process is the adoption of the United Nations Convention on Tracts for the International Sale of Goods."); Michael P. Van Alstine, *Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law*, 37 VA. J. INT'L L. 1, 6 (1996) (concluding that "[i]t can be said with little risk of overstatement that the

This article challenges the belief that the CISG accomplishes its goal of uniformity; instead, this article contends that the CISG is actually an obstacle to uniformity in the law of international sales. The failure of the CISG to create uniformity is the result of the treaty's misguided goal, its character as a multinational treaty, its specific provisions, and its incorporation into the United States as a self-executing treaty. The combination of these elements results in several specific problems which prevent uniformity in both the interpretation and application of the CISG. First, as a self-executing treaty under U.S. law, the CISG is virtually unknown to U.S. courts and practitioners. The result is that the CISG is frequently ignored by both U.S. attorneys and courts. Second, the CISG's rules on interpretation are so obscure that the treaty's own guidelines for producing consistent interpretations fail to promote uniformity. Third, the treaty's provisions regarding contractual freedom lead to bewildering and potentially contradictory results which prevent uniformity in application of the treaty. Fourth, the Convention's failure to define its subject matter prevents uniform application. Finally, the CISG's allowance for certain reservations by nations ratifying the treaty insidiously undermines the treaty's goal of uniformity.

Fortunately, many of these problems can be eliminated or at least ameliorated by three changes: U.S. federal legislation, UNCITRAL review of all court decisions involving the CISG, and a broad interpretive approach by courts when called upon to apply the CISG.

Section I of this Article begins with a concise history of the treaty's development. Section II addresses the CISG's nature under U.S. law as a self-executing treaty. Section III analyzes how the specific provisions gov-

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United Nations Convention on Contracts for the International Sale of Goods represents one of history's most successful efforts at the unification of the law governing international transactions.") (Footnote omitted.); Del Pilar Perales Viscasillas, *Recent Development Relating to CISG: Contract Conclusion Under CISG*, 16 J.L. & Com. 315, 315 (1997) (emphasizing that "[the] wide acceptance on the part of states with different social, legal, and economic systems demonstrates the considerable success achieved by the Convention."); Honorable Diane P. Wood, *Regulation in the Single Global Market: From Anarchy to World Federalism?* 23 Ohio N.U. L. Rev. 297, 302 (1996) (writing that "[i]n the area of private law, harmonized or uniform global rules have also been evolving. One of the most successful examples is the United Nations Convention on Contracts for the International Sale of Goods . . . ."); Maureen T. Murphy, Note, *United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law*, 12 Fordham Int'l L.J. 727 (1989) (discussing the unifying effects of the CISG on international contract law). *Cf.* 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, 216 (1998) (mentioning that "compared to the 'Babel of diverse domestic legal systems' that it replaced, the Convention represents vast progress towards a uniform international sales law. However, it does not and could not achieve *perfect* uniformity.") (emphasis added). *See also* Bradley J. Richards, Note, *Contracts for the International Sale of Goods: Applicability of the United Nations Convention*, 69 Iowa L. Rev. 209, 216 (1983) (concluding that "[t]he widespread support for the CISG foreshadows the ultimate success of the long-standing effort to unify important aspects of international trade law."); A. H. Herman, *Business and the Law: Handle with Care - A.H. Hermann on Some Pitfalls of Foreign Trade under the Vienna Convention*, Fin. Times, Sept. 21, 1993 (concluding that "[the CISG represents the] biggest success so far achieved by inter-governmental attempts at unification of commercial laws.").

erning interpretation of the CISG undermine its goal of uniformity. Section IV analyzes how the treaty's rules on contract formation and choice of law encourage a variety of results rather than uniformity. Section V addresses the confusion caused by the Convention's failure to define "goods." Finally, Section VI examines how individual national reservations to the treaty prevent rather than assist uniformity. The article concludes with a summary of the solutions proposed in the previous sections which will enable the treaty to continue as a worthwhile international effort to harmonize the law of international sales.

I. Historical Background

A. Previous Efforts to Regulate International Sales

The desire for, and effects of, increased trade levels in the twentieth century provided the impetus for the nations of the world to harmonize international sales law.[8] The initial pressure to create an international law of sales arose from the dramatic increase in international trade.[9] The second pressure to harmonize international commercial law came from the realization that harmonization law would further increase the level of international trade.[10]

Nations first recognized the desirability of uniformity in international sales in the 1920s.[11] By 1930 the International Institute for the Unification of Private Law (UNIDROIT), under the auspices of the League of Nations, began specific efforts to establish an international treaty which would harmonize the law of international sales.[12] Though interrupted by the Second World War, that effort continued until the 1960s, when interested nations convened a conference in the Hague in 1964.[13] That conference adopted two uniform laws: the Convention Relating to the Uniform Law on the International Sale of Goods (ULIS),[14] and the Convention relating to a Uniform Law on the Formation of International Contracts for the

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8. *See* THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS: A HANDBOOK OF BASIC MATERIALS 3 (Daniel Barstow Magraw & Reed R. Kathrein, eds., 2d ed. 1990).

9. *See* Hannu Honka, *Harmonization Of Contract Law Through International Trade: A Nordic Perspective*, 11 TUL. EUR. & CIV. L.F. 111, 113 (1996) (observing that "[e]xpanding trade will probably increase the number of international contracts concluded and especially the economic volume involved, and further necessitate the harmonized handling of contractual disputes. This is no novel basis; the same justification underlay the medieval European *lex mercatoria*.")

10. *See* Michael Kabik, *Through the Looking-Glass: International Trade in the "Wonderland" of the United Nations Convention on Contracts for the International Sale of Goods*, 9 INT'L TAX & BUS. LAW 408, 409 (1992).

11. *See* Franco Ferrari, *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writings*, 15 J.L. & COM. 1, 5 (1995).

12. *See* Kazuaki Sono, *The Vienna Sales Convention: History and Perspective*, *in* INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 2 (Petar Sarcevic & Paul Volken eds., 1986).

13. *See id.*

14. Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S 107 [hereinafter *ULIS*].

Sale of Goods (ULF).[15] The 1964 Hague Conventions entered into force in 1972;[16] however, because these treaties are generally considered too far-reaching in their scope, most countries, including the United States, have refused to adopt them.[17]

B. The Creation of the CISG

The failure of the 1964 Hague treaties to gain widespread acceptance prompted the United Nations Commission on International Trade Law (UNCITRAL)[18] to form the Working Group on the International Sale of Goods in 1969 and charge it with the task of drafting the text for a new, more widely acceptable treaty on the international sale of goods.[19] The early discussions in UNCITRAL focused on efforts to revise the two 1964 Hague Conventions: ULF and ULIS.[20] Eventually, after a process of drafting, soliciting comments from U.N. members and international organizations and revising in light of those comments,[21] UNCITRAL adopted the 1978 Draft Convention on Contracts for the International Sale of Goods.[22]

In March 1980 the United Nations convened a conference in Vienna to consider adoption of a treaty based on the 1978 draft.[23] The Vienna conference divided its work between two Committees: the First Committee preparing Parts I-III (Arts. 1-88) of the CISG, the Second Committee preparing Part IV (Arts. 89-101) and the Protocol Amending the Convention on the Limitation Period in the International Sale of Goods.[24] On April 11, 1980, with relatively few amendments to the 1978 draft,[25] the sixty-two

15. 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. 169 (1972) [hereinafter *ULF*].

16. *See* Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE INT'L L. 1, 36 n.140 (1993).

17. Although both treaties are still in force, only Belgium, Germany, Gambia, Israel, Italy, the Netherlands, San Marino and the United Kingdom are party to both. *See American Bar Association Report to the House of Delegates*, 18 INT'L LAW 39, 41 n. 4 (1984).

18. The United Nations created UNCITRAL in 1966 in order to promote "the progressive harmonization and unification of the law of international trade." G.A. Res. 2205, U.N. GAOR, 21st Sess., Supp. No. 16, at 99, U.N. Doc. A/6316 (1966), *reprinted in* [1970] 1 Y.B. UNCITRAL 65, U.N. Doc. A/CN.9/SER.A/1970.

19. *See* U.N. Doc. A/CONF./97/5, at 8-9 (1979).

20. *See* JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 37 (1987).

21. *See* Sono, *supra* note 12, at 5.

22. The Commission adopted the revised texts at its 10th and 11th sessions. 32 U.N. GAOR Supp. (No. 17) para. 35, U.N. Doc. A/32/17 (1977). 33 U.N. GAOR Supp. (No. 17) para. 28, U.N. Doc. A/33/17 (1978). It combined the revised ULF and ULIS into a single Draft Convention on Contracts for the International Sale of Goods. *Id.*, para. 18.

23. *See* Sono, *supra* note 12, at 5.

24. *See* HONNOLD, *supra* note 20, at 38.

25. In researching the 1980 Conference one should note that "all [1980 Conference] references relate to provisions to provisions as they were numbered in the 1978 Draft." *Id.* at 37.

participating countries[26] unanimously adopted[27] the Final Act of the United Nations Conference on Contracts for the International Sale of Goods. In the Final Act the participating nations approved six official CISG texts: Arabic, English, French, Spanish, Chinese and Russian.[28]

Following U.S. Senate approval on October 9, 1986,[29] the United States deposited its ratification of the treaty with the United Nations Secretariat on December 11, 1986.[30] On January 1, 1988, pursuant to the terms of Article 99 of the Convention,[31] the CISG entered into force[32] for eleven countries, including the United States.[33] To date, over fifty nations have ratified the CISG,[34] making it the most significant international treaty on international sales.[35] Indeed, the CISG now constitutes the law governing international sales in countries that account for over two-thirds of international trade.[36]

Although acceptance of the CISG continues to spread, the following sections document how provisions within the CISG actually undermine the Convention's goal of increasing international trade through the creation of a uniform law of international sales.

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26. *See Final Act of the United Nations Conference on the Contracts for the Sale of International Goods, reprinted in United Nations Conference on Contracts for the International Sale of Goods, Official Records* at 176-77, U.N. Doc. A/CONF.97/19 (1981).

27. The adoption of the official text of a Convention (i.e., signing the Final Act of a conference) does not obligate a nation to sign or ratify the treaty represented by that text. *See* J.M. JONES, FULL POWERS AND RATIFICATION 79 (1949).

28. *See* CISG, *supra* note 1, 19 I.L.M. at 671.

29. *See* United Nations Convention on Contracts for the International Sale of Goods, 15 U.S.C.A. App. (West 1998). The United States signed the Convention on August 31, 1981 and transmitted it to the Senate for advise and consent on Sept. 21, 1983. *See* Letter of Transmittal, Sept. 21, 1983, Senate Treaty Document No. 98-9, Message from the President of the United States Transmitting the United Nations Convention on Contracts for the International Sale of Goods, Adopted by a United Nations Conference of Sixty-Two States on April 11, 1980 [hereinafter "Letter of Transmittal"].

30. *See* State Department Notices – 1987, Public Notice 1004. 52 Fed. Reg. 40 (1987).

31. *See* CISG, *supra* note 1, art. 99(1).

32. *See* 52 Fed. Reg. 232 (1987).

33. *See id.* The eleven countries were Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, the United States, Yugoslavia and Zambia.

34. A total of 54 nations have signed the CISG: Argentina, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Burundi, Canada, Chile, China (PRC), Croatia, Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Guinea, Hungary, Iraq, Italy, Latvia, Lesotho, Lithuania, Luxembourg, Mexico, Moldova, Mongolia, Netherlands, New Zealand, Norway, Poland, Romania, Russian Federation, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States, Uruguay, Uzbekistan, Yugoslavia, and Zambia.

35. *See* Kevin Bell, *The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods*, 8 PACE INT'L L. REV. 237, 237 (1996).

36. For example, in 1994, with only 45 signatories, the CISG accounted for almost two-thirds of all world imports and exports of goods. *See* International Monetary Fund, Direction of Trade Statistics Yearbook 2-9 (1995). *See also* Pace University School of Law, Pace Law Library, and the Institute of International Commercial Law website (visited July 20, 1999) <www.cisg.law.pace.edu/index2.html> [hereinafter the Pace website].

II. The CISG's Nature As a Self-Executing Treaty Prevents Uniformity

A. Introduction

Despite the CISG's applicability to every international contract for the sale of goods in North America[37] as well as for most contracts involving the major trading partners of the United States,[38] many U.S. businesses, lawyers and courts have yet to realize that contracts they assume are governed by the Uniform Commercial Code (UCC)[39] are actually governed by the CISG. The dearth of U.S. case law concerning the CISG despite its ten years of applicability to the majority of U.S. international sales transactions is itself evidence of the lack of awareness of the CISG in the United States – to date, only fifteen federal court opinions and two state court opinions have cited the CISG.[40] While other reasons may contribute to this lack of awareness,[41] the treaty's character under U.S. law as a self-executing treaty is probably the main reason U.S. parties are unaware of its existence.

