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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 (1998).

ALWD 7th ed.
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APA 7th ed.
Flechtner, H. M. (1998). The several texts of the cisg in decentralized system: observations on translations, reservations and other challenges to the uniformity principle in article 7(1). Journal of Law and Commerce, 17(2), 187-218.

Chicago 17th ed.
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)," Journal of Law and Commerce 17, no. 2 (1998): 187-218

McGill Guide 9th ed.
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MLA 9th ed.
Flechtner, Harry M. "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)." Journal of Law and Commerce, vol. 17, no. 2, 1998, pp. 187-218. HeinOnline.

OSCOLA 4th ed.
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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)

*Harry M. Flechtner**

[T]he 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.[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]

The half century of work that culminated in the [CISG] was sustained by the need to free international commerce from a Babel of diverse domestic legal systems. . . . [T]he Convention's ultimate goal [is] uniform application of the uniform rules.[3]

I. INTRODUCTION: THE ROLE OF THE UNIFORMITY PRINCIPLE IN ARTICLE 7(1) OF THE CISG

Uniformity is a fundamental theme and a central value in the United Nations Convention on Contracts for the International Sale of Goods ("CISG" or "Convention"). The drafters of the CISG did not particularly seek to devise new, improved, or reformed provisions of sales law. Their primary goal was to create *uniformity* in the rules for international sales, in order to supplant the complex and difficult-to-predict system that subjected international sales to the varying provisions of national sales laws. The excerpt from the preamble to the CISG quoted in the headnote identifies the creation of uniform sales rules as the Conven-

* Professor, University of Pittsburgh School of Law. A.B. 1973, Harvard College; A.M. 1975, Harvard University; J.D. 1981, Harvard University School of Law.

1. United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* April 10, 1980, Preamble, U.N. DOC. A/CONF. 97/18, Annex I, *English version reprinted in* 52 Fed. Reg. 6264 (1987) and in 19 I.L.M. 668 (1980) [hereinafter "CISG" or "Convention"].

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

3. JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 1 (1989) [hereinafter DOCUMENTARY HISTORY.]

tion's contribution to the development of international trade. Books, articles, and judicial decisions celebrate the achievement of a uniform text embodying international sales rules, and elaborate on the importance of uniform application of the Convention. The crowning statement of the importance of uniformity to the Convention may be in the text of the CISG itself, where Article 7(1) (also quoted in the headnote) identifies the promotion of uniformity in the application of the CISG as one of the basic interpretative principles of the Convention.

The central place occupied by uniformity in the Convention's value-system, however, has not guaranteed that the concept and its implications would be properly understood. In the early stages of applying and commenting on the Convention, a simplistic and overly-rigid conception of the mandate of Article 7(1) concerning uniform application of the CISG has sometimes marred both court decisions and scholarly analysis. With the perspective gained from ten years' experience of the Convention in force, we are now in a position to achieve a more nuanced and accurate understanding of the Article 7(1) uniformity principle.

This paper attempts to move towards such an understanding by exploring three theses. First, the Convention does not and cannot mandate absolute uniformity of interpretation because the Convention itself is not a uniform document, and because the uniformity principle is only one of several interpretative principles that co-exist in Article 7(1). Second, the uniformity principle of Article 7(1), while fundamental to the purposes of the Convention, is neither a rigid nor a simple mandate. Properly understood, it requires a process or methodology involving awareness of and respect for, but not necessarily blind obedience to, interpretations of the CISG from outside one's own legal culture—an approach not unlike the treatment U.S. courts accord decisions of other jurisdictions when applying our Uniform Commercial Code. Third, attempts to apply the uniformity principle in a rigid or absolutist fashion not only are unjustified by the Convention, but also could undermine the substantive purposes and the political underpinnings of the CISG.

II. Sources of Non-Uniformity in the CISG

A. *Textual Non-Uniformity in the Convention*

To date, most of the discussion concerning the Article 7 uniformity principle has focused on non-uniform interpretations and applications of the Convention's text—matters that clearly pose a threat to the underlying purposes of the CISG to lower legal barriers to and promote develop-

ment of international trade.[4] This discussion has proceeded largely on the premise that the CISG contains a single autonomous legislative text applicable to transactions governed by the Convention no matter what the location or domestic legal background of the parties or the tribunal deciding a dispute. To paraphrase the title of one of Professor Honnold's contributions to the 1987 CISG symposium at the University of Pittsburgh, it was assumed that we now have "uniform international words" and the issue was whether we could achieve "uniform application" of those words.[5]

From the perspective of ten years studying and experiencing the CISG in action, however, a somewhat more complicated picture emerges. The idea that the Convention comprises a set of uniform words—a single text describing a single set of rules equally applicable to all transactions within the scope of the CISG—turns out not to be strictly accurate. Indeed, upon closer examination of the Convention the picture that emerges is not that of a single uniform text, but rather of a dizzying variety of texts. By this I mean that the very words comprising the Convention's rules will vary, often quite significantly, depending on: (1) the countries in which the parties to a CISG-governed transaction are located, and (2) the language of the tribunal resolving disputes about the transaction. This phenomenon results from the different language versions in which the Convention's sales rules are embodied, and the declarations or reservations made by various contracting states when they ratified the CISG. Each of these matters, and their effect on the uniformity of the very text that those dealing with the Convention must apply, deserve further comment.

1. The Several Language Versions of the CISG

At the 1980 diplomatic conference in Vienna, the text of the Convention was approved in "a single copy in the Arabic, Chinese, English, French, Russian, and Spanish languages, each text being equally authentic."[6] There were, undoubtedly, many advantages to having six official language versions of the Convention. It presumably facilitated the broad acceptance that the CISG has in fact achieved, it provided an appropriate

4. *See* CISG, *supra* note 1, Preamble.

5. John Honnold, *The Sales Convention in Action—Uniform International Words: Uniform Application?*, 8 J.L. & COM. 207 (1988) [hereinafter Honnold, *The Sales Convention in Action*].