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37. *See supra* text accompanying note 5.
38. *See supra* text accompanying note 6.
39. *See* 1 Ronald A. Anderson, Uniform Commercial Code § 1-101:61 (3d ed. 1996). *See also* CISG, *supra* note 1.
40. *See* Attorneys Trust v. Videotape Computer Products, Inc., 94 F.3d 650 (9th Cir. 1996) (unpublished opinion); Delchi Carrier S.P.A. v. Rotorex Corp., 71 F.3d 1024 (2d Cir. 1995); Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc., 993 F.2d 1178 (5th Cir. 1993); Claudia v. Olivieri Footware Ltd., 1998 WL 164824 (S.D.N.Y. 1998); MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.P.A., 1998 WL 343335 (11th Cir. 1998); Helen Kaminski Pty. Ltd. v. Marketing Australian Products, Inc., 1997 WL 414137 (S.D.N.Y. 1997); Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd., 1997 WL 458785 (S.D.N.Y. 1997); Huntington Int'l Corp. v. Armstrong World Indus., 981 F. Supp. 134 (E.D.N.Y. 1997); Delchi Carrier v. Rotorex Corp., 1994 WL 495787 (N.D.N.Y. 1994); Graves Import Co., Ltd. v. Chilewich Int'l Corp., 1994 WL 519996 (S.D.N.Y. 1994); S.V. Braun, Inc. v. Alitalia-Linee Italiane S.P.A., 1994 WL 121680 (S.D.N.Y. 1994); Filanto S.P.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229 (S.D.N.Y. 1992); Interag Co. Ltd., 1990 WL 71478 (S.D.N.Y. 1990); Orbisphere Corp. v. United States, 726 F. Supp. 1344 (C.I.T. 1989); GPL Treatment, Ltd. v. Louisiana-Pacific Corp., 894 P.2d 470 (Or. App. Ct. 1994), *aff'd*, 914 P.2d 682 (Or. 1996); Promaulayko v. Amtorg Trading Corp., 540 A.2d 893 (N.J. Super. 1988).

See infra note 41 and text accompanying notes 58 to 72. As one author has explained:

> there are other reasons that may account for the under-utilization of the Convention, such as the bargaining power of one of the parties to an international sales transaction to demand application of its own national laws or failure of counsel to raise the issue of application of the Convention at trial.

V. Susanne Cook, *Recent Development Relating to CISG: The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity*, 16 J.L. & Com. 257, 258, n.5 (1997).

Nevertheless, as the court observed in *Filanto*, 789 F. Supp. at 1237,

> there is as yet virtually no U.S. case law interpreting the Sale of Goods Convention . . . [However,] it may safely be predicted that this will change because absent a choice-of-law provision, and with certain exclusions not here relevant, the Convention governs all contracts between parties with places of business in different nations, so long as both nations are signatories to the Convention.

See also CISG, *supra* note 1, art. 1(1)(a).

41. The CISG receives little or no coverage in secondary legal sources. As one commentator has observed:

> Even though its member states nearly quadrupled [within 8 years of its entry into force], its international bibliography reached well over 200 pages, and its commentaries in many languages abound, one may still come across elaborate

Hence, as it currently exists under U.S. law, the CISG does not bring uniformity to the law of international sales but instead fosters disharmony based on ignorance.[42]

B. The Nature of the CISG as a Self-Executing Treaty

Under U.S. law treaties are either self-executing or non-self-executing.[43] Non-self-executing treaties require corresponding federal legislation before they will be binding on U.S. citizens.[44] Self-executing treaties do not require additional federal legislation, and therefore become binding as U.S. law upon completion of the ratification process.[45] Unless the treaty expressly calls for legislative implementation or the subject matter is within the exclusive jurisdiction of Congress, the question of whether a treaty is self-executing is a question left to judicial determination.[46] In making this determination, courts must examine the intent of the parties as manifested within the language of the treaty. The CISG has been recognized by U.S. courts and numerous commentators as a self-executing treaty.[47]

The conclusion that the CISG is self-executing is supported by two aspects of the treaty: legislative history and subject matter.[48] During the sixth session of the UNCITRAL Working Group charged with drafting what would become the CISG, the Working Group decided that the treaty should be drafted so that the provisions would be applicable to international sales contracts without the need of parallel domestic legislation.[49] Therefore, to speed implementation and acceptance, the negotiating parties (which

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treatises on International Sales Law which either do not mention CISG at all or limit themselves to a few lines of reference.

MICHAEL R. WILL, CISG THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: INTERNATIONAL BIBLIOGRAPHY, 1980-1995; THE FIRST 150 OR SO DECISIONS 241 (1995) (footnotes omitted). *See also* DAVID ZASLOWSKY & LAURENCE W. NEWMAN, LITIGATING INTERNATIONAL COMMERCIAL DISPUTES (1996) (which does not even mention the CISG) and RALPH FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM ORIENTED CASEBOOK (3d ed. 1995) (spending less than seven out of 1259 pages on the CISG).

42. *See infra* text accompanying notes 55-60 which discusses *Attorneys Trust* as an illustration of the problems posed by the CISG's obscure existence under U.S. law.

43. *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888).

44. *See id.* (stating that "[i]f the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment.").

45. *See id.*

46. *See* British Caledonia Airways, Ltd. v. Bond, 214 U.S. App. D.C. 335; 665 F.2d 1153, 1160 (1976). *See also* United States v. Postal, 589 F.2d 862, 877 (5th Cir. 1979).

47. *See Delchi Carrier,* 71 F.3d at 1027 (2d Cir. 1995) (stating that "[t]he CISG . . . [is] a self-executing agreement. . ."); *Filanto,* 789 F. Supp. at 1237 (S.D.N.Y. 1992). *See, e.g.,* Richard E. 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) (stating that "[i]n the United States, [the CISG] is a self-executing treaty with the preemptive force of federal law.").

48. Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976) (stating that "[i]n determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse must be had to the circumstances surrounding its execution.").

49. *See* Sono, *supra* note 12, at 4.

included the United States) drafted the CISG to be a self-executing treaty.[50]

The subject matter of the treaty also reveals its nature as a self-executing treaty. With the exception of a few routine diplomatic aspects addressed in the final articles of the treaty,[51] the CISG's focus is devoted entirely to the substantive law regulating the sale of goods between private parties. This characteristic is typical of self-executing treaties.[52] Moreover, unlike a non-self-executing treaty, the CISG does not alter or affect the relationships among the signatory nations in their capacity as sovereign nations.

C. The Problem Created by the Self-Executing Nature of the CISG

Unfortunately, the nature of the CISG as a self-executing treaty interferes with uniform recognition and application of the treaty in the United States because self-executing treaties do not become law in the way that other federal legislation becomes law. Typically, after the President signs a bill that has been passed by both the House and Senate, that law is placed within the appropriate title of U.S. Code and each of its parts is given a section number. This numeration system, and the inclusion of the legislation in the U.S. Code indices, enables courts and lawyers to easily locate the law in question. As a self-executing treaty, however, the CISG needed only Senate ratification to become applicable within the United States. Therefore, the CISG became federal law without any changes, without the addition of individual section numbers, and without being included in the various indices to the U.S. Code.[53] Essentially, the CISG was simply dumped, without introduction or comment, into the Appendix to Title 15 of the U.S. Code.[54] The effect is that one cannot find the CISG in the U.S. Code unless one already knows it exists and where it is located. Further,

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50. *See* Paul Volken, *The Vienna Convention: Scope, Interpretation and Gap-Filling, in* INTERNATIONAL SALE OF GOODS; DUBROVNIK LECTURES, 21 (Peter Sarcevic & Paul Volken eds., 1986) (stating that "[t]he rules of the Vienna Convention are clearly self-executing.").

51. CISG Articles 89-101 address matters such as accession, ratification, declaration of reservations, and denunciation of the treaty. *See* CISG, *supra* note 1, arts. 89-101. Such issues are routinely included in modern treaties, regardless of the subject matter of the treaty as a whole.

52. *See* United States v. Verdugo-Urquidez, 939 F.2d 1341, 1358, n. 17 (9th Cir. 1991) (stating that "[a] self-executing treaty is one which, of its own force, confers rights on individuals, without the need for any implementing legislation."). *See also* Breard v. Pruitt, 134 F.3d 615, 622 (4th Cir. 1998) (stating that "[t]he Vienna Convention is a self executing treaty – it provides rights to individuals rather than merely setting out the obligations of signatories.").

53. Article 93 of the CISG allows nations with political subdivisions to submit the CISG to those subdivisions for piecemeal acceptance. *See* CISG, *supra* note 1, art. 93. Canada, for example, chose this approach and its provinces individually acceded to the CISG. Although the United States was similarly free to submit the CISG for independent approval by each state, the Senate chose to commit the United States as a whole.

54. *See* Richard E. Speidel, *The Impact of Internationalization of Transnational Commercial Law: The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 J. INT'L L. & BUS. 165, 167 (1995) (stating that "Congress did not enact legislation to implement CISG and made no provision for coordination with the domestic law of sales.").

since none of the provisions of the CISG are contained in the indices to the U.S. Code, the individual subjects regulated by the CISG cannot be discovered through traditional legal research methods.

If one does not already know of the CISG, the only way to find the CISG in the U.S. Code is with a computer search. However, merely locating the treaty does not completely reveal its importance because the CISG itself does not state that it is a self-executing treaty. Thus, even if a party locates the CISG within the U.S. Code, not even the most careful reading of the treaty will reveal that the treaty is U.S. law potentially applicable to international sales contracts involving U.S. parties. This problem is illustrated by the case of *Attorneys Trust v. Videotape Computer Products, Inc.*[55] *Attorneys Trust* involved a dispute over a sales contract between a U.S. party and a Taiwanese party. The basis for the dispute is unimportant; what is important is how the attorneys and the 9th Circuit Court of Appeals fumbled with the issue of whether the dispute should be governed by the CISG. On appeal, counsel for the Taiwanese party asserted for the first time that the CISG governed the dispute. The 9th Circuit rejected this claim, stating that according to Federal Rule of Civil Procedure 44.1, it was too late to raise the issue of foreign law and that the law of the forum, California, applied.[56] In making this ruling, the court revealed its total ignorance of the CISG: the CISG is U.S. law, *not* foreign law.[57] Further, application of the CISG would not have led to the application of Taiwanese law as the court believed counsel had suggested.[58] Fortuitously, no harm resulted from the court's ignorance. Since Taiwan has not ratified the CISG, counsel for the Taiwanese party was incorrect in asserting that the CISG governed the dispute.[59] Thus, despite its ignorance of the CISG as U.S. law, the 9th Circuit reached the correct result (that the CISG did not apply to the dispute) for completely incorrect reasons.[60]

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55. *See* Attorneys Trust v. Videotape Computer Products, Inc. 94 F.3d 650 (9th Cir. 1996) (unpublished opinion).

56. *See id.* at 650.

57. As U.S. law, the CISG is also California law. *See infra* text accompanying notes 61-64.

58. *See* Attorneys Trust, 94 F.3d at 650 (stating that "CMC's final attempt to avoid the district court's judgment consists of its assertion that the district court erred because it should have applied the United Nations Convention on Contracts for the International Sale of Goods. That would have led to the application of the law of Taiwan to this case, says CMC. However, this claim is too little too late. Assuming that Taiwan is a party to the Convention, '[a] party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice.' Fed. R. Civ. P. 44.1. The failure to raise the issue results in application of the law of the forum, here California.")

59. This error by the attorneys is not surprising given that the CISG is often overlooked in publications written by and for U.S. lawyers. *See, e.g.*, ZASLOWSKY & NEWMAN, *supra* note 41 (failing to even mention the CISG).

60. The analysis should have been as follows: according to U.S. law, made applicable to the individual states by the Supremacy Clause of the United States Constitution, the CISG applies to all contracts for the sale of goods between parties located in the United States and parties located in nations which have also ratified the CISG. Since Taiwan has not ratified the CISG, the CISG does not govern this transaction.

The inability to identify the treaty as U.S. law drastically reduces the likelihood that courts and lawyers will be able to apply it as intended, as a uniform law. The problem is exacerbated by the fact that, as a treaty, the CISG is the legal equivalent of federal legislation.[61] Hence, by virtue of the Supremacy Clause of the U.S. Constitution,[62] the CISG preempts all conflicting state laws,[63] and all U.S. courts must apply the CISG to issues raised by international sales contracts covered by the CISG. Thus, the CISG supplants the UCC throughout the United States. Since no provision in the treaty identifies the treaty as self-executing and since the treaty is not easily located within the U.S. Code, this uniform law which preempts the UCC in the area of international sales[64] remains both hidden and unknown to courts and practitioners.

Unfortunately, one cannot treat the problem of the CISG's cloistered existence in the U.S. Code as one that will be eventually remedied as word of the law spreads. As a treaty, the CISG is equal in authority to federal law.[65] Changing federal law embodied in a treaty requires the United States either to formally repudiate the treaty[66] or pass subsequent federal legislation which directly conflicts with the treaty's provisions. If subsequent federal legislation unavoidably conflicts with the law embodied in a treaty, the subsequent federal law supersedes the provisions of the treaty as the most recent expression of the legislative will of the United States.[67] However, by virtue of the treaty's existence outside of the regular sequencing of the U.S. Code, it is difficult to know when, if ever, federal legislation conflicts with the CISG. Legislators could easily be unaware that a pend-

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61. *See supra* notes 43-47.

62. U.S. Const. art. VI, cl. 2.

> This Constitution and the Laws of the United Sates which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

63. *See Filanto*, 789 F. Supp. at 1237.

64. The CISG is a detailed set of rules governing numerous aspects of international sales contracts involving U.S. parties including formation of contracts, the obligations of buyer and seller, the passage of risk, and remedies available to both parties in case of breach of contract. *See generally* CISG, *supra* note 1.

65. *See supra* note 43-47.

66. Article 101 of the CISG allows parties to remove themselves from coverage of the treaty. However, since the United States was the most influential party during the Vienna Convention negotiations, and obtained numerous concessions in the final text, it seems highly unlikely that the United States will repudiate the CISG any time soon.

67. *See* Reid v. Covert, 354 U.S. 1, 18 (1957) (stating that "when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of the conflict renders the treaty null."); Chae Chan Ping v. United States, 130 U.S. 581, 602 (1889) (holding that an existing treaty is superseded by subsequent federal law in the event of conflict); Whitney v. Robertson, 124 U.S. 190, 194 (1888) (holding that "[b]y the Constitution a treaty is placed on the same footing . . . with an act of legislation . . . [B]ut if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty . . . is self-executing.").

ing bill is in conflict with the CISG as would courts later called on to apply the CISG.

This problem is particularly acute when one attempts to discern the effects of future legislation which fails to amend the CISG by direct reference. For example, as of this date, there has been no definitive resolution under U.S. law of whether software is a "good" and therefore covered by the UCC.[68] If a significant divergence among U.S. courts develops on this issue, Congress may decide to resolve the conflict by passing legislation declaring software to be a "good" for purposes of the UCC. Application of the "last in time" doctrine would mean that any such federal legislation on software would supersede the CISG in case of conflict. This would raise the question of whether, by declaring software to be a good, Congress intended international software sales to be covered by the UCC rather than the CISG. The goal of the CISG, uniformity of application and result with regard to international sales law, is hardly likely to be achieved in this situation.

The United States may apply the CISG in a manner consistent with other nations in order to achieve a unified international sales law. In this respect, the sales law of the several states must be made to conform to the CISG. This can only be achieved by federal legislation implementing the CISG.

In the past, the United States has used federal legislation as an effective remedy to the problems of implementation associated with self-executing treaties. Such parallel legislation has the advantages of increasing public and judicial awareness of the agreement, reducing the potential for inadvertent conflict with future legislation, and compelling consistent application of the agreement by the several states. For example, Congress passed the Carriage of Goods by Sea Act as a separate federal law embodying the Hague Convention for the Unification of Certain Rules Relating to Bills of Lading. Complex agreements such as the Canadian Free Trade Act (CFTA),[69] the North American Free Trade Act (NAFTA),[70] and the U.S. commitment to the World Trade Organization (WTO)[71] have been accompanied by domestic legislation,[72] and all three are part of the U.S. Code.[73]

68. *See, e.g.*, Micro Data Base Sys., Inc. v. Dharma Sys., Inc., 148 F.3d 649, 654 (7th Cir 1998) (pointing out, in resolving a choice of law question, that the only case to address the issue in Indiana held that software is a service, while the only case to address the issue in New Hampshire held that it is a good); Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 672 (3d Cir. 1991) (holding that "computer software is a good within the Uniform Commercial Code.")

69. *See* United States-Canada Free Trade Agreement, Dec. 22, 1987 - Jan. 2, 1988, U.S.-Can., 27 I.L.M. 281 (1988) [hereinafter CFTA].

70. *See* 19 U.S.C. §§ 3301-3473 (1998).

71. *See* 19 U.S.C. § 3501(9) (1998).

72. To avoid the difficulties attendant with enacting the CFTA, NAFTA, and WTO into separate federal legislation without amendment, the United States negotiated all three treaties under fast-track negotiating authority granted to the President by the House and Senate. Generally speaking, fast-track authority allows the President to negotiate a treaty and submit it to the House and Senate for approval based on a majority vote without the possibility of amendment. Rather than subject a detailed trade treaty to Con-

The CISG would similarly benefit from parallel federal legislation. The CISG has spent the last decade buried in the Appendix to Title 15. As a result, courts have inconsistently applied the CISG, particularly where it supplants the international sales provision of the UCC. New federal legislation would bring the broad provisions of the CISG into the view of the courts, and provide a basis for the unification of international sales law.[74]

III. The Elusive Principles of Interpretation of the CISG

A. Introduction

The CISG will not achieve its goal of uniformity in international sales law unless it incorporates more effective principles of interpretation. The principles of interpretation currently incorporated in the CISG have failed to guide independent national courts to a consistent interpretation of the treaty.

Article 7 contains four principles for interpreting the provisions of the Convention:[75] (1) consideration of the Convention's international character,[76] (2) the Convention's need for uniformity,[77] (3) observation of good faith in interpreting the Convention,[78] and (4) the use of the Convention's implicit general principles to address matters not explicitly covered by the

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gressional approval after negotiations, the House and Senate are allowed to provide feedback to the U.S. Trade Representative during the negotiation process. For a general discussion of the fast-track negotiating process, see generally Frederick M. Abbott, *Foundation – Building for Western Hemisphere Integration*, 17 Nw. J. INT'L L. & BUS. 900, 930 n.63 (1996-97); Lisa Anderson, Comment, *The Future of Hemispheric Free Trade: Towards a Unified Hemisphere?*, 20 HOUS. J. INT'L L. 635, 648 (1998).

73. NAFTA is currently located in 19 U.S.C. §3301-3473 (1998). The rules of GATT and the WTO are located in 15 U.S.C. § 1052, 17 U.S.C. § 104A, 19 U.S.C. §§ 167lb, 1675, 1675b, 1677, 2702, 2905, 3111, 3202, 3501(9), 3511, 3521, 3522, 3531, 3532, 3533, 3534, 3535, 3551, 3591, 3602, 3622, 3623 (1998).

74. *See* Hearing before the Committee on Foreign Relations on Treaty Doc. 98-9, 98th Cong., *Comments of Mr. Frank A Orban, III, in* 1 GUIDE TO THE INTERNATIONAL SALE OF GOODS CONVENTION (44), 303.74 (1997).

> Although [having the individual U.S. states separately enact the Convention] . . . would have the benefit of bringing the Convention before the general American business community from coast to coast, it is probably inefficient. Implementing legislation passed by both Houses of Congress, which repeated the text of the Convention, would probably serve the same educational purpose and be politically more desirable as well as quick.

Id.

75. CISG art. 7 states *in toto*:

> (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
>
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

CISG, *supra* note 1, art. 7.

76. The first part of paragraph (1) of Article 7 contains this criterion. *See id.*

77. *See id.*

78. The concluding words of paragraph (1) of Article 7 contain this criterion. *See id.*

Convention.[79] Moreover, these provisions also establish a specific hierarchy for interpretation of the Convention: if the explicit provisions of the CISG do not provide an answer, a court is to look for guidance from the CISG's unstated general principles. If no answer is found there, a court must turn to domestic law rules "applicable by virtue of the rules of private international law [i.e., the result of a choice of law analysis]."[80]

Unfortunately, the principles of interpretation articulated in Article 7 are vague and difficult to apply. While Article 7 requires that the CISG be interpreted according to "independent international principles"[81] in order to achieve uniform results,[82] it does not adequately explain what those principles mean.

B. Interpreting the Convention According to Its "International Character"

Discerning the meaning of Article 7's command to interpret the Convention according to its "international character" requires tracing the phrase to its origins in the ULIS.[83] Articles 2 and 17 of the ULIS greatly influenced the Working Group in drafting Article 7 of the CISG. In particular, Article 2 of the ULIS states that "[r]ules of private international law [and the domestic laws resulting therefrom] shall be excluded for the purpose of the application of the present Law . . . ,"[84] and ULIS Article 17 states that "[q]uestions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which the present Law is based."[85] The nations which negotiated the ULIS intended these two provisions to create a self-contained law of sales interpreted and applied without reference to national laws.[86] National representatives to the CISG negotiations proposed various modifications,[87] but ultimately the Working Group settled on a revision which eventually became the first part of CISG Article 7: "In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity."[88] Thus,

79. Paragraph (2) of Article 7 contains this criterion. *See id.*

80. *Id.* art. 7(2).

81. *Id.* art. 7(1).

82. *See id.*

83. *See supra* text accompanying notes 11-15.

84. ULIS, *supra* note 14, art. 2. The term "private international law" used in ULIS article 2 refers to the rules of choice of law. Application of choice of law rules would lead to the application of domestic laws to an international sales contract. Hence, the reason why the ULIS and the CISG exclude them, albeit with different wording.

85. *Id.* art. 17.

86. *See* Michael J. Bonell, *Article 7*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW, THE VIENNA SALES CONVENTION 65 (Milan 1987).

87. These modifications included: redrafting ULIS Article 17 to emphasize interpretation of the Convention to foster uniformity in the law of international sales, deleting the provision altogether, expressly stating the contrary position (that domestic laws indicated by private international law would be used in situations not specifically covered by the Convention), and combining these suggestions so that domestic laws indicated by private international law would be used only as a last resort. *See id.* at 67.

88. *See id.*

the legislative history of Article 7 reveals that the drafters included the directive to interpret the Convention according to its "international character" to direct courts to treat the CISG as an autonomous body of law rather than as a place on which to graft their domestic rules and traditions.[89]

The restriction on national courts contained in Article 7 is based on sound reasoning: all legislation, whether created at the domestic or international level, eventually requires interpretation because no legislation can anticipate all the situations in which it might be applied. This poses particular problems for international legislation, for unlike domestic systems in which a court can base its decision on established jurisprudence, an instrument created at an international level lacks an established legal tradition.[90] Article 7(1) therefore establishes that a court is to interpret the CISG not as a purely domestic law but as a unique set of rules which is neither grounded in any one legal tradition nor subject to unifying interpretation by a single high court.[91]

The principle of interpreting the CISG according to its "international character" contained in Article 7(1) poses a challenge for U.S. courts which approach the Convention from the case law-based tradition of the common law rather than the code-based tradition of the civil law.[92] The Second Circuit's decision in *Delchi Carrier SPA v. Rotorex Corp.*[93] is an excellent example of the errors that result from the failure to interpret and apply the Convention as an international, rather than a domestic, body of law. In *Delchi*, a foreign buyer sought damages under the CISG for the seller's delivery of non-conforming goods. The first paragraph of the *Delchi* court's legal analysis demonstrates the differences in approach between the common law background of the court and the civil law perspective of the CISG. Although the Second Circuit recognized that the CISG governed the dispute,[94] the court stated: "Because there is sparse case law under the Convention, we look to its language and to 'the general principles' upon which it is based."[95] This conclusion, which appears to be a routine description of standard common law analysis, contains several errors with respect to the Convention.

First, only if no case law existed *in the United States* would the court's

89. *See id.* at 72-73. *See also* Lisa M. Ryan, *The Convention on Contracts for the International Sale of Goods: Divergent Interpretations*, 4 Tul. J. Int'l & Comp. L. 99, 100 (1995). *See also* Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Convention*, 8 Nw J. Int'l L. & Bus. 601-02 (1988) (concluding that Article 7 requires courts to interpret the CISG "not merely as a part of their own law, but also as a text that is shared by an international community and is the basis for international deliberation . . . .").

90. *See* Bonell, *supra* note 86, at 65.

91. *See id.*

92. *See, e.g.*, Volken, *supra* note 50, at 39-40, which points out differences between the common law and civil law approaches to statutory interpretation.

93. 71 F.3d 1024 (2d Cir. 1995).

94. *See id.* at 1027.

95. *Id.* at 1027-28 (citing CISG art. 7(2)).

they have exhaustively examined the language of the Convention.[104]

Examination of the Convention in order to interpret it according to its international character, however, poses the problem of finding guidance in making such an interpretation. Although an official commentary to the CISG would be helpful in this regard, none exists.[105] Instead, interpreting the Convention according to its international character requires consideration of decisions of tribunals from other jurisdictions,[106] the legislative history of the Convention[107] (as found in the records of its drafts and negotiations[108]) and the Secretariat Commentaries to the 1978 Draft of the Convention.[109] Further, the body of law applying the Convention has been slowly building over the past two decades and can be found in various forms in several sources.[110] In those areas where the Secretariat Commentaries are silent or too brief, the *traveaux preparatoires*, or legislative history, can be discerned through comparison to the 1978 draft of the

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104. *See* Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria, in* Lex Mercatoria and Arbitration (Carbonneau ed., 1998) (stressing that "[even if] a Convention rule is directly inspired by domestic law . . . the court should *not* fall back on its domestic law, but interpret the rule by reference to the Convention."). *Id.* at 188 (emphasis added). *See also* John O. Honnold, *The Sales Convention in Action – Uniform International Words: Uniform Application?*, 8 J.L. & Com. 207, 208 (1988) and Ferrari, *supra* note 103, at 1024-26.

As explained below, analysis of the provisions of the CISG often requires consideration of foreign (and domestic) cases which discuss *the CISG*. *See infra* text accompanying notes 125-29.

105. The closest counterpart to an Official Commentary is the Secretariat Commentaries to the 1978 Draft prepared by the Secretariat of the United Nations. *See infra* text accompanying note 116.

106. Most commentators discuss consultation of foreign cases as part of the "internationality" requirement. *See, e.g.*, Honnold, *supra* note 20, at 114; Albert H. Kritzer, Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods, 108-09 (1989). However, this article treats the need to examine foreign case law as an element of Article 7's second principle, the need for uniformity. The reason for this distinction is that although staying true to the "international character" of the CISG will often result in examination of foreign case law for guidance to determine the meaning of a particular provision, the precise role foreign case law should play and the degree of authority with which it should be considered is more properly treated as an aspect of the Convention's uniformity principle. *See infra* text accompanying notes 125-29.

107. *See* Honnold, *supra* note 20, at 114.

108. The documents of the 1980 Sales Conference which resulted in the CISG all bear the standard U.N. method of designation. For example, the designation "A/CONF.97/C.1/SR.1" indicates that this document refers to the first summary record (SR.1) of the First Committee (C.1) of the ninety-seventh conference called by the United Nations General Assembly (A/CONF.97). *See id.* at 38-39.

109. Although these Commentaries can be frustratingly brief, they are useful in researching the legislative history of the Convention. However, the parties to the Final Act did not adopt them as part of the Convention. Hence, the Commentaries do not refer directly to the CISG but to the articles as they appeared in the 1978 draft of the Convention.