6. DOCUMENTARY HISTORY, *supra* note 3, at 765 (Final Act of the U.N. Conference on Contracts for the International Sale of Goods). The texts of the six official language versions of the CISG are reprinted in DOCUMENTARY HISTORY, *supra* note 3, at 766-867.

symbol of the diverse world in which the Convention was to operate, and it certainly could be expected to prove useful to parties whose language corresponded to one of the official versions. Yet, as anyone who has attempted to express even simple matters in a different language can attest, there is no such thing as a perfectly "transparent" translation. The meaning of expressions in two languages (never mind six) is seldom if ever exactly the same.[7] The diversity of structure and background among the six official languages of the Convention was likely to exacerbate the translation problem. Thus, no matter how much care was taken in casting the CISG into its six official language versions, there were bound to be differences in the meanings conveyed.[8]

There is evidence that the existence of several official language versions of the CISG produces textual non-uniformity. Consider the following passage by Paul Volken describing the preparation of a German language translation of the Convention:

> After the international adoption of a new multilateral convention, the German-speaking countries usually meet in order to prepare a common German-language version of the new instrument. Since the French version always serves as the official text in Switzerland, Swiss delegates to the translation meetings must be especially careful to avoid unacceptable discrepancies between the French and the German versions.
>
> With respect to the Vienna Sales Convention, the translation meeting was held in January 1982 in Bonn, and the preparatory draft of the translation was drawn up on the basis of the official English text. At the meeting, three out of four Swiss interventions were raised against deviations from the French version that were considered too far-reaching. The meeting made it clear that in most instances the deficiencies were not due to the basic German draft, but to the fact that the original English and French texts contained discrepancies.[9]

A specific example—chosen not for its importance, but because it requires little in the way of language skills (I certainly have little) and because it will embarrass only me—illustrates the textual non-uniformity created by the different official language versions of the Convention. In an article written for the 1987 symposium on the CISG sponsored by the

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7. *See* B. Blair Crawford, *Drafting Considerations Under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 187, 191 (1988) ("the everyday experience of multilingual lawyers teaches that differences in meaning do crop up in translations and can be problematic").

8. *See id.* at 190-191; *see also* Frank Diedrich, *Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG*, 8 PACE INT'L L. REV. 303, 316 (1996).

9. Paul Volken, *The Vienna Convention: Scope, Interpretation, and Gap-Filling*, *in* INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 19, 41 (Petar Šarčević & Paul Volken eds., 1986).

Journal of Law and Commerce, I addressed the standards found in Articles 71 and 72 dealing with the effect of a party's prospective inability to perform. Article 71(1) permits a party to *suspend* temporarily its performance if "it becomes apparent that the other party will not perform a substantial part of his obligations."[10] Article 72(1), on the other hand, allows a party to *avoid the contract*, thus putting a permanent end to its obligation to perform, if "it is clear" that the other side "will commit a fundamental breach of contract."[11] In my earlier article I noted (as have others) that the Convention appears to require a higher degree of certainty that a future breach will occur in order to justify permanent avoidance of contract as compared to temporary suspension of performance. In other words, Article 72 states that the prospect of future breach must be "clear" to justify avoidance, whereas suspension under Article 71 requires only that the threat of breach "becomes apparent."[12] But I went further and made an original (albeit minor) argument that the Convention also required the threat of a more serious breach—one with more significant consequences—to trigger avoidance under Article 72 as compared with suspension of performance under Article 71.[13]

My argument—that avoidance of contract under Article 72 required the prospect of a more serious breach than did mere suspension of performance under Article 71—was in large part a textual one. This textual argument focused on the fact that the English version of Article 72 required the threat of a "fundamental breach of contract," whereas the English text of Article 71 required only the possibility that a party would not perform "a substantial part of his obligations." The thrust of the argument was that the drafters would not have used two different phrases ("fundamental breach" as opposed to non-performance of "a substantial part of his obligations"), and in particular, two different adjectives describing the seriousness of the breach ("fundamental" as opposed to "substantial"), had they not intended to distinguish the seriousness of the threatened breach that would satisfy the standards of the respective articles.

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10. CISG, *supra* note 1, art. 71(1).

11. *Id.* at 72(1).

12. *Compare* Harry M. Flechtner, *Remedies Under the New International Sales Convention: The Perspective From Article 2 of the U.C.C.*, 8 J.L. & COM. 53, 94 (1988) (arguing that the CISG requires a higher probability that a threatened future breach will occur in order to justify avoidance of contract under Article 72 as opposed to suspension of performance under Article 71) *with* JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 388 at 487 & § 396 at 495 (2d ed. 1991) (the same) [hereinafter HONNOLD TREATISE].

13. *See* Flechtner, *supra* note 12, at 94.

Some time after publishing this argument I had occasion to look at the official French version of Articles 71 and 72, and was surprised to discover that my argument was, at the least, much harder to make under the French text. In the French version, both Article 71 and Article 72 use the same adjective to describe the seriousness of a threatened breach that would trigger their provisions. In both, the standard is a breach or non-performance that is "essentielle," i.e., Article 71 states that, to justify suspension, a party must threaten non-performance of "une partie *essentielle* de ses obligations," and Article 72 requires a threat of "une contravention *essentielle* au contrat" to warrant avoiding the contract.[14] One need not be an accomplished linguist to recognize that the French text's use of the same adjective to describe the severity of the threatened breach in both Articles 71 and 72 undercuts my argument, particularly when a different adjective equivalent to (indeed, a cognate of) the adjective used in the English text of Article 71—"*substantielle*"—was available to the drafters of the French text.

I will not here try to sort out whether the French text of Articles 71 and 72 conclusively rebuts my argument.[15] I merely wish to give an example of how different official language versions of the same CISG provisions constitute substantially different texts, a point that seems intuitive enough that it need not be further belabored. It is worth noting, however, that the textual non-uniformity created by the six official language versions of the CISG is only part of the problem in this area. Naturally, translations of the CISG are being made for those whose language does not coincide with any of the six official versions. I have already alluded to the German translation commissioned by the governments of Austria, Germany and Switzerland,[16] and I am also aware of an Italian version.[17] Such translations may be "unofficial,"[18] but that does not mean they are

14. CISG, *supra* note 1, arts. 71, 72 (French version), *reprinted in* DOCUMENTARY HISTORY, *supra* note 3, at 825 (emphasis added).

15. For one approach to reconciling divergent official language versions of the CISG (an approach that would be quite unhelpful in the particular case described in the text), see the text accompanying note 67 *infra*. The official Spanish text of Articles 71 and 72 echoes the English text in using two different adjectives ("sustancial" in Article 71; "esencial" in Article 72) to describe the seriousness of the breach required to trigger the two provisions. I do not possess the requisite language skills to comment on the Chinese, Russian or Arabic texts.

16. *See supra* text accompanying note 9. For another description of the German translation, see Diedrich, *supra* note 8, at 317-18.

17. The German and the Italian translations are reproduced in C.M. BIANCA ET AL., COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 807-40 (1987).

18. They are "unofficial" in that they are not sanctioned by the sponsoring body of the Convention, UNCITRAL. That does not mean that they are not sponsored by governments or that they do not have official (or at least quasi official) status within countries in which the language of the "unofficial"

unimportant. As a practical matter, they will undoubtedly constitute the primary source of Convention provisions for courts, arbitral panels and practitioners that work in a language lacking an official version. It is, of course, inevitable that discrepancies and inaccuracies will crop up in such unofficial translations, as they would in any translation. The fact that there is no "official" vetting of such translations by UNCITRAL presumably increases the risk of deviations.

2. *Reservations (Declarations) and Their Effect*

In ratifying a treaty, a state will sometimes make a "reservation" or "declaration" that it will not be bound by some part or aspect of the treaty.[19] In order to limit non-uniformity arising from such reservations,[20] the drafters of the CISG provided in Article 98 that only reservations expressly authorized by the Convention are permitted.[21] Articles 92-96 of the Convention authorize five reservations. Despite the drafters' attempts to limit their scope and effect, reservations have produced substantial non-uniformity in the text of the Convention in force in the various countries that have ratified the CISG.

Article 92 of the CISG permits a Contracting State to declare that it is not bound either by Part II of the Convention (Articles 14-24, governing contract formation) or by Part III of the CISG (Articles 25-88, governing the substantive rights and obligations arising from a sales contract).[22] The four Scandinavian countries (Denmark, Finland, Norway &

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translation is spoken. The German translation, for example, was produced by the governments of the German-speaking countries, presumably for the purpose of being used by courts and other public bodies. *See* Volken, *supra* note 9, at 39-42. Indeed, the German version has been labeled "official but non-authentic." Diedrich, *supra* note 8, at 317.

19. Article 19 of the Vienna Convention on the Law of Treaties authorizes treaty reservations but limits their range:

> A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
>
> (a) the reservation is prohibited by the treaty;
>
> (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
>
> (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Vienna Convention on the Law of Treaties, art. 19, U.N. Doc. A/CONF.39/27 (1969) [hereinafter Vienna Treaty Convention].

20. *See* Peter Winship, *Final Provisions of UNCITRAL's International Commercial Law Conventions*, 24 INT'L LAW. 711, 725 (1990).

21. Such a provision is enforceable under the Vienna Treaty Convention, *supra* note 19, art. 19(b).

22. *See* CISG, *supra* note 1, art. 92(1).

Sweden) have made declarations under Article 92 reserving out of the contract formations provisions (Part II) of the CISG. The text of the Convention in force in these countries, therefore, omits eleven provisions found in the version of the CISG in force in states that did not make the Article 92 reservation. When parties located in Denmark, Finland, Norway or Sweden are involved in a sale within the scope of the Convention, the contract formation rules applicable to the transaction will depend on the law applicable under the rules of private international law.[23]

Article 93 of the Convention permits a Contracting State to declare that the Convention "extends to one or more but not all of the territorial units" of the State.[24] Four countries—Australia, Canada, Denmark and New Zealand—have made reservations pursuant to this "federal State" clause.[25] Article 94 of the Convention permits a Contracting State that shares "the same or closely related legal rules" on sales with one or more other states to declare that the CISG does not apply to transactions involving parties located in those other states.[26] Denmark, Finland, Norway and Sweden have made the declaration authorized by this provision, in order to preserve the common sales rules that they have developed for intra-Scandinavian trade.[27] While the reservations permitted by Articles 93 and 94 do not change the text of the Convention in a literal sense, they produce what amounts to an alteration in the meaning of the term "Contracting State" for purposes of the scope provision (Article 1) of the Convention. For example, a party located in Greenland—a territory to which the CISG does not extend pursuant to Denmark's reservation under Article 93—is not deemed to be in a "Contracting State" for purposes of

23. For example, suppose one party to a sale is located in Country A, a CISG Contracting State that has made the Article 92 reservation, and the other party is located in Country B, a Contracting State that has not made the reservation. If the forum's conflicts/choice-of-law rules lead to the application of the law of State A, the domestic sales contract formation rules of State A will apply. *See* Judgment of May 21, 1996, Budapest fováros Birósága [Metropolitan Court of Budapest], UNILEX (Hung.); Judgment of July 27, 1995, OLG Rostock, UNILEX (F.R.G.); JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN SCANDINAVIA § 2-3 at 14 (Illustration 2b) (1996). *But see* Judgment of March 8, 1995, OLG München, UNILEX (F.R.G.) (apparently applying general principles of contract formation derived from the CISG where Part II of the CISG was inapplicable because of the Article 92 reservation of the seller's country (Finland)). If the forum's conflicts/choice-of-law rules lead to the application of the law of State B, in contrast, the contract formation rules of the CISG will apply (unless State B has made a reservation pursuant to Article 95, a provision discussed in the text accompanying notes 30-32 *infra*). *See* HONNOLD TREATISE, *supra* note 12, § 467(4); LOOKOFSKY, *supra*, § 2-4 (Illustration 2e).

24. CISG, *supra* note 1, art. 93(1).

25. For a discussion of "federal State" clauses in the CISG and other conventions, see Winship, *supra* note 20, at 721-24.

26. CISG, *supra* note 1, art. 94(1)-(3).

27. *See* HONNOLD TREATISE, *supra* note 12, § 469.

Article 1, even though Greenland is a part of Denmark and Denmark has ratified the Convention.[28] Article 94 reservations have a similar effect. Although Article 1(1)(a) of the Convention makes the CISG applicable to sales between parties located in Contracting States, transactions between parties in Norway and Sweden are not governed by the CISG even though both these countries have ratified the Convention; in other words, because of their Article 94 reservations, Norway and Sweden (and the other Scandinavian countries) are in effect not "Contracting States" when they trade with each other.[29]

The reservation authorized by Article 95 has been made by an interesting grouping of five countries: China, the Czech Republic, Singapore, Slovakia and the United States.[30] By their reservations, these countries have declared that they are "not bound by subparagraph (1)(b) of Article 1." Article 1(1)(b) provides that CISG applies to international sales transactions "[w]hen the rules of private international law lead to the application of the law of a Contracting State."[31] The complexities of applying this reservation have been explored elsewhere.[32] For the purposes of this article it is sufficient to note that the effect of the reservation is to remove a critical scope provision from the text of the CISG that is in force in five countries, including the United States. The version of the

28. *See* CISG, *supra* note 1, art. 93(3).

29. As authorized by Article 94(2), the reservations made by Denmark, Finland, Norway and Sweden extend not only to trade between parties located in those countries, but also to sales between one of those countries and Iceland, a country that has not ratified the Convention. This aspect of the reservation effects the application of CISG Article 1(1)(b), which makes the Convention applicable if principles of private international law lead to the application of the law of a Contracting State. Because of the Scandinavian countries' Article 94 reservation, the CISG will not apply to transactions between an Icelandic party and a party located in Denmark, Finland, Norway or Sweden even if private international law principles point to the application of the law of the (ratifying) Scandinavian country.