110. The *Journal of Law & Commerce* provides translations of selected foreign CISG cases. UNCITRAL provides summaries of all foreign cases on the CISG at the Case Law on UNCITRAL Texts (CLOUT) website (visited July 20, 1999) <http://www.un.or.at/uncitral/en-index.htm>. The Pace website, *supra* note 36, provides UNCITRAL summaries as well as commentary on most U.S. CISG cases.

Convention,[111] comparison to the 1964 Hague Conventions[112] on the same subjects and the various accounts of the CISG negotiations.[113] Also, since the Convention exists in six official languages,[114] reference to the wording of the other five official texts is appropriate and potentially useful.[115] Finally, the Secretariat Commentaries to the 1978 draft should provide a court with some guidance in interpreting the Convention since they have been described as "perhaps the most authoritative citations to the meaning of the Convention [short of an Official Commentary]."[116] Ultimately, though, courts are left on their own in determining both how to best interpret the command in Article 7(1) to interpret the CISG according to its "international character" and how to apply that principle.

As the *Delchi* and *Lucas Kahn* decisions demonstrate, requiring U.S. courts to abandon the traditional common law approach and examine the Convention's provisions ahead of analogous U.S. law is problematic. Since interpreting the CISG according to its "international character" is essential to the creation of a unified jurisprudence for the CISG, successful application of that approach in any nation mandates that this principle be clearly enunciated.[117] Unfortunately, the most Article 7 does is to vaguely announce the principle, leaving courts to divine its meaning. Without an explicit explanation of how to implement the command to interpret the Convention according to its international character, Article 7 fosters inconsistency because some courts will be more zealous than others in their recognition of the Convention's international character.[118]

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111. *See Commentary on the Draft Convention on Contracts for the International Sale of Goods, in* UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, OFFICIAL RECORDS A/CONF.97/5, 14 (1980) (reproducing the 1978 Draft).

112. *See supra* text accompanying notes 20 and 21.

113. *See, e.g.*, Kritzer, *supra* note 106.

114. *See* penultimate paragraph of CISG, *supra* note 1: "Done at Vienna . . . in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic."

115. *See* Volken, *supra* note 50, at 41 (stating that "sincere efforts towards achieving uniform application of the Vienna Convention may require consulting its texts not only in one but several official languages."). The CISG offers no guidance as to when a court should refer to the various official texts in interpreting the CISG. Since the penultimate paragraph of the CISG declares that all versions are equally authentic, a comparison of the various linguistic nuances in the different texts would seem appropriate if the text is unclear the linguistic version adopted in that country. While it may be too much to expect a court sitting in a country which speaks one of the official languages to defer to a version of the CISG written in another official language, courts located in nations which speak a language other than one of the official languages routinely face this problem.

116. *See* Kritzer, *supra* note 106, at 2.

117. This is particularly true for a nation with a common law tradition.

118. For example, nations within the European Union have been referring to legal activities and judicial opinions in other EU nations for decades. The requirement that courts refer to the decisions of foreign courts has not been received as a novel concept. Thus far, the requirement of Article 7 to examine foreign case law has yet to be embraced by any U.S. court.

C. The Need to Promote Uniformity in Application

Allowing national courts to apply their own established jurisprudence to the Convention would have provided an easily applied mechanism for interpretation of the CISG. However, this approach would have created two new problems: (1) ready application of domestic legal principles would likely preclude much application of the uniform law itself, thereby defeating the purpose of enacting the uniform law, and (2) application of various domestic principles would not lead to uniform interpretation or application of the Convention. To avoid the inconsistency and uncertainty that would result from allowing each forum to interpret the Convention according to its own legal tradition, interpretation of the Convention could not be based on the jurisprudence of any one domestic system.[119] The second element of Article 7(1), the call for interpreting the CISG in light of the need for uniformity, directly addresses this issue. Unfortunately, Article 7 fails to adequately establish this central principle.

The principle of promoting uniformity found in Article 7(1) is obviously closely related to Article 7's initial principle of interpreting the Convention according to its international character.[120] Thus, the initial theoretical question regarding Article 7 is whether these two phrases should be considered separate principles or must be applied as a single concept. As the following analysis demonstrates, these two criteria are actually two facets of a single goal. Article 7's "international character" principle is a prohibition against a parochial approach to interpretation of the Convention. As indicated above, adherence to that principle often requires reference to foreign case law.[121] The following section explains how Article 7's second principle, "the need for uniformity," provides guidance in the use of that foreign case law.

Ascertaining the legal content of Article 7's exhortation regarding the "need to promote uniformity" in interpreting the Convention is problematic. Certainly this criterion emphasizes both the nature and aspirations of the Convention, but most commentators make no distinction between Article 7's emphasis of the need for uniformity and Article 7's call for recognition of the international character of the CISG.[122] In fact, one commentator has stated that "the need to promote uniformity" is no more than "a logical consequence" of interpreting the Convention according to its "international character."[123] However, paragraph 1 of the Secretariat Commentary to the 1978 draft maintains the separateness of the two criteria in Article 7(1) by emphasizing that the criteria are complementary to one another:

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119. *See id.* at 66. *See also* Volken, *supra* note 50, at 41.

120. *See* HONNOLD, *supra* note 20, at 114.

121. *See supra* notes 113 and 115.

122. For example, Professor John Honnold initially distinguishes the two principles but then proceeds to discuss only the legislative history of the criterion regarding the Convention's "international character." *See generally* HONNOLD, *supra* note 20, at 114-23.

123. *See* Bonell, *supra* note 86, at 72.

> National rules on the law of sales of goods are subject to sharp divergencies [sic] in approach and concept. Thus, it is especially important to avoiding differing constructions of the provisions of this Convention by national courts, each dependent upon the concepts used in the legal system of the country of the forum. To this end Article 7 emphasizes the importance, in the interpretation and application of the provisions of the Convention, of having due regard for the international character of the Convention and the need to promote uniformity.[124]

The only way to create a uniform international jurisprudence as Article 7 requires, is for courts to interpret the CISG with an eye toward rendering decisions which are compatible with existing decisions and are likely to be compatible with subsequent decisions.[125] Essentially, the criterion of uniformity incorporates the concept of precedent into the CISG. Consequently, effective application of precedent in an international treaty requires consideration of foreign court decisions.

Although the only way the criterion of uniformity has meaning is through the use of international precedent, neither Article 7 nor its legislative history indicate the degree to which courts should defer to that precedent. Certainly there is no indication that Article 7 establishes that decisions in foreign jurisdictions are binding precedent in the sense of the common law principle of *stare decisis*.[126] Further, neither the Convention nor its legislative history indicate whether courts are to afford foreign decisions even the lesser weight required by the civil law principle of *jurisprudence constante*.[127] Thus, while the Convention's requirement that decisions from other jurisdictions be considered is clear, just how much

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124. Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat, Official Records, art. 6, cmt. 1. 7, U.N. Doc. A/CONF.97/5 (1979 (1978 Draft)) [hereinafter *Secretariat Commentary*].

125. *See* Kritzer, *supra* note 106, at 109. *See also* Bonell, *supra* note 86, at 91-92.

> The most effective means of ensuring uniformity in the application of the Convention consists in having regard to the way in which it is interpreted in other countries . . . . A judge . . . faced with the same issue should in any event take into consideration the solutions so far elaborated in other Contracting States . . . . [However, a] judge . . . faced with a question of interpretation of the Convention may discover that . . . divergent solutions have been adopted by the different national courts. As long as the conflicting decisions are rather isolated and rendered by courts of first instance, or the divergencies are to be found even within one and the same jurisdiction, it is still possible either to choose the most appropriate solution among the different ones so far proposed or to disregard them altogether and attempt to find a new solution.

Id.

126. Nevertheless, the directive of Article 7 regarding the need to promote uniformity indicates that decisions from common law jurisdictions should be at least persuasive authority even in legal systems which operate without the common law principle of *stare decisis*. *See* Kritzer, *supra* note 106, at 109.

127.
> [The doctrine of *jurisprudence constante*] embodies the principle that once a matter has been decided the same way numerous times and thereby an official interpretation of the written law, the court will follow this interpretation. In effect, a series of consistent judicial decisions is granted the status of interpretation of the written law provided by custom.

significance a court should attach to those decisions is not.[128] Without a clear indication of how much significance a court should attribute to a foreign decision, the principle of uniformity contained in Article 7 must be applied with a measure of flexibility that is greater than that provided by either of the principles of *stare decisis* or *jurisprudence constante.* This is a serious weakness in the Convention. Without a clear theoretical basis for evaluating the materiality of decisions from other jurisdictions, the principle of uniformity in Article 7 remains ambiguous.

Thus, while Article 7's call for uniformity is explicit and the means for achieving that uniformity is clear, the utility of the uniformity principle is questionable because Article 7 provides no guidance as to how much authority those foreign decisions have. By failing to establish the legal significance of foreign case law, Article 7 undermines its own goal of uniformity – courts will independently determine how much weight to give to foreign case law.[129]

D. Observing "Good Faith in International Trade"

Of all the principles contained in Article 7, the declaration that the CISG must be interpreted so as to "[observe] good faith in international trade" is the most puzzling. In fact, there seems to be no agreement as to what this principle means or in what situation it is to be applied.[130] Negotiators questioned the appropriateness of including the principle during discussions of the Working Group[131] and at the Vienna Conference.[132] The legislative history reveals that the Working Group ultimately included the exhortation regarding good faith to draw the attention to emphasize that high standards of behavior were to be expected in international transactions.[133] The parties at the subsequent Vienna Conference considered two

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JOHN P. DAWSON, THE ORACLES OF THE LAW 416-31, 498-99 (1968).

128. *See, e.g.*, Bonell, *supra* note 86, at 92.

> A judge . . . may discover that . . . divergent solutions have been adopted by the different national courts. As long as the conflicting decisions are rather isolated and rendered by courts of first instance, or the divergencies are to be found even within one and the same jurisdiction, it is still possible either to choose the most appropriate solution among the different ones so far proposed or to disregard them altogether and attempt to find a new solution.

Id.

129. Although I can point to no study for support, my sense is that the existence of "persuasive authority" in the multi-jurisdictional system of the United States has not significantly contributed to uniform interpretation of even identically-worded uniform statutes such as the UCC.

130. *See, e.g.*, Kritzer, *supra* note 106, at 109 ("While the regard to be given to its references to internationality and uniformity of application seems clear, the legislative history of the Convention's companion reference to good faith is cloudy."). *See also* HONNOLD, *supra* note 20, at 123 ("One may hope that the scholarship in this area will be developed further with special reference to the application of 'good faith' principles to issues that arise in international trade.").

131. *See* Bonell, *supra* note 86, at 69.

132. *See id.* at 71.

133. *See id.* at 69.

revisions of the "good faith" provision[134] before deciding that the issue had been sufficiently discussed by the Working Group and that further changes were unnecessary.[135] Nonetheless, how and when the principle should be applied remains unclear. Aside from Articles 19(2) and 21(2), which require a party to dispel known misapprehensions of the other party,[136] and Articles 47 and 63, which address the duty to accept the performance one has demanded,[137] the CISG provides little guidance as to how courts should apply the principle of "good faith."[138] Moreover, Articles 19, 21, 47 and 63 may not be relevant since those articles address particular conduct of the parties, while Article 7 fails to establish whether the observance of good faith is to be made in connection with interpretation of a contract governed by the CISG[139] or interpretation of the CISG itself.[140]

The reference to observing good faith in paragraph (1) of Article 7

134. Both Norway and Italy suggested amendments. Italy's proposal would have moved the language regrading good faith to a separate article. *See* A/Conf. 97/C.1/L.59. Norway's proposal was to move the emphasis of good faith from what is now Article 7 to the end of Draft Article 8 which discusses the conduct of the parties. *See* A/Conf. 97/C.1/L.28. *See also id.* at 71.

135. *See* Bonell, *supra* note 86, at 71.

136. *See* CISG, *supra* note 1, art. 19, which states:

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Id. art. 21 states:

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

137. Articles 47 and 63 are beyond the scope of this article. *See* HONNOLD, *supra* note 20, at 125 for a similar observation regarding the application of good faith to Articles 19, 21, 47, and 63 of the Convention.

138. *See* Kritzer, *supra* note 106, at 109. *See also* HONNOLD, *supra* note 20, at 124 ("These illustrations [regarding possible application of "good faith"], of course, are incomplete and tentative."). The U.S. State Department had little to say about the Convention's "good faith" requirement other than to note that the good faith requirement found in UCC § 1-203 was broader. *U.S. State Dept. Analysis*, *in* GUIDE TO THE INTERNATIONAL SALE OF GOODS CONVENTION, 201.038 (1997) [hereinafter *State Dept.*].

139. *See, e.g.*, *Executive Legal Summary* 232, *in* Guide to the International Sale of Goods Convention, 100.007 (1997) [hereinafter *Executive Summary*] (stressing that "[t]he important point to remember is that this good faith requirement is not a duty imposed on the parties, but rather a guide for the interpretation of their contract.").

might refer to the application of paragraph (2) of Article 7[141] which describes how courts are to fill gaps in the Convention. If that is so, then the requirement to act in "good faith" in interpreting the Convention may be a caution to courts not to jump too quickly to the conclusion that a particular situation is not covered by the Convention and thereby prematurely apply domestic principles to resolve the dispute.[142] This approach would have the effect of increasing uniformity in interpretation of the Convention and greatly reduce the temptation of parties to forum shop.[143] Unfortunately, though reasonable, nothing in the legislative history of Article 7 supports this interpretation. Ultimately, one may be forced to concede that, as pointed out during the Working Group negotiations, the emphasis on observing good faith in international trade was included more out of a sense that it could do no harm rather than out of any conviction it would do specific good.[144] Thus, one must conclude that the emphasis on good faith as a tenet of interpretation is either an empty pronouncement awaiting judicial decisions to give it content or an unfocused aspiration which cannot be effectively applied by any court. The failure of Article 7 to establish the legal content of this principle will likely result in a variety of judicial interpretations which will produce uniformity through fortuity rather than through the plans of the drafters of the CISG.