30. At the time it acceded to the CISG, Canada combined the authority granted by Article 93 (the "federal State" clause) and Article 95 by making an Article 95 reservation that applied only to one province—British Columbia. Canada later withdrew this "provincial" Article 95 reservation. *See CISG Contracting States and Declarations Table*, 17 J.L. & COM. 449 (1998) [hereinafter *Table*].

31. CISG, *supra* note 1, art. 1(1)(b). Germany's ratification of the CISG includes an "observation" that, in its view, States that have made an Article 95 reservation are not to be considered "Contracting States" for purposes of Article 1(1)(b) of the Convention. *See Table*, *supra* note 30. The effect of this position is that Germany, which has not made the Article 95 reservation and thus is bound by Article 1(1)(b), would not be forced to apply the Convention pursuant to Article 1(1)(b) if private international law rules lead to the application of a Contracting State that has made an Article 95 reservation (such as the United States). Since in this situation the State whose law is designated by private international law rules would not itself apply the CISG (because of its Article 95 reservation), the German position seems eminently sensible. On the other hand, the German "observation"—which amounts to a particular interpretation of the text of the Convention—is not one of the reservations authorized by the Convention, and thus its legal status is unclear.

32. For an especially thorough treatment see HONNOLD TREATISE, *supra* note 12, §§ 47-47.5.

Convention in force in those countries provides that the CISG applies only when the requirements of Article 1(1)(a) are met—i.e., when both parties to a sales transaction are located in Contracting States.

The reservation authorized by Article 96 is, by a considerable margin, the most popular of the CISG declarations. Ten countries—Argentina, Belarus, Chile, China, Estonia, Hungary, Latvia, Lithuania, the Russian Federation and the Ukraine—have opted for it.[33] To understand the consequences of an Article 96 reservation one must first be aware that Articles 11 and 29 of the Convention affirmatively eliminate any requirement that sales contracts governed by the CISG (or modifications thereof) be in writing in order to be enforceable.[34] The effect of an Article 96 reservation on this elimination of writing requirements is specified in Article 12:. "Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement . . . to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention."[35]

To illustrate, assume a party located in the United States and a party located in Argentina orally agreed to a sales contract. Because Argentina has made the Article 96 reservation,[36] the provisions of Articles 11 and 29 dispensing with any writing requirement are called off by Article 12. That does not, however, mean that the transaction is subject to a writing requirement. The resolution of that issue will depend on a choice of law analysis. If private international law principles lead to the application of Argentinian law, the writing requirements of Argentinian domestic sales law will apply. If the rules of private international law designate U.S. law, then the writing requirements of U.S. domestic sales law will apply. The result in the latter situation is rather ironic. Because one party to the sale is from *Argentina* and *Argentina* has made an Article 96 reservation, the transaction becomes subject to the domestic *U.S.* Statute of Frauds requirements (most likely § 2-201 of the Uniform Commercial Code as enacted in the jurisdiction whose law governs the transaction). And this

33. *See Table, supra* note 30.

34. *See* CISG, *supra* note 1, arts. 11, 29.

35. *Id.* art. 12. Article 96 specifies that the reservation it authorizes is available only to "[a] Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by a writing." CISG, *supra* note 1, art. 96. Thus, a country whose domestic legislation imposes no writing requirements on sales contracts is forbidden (at least theoretically) from making an Article 96 reservation.

36. *See Table, supra* note 30.

is the case, even though the United States, by failing to make an Article 96 declaration, in effect declared its willingness to forego its Statute of Frauds rules and accept oral international sales contracts.

At any rate, my point is that the reservation permitted by Article 96 changes the text of the Convention by eliminating those aspects of Articles 11 and 29 (as well as anything in Part II of the CISG) that dispense with writing requirements. The Article 96 reservation has this effect, not just in countries making the reservation, but also in non-reserving countries, on a transaction-by-transaction basis. In other words, whether the text of the Convention includes provisions eliminating writing requirements varies, even in a State that has not made the Article 96 reservation, depending on whether one of the parties is located in *another* State that made the reservation. This certainly makes this aspect of the CISG appear less like a stable and uniform text and more like a Joseph's coat of shifting rules.

Of the fifty-one Contracting States (at the time of this writing), twenty-one (over 40%) have made reservations, and in several cases, multiple reservations.[37] Ten States—almost 20% of the countries that have ratified the Convention—have adopted the Article 96 reservation. The effect of these reservations is to introduce significant variations in the text of the CISG in force in Contracting States—variations ranging from changing the meaning of the term "Contracting State," to eliminating a subpart of the article dealing with applicability, to excising an entire eleven-provision component of the Convention.

In summary, even at the most fundamental level—the very words employed to convey meaning—non-uniformity is introduced into the CISG by the promulgation of different language versions of the Convention, and by the decision of some Contracting States to adopt reservations. The impact of the *textual* non-uniformity engendered by these phenomena may well be considerable. Furthermore, even when those charged with applying the Convention are dealing with the same (or very closely equivalent) texts, non-uniform approaches and results are sure to arise. The sources of this second type of non-uniformity include the limited scope of the CISG, explicit or implied incorporation of non-uniform national law rules by the Convention, and what Professor Honnold has labeled the "homeward trend" in interpreting the CISG's text. The significance of non-uniformity arising from such sources likely eclipses even that of the textual non-uniformity described above, and will be explored in the next sections.

37. *See id.*

B. Incorporation of Non-Uniform National Law into the CISG

The CISG does not attempt to provide rules for every legal issue that can arise in an international sales transaction. Such an effort, indeed, would have required a massive body of civil and criminal law dealing with questions relating to everything from larceny and fraud to customs and libel issues. The Convention's ambitions, understandably, are far more modest. The basic definition of the limited subject-matter scope of the CISG is in the first sentence of Article 4: "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract."[38] This limited focus omits some subjects that a lawyer from the United States might think of as part of sales law—subjects that, at any rate, are dealt with in Article 2 of the U.C.C.[39] Nevertheless, the subject matter that the CISG defines for itself corresponds roughly to a very familiar division of U.S. law—contract law, as opposed to tort law, property law and other major fields into which U.S. civil law has traditionally been divided. For this reason, U.S. lawyers are likely, on the whole, to feel comfortable with the way that the CISG limits its subject-matter scope.

The fact that the subject-matter reach of the Convention is limited, of course, means that some sales-related issues have not been brought within its regime of uniformity. Perhaps the most important example involves questions of contractual "validity," which are expressly placed beyond the scope of the CISG by Article 4(a). While there is uncertainty concerning the exact reach of the validity exclusion, commentators generally agree that issues of fraud, duress, unconscionability, illegality, capacity to contract, and agents' authority are matters of validity that are beyond the scope of the Convention.[40] There is also consensus that questions of validity are referred to the national law of the jurisdiction designated by applicable choice of law principles.[41] Indeed, the purpose of the "validity" exception was to preserve national rules that embodied

38. CISG, *supra* note 1, art. 4.

39. A prime example of such an issue is whether a buyer acquires good title to goods—a matter that is treated as part of U.S. domestic sales law (see § 2-403 of the Uniform Commercial Code) but which is expressly excluded from the Convention by Article 4(b).

40. *See* Harry M. Flechtner, *More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, "Validity" and Reduction of Price Under Article 50*, 14 J.L. & COM. 153, 166 (1995) and authorities cited therein.

41. *See* BIANCA ET AL., *supra* note 17, art. 4, ¶ 2.4 at 45; ALBERT H. KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 81 (1989); Flechtner, *supra* note 40, at 165; Helen 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, 3 *passim* (1993).

important social values and which could not be waived by the agreement of parties to a contract.[42] Thus even where a sales contract is governed by the CISG, validity issues remain subject to the non-uniform rules of individual States. For this reason it has been asserted that the validity exception poses "a particular danger" to the development of a uniform and coherent jurisprudence under the Convention.[43]

Matters of validity are by no means the only issues referred to national law by the CISG. For example, Article 28 expressly subjects the availability of specific performance as a remedy to the rules of the jurisdiction of the adjudicating tribunal.[44] In other instances, references to domestic national law are implied. Article 7(2) even establishes an express methodology for determining when to make implied references to national law, by providing that questions not expressly settled in the Convention are first to be answered by reference to the "general principles" of the CISG and then, "in the absence such principles, in conformity with the law applicable by virtue of the rules of private international law."[45] Other contributions to this Symposium adduce several instances of implied references to national law in the CISG. Professor Behr and Professor Garro point out that the interest rate payable under Article 78—a matter not expressly dealt with in the Convention—is generally held to be governed by applicable national law.[46] In addition, Professor Ferrari argues persuasively that the phrase "rules of private international law" in Article 1(1)(b) must be determined by reference to the choice-of-law rules of national law rather than by an autonomous interpretation of the text of the Convention.[47]

Such instances of express and implied references to national law to deal with issues that would otherwise be within the scope of the Convention naturally import non-uniformity into the CISG. In sales governed by the Convention, for example, interest rates on monetary awards and the availability of specific performance will vary from transaction to transac-

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42. *See* Hartnell, *supra* note 41, at 22-45.

43. *Id.* at 7.

44. *See* CISG, *supra* note 1, art. 28. For the argument that Article 28 refers to the domestic specific performance rules of the forum, as opposed to the specific performance rules of the jurisdiction designated by choice of law analysis, see HONNOLD TREATISE, *supra* note 12, § 195.

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

46. *See* Dr. Volker Behr, *The Sales Convention in Europe: From Problems in Drafting to Problems in Practice*, 17 J.L. & COM. 263 (1998); Alejondro M. Garro, *The U.N. Sales Convention in the Americas: Recent Developments*, 17 J.L. & COM. 219 (1998).

47. *See* Franco Ferrari, *CISG Case Law: A New Challenge for Interpreters?*, 17 J.L. & COM. 245 (1998).

tion depending on the jurisdiction whose substantive law applies and the forum in which disputes are being resolved.

C. *The "Homeward Trend"—The Effect of Domestic Law Ideology*

The sources of non-uniformity described to this point—the different language versions of the CISG, the reservations made by Contracting States, and the Convention's references to national law to determine certain questions—by no means exhaust the subject. Perhaps the single most important source of non-uniformity in the CISG is the different background assumptions and conceptions that those charged with interpreting and applying the Convention bring to the task. As Professor Honnold has eloquently put it:

> The Convention, *faute de mieux*, will often be applied by tribunals (judges or arbitrators) who will be intimately familiar only with their own domestic law. The tribunals, regardless of their merit, will be subject to a natural tendency to read the international rules in light of the legal ideas that have been imbedded at the core of their intellectual formation. The mind sees what the mind has means of seeing.[48]

Professor Honnold labels this phenomenon the "homeward trend."[49] It is helpful to illustrate it using an imaginary example, a kind of legal thought experiment. The imaginary example focuses on what lawyers in the common law tradition would call a parol evidence issue—whether parties to a contract intended to rescind or discharge certain terms they might have agreed on during negotiations, because they omitted those terms from a later writing embodying their agreement.

Of course this issue can arise, and in fact has arisen several times, in transactions governed by the CISG.[50] The Convention has (in my opinion) little to say that is directly relevant to resolving this issue. Article 8(3) of the CISG does provide that, in interpreting the parties' intent and the meaning of an agreement, "due consideration is to be given to all

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48. DOCUMENTARY HISTORY, *supra* note 3, at 1. Ten years ago, at the first University of Pittsburgh symposium on the CISG sponsored by the *Journal of Law and Commerce*, Professor Honnold described the phenomenon as follows: "Years of professional training and practice cut deep grooves. How can we avoid the tendency to think that the words we see are merely trying, in their awkward way, to state the domestic rule we know so well." Honnold, *The Sales Convention in Action*, *supra* note 5, at 208.

49. DOCUMENTARY HISTORY, *supra* note 3, at 1.

50. *See, e.g.*, Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc., 993 F.2d 1178 (5th Cir. 1993); Judgment of September 22, 1992, OLG Hamm (Germany). For a discussion of these cases see *infra* text accompanying notes 57-59.

relevant circumstances of the case, including the negotiations. . . ."[51] Some have taken this to be a repudiation of the common law parol evidence rule.[52] I, however, have argued that, because Article 8(3) deals only with questions of interpretation, its impact on parol evidence questions is limited.[53] At any rate, most English-language commentators—including those who believe that the Convention rejects the parol evidence rule—agree that a well-drafted merger clause, providing that a written contract constitutes the complete and final statement of the agreement, will prevent the parties from being bound by prior terms omitted from the writing.[54] If that is the case, then it is certainly possible that parties to a CISG transaction who have failed to include a merger clause in their written agreement may nevertheless have *impliedly* intended the writing to be the complete operative statement of their agreement, and thus to

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51. CISG, *supra* note 1, art. 8(3).