E. Applying the Convention's Unstated General Principles

Article 7(2) describes the means by which situations not covered by the Convention are to be resolved. According to Article 7(2) such situations must be resolved "in accordance with the general principles on which it [the Convention] is based or, in the absence of such principles, in conformity with the [domestic] law applicable by virtue of the rules of private international law [i.e., conflicts of law rules]."[145] On its face, this approach appears to foster uniformity. However, since the general principles alluded to in Article 7 are not explicitly stated in the Convention, they must be divined by scrutinizing the Convention's provisions. This resort to general principles to fill gaps in legislation is a standard approach in civil law systems[146] but is far less common in common law systems which traditionally look to case law rather than legislation as the source of general principles.[147] For example, the resort to general principles under the CISG

140. Prof. Honnold alludes to, but does not expound upon, this possible application of "good faith" in interpreting the Convention's principles rather than the terms of a contract subject to the Convention. *See* HONNOLD, *supra* note 20, at 125.

141. *See id.*

142. *See infra* text accompanying notes 160 to 165.

143. For a similar conclusion, *see Executive Summary, supra* note 139, at 100.007.

144. Bonell observes that "[i]n support of the article's retention, it was first of all argued that because of the universal recognition of good faith there would be little harm in including it in the Convention." Bonell, *supra* note 86, at 69.

145. *See* CISG, *supra* note 1, art. 7(2).

146. *See e.g.*, Austrian Civil Code of 1811, § 7; Italian Civil Code, art. 12 (prelim. Provisions), Spanish Civil Code, art. 6; Egyptian Civil Code, art. 1.

147. In civil law systems, the legislated civil code provides the general principles as well as whatever detailed provisions are needed. In common law systems, legislation

appears similar to the UCC's reference to general principles under § 1-103,[148] but that surface similarity obscures a significant difference. Although some sources consider the approaches to be essentially the same,[149] the fact remains that UCC § 1-103 emphasizes the supremacy of the general principles of the common law unless the "particular provisions" of the UCC displace those principles, while the CISG looks to its own provisions for its unstated general principles.[150] Given that the common law tradition looks to case law unless a statute provides specific coverage,[151] U.S. courts should be aware that Article 7(2) of the CISG requires a different approach to filling in gaps in coverage: U.S. courts must stay within the Convention as much as possible in search of either specific provisions which may be applied by analogy or general principles which underlie the entire Convention.[152] Only if the search for analogous provisions and general principles within the text of the Convention proves fruitless may a court apply analogous domestic law to the dispute before it.[153]

Unfortunately, U.S. decisions on the CISG repeatedly reflect an erroneous tendency to look first to case law, then to the statute. For example, in *Delchi*, the Second Circuit stated the common law approach very clearly: "Because there is virtually no case law under the Convention, we look to its language and to 'the general principles' upon which it is based."[154] This approach is incorrect; the proper starting point is the CISG's language, followed if necessary by considerations of its general principles.[155] Only if these sources fail to produce an answer should analogous domestic law be considered. This same incorrect starting point has been repeatedly used by the U.S. District Court for the Southern District of New York in

often provides only the necessary details, while relying on existing case law to provide the general principles. *See* Bonell, supra note 86, at 77. *See also* UCC, *supra* note 39, §1-103, quoted in *infra* note 148.

148. "Unless displaced by particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating clause shall supplement its provisions." *Id.*

149. *See, e.g., Executive Summary, supra* note 139, at 100.008 (stating that "[t]he CISG's method of dealing with omissions resembles that of the UCC. Under both codes, the courts look first to the code itself and then to a set of external norms.").

150. *See supra* text accompanying notes 145-47.

151. *See supra* text accompanying notes 92-104.

152. Bonell, *supra* note 86, at 78. *See also* Kritzer, *supra* note 106, at 115-16, discussing the method of analogizing provisions in the Convention.

153. *See* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 157 (2d ed. 1991). *See also* Kritzer, *supra* note 106, at 117

> When a matter is governed by the Convention but not expressly settled in it, the Convention's solution is (i) internal analogy where the Convention contains an applicable general principle; and (ii) reference to external legal principles (the rules of private international law) where the Convention does not contain an applicable general principle.

154. 71 F.3d at 1027-28.

155. As discussed earlier, interpretation of an unclear CISG provision calls for a court to consider foreign and domestic cases *concerning the CISG* in an effort to achieve uniformity of application. *See supra* text accompanying notes 100-18.

Filanto,[156] *Helen Kaminski*,[157] and *Claudia*.[158] As pointed out earlier,[159] a court should look to the Convention's language first.[160] If the CISG itself does not provide an answer, then a court should look to CISG case law (including case law from other nations)[161] for guidance in reaching a decision which will foster uniformity of results.[162] If no answer is found after an examination of case law, then courts must look to the Convention's unstated principles for guidance. Only if no answer can be achieved by the foregoing means should analogous domestic principles be consulted. Thus, the *Delchi* court's statement that the UCC "may also inform a court where the language of the relevant CISG provisions tracks that of the UCC"[163] is highly misleading because the provisions of Article 7 expressly state that only if the sequence described therein[164] fails to provide an answer is a court to look to domestic law.[165] The *Delchi* court erred in stating that a court may look to domestic law for guidance *before* seeking that guidance in the general principles of the Convention.

However, discerning the unstated "general principles" of the Convention is left entirely to the particular court called on to apply the CISG, thereby undermining the Convention's goal of achieving uniformity in international sales law. The reason the Convention allows individual courts to determine these general principles is evidently because the drafters of the CISG were themselves ambivalent toward inclusion of this provision. Although Article 7 essentially continues the approach found in the ULIS,[166] the Working Group initially considered deleting reference to "general principles" in favor of stressing the Convention's "international character" and the need for uniformity in its application.[167] Ultimately, though, the Working Group decided on the wording which now appears in Article 7(2).[168] The ambivalence of the drafters toward even referring to general

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156. *Filanto*, 789 F. Supp. at 1237 (holding that "[t]here is as yet virtually no U.S. case law interpreting the Sale of Goods Convention . . . .").

157. *Helen Kaminski*, 1997 U.S. Dist. LEXIS 10630, at * 3 (holding that "[there is] little to no case law on the CISG in general.").

158. *See Claudia*, 1998 U.S. Dist. LEXIS 4586, at *13 (holding that "[t]he case law interpreting and applying the CISG is sparse.").

159. *See supra* text accompanying notes 96-113.

160. *See supra* note 104.

161. *See supra* note 100.

162. *See supra* text accompanying notes 119-29.

163. *Delchi*, 71 F.3d at 1028.

164. *See supra* text accompanying notes 75-80.

165. Interestingly, after beginning the opinion with the erroneous approach described above, the *Delchi* court looks exclusively to the provisions of the CISG in resolving the dispute. Although the court does not say as much, it is implicit in the opinion that the court applied the Convention only because it could not first find U.S. case law. As pointed out above, this approach is exactly the reverse of the proper sequence called for by Article 7 of the Convention.

166. *See* ULIS, *supra* note 14, art. 17 requires that any matters not expressly governed by the ULIS "are to be settled in conformity with the general principles on which the present Law is based."

167. *See* Bonell, *supra* note 86, at 67-68.

168. *See id.* at 70. The nations at the Conference stressed the importance of the Convention's international character and the need for uniformity by placing those principles

principles may explain why the CISG does not explicitly identify those principles. Unfortunately, merely the existence of different legal traditions will inevitably lead to differences in the interpretation of these general principles.[169] This leads to the unsatisfactory situation of requiring courts to look for and apply general principles but without any guidance as to how to accomplish this requirement.

Indeed, ascertaining the unstated general principles to which Article 7 refers may prove to be a daunting, if not impossible, task for a court. Even though Article 7(1) provides three general principles (international character, uniformity, and good faith), the previous three sections of this article have pointed out that the legal content of each of those *stated* principles is obscure. Determining the content of *unstated* principles would therefore seem highly unlikely. What is certain though is that the failure to provide either explicit general principles or clear methodology for determining unstated general principles means that the Convention's goal of uniformity rests on the hope that the national courts from the signatories to the Convention will all arrive at the same conclusions. The possibility of uniformity in ascertaining and supplying unstated general principles seems remote, at best.

F. Ameliorating the Problems of Article 7

The obscure legal content of the explicit but ambiguous principles of Article 7 and the vague nature of the unstated principles of the Convention are unlikely to lead to uniform results in either application or interpretation of the CISG. This is particularly true when the CISG is interpreted by courts which apply a common law approach to every other case which comes before them.[170] However, although it is not possible to achieve the Convention's goal of uniformity without significantly amending the treaty, it is

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in paragraph (1), while slightly subordinating the requirement of applying the Convention's general principles by placing it in paragraph (2). For a discussion of paragraph (1) of Article 7, *see infra* text accompanying notes 91-141.

169. [A] common law jurist, because of his legal tradition, will probably tend towards a more restrictive interpretation of the Convention and its provisions. Thus, he might be more often confronted with a gap, than would a civil law jurist. Civil law jurists are more frequently used to work [sic] with generally framed, systematically conceived legal codes. Out of this experience they are more readily prepared to solve unsettled questions or to fill gaps by referring to the general principles contained in the code itself.

U. Huber, *Der UNCITRAL-Entwurf eines Uebereinkommens uber Internationale Warenkaufvertrage*, RABELSZ 432-33 (1979) (as quoted in Volken, *supra* note 50, at 43).

See also HONNOLD, *supra* note 153, at 156:

> This writer, although nurtured in the common law, has come to believe that international unification [as required by the CISG] calls for us to reexamine our traditional approach. Invoking domestic law under the Convention has more serious consequences than invoking common law principles to solve problems under a statute in a common law jurisdiction.

Id.

170. In addition to the United States, the common law nations of Australia, Canada and New Zealand are parties to the CISG.

possible to increase the likelihood of uniform interpretation in the United States through a minor adjustment in U.S. CISG legislation.

Along with enacting the CISG as national legislation as discussed above,[171] the Secretariat Commentary to the 1978 draft should be adopted as the official commentary of the U.S. domestic CISG legislation with two changes. First, the article references in the Secretariat Commentary should be renumbered so that the current CISG article numbers correspond to those in the commentary. Including this commentary would provide needed guidance for U.S. courts and lawyers when attempting to understand a legislative scheme with so many civil law elements. Second, the official comment accompanying Article 7 should include a statement such as "decisions made by the courts of other nations are relevant jurisprudence in interpreting the CISG as as to create a uniform, international jurisprudence. Domestic law which is analogous to provisions in the CISG should be considered only when the CISG and all relevant CISG case law fail to provide adequate guidance." Such a statement would direct U.S. courts to the appropriate approach to interpreting the CISG without resorting to amending Article 7 itself.[172] This legislative action would increase the likelihood of a uniform body of CISG jurisprudence within the United States by directing U.S. courts to render decisions consistent with those of courts from other CISG signatory nations.

IV. The Inconsistency Involving the Parties to Whom the CISG Applies

Article 1 of the CISG declares that the Convention applies to contracts between parties located in nations that have ratified the Convention or when conflicts of law analysis calls for applying the law of a ratifying nation.[173] This straight-forward provision is complicated by two other provisions of the CISG which render uniform application virtually impossible. The first is Article 10 which explains how the location of the parties to

171. *See supra* text accompanying notes 53-74.

172. Amending the provision could lead to confusion since the United States would have ratified a treaty with one version of Article 7 but would have enacted domestic legislation containing a different version of Article 7.

173. CISG art. 1 states that the Convention "applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State . . . ."

The applicability of the CISG is far more restricted than that of the Hague Sales Convention of 1964 which applies to *all* international sales of goods, even if neither the parties nor their contract had any connection to a nation that had ratified the treaty.

ULIS Article 1 states *in toto*:

> 1. Each Contracting State undertakes to incorporate into its own legislation, in accordance with its constitutional procedure, not later than the date of the entry into force of the present Convention in respect of that State, the Uniform Law on the International Sale of Goods (hereinafter referred to as "the Uniform Law") forming the Annex to the present Convention.
>
> 2. Each Contracting State may incorporate the Uniform Law into its own legislation either in one of the authentic texts or in a translation into its own language or languages.

which Article 1 refers is to be determined. The second provision is Article 6 which seems to allow parties to contract out of the CISG.

A. The Uncertainty in Application of the CISG

Article 1(1)(a) applies the Convention to contracts of sale between parties located in separate countries which have ratified the Convention without regard to whether the goods in question cross international borders.[174] In connection, Article 10 declares that a party's business location is that location "which has the closest relationship to the contract and its performance . . . ."[175]

The surprising result of the Convention's applicability being based on the location of a party's place of business, rather than on the movement of goods over borders, is that the CISG can apply to transactions which are ostensibly domestic sales. For example, if a Paris-based branch office of a New York corporation buys a product from a party located in Indiana for delivery to a Montana address, that transaction may well be governed by the CISG because the parties to the transaction are located in separate CISG nations. Deciding whether the CISG applies in that situation will hinge on a court's application of Article 10.[176] Conversely, a court could decide that the CISG does not apply if the Paris office ordered delivery to its New York headquarters. In that instance the court could conclude that New York is the location of the buyer because the New York office has the closest relationship "to the contract and its performance."[177] Therefore, since both the buyer and the seller are located in the United States, the CISG would not apply. However, it is also possible that the court could conclude that the Paris office has the closest relationship to the contract because the purchase and delivery orders, as well as payment, issued from Paris. If so, then the court would rule that the CISG *does* govern the contract.

> 3. Each Contracting State shall communicate to the Government of the Netherlands the texts which it has incorporated into its legislation to give effect to the present Convention.

The CISG Working Group selected the location of the parties to the contract as a means of determining the international character of the transaction as a correction to the overreaching provision of Article 1 of ULIS. Volken, *supra* note 50, at 28. Thus, even though

> in nine out of ten cases the transnational character of a contract is determined by the place where either the parties to the transaction of the goods themselves are located . . . . [I]n defining the international character of a sales transaction, the Vienna Convention refers only to the contracting parties without any reference whatsoever to the goods to be purchased.

Id. at 27.

174. *See* HENRY GABRIEL, PRACTITIONER'S GUIDE TO THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) AND THE UNIFORM COMMERCIAL CODE (UCC) 4 (1994).

175. CISG, *supra* note 1, art. 10. Article 10 also states that a party without a formal place of business is deemed to be located at "his habitual residence." *Id.*

176. *See id.*

177. *Id.*

Thus, the location of the parties criterion of Article 10 makes determination of whether the CISG applies to a particular contract highly problematic and very unlikely to produce uniform results. Moreover, although the CISG was drafted in part to eliminate the uncertainty that choice of law rules created regarding the applicable law in international sales,[178] Article 10 re-introduces that uncertainty in another context by focusing on the location with the closest relationship to the contract and its performance.

Ascertaining the applicability of the CISG would be much easier and would produce uniform results if the CISG been made applicable to all international sales involving goods which are shipped across national borders. However, the drafters of the CISG specifically rejected this approach, considering it too expansive. In doing so, the drafters sacrificed their goal of uniformity in favor of creating a more widely acceptable treaty.

B. Contracting Out of the CISG: The Theoretical Infirmities of Article 6

Article 6 creates a major theoretical conflict within the Convention which will inevitably lead to confusion and prevent uniformity in international sales law. Article 6 appears to allow parties to avoid the CISG completely because it states that parties are free to contract out of or vary the effect of any provision of the CISG.[179] Support for this interpretation can be found in the conclusions of various commentators who contend that parties to a contract can avoid the CISG by inserting a choice of law clause in their contract.[180] Unfortunately for courts and practitioners called on to apply the CISG, those conclusions are incorrect. Careful examination of the principles of choice of law and the CISG provisions on contract formation indicate that parties cannot completely contract out of the CISG. Rather than creating uniformity, the broad wording of Article 6 creates confusion regarding the extent to which parties can contract out of the CISG.

The difficulties surrounding the correct interpretation of Article 6 begin with its sweeping language. Article 6 allows parties to "exclude," "derogate from" or "vary" any of the provisions in the CISG.[181] This seems to allow parties otherwise subject to the CISG to avoid the CISG completely; however, that is simply not possible when one considers the issues

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178. *See, e.g.*, Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: the Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT'L L. 1, 6 (1993) (stating that "[t]he drafters [of the CISG] believed that the unpredictability spawned by the conflict of laws was the key problem [in the area of international sales]."); Lisa M. Ryan, *The Convention on Contracts for the International Sale of Goods: Divergent Interpretations*, 4 TUL. J. INT'L & COMP. L. 99, 100 (1995) (stating that "[t]he drafters of the CISG sought to replace the multitude of foreign laws which were previously applicable to foreign transactions with a single system of internationally adopted uniform rules.")

179. CISG, *supra* note 1, art. 6 (holding that "[t]he parties may exclude the application of this Convention or . . . derogate from or vary the effect of any of its provisions.").

180. *See, e.g.*, Bonell, *supra* note 86, at 53-54; HONNOLD, *supra* note 20, at 105.

181. *See* CISG, *supra* note 1, art. 6.

surrounding formation of contract.[182] Choice of law principles reveal that Article 6 cannot permit parties to avoid CISG rules on contract formation. The conflict between the wording of Article 6 and the interpretation of Article 6 required by fundamental choice of law principles creates confusion in several ways.

The first source of confusion arises from the failure of Article 6 to distinguish between two distinct sets of rules in every choice of law analysis: (1) the rules applicable to whether the actions of the parties have led to an enforceable contract (that is, whether the "contract" is valid) and (2) the rules applicable once a contract has been formed.[183] Since the CISG sets out rules governing the actions of the parties with respect to formation of a contract,[184] a court must always apply the CISG rules on formation of contract to determine whether the actions of the parties actually resulted in a contract. Parties may not avoid the application of the CISG to the question of whether a contract has been formed by including a choice of law clause in the memorialization of the contract. Only *after* a court concludes that a contract has in fact been formed can a court give effect to a choice of law clause within that contract declaring that the contract itself will be governed by law other than the CISG.[185]

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182. *But see* HONNOLD, *supra* note 20, at 105 (asserting unequivocally that Article 6 allows parties to contract out of the CISG rules on formation of contract).

183. *See, e.g.*, P.M. NORTH & J.J. FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 457-58 (12th ed. 1992) which states:

> [C]ontracts are planned transactions and the parties may well have considered the question of what law should govern the contract in the event of a dispute between them. They may have made provision in the contract, choosing the applicable law. [Also] . . . a wide variety of different contractual issues can arise. For example, there can be a problem over *whether a contract has been validly created* . . . . (emphasis added)

Id.

See also Siegelman v. Cunard White Star, 221 F.2d 189, 195 (2d Cir. 1955) in which Judge Harlan, later Justice Harlan, stated:

> As we have said, we construe the contract as establishing the intention of the parties that English law should govern both the interpretation and validity of its terms. And we think it clear that the federal conflicts rule will give effect to the parties' intention that English law is to be applied to the interpretation of the contract. Stipulating the governing law for this purpose is much like stipulating that words of the contract have the meanings given in a particular dictionary. *See* Cheatham, Goodrich, Griswold, & Reese, Cases on Conflict of Laws 461 (1951). On the other hand, *there is much doubt that parties can stipulate the law by which the validity of their contract is to be judged.* Beale, Conflict of Laws @ 332.2 (1935). To permit parties to stipulate the law which should govern the validity of their agreement would afford them an artificial device for avoiding the policies of the state which would otherwise regulate the permissibility of their agreement. It may also be said that to give effect to the parties' stipulation would permit them to do a legislative act, for they rather than the governing law would be making their agreement into an enforceable obligation. And it may be further argued that since courts have not always been ready to give effect to the parties' stipulation, no real uniformity is achieved by following their wishes. (emphasis added)

Id.

184. *See* CISG, *supra* note 1, arts. 8, 9, and 14-24.

185. *But see* Bonell, *supra* note 86, at 53-54.

This restriction on the scope of Article 6 to post-formation issues is supported by the legislative history, as well. Although the Secretariat Commentary to 1978 Draft Article 5 (which is identical to current Article 6) seems to indicate that Article 6 allows unfettered freedom to avoid the Convention, a literal reading of the Secretariat Commentary reveals that the freedom granted by Article 6 is limited to choice of law within a formed contract. The Secretariat Commentary states that "[t]he parties may exclude its [the Convention's] application entirely by choosing a law other than this Convention *to govern their contract*. . . ."[186] The broad wording of Article 6 obscures the choice of law analysis inherent in any attempt by parties to contract out of the CISG. As a result, incorrect conclusions regarding the applicability of the CISG to international sales will continue. Divergence rather than uniformity will result: in some countries courts will correctly apply choice of law rules, while courts in other countries will apply the incorrect conclusion of the commentators and allow complete avoidance of the CISG. Only after a contract has been formed does Article 6 allow the parties to an international sales contract to select the law they wish to govern the operation of their contract.[187]

This problem is compounded in the United States by the CISG's character as a self-executing treaty.[188] Since treaties are equal in authority to U.S. federal law,[189] the CISG preempts all states laws with which it conflicts. As a result, the CISG, not the UCC as adopted by individual states, governs international sales contracts involving U.S. parties.[190] This means that a party who inserts a choice of law clause into a contract, such as "this contract will be governed by the law of Oregon," has not selected Oregon's UCC rules, but has actually selected the CISG which is state law by virtue of the Supremacy Clause. Thus, not only will such a choice of law clause fail to avoid the CISG provisions governing formation of contract, but that clause will also fail to avoid application of the CISG to any contract formed between the parties.

Article 6 also fails to account for the problems raised by the timing of its invocation by the parties.[191] Absent the extraordinary situation in which the parties begin their negotiations with the declaration "we agree that the CISG will not govern the agreement we may or may not subsequently negotiate," the CISG rules on formation of contract will definitely govern some aspect of the negotiations. Even if the parties later agree that some law other than the CISG governs their contract, it is impossible for

186. *Secretariat Commentary, supra* note 125.

187. Generally speaking, parties to international contracts are free to select as the law governing the contract the law of any forum provided the selection of that forum has a rational basis in relation to the contract. *See, e.g.*, Seeman v. Philadelphia Warehouse Co., 274 U.S. 403 (1927). The CISG has no provision regarding the legitimacy of the selection of a particular forum's law; therefore whether a particular choice of law clause is to be given effect will depend on a domestic law analysis.

188. *See supra* text accompanying notes 43-74.

189. *See supra* text accompanying note 45.

190. *See supra* text accompanying notes 39-74.

191. *See* Bonell, *supra* note 86, at 58.

them to retroactively undo the negotiations which produced their choice of law clause. The longer the parties wait to exercise their option under Article 6, the greater the portion of their agreement will be subject to the CISG. Technically, a lengthy delay in invoking Article 6 requires parties to either modify or replace whatever agreement had already been created under the CISG. While this can be accomplished with a clause stating that "this writing constitutes the entire agreement between the parties,"[192] the unwieldy interaction between Article 6 and the CISG provisions on contract formation make such a provision absolutely essential if the parties desire to reduce their entire agreement to writing. Moreover, if the parties intend to extend that agreement in the future, they must include a provision in the current writing which declares that all future agreements will be governed by a law other than the CISG. Without such a provision, all subsequent negotiations may be interpreted as part of separate contracts fully subject to the CISG.[193]

The confusion surrounding proper interpretation of Article 6 is further complicated by national reservations to the CISG.[194] Article 96 allows nations to declare that they will not be bound by Article 11 of the CISG, which permits oral contracts.[195] While such a reservation requires written evidence of a contract, a reservation to Article 11 will not avoid the CISG rules on *formation* of contracts. In analyzing whether the parties have formed a contract, courts in countries declaring such a reservation must still consider the intent of the parties and the usage between the parties as required by Articles 8 and 9. Although it seems to prevent consideration of anything but written exchanges between the parties, a reservation to Article 11 merely introduces a formal requirement that there be some written evidence of the contract, not that the contract be entirely embodied in writing.

V. Confusion Regarding Contract Coverage

A. Confusion Regarding the Contracts to Which the CISG Is Applicable: Identifying "Goods"

Articles 1(1) and 3, respectively, state that the Convention applies to contracts for the sale of goods,[196] and contracts for the supply of goods.[197]

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192. Such clauses are called "merger" or "integration clauses" and are designed to eliminate the possibility of extrinsic oral elements of the written agreement.

193. Of course, even with such a clause the subsequent agreements would have to be sufficiently related to the current contract to be considered extensions or modifications of that original contract. Parties cannot contract out of the CISG for all contracts they might conclude in the future simply because as separate contracts, the formation of those new contracts would be governed by the CISG.

194. *See* CISG, *supra* note 1, arts. 92, 95 and 96 permit nations acceding to the CISG to declare that they will not be bound by certain provisions.

195. *See* CISG, *supra* note 1, art. 11 (stating that "[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses."). *Id.*

196. *See id.* art. 1.

197. *See id.* art. 3(1).

Yet, the Convention does not define "goods." The Convention's failure to define the subject matter of its coverage means that the accomplishment of the goal of uniformity depends entirely on whether individual national courts will reach the same conclusion regarding the definition of "goods." Since Articles 2[198] and 3[199] list those sales contracts which are *not* covered by the Convention, it is plausible to infer that all sales contracts not expressly excluded from coverage are subject to the Convention. However, unless this inference is limited to all sales contracts involving *goods*, the inference dramatically expands the coverage of the Convention.[200] Yet, limiting this inference to the sale of goods only returns us to the initial problem: the CISG has left it to national courts to define the essential subject matter of the Convention.

Although Article 2 excludes certain sales from coverage, the list of excluded sales does not assist in deriving a definition of "goods" by negative inference. Article 2 expressly excludes from coverage the sale of ships, vessels, hovercraft, aircraft and electricity. However, Article 2 does not describe any of these items as "goods" but simply excludes from coverage sales of these items. The legislative history of Article 2 reveals that electricity was excluded because many legal systems had not conclusively classified electricity as a "good,"[201] while ships, vessels, hovercraft and aircraft were excluded because sales of these items typically included complicated rules of owner registration.[202] Thus, no definition of "goods" can be

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198. CISG art. 2 states *in toto*:

> This Convention does not apply to sales:
> (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
> (b) by auction;
> (c) on execution or otherwise by authority of law;
> (d) of stocks, shares, investment securities, negotiable instruments or money;
> (e) of ships, vessels, hovercraft or aircraft;
> (f) of electricity.

199. CISG, *supra* note 1, art. 3 states *in toto*:

> (1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.
> (2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

Id.