52. *See, e.g.*, KRITZER, *supra* note 41, at 125 (referring to the "absence of a parole [*sic*] evidence rule" in the Convention); B. Blair Crawford & Janet L. Rich, *New Rules for Contracting in the Global Marketplace: The United Nations Convention on Contracts for the International Sale of Goods ("CISG")*, *in* GOING INTERNATIONAL: INTERNATIONAL TRADE FOR THE NONSPECIALIST Vol. 1 (ALI-ABA COURSE OF STUDY MATERIALS), 11, 25, July 9-13, 1990 ("CISG Article 8 directs the court to give due consideration to all relevant evidence of the parties' intent including negotiations, course of dealing usages and performance. The parol evidence rule is thus revoked for CISG contracts."); John E. Murray, Jr., *An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 11, 44 (1988) ("CISG rejects the parol evidence rule. . . ."); *cf.* HONNOLD TREATISE, *supra* note 12, § 110, at 170-71 ("Article 8 does not directly address the 'parol evidence rule' . . . [b]ut the language of Article 8(3) seems adequate to override any domestic rule that would bar a tribunal from considering the relevance of other agreements.").

53. *See* Flechtner, *supra* note 40, at 157-58; Ronald A. Brand & Harry M. Flechtner, *Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention*, 12 J.L. & COM. 239, 251-52 (1993). For an argument that even my view of the limited effect of the parol evidence rule goes too far, see David H. Moore, *The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying* Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc., 1995 B.Y.U. L. REV. 1347 (1995).

54. *See* HONNOLD TREATISE, *supra* note 12, § 110, at 171; KRITZER, *supra* note 41, at 125; Peter Winship, *Domesticating International Commercial law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 LOY. L. REV. 43, 57 (1991). *See also* JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 152D(4) (suggesting that drafters should "supplement the normal merger clause to the effect that, pursuant to Article 6 . . ., the parties expressly agree to derogate from that portion of Article 8(3) (permitting prior negotiations to be admitted into evidence as a relevant circumstance) and intend the contract to be subject to the parol evidence rule as found in UCC § 2-202"). *But see* Paul C. Blodgett, *The United Nations Convention on the Sale of Goods and the "Battle of the Forms,"* 18 COLO. LAW. 421, 424 (1989) (implying that evidence of the parties' negotiations is admissible under the CISG even if the parties had integrated their transaction into "a writing without ambiguities, intended as a final, complete and exclusive expression of [their] agreement"); Stephen E. Camisa, Comment, *From Moscow to Moscow: Primary Contractual Considerations for the International Sale of Goods*, 27 IDAHO L. REV. 347, 351 (1990-91). "When the writing is intended as a 'final expression' of the parties' agreement, the U.C.C. would exclude factors such as the negotiations which CISG allows." *Id.* (citation omitted).

discharge and render irrelevant prior agreed terms omitted therefrom. This is simply a question of determining the parties' intent when they have left it ambiguous.

Now suppose this issue—whether the parties intended to discharge terms omitted from a writing that contained no express merger clause—arose before two tribunals from different legal traditions. Suppose further that, in one tradition, contracts are assumed to be, typically, the product of an adversarial relationship where each party seeks to gain the most while giving up as little as possible; and as a consequence, each party has little trust for the other. In the other tradition, contracts are conceived of as cooperative ventures where the parties are engaged in a mutually beneficial relationship based on trust and joint action.

A judge from the first tradition is likely to assume, even without a merger clause in the written contract, that the parties' probable purpose in making the writing was to create an authoritative record of their agreement in order to minimize disputes and temptations toward opportunism, and to create concrete evidence of the contract that would limit the impact of self-interested recollection. This seems the most plausible explanation of why adversarial and distrustful parties would go to the trouble of preparing the writing. Such a judge is likely to view the omission of alleged terms from the writing with suspicion. Given the (assumed) lack of trust between the parties, it seems absurd to presume that the parties intended to be bound by terms that they failed to "nail down" in the writing. Indeed, such a judge is likely to approach the issue with the presumption that, unless special circumstances explain why the parties failed to include binding terms in their writing,[55] they did not intend to be bound by the omitted terms.

A judge from the second tradition, in contrast, will approach the issue from quite a different perspective. Where the background presumption is that parties to a contract are generally cooperative and trustful, the preparation of a written contract is less likely to look like an attempt to set out a clear, final and complete statement of the parties' agreement. Any number of alternative explanations would seem to be as or even more plausible. The writing might have been created to satisfy formal requirements and the exigencies of record-keeping, to provide a convenient reminder of the general outlines of the transaction, or to allow each side to demonstrate good faith by formally committing itself to the deal. From such a perspective, the omission of alleged terms from the writing is far

55. For example, it might be shown that the writing was intended to be placed in public records, and the parties did not wish to disclose their entire agreement.

less likely to raise an inference that the parties were abandoning those terms. Indeed, it might be a breach of the etiquette appropriate in a cooperative contractual relationship—a suggestion of a lack of trust—for one party even to mention that certain agreed-upon terms were omitted from a later writing. A judge with such a vision of contracts and contractual writings is likely to require specific affirmative proof that the parties intended to discharge terms just by failing to include them in a writing. In the absence of a formal declaration of such intent—i.e., a merger clause—the required proof will indeed be difficult to produce.

Thus, without contradicting any provision of the Convention, judges with different background assumptions about the nature of the contractual relationship could well come to inconsistent results in dealing with parol evidence issues. I am no comparativist, so I have little basis to assert that the two imaginary traditions described above correspond to actual legal traditions. I do suspect that the common law world has tended (traditionally) to view contracts as more adversarial than has the civil law tradition.[56] If so, this will make it difficult for civilians and common lawyers to reach common ground in the way they frame the issues and view the evidentiary burdens when parol evidence questions arise in a transaction governed by the CISG.

There is in fact some evidence that U.S. courts are relatively more willing than are their counterparts in civil law jurisdictions to find that omitting terms from a writing renders them non-binding. In *Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*,[57] the United States Court of Appeals for the Fifth Circuit indicated that the Convention had no effect on the application of the Texas parol evidence rule to a written settlement agreement between parties engaged in international trade. The court held that the parol evidence rule barred evidence of two alleged oral agreements between the parties, even though the written contract contained no merger clause and the alleged oral agreements did not contradict anything in the writing.[58] According to an

56. In a forthcoming article, Professor Vivian Curran, who is a true comparativist, argues that in the common law tradition the primary focus of contract law is efficiency, whereas the dominant concern in the civil law tradition of contract law is the moral obligation to honor one's promises. Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. (forthcoming 1998). The distinction Professor Curran makes between the foci of common law and civilian contract law is certainly consistent with the two different conceptions of the nature of the contractual relationship described in the text.

57. 993 F.2d 1178 (5th Cir. 1993).

58. *Id.* at 1182-83 n.9 (asserting that the court need not determine whether the CISG governed the transaction at issue "because our discussion is limited to application of the parol evidence rule (which applies regardless)"). It should be noted that some U.S. courts and commentators have not

English summary appearing in UNILEX, in contrast, a German court—the Oberlandesgericht Hamm—has asserted a general principle that under the CISG an oral agreement can *contradict* a written one.[59] The approaches of these two courts to the issue of what effect a writing has on prior agreements omitted from the writing exemplifies a non-uniformity that may well reflect a "homeward trend."

At any rate, my point is that the "homeward trend" is likely to manifest itself at the level of unarticulated and even unconscious background suppositions, as in the foregoing example involving parol evidence issues. Even the drafters of the Convention, who were certainly aware of and sophisticated about the difficulties of communicating legal concepts to members of different legal cultures,[60] were probably only dimly conscious of the disparate assumptions they brought to the drafting process. Even when they agreed upon particular treaty language and the overall scheme of the CISG, they most likely had different understandings, reflecting their different legal backgrounds. Thus the ambiguity created by the variety of "legal ideologies" possessed by those who will interpret and apply the Convention is in a sense built into the very text of the CISG. This presents a severe challenge to achieving uniformity in applying the Convention—a challenge that can be met only by sensitive, energetic and intelligent attempts to become aware of one's own preconceptions and the perspectives of those from different cultures. This will have to occur in a difficult organizational context—one in which the decisions of various national court systems and arbitral panels are not subject to review by a single final tribunal with the power to provide authoritative interpretations. The process of building a common international framework for understanding contracts, and thus escaping the pull of the "homeward trend," is therefore likely to be a long and difficult one.

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adopted the approach taken in the *Beijing Metals* case, asserting instead that the Convention rejects or, at any rate, substantially modifies the domestic U.S. parol evidence rule. *See* Filanto S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1238 n.7 (S.D.N.Y. 1992) (stating that "the Convention essentially rejects . . . the parol evidence rule" (citing Article 8(3)); Flechtner, *supra* note 40, at 156-61 and authorities cited therein.

59. *See* OLG Hamm, UNILEX, No. 19 U 97/91 (Sept. 22, 1992). On the particular facts before it, the court found insufficient proof that a contradictory oral agreement existed. *Id.*

60. *See* HONNOLD TREATISE, *supra* note 12, § 87(1) (explaining the drafters' attempt to avoid "abstract, disembodied concepts" that have "similar names but different meanings" in different traditions, in favor of "plain language that refers to things and events for which there are words of common content in the various languages").

III. A Closer Look at the Uniformity Principle of Article 7(1)

A. *The Uniformity Principle in Context*

Given the various and powerful sources of non-uniformity in the Convention, it is clear that strict global uniformity in applying the CISG is neither possible nor (I would argue) even desirable. The question, then, is whether Article 7(1) nevertheless requires the impossible and undesirable.

Thankfully, a closer look at Article 7(1) reveals that the answer is no. That provision does not mandate absolute uniformity of results under the Convention. It provides only that, in interpreting the CISG, "regard is to be had . . . to the need to promote uniformity in its application. . . ."[61] Thus the mandate is to "promote" uniformity—an approach that presumably recognizes that actual achievement of uniformity may not always be the result. In addition, Article 7(1) treats the promotion of uniformity only as a consideration in interpreting the Convention, rather than as an inviolable principle. Furthermore, the uniformity consideration (which may in fact be a better phrase than "uniformity principle") is but one of several considerations mentioned in Article 7(1). Those interpreting the CISG are also charged to bear in mind its "international character" and "the need to promote . . . the observance of good faith in international trade."[62] Although in many cases these various considerations will converge on a particular interpretation of the Convention, they will sometimes point in different directions, as the discussion of the *Malev* case later in this paper will demonstrate. There is nothing in Article 7(1) to suggest that promoting uniform results is to be given precedence over promoting good faith or recognizing the international character of the CISG. Those interpreting the Convention apparently are to use discretion and judgment in balancing the various considerations mentioned in Article 7(1).

Thus, although the Convention represents an immense step toward a uniform set of international sales rules, it does not, and could not, achieve complete uniformity of those rules. Substantial non-uniformity is built into the Convention and the processes by which it is applied. Article 7(1) does not mandate a doomed quest for an unobtainable (and, I would argue, ultimately harmful) ideal of rigid uniformity. Nevertheless, Article 7(1) does articulate the promotion of uniformity as a fundamental

61. CISG, *supra* note 1, art. 7(1).

62. *Id.*

value to be considered when interpreting the CISG. I will now turn to analysis of how that value should be implemented.

B. Distinguishing Varieties of Non-Uniformity

Given the substantial non-uniformity built into the Convention and the processes by which it is applied, proper application of the uniformity principle found in Article 7(1) requires making distinctions among the various non-uniform rules and results flowing out of the CISG.

Some types of non-uniformity in the application of the Convention were intended by the drafters. Another name for such non-uniformity is the less pejorative "flexibility." Given the immense variety of sales transactions for which the Convention was designed, the vastly different legal, economic, and social contexts in which those transactions take place, and the significant political challenges that had to be overcome in the drafting and ratification processes, it was inevitable that the drafters would include a variety of mechanisms designed to accommodate different circumstances. Examples of such intentional non-uniformity include the divergent rules produced by reservations and by the Convention's references to national law, as in Article 28.

Some of the non-uniformity associated with the CISG, however, was not intended—or at least not desired—by the drafters. Such non-uniformity grows from the ambiguity of communication and the diversity of cultures, languages, views and background assumptions of those who drafted the CISG, and the tribunals charged with applying it. A clear example of an unintended and undesired variety of non-uniformity would be a discrepancy between two of the official language versions of the Convention, each presumably meant to convey exactly the same thing, though the nature of language and translation make such an ideal impossible to achieve.

Given the existence of these two types of non-uniformity in the CISG—the intentional flexibility that permits the CISG to accommodate the incredible diversity of circumstances in its subject matter and milieu, and the unintended non-uniformity resulting from limitations in human understanding and communication—the mandate of Article 7(1) to promote uniformity in interpreting the Convention becomes more difficult. The job apparently requires distinguishing between the two types of non-uniformity. The intended flexibility of CISG must be preserved and accommodated in order to promote the drafters' intentions, while unintended non-uniformity should be minimized.