200. For example, numerous international sales transactions involve services, franchises, licenses and the right to use trademarks, copyrights and patents. Although some contracts involving services are covered by the CISG, no one argues that the Convention covers contracts that are not essentially for the sale of goods. *See infra* text accompanying notes 214 to 226.

201. These sales were excluded because some legal systems had yet to determine whether electricity should be considered a "good." *See also* Bonell, *supra* note 86, at 38-39.

202. *Secretariat Commentary, supra* note 124, cmt. 9

> "In order not to raise questions of interpretation as to which ships, [and] vessels . . . were subject to this Convention, especially in view of the fact that the relevant place of registration, and therefore the law which would govern the

inferred from Article 2's list of excluded sales.

Allowing the various national courts to independently define the subject matter of the Convention will inevitably lead to a lack of uniformity because certain things currently sold internationally have yet to be classified as goods. As mentioned, the drafters of the CISG excluded the sale of electricity from coverage because some nations had yet to classify electricity as a good.[203] The same lack of resolution awaits many technological developments both small and great. For instance, the question of whether software should be considered as a good has yet to be conclusively determined either in the United States[204] or internationally.[205] Similarly, there is no international agreement on the nature of television broadcasting.[206] The Convention's lack of a definition for goods will be an ongoing obstacle to uniformity in international sales involving advances in technology.

B. Problems Determining Coverage of Contracts Involving Goods and Services

The exceptions described in Article 3 distinguish between contracts involving the sale of services and those involving the sale of goods, but Article 3 does not provide a definition of either goods or services. Although this ambiguity will not create surprises in most contracts, parties who do not carefully plan agreements involving the supply of goods and services may be surprised to find that those services obligations are also governed by the CISG.

> registration, might not be known at the time of the sale, the sale of all ships, [and] vessels . . . was excluded from the application of this Convention."

Id.

203. *See* CISG, *supra* note 1, art. 2(f).

204. *See, e.g.*, Micro Data Base Sys., Inc. v. Dharma Sys., Inc. 148 F.3d 649, 654 (7th Cir. 1998) (pointing out in resolving a choice of law issue that the only case to address the issue in Indiana held that software is a service, while the only case to address the issue in New Hampshire held that it is a good.); Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 672 (3d Cir. 1991) (holding that "computer software is a good within the Uniform Commercial Code."). *Id.*

205. *See, e.g.*, Frank Diedrich, *Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG*, 8 PACE INT'L L. REV. 303 (1996); Marcus G. Larson, *Applying Uniform Sales Law to International Software Transactions: The Use of the CISG, Its Shortcomings, and a Comparative Look at How the Proposed UCC Article 2B Would Remedy Them*, 5 TUL. J. INT'L & COMP. L. 445 (1997).

206. For example, the dispute between the United States and Canada over the Canadian government's discontinuation of the Country Music Television channel is operating in Canada centers on the classification of cable television broadcasts as either goods or services. For a general discussion of this dispute, see Andrew M. Carlson, *The Country Music Television Dispute: An Illustration of the Tensions Between Canadian Cultural Protectionism and American Entertainment Exports*, 6 MINN. J. GLOBAL TRADE 585 (1997). The United States is involved in a similar dispute with the European Union over the EU's requirement that EU broadcasters allocate no less than 50% of their airtime to European works. Again, the characterization of television services as either goods or services is a central issue in this dispute. *See generally* John David Donaldson, *"Television Without Frontiers": The Continuing Tension Between Liberal Free Trade and European Cultural Integrity*, 20 FORDHAM INT'L L.J. 90 (1996).

Article 3 contains two exceptions from CISG coverage based on the essential character of the contract at issue. The first paragraph of Article 3 excludes contracts for the sale of goods when "the party who orders the goods undertakes to supply a *substantial* part of the materials necessary for . . . [the] manufacture or production [of those goods]" (emphasis added).[207] Since the buyer in such a contract is providing the raw material for the goods to be produced, the contract is considered a contract for manufacturing services rather than the sale of goods.[208] The ambiguity surrounding the word "substantial" complicates this provision. In English, "substantial" can have widely differing meanings. For example, "substantial" has been defined as "material" as well as "considerable in amount, value or worth."[209] Indeed, although "substantial" does not mean "the majority of,"[210] the question of how "substantial" is to be interpreted cannot be satisfactorily resolved without reference to a body of international jurisprudence.[211] To date, though, no court has addressed this specific question.[212] The closest any court has come to addressing this issue is an Austrian court's decision that the CISG did not apply to a contract in which the buyer had supplied the seller with the materials for the production of brooms and brushes.[213] The court reasoned that the buyer had supplied a substantial part of the materials to be used in their manufacture and therefore the obligation of the seller was primarily the furnishing of labor rather than goods.[214] However, the Austrian court did not attempt to define "substantial."

Article 3 also does not distinguish between materials which are physically a substantial part of the goods received and those materials which are essential to the utility of the good produced.[215] Article 3's use of the ambiguous and relative term "substantial" will inevitably produce disparate judicial interpretation. Parties and courts are left without guidance in

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

208. *Secretariat Commentary, supra* note 124, art. 3, cmt. 5.

209. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2280 (8th ed. 1986).

210. *See infra* text accompanying notes 226 to 230.

211. The Secretariat Commentary to the 1978 Draft does not discuss the precise meaning of "substantial." *See Secretariat Commentary, supra* note 124, art. 3, cmt. 5.

212. A few commentators have addressed the issue, though, concluding that anywhere from 15% to 50% might be considered "substantial" by a court. *See, e.g.*, Ferrari, *supra* note 11, at 60-61.

213. *See Zeitschrift fur Rechstvergleichchung*, Austria Supreme Court, 8 Ob 509/93, as summarized in GUIDE TO THE INTERNATIONAL SALE OF GOODS CONVENTION 201.033 (1997).

214. *Id.*

215. An insight to this potential problem of interpretation can be seen in the difference between the French and English versions of the CISG. The official French text uses the phrase "*une part essentielle*" because "[t]he drafters of the French version had difficulty with the concept of 'substantial.'" *See* HONNOLD, *supra* note 153, at 106, n.3. The difference in meaning between these two terms is significant. The French word "essentielle" refers to something which has a crucial or indispensable quality to it rather than the quantity of amount connoted by the English word "substantial." *See, e.g.*, THE OXFORD-HACHETTE FRENCH DICTIONARY 317 (1994).

determining the degree and nature of materials which will prevent or require application of the CISG.

The second paragraph of Article 3 presents a similar problem. Article 3(2) excludes from coverage contracts in which "the preponderant part of the obligations of the party supplying the goods consists in the supply of labour or other services."[216] Since "preponderant" at least implies "major part of,"[217] the potential for interpretation problems seems less here than with the interpretation of "substantial" under paragraph (1). However, while "preponderant" must mean "more than half,"[218] the Convention does not indicate whether "preponderant" is referring to price, cost or value.[219] This again returns one to the unanswered question of whether "preponderant" is a reference to services which are extensive in time, labor, quality, or are indispensable to the value of the good. Thus, the exact extent to which the Convention applies to such mixed contracts remains ambiguous and the possibility of uniform application of Article 3 remains uncertain.[220]

C. Addressing the Problems of Ambiguity in Article 3

The ambiguity which arises from Article 3's failure to define either goods or services will likely lead to disparate judicial decisions. At the very least Article 3's ambiguity will surprise businesses which discuss supplying "after the sale" services in connection to the goods they sell when the negotiations over subsequent service obligations are determined to be governed by the CISG rather than domestic law.

U.S. courts and businesses should be aware that although the CISG explicitly excludes coverage of sales of certain goods,[221] the CISG applies to more transactions than simply sales of goods. The sale of documents of title to goods,[222] contracts for the supply of goods,[223] and some contracts which involve the supply of services as part of a contract of the sale of

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216. *See* CISG, *supra* note 1, art. 3(2).

217. *See* Volken, *supra* note 50, at 42.

218. Not only does "preponderant" have this meaning in English ("having superior weight, force, or influence" or "having greater prevalence," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1791 8th ed. (1986)), but in the context of Article 3, it must mean more than "substantial" which is used in the first paragraph of the same Article.

219. Kritzer, *supra* note 106, at 73. *But see* Ferrari, *supra* note 11, at 62-63.

> "[P]reponderant part" seems merely to refer to the comparison between the economic value of the obligations regarding the supply of labor and services and the economic value of the obligations regarding the delivery of the goods . . . . Thus, where the economic value of the obligation regarding the supply of labor or services is "preponderant," i.e., where it is more than 50 per cent . . . the CISG is inapplicable. (footnotes omitted).

220. The Official Commentary to the 1978 draft discusses neither the meaning of "preponderant" nor to which terms in Article 3(2) it applies. *See Secretariat Commentary*, *supra* note 124, art. 3, cmts. 2 and 3.

221. *See supra* note 198.

222. *See Secretariat Commentary*, *supra* note 124, art. 2, cmt. 8. *See also* CISG arts. 30, 34 and 58(1) which cover the duty to deliver documents representing title to goods.

223. *See supra* text accompanying notes 207-20.

goods[224] are all governed by the Convention. Therefore, U.S. parties should initially assume that any contract involving any sale of goods within a CISG signatory nation will be governed by the CISG. From that initial working assumption, parties can then safely proceed without the risk of unexpected coverage by the CISG. To avoid the potential coverage of the CISG, parties who do not want their service obligations governed by the CISG should be careful to enter into a separate contract for services rather than include those obligations within the contract for the sale of the items to be serviced.

Further, U.S. legislation which enacts the CISG should be drafted to alert U.S. parties to the Convention's coverage beyond purely sale of goods transactions. This can be accomplished by slightly altering the name of the Convention in the U.S. Code to "The Convention for International Contracts Involving the Sale of Goods and Related Services." Without modifying the substance of the treaty, this change would both foster awareness of the treaty and clarify the coverage thereby increasing the chances for uniform application of the CISG.

Of course, the greatest handicap to the creation of a unified jurisprudence of the CISG is the absence of an international court which would resolve divergent interpretations of national courts. Since the creation of an international sales court is not on the horizon,[225] other international solutions must be considered. One way in which uniformity in interpretation and application of the CISG could be increased, and perhaps assured, is through the existing mechanism of UNCITRAL.

Currently, UNCITRAL summarizes all judicial decisions involving the CISG.[226] In addition to having summaries of the decisions, national courts would be greatly assisted in their efforts to evaluate foreign CISG decisions if UNCITRAL would also indicate whether UNCITRAL approves or disapproves of a particular summarized decision. The benefit of a system in which UNCITRAL, an existing international body experienced in issues involving international trade, would comment on CISG decision is that UNCITRAL could provide needed guidance without impinging on the autonomy of national courts. UNCITRAL comments would not be binding on subsequent courts, but they would provide a means for independent evaluation of the rapidly developing international case law. Without some guidance from a central authority, the sheer weight of foreign-language cases will be an obstacle to uniformity.

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224. *See id.*

225. *See, e.g.*, Frank Diedrich, *Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG*, 8 PACE INT'L L. REV. 303, 303 (1996) ("With every new ratification [of the CISG], it becomes more unlikely that an international court will be established to ensure the uniform interpretation and application of the CISG. . . . Problems of binding force, seat and procedure may by too great to overcome in interpreting the CISG.")

226. *See supra* note 18.

VI. National Reservations to the Treaty Prevent Rather Than Assist Uniformity

The Convention's allowance for reservations to various aspects of the CISG both decreases uniformity and increases the likelihood of confusion regarding the application of the CISG. Articles 89 to 101, contained in Part IV of the Convention, address issues involving ratification, acceptance, approval and declarations of reservations by nations regarding the CISG. Article 98 explicitly declares that nations wishing to become parties to the Convention may only make those reservations which are expressly authorized by the Convention.[227] Part IV authorizes parties to the CISG to declare that they will not be bound by Article 1(1)(b),[228] Article 11,[229] Article 29,[230] Part II (formation of contract),[231] and Part III (obligations of buyer and seller and remedies for breach).[232] Article 93 also permits nations with two or more territorial units in which different systems of law operate to exclude those areas from coverage under the Convention.[233] Finally, Article 94 permits nations which have already concluded an international agreement covering the subject matter of the CISG to opt out of coverage by the CISG in favor of their existing agreements.[234] The purpose of allowing those reservations was to make the CISG acceptable to a greater number of nations. Unfortunately, the concessions which enable more

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227. *See* CISG, *supra* note 1, art. 98.

228. *See id.* art. 95. Article 1(1)(b) extends coverage of the CISG when only one party is from a CISG signatory state and choice of law rules call for application of the law of the country that is a party to the CISG. Pursuant to Article 95, China (PRC), the Czech Republic, Singapore, Slovakia and the United States declared that they would not be bound by Article 1(1)(b).

229. *See id.* art. 96. Article 11 permits oral contracts. Pursuant to Article 96, Argentina, Belarus, Chile, Estonia, Hungary, Latvia, Lithuania, Russian Federation and Ukraine declared that in accordance with articles 12 and 96 of the Convention any provision of article 11, article 29 or Part II of the Convention that allows formation, modification, or termination of a contract of sale or other indication of intention in any form other than in writing does not apply where a party has his place of business in that country. In essence, this reservation retains those nations' requirements that contracts be in writing. China (PRC) made a reservation under Article 11 alone; applied literally, the Chinese reservation requires a writing in order to form a contract, but permits oral modification and termination of contracts under Article 29.

230. *See id.* CISG art. 29 permits oral termination and modification of contracts. *See supra* note 239 for the list of countries making reservations to this article.

231. *See id.* arts. 92 and 96.

232. *See id.* art. 92. Pursuant to this article, Denmark, Finland, Norway and Sweden declared that they would not be bound by Part II of the Convention governing formation of contract.

233. *See id.* art. 93. Three nations have made reservations under this article: Australia declared that the Convention shall not apply to the territories of Christmas Island, the Cocos (Keeling) Islands and the Ashmore and Cartier Islands; Denmark declared that the Convention shall not apply to the Faroe Islands and Greenland; and New Zealand declared that the Convention shall not apply to the Cook Islands, Niue and Tokelau.

234. *See id.* art. 94. This article allowed the Scandinavian countries (Denmark, Finland, Norway and Sweden) to retain an extant treaty covering international sales among them but still become parties to the CISG.

widespread acceptance of the Convention [undermine] the Convention's goal of creating a uniform law of international sales.

Excluding the reservations of the Scandinavian countries based on their pre-existing Scandinavian-CISG agreement, seventeen nations have made reservations to at least one article of the CISG, and twelve nations have made multiple reservations.[235] Far from creating a uniform law of international sales, the reservations permitted by the CISG allow for multiple variations on a theme. This is particularly true with regard to Articles 11 and 29 which dispense with the need for the contract to be in writing.[236]

The potential for undermining international uniformity by allowing a reservation to Articles 11 and 29 is great. For example, Argentina's reservation excludes application of Article 11 and Article 29. Thus, Argentine rules regarding the necessity and sufficiency of a writing for formation, termination and modification of contract will apply to contracts otherwise governed by the CISG. However, those Argentine rules regarding the necessity and sufficiency of a writing are not likely to be the same as the rules of the other eight nations which have opted out of coverage under Articles 11 and 29. This means that, as of this writing, one cannot speak of a single CISG with regard to Articles 11 and 29, one must speak in terms of ten CISGs: the CISG contained in the official text and the nine other CISGs which, as a result of reservations, contain the law of nine different nations regarding the sufficiency of writing in forming, modifying and terminating a contract.

This proliferation of reservation-produced variations of the CISG is further complicated by the particular language used by the nation declaring the reservation. For example, China declared a reservation only with regard to Article 11 which covers formation of contracts; China did not make a reservation regarding Article 29 which allows a contract to be orally terminated or modified.[237] While it seems illogical to require a contract to be in writing but allow it to be orally modified or terminated, this is exactly what the Chinese reservation purports to do. Permitting such res-

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235. *See supra* notes 231-34 for lists of articles to which reservations have been declared and the countries which declared them.

236. CISG, *supra* note 1, Article 11 states *in toto*: A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

CISG Article 29 states *in toto*:

> 1) A contract may be modified or terminated by the mere agreement of the parties.
>
> (2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

Id.

237. The reservation of China reads as follows: "The People's Republic of China does not consider itself to be bound by subparagraph (b) of paragraph 1 of article 1 and article 11 as well as the provisions in the Convention relating to the content of article 11."

ervations in this situation requires parties to an international sales contract to be familiar with three layers of law: (1) the standard CISG provisions, (2) the reservations each of their countries may have made to the CISG (which includes interpreting the effect of those reservations), and (3) the individual national laws regarding the sufficiency of writing in the formation of a contract. Far from creating uniformity, allowing such reservations requires contracting parties to think in terms of "which version of the CISG might apply in this situation?"

This situation undermines uniformity still further because the Convention frequently requires courts to apply the law of another nation. Article 1 states that if the parties to the intended sale of goods are both from nations bound by the CISG, then the CISG applies. This would seem to simplify matters since a court called upon to address a dispute between the parties would simply apply the CISG. This is not the case, though. A court must still engage in a choice of law analysis before applying the rules of the CISG. This step is made necessary solely because the CISG permits reservations to its provisions. As a result, the CISG does not unify international sales law, but instead adds a layer of complexity to the analysis. A court in this situation does not simply apply the CISG, but must determine which country's version of the CISG applies. Then the court must determine, even though that nation is a party to the CISG, whether that country's *domestic* law applies as a result of a reservation. For example, if the choice of law analysis involving a purported CISG contract before a U.S. court were to call for the application of the law of China, the appropriate analysis would require a written contract because the law of China applies as a result of China's reservation to Article 11. This conclusion would also require a U.S. court to research, interpret and apply Chinese law to determine whether the relevant writing amounted to an enforceable contract.

It may be worth noting how many places a court can err in this situation because the complexity of the analysis alone is an obstacle to achieving uniformity. Suppose a U.S. court is called upon by a U.S. party and a Chinese party to determine whether a contract exists between them. The initial impulse of the U.S. court would be to apply the UCC and look for a writing sufficient to meet the requirements of §2-201.[238] However, since the UCC has been supplanted by the CISG, the court would discover that Article 1(1)(a) of the CISG states that the CISG applies when both parties are from CISG countries, and the CISG does not require a writing. Article 1 would seem to obviate the need for a choice of law analysis because even if a choice of law analysis indicated that Chinese law applies, the court would still be required to apply the CISG to the acts of the parties (and not require a written contract). However, since China has opted out of Article 11, the court would discover that Chinese domestic law *does* apply, and under Chinese law written evidence of the contract is required. At this point the court -- having correctly moved through an analysis which alternately indicated that a writing is required, is not required, and ultimately is

238. *See* UCC § 2-201 (1999).

required – must attempt to apply Chinese law as to the sufficiency of whatever writing exists as evidence of the contract. Not only does this situation and its attendant pitfalls await every U.S. court, but every other court in every other CISG country must negotiate the same maze only to face the task of correctly applying foreign law rather than the CISG. Instead of narrowing the possible results and thereby increasing the potential for uniformity, by allowing reservations to Articles 11 and 29 the CISG fosters a proliferation of opportunities for courts to reach a virtually infinite number of decisions.

Conclusion

The degree of the scope and importance of the CISG concerning U.S. trade is readily apparent when one notes that the United States, Canada (the United States' largest trading partner),[239] and Mexico (the United States' third largest trading partner),[240] have all ratified the CISG.[241] This means that the CISG is *the* sales law of the North American Free Trade Area created by NAFTA.[242] Further, Chile, the nation most likely to be admitted to NAFTA[243] has also ratified the CISG[244] as has most of the European Union.[245] In fact, given the nations that have ratified the CISG,[246] it is not an exaggeration to say that the CISG governs the majority of international sales contracts involving U.S. businesses.[247]

239. *See* Office of Trade & Economic Analysis: *U.S. Aggregate Foreign Trade Data–Table 9 Top 50 Partners in Total U.S. Trade, 1991-1997* (last updated July 1998) <http://www.ita.doc.gov/industry/otea/usfth/t09.prn>.

240. *See id.*

241. Mexico, December 29, 1987 (took effect January 1, 1989); Canada, April 21, 1991 (took effect May 1, 1992). *See Table, supra* note 1.

242. *See* Harry M. Flechtner, *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).

243. "The three NAFTA partners formally invited Chile to join NAFTA at the conclusion of the 1994 Summit of the Americas. However, negotiations so far have been stymied by the lack of U.S. fast-track negotiating authority." *See* 14 INT'L TRADE REPORTER 10, 411 (1997).

244. February 7, 1990 (took effect March 1, 1991). *See Table, supra* note 1.

245. The European Union nations that have ratified the CISG are: Austria, December 29, 1987 (took effect January 1,1989); Belgium, October 31, 1996 (took effect November 1, 1997); Denmark, February 14, 1989 (took effect March 1, 1990); Finland, December 15, 1987 (took effect January 1, 1989); France, August 6, 1982 (took effect January 1, 1988); Germany, December 21, 1989 (January 1, 1991); Italy, December 11, 1986 (took effect January 1, 1988); Luxembourg, January 30, 1997 (took effect February 1, 1998); Netherlands, December 13, 1990 (took effect January 1, 1992); Spain, July 24, 1990 (took effect August 1, 1991); Sweden, December 15, 1987 (took effect January 1, 1989). *See Table, supra* note 1.

246. *See supra* note 34.

247. The CISG governs all the members of NAFTA as well as most of the European Union. This means that the CISG governs transactions involving 3 of the top 5 trading partners of the United States and 6 of its top 10 trading partners.

Although parties may opt out of the CISG's application top a formed contract, the parties cannot prevent the CISG's application to the issue of formation itself. *See supra* text accompanying notes 183-85.

Even though awareness of the CISG appears to be spreading, as evidenced by the increasing rate of discussion of the CISG in U.S. court decisions,[248] a very simple legislative step would speed the awareness and understanding of the CISG in the United States: the CISG should be enacted as federal legislation. While the CISG's nature as a self-executing treaty[249] makes such legislation unnecessary in terms of application within the United States, passage of domestic federal legislation would place the CISG within the standard statutory scheme of the U.S. Code and thereby notify U.S. lawyers of its applicability.[250] Placement within the U.S. Code as national legislation would eliminate any confusion as to its application and would unequivocally notify U.S. courts, lawyers and businesses of its application.

Additional clarification of the scope of coverage of the CISG would be achieved by the simple expedient of changing its name in the U.S. Code to reflect its content more completely. U.S. legislation should modify the title of the convention to "The Convention for International Contracts Involving the Sale of Goods and Related Services."

Along with enacting the CISG as national legislation, the Secretariat Commentary to the 1978 draft should be adopted as the official commentary of the U.S. domestic CISG legislation. The only necessary changes to the Secretariat Commentary would be to renumber the article references so that the current CISG article numbers would properly correspond to the commentary. Including this commentary would provide needed guidance for U.S. lawyers when attempting to understand a legislative scheme with so many civil law elements. One further change should be made in the commentary – the official comment accompanying Article 8 should include a statement such as "decisions made by the courts of other nations are relevant jurisprudence in interpreting the provisions of the CISG according to both its international character and the need for a uniform jurisprudence in its interpretation." A statement like this would direct U.S. courts to the appropriate approach to interpreting the CISG without resorting to amending Article 8 itself.[251]

U.S. legislation regarding NAFTA should also be amended to include a reference to the CISG coverage of contracts for goods (as defined by the CISG) concluded between parties located in different NAFTA nations. Again, this legislation would not alter the substance of NAFTA but would

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248. Over a third of the U.S. decisions which cite the CISG have been issued in the past two years. *See supra* note 40.

249. *See supra* text accompanying notes 43-47.

250. Although it is true that the CISG is already published in the Appendix to the U.S. Code, it has no statutory sections as do other national laws. Moreover, the CISG is almost impossible to locate in the Code: neither the index to the U.S. Code nor the index to Title 15 refer to the CISG or any of the terms in its title. Further, the CISG is not listed in the Table of Popular Names. Without the benefit of a computer search, finding the CISG in the U.S. Code requires knowing its location beforehand.

251. Amending the provision could lead to confusion since the United States would have ratified a treaty with one version of Article 8 but would have enacted domestic legislation containing a different version of Article 8.

provide additional guidance and notification to U.S. parties regarding the applicability of the CISG.

These changes in U.S. federal legislation would clarify both the role and application of the CISG in U.S. law. This clarification would assist the United States in accomplishing the goals it sought in signing and ratifying the CISG:

> International trade now is subject to serious legal uncertainties. Questions often arise as to whether our law or foreign law governs the transaction, and our traders and their counsel find it difficult to evaluate and answer questions based on one or another of the many unfamiliar foreign legal systems. The Convention's uniform rules offer effective answers to these problems.[252]

This sort of clarification would also greatly reduce the current confusion in U.S. courts over the proper application at the CISG in the United States.

The benefits of the federal legislation outlined in the preceding paragraphs would be greatly increased if individual states would amend the first clause of §2-102 of the UCC to read: "Unless the context appears otherwise, this Article applies to transactions in goods *not covered by the Convention on Contracts for the International Sale of Goods as contained in Title 15 of the United States Code.*" This language would clarify coverage of the UCC with regard to international sales and would unmistakably announce the presence and location of the U.S. law which often supersedes the UCC.

In the absence of such changes in legislation, U.S. attorneys and courts should note at least the following aspects of the CISG. First, as a U.S. treaty the CISG preempts state law[253] and governs virtually all contracts for the sale of international goods involving the nations of North America and Europe.[254] Second, location of the parties, rather than the movement of goods across international borders, determines applicability of the CISG;[255] therefore, even transactions which are ostensibly domestic transactions may be covered by the CISG.[256] Third, the CISG mandates that courts attempt to attain uniformity in interpretation of its provisions by considering prior, relevant rulings by foreign courts.[257] Finally, the CISG requires courts to begin their interpretation of the provisions of the CISG itself and refer to principles and jurisprudence of domestic law only as a last resort.[258]

Finally, UNCITRAL should include with its comprehensive summaries of case law concerning the CISG a statement as to whether UNCITRAL approves of the interpretation in that decision. Such a system would provide extraordinarily useful guidance in the application of a law which

252. Letter of Transmittal, *supra* note 29.
253. *See supra* text accompanying notes 62-65.
254. *See supra* text accompanying note 1.
255. *See supra* text accompanying notes 172-78.
256. *See id.*
257. *See supra* note 100.
258. *See supra* text accompanying notes 152-53.

attempts to create uniformity but which has no judicial hierarchy for resolving conflicting interpretations of its provisions.

Until Congress incorporates the CISG into the U.S. Code, and until state law explicitly refers to the CISG, U.S. businesses and U.S. lawyers will continue to experience both legal surprise and economic loss as a result of their lack of awareness of the CISG and the applicability of its provisions.

Although the CISG's goal of uniformity in the area of international sales is unlikely to be attained as long as the CISG exists in its current form, implementation of the solutions proposed in this article would foster a more uniform approach to the CISG both within the United States and abroad. The more consistently the CISG is interpreted, the closer the ultimate goal of the CISG, increasing national wealth through increased trade in goods, will be to realization.