At the very least, the necessity of making this distinction complicates the job of promoting uniformity in compliance with Article 7(1). Indeed, distinguishing the two types of non-uniformity can sometimes be virtually impossible. The drafters intentionally left open some matters upon which they were unable to reach consensus. For example, Article 25 of the CISG states that, in determining whether a breach is "fundamental," only those detrimental effects of the breach that were foreseeable to the breaching party should be considered.[63] The text of Article 25, however, does not specify whether this foreseeability should be determined as of the time of contract formation—as it is, under Article 74, when the issue is the recoverability of a particular item of damage—or at the time the breach occurred.[64] The drafters considered this specific issue, and consciously refused to amend the text of Article 25 to resolve it.[65] Would a non-uniform rule on this issue, with some tribunals measuring foreseeability at the time of contract formation and others doing so at the time of breach, be offensive to the uniformity principle in Article 7(1)? Or would such non-uniformity create a useful experiment in the advantages of the different positions, an experiment that the drafters consciously invited when they refused to resolve the question? It is extraordinarily difficult to decide whether such issues should be resolved in a single, uniform way, or whether multiple answers are more in keeping with the drafters' intentions. In other words, the creation of ambiguity concerning the time for determining foreseeability under Article 25 was intentional, and as a consequence it is not clear whether the drafters intended a uniform result.

Where a particular failure of uniformity is unintended and would violate Article 7(1), the choice from among the competing resolutions can be extraordinarily difficult. This is true even in the relatively easy case where the drafters clearly intended a particular uniform result. For example, suppose non-uniform rules arise from discrepancies in the official language versions of the CISG. As suggested above, this represents unintentional and undesirable non-uniformity: the drafters presumably intended the results in one language version as opposed to another, a single uniform rule. The uniformity principle in Article 7(1) appears to require an attempt to promote the uniform rule intended by the drafters and (presumably) embodied in one of the language versions. The Final Act of the

63. *Id.* art. 25.

64. *See id.* arts. 25, 74.

65. An account of this issue and the related episodes of drafting history is given in HONNOLD TREATISE, *supra* note 12, § 183.

CISG, however, declares that the six official versions of the Convention constitute "a single copy in the Arabic, Chinese, English, French, Russian, and Spanish languages, each text being equally authentic."[66] How does one reconcile different rules expressed in different official language versions?

One commentator has suggested that "the English and French texts of the CISG best represent the intentions of the representatives at the 1980 Diplomatic Conference in Vienna as to the exact wording of the Convention's text," and that in cases of irreconcilable differences among official texts, the English and French versions should form the basis for interpreting the CISG.[67] Such an approach, however, flatly contradicts the Convention language declaring that all six official language texts of the CISG are "equally authentic." The People's Republic of China, for instance, might be surprised to learn that the official Chinese text of the CISG (on which I presume it relied in ratifying the Convention) could be deemed subordinate to the English and French texts in cases of conflict. And what if the English and French diverge? In the end, the idea of elevating one official language text over another in resolving conflicts appears both unwise and unworkable. An alternative methodology, however, is not easy to devise.[68] My point is that, even when the drafters intended a uniform rule in CISG, honoring the uniformity principle in Article 7(1) is often an extraordinarily difficult task. Moreover, a tribunal will sometimes have to choose from among conflicting interpretations of the CISG in situations where the text itself does not express a single unified intention. As was noted above,[69] the drafters themselves could and did fall prey to unconscious background assumptions and imperfect communications that would lead them to believe that there was agreement when in fact they had not formed a common intent for a particular result.[70]

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66. DOCUMENTARY HISTORY, *supra* note 3, at 765 (Final Act of the U.N. Conference on Contracts for the International Sale of Goods).

67. Diedrich, *supra* note 8, at 317. The reasoning behind this conclusion is that English and French "were the languages in which the deliberations and legal negotiations among the representatives of the Contracting States took place." *Id.*

68. Paul Volken suggests, rather vaguely, that "sincere efforts towards achieving uniform application of the Vienna Convention may require consulting its texts not only in one but in several official languages," and that achieving uniform application of the Convention requires "taking other linguistic versions of the same provision into account. . . ." Volken, *supra* note 9, at 41. He does not, however elaborate on what is meant by "taking into account" different language versions, nor does he specify how to proceed if "consulting" the various official language texts of the CISG reveals a discrepancy.

69. *See supra* text accompanying note 60.

70. Parol evidence issues, once again, can serve as an example. Professor Honnold, who played a central role in the drafting of the Convention, has written that Article 8(3) "override[s]" the U.S. do-

In short, the mere fact that the Convention has yielded non-uniform results does not necessarily mean that it has been misapplied, or that the uniformity principle of Article 7(1) has been violated. The Convention tolerates, and in some cases actually promotes, some non-uniform results. Distinguishing undesirable non-uniformity from beneficial flexibility is a difficult but essential part of applying the uniformity principle in Article 7(1).

C. *Misuse of the Uniformity Principle*

Failure to appreciate the complexity of the Convention's uniformity principle, and indulging instead a rigid and inflexible view of the demands of uniformity have, I believe, led some courts and commentators into error. One example is an opinion of the Oberlandesgericht Frankfurt am Main (Germany)[71] dealing with a contract to sell mussels. The German buyer had attempted to avoid the contract after the mussels were declared "not completely safe" because they contained cadmium exceeding the levels advised in a directive by the German Health Department. The court, however, found that the goods did not violate Article 35(2)(a), and it ruled that the buyer did not have the right to avoid the contract. In arguing that the mussels were fit for ordinary use, despite the violation of the health directive, the court asserted that such regulations had no role to play in determining whether the goods conformed to the contract ("keinen Einfluβ auf die Vertragsgemäβheit der Ware") under Article 35(2)(a). Ignoring local regulations was compelled, the court asserted, by the requirement that the Convention be interpreted in a unified fashion ("das Erfordernis, daβ das Recht in den Vertragsstaaten eine einheitliche Anwendung finden soll").

The opinion implies that the uniformity principle requires a single, global standard of merchantability for mussels, and, presumably, all other goods, under Article 35(2)(a). I believe that is a misreading of both Article 7(1) and Article 35. The standard of quality specified in Article 35(2)(a)—"fit for the purposes for which goods of the same description would ordinary be used"—is a general standard, designed, I believe, to be flexible enough to accommodate different expectations and conditions

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mestic parol evidence rule, but he asserts that "[j]urists interpreting agreements subject to the Convention can be expected to continue to give special and, in most cases, controlling effect to detailed written agreements." HONNOLD TREATISE, *supra* note 12, § 110, at 171. As was previously noted, however, a German court has asserted that under the Convention an oral agreement can contradict a written one. *See* OLG Hamm, UNILEX, No. 19 U 97/91 (Sept. 22, 1992). Thus, it is not clear that Professor Honnold's view is shared by the civilians who participated in the drafting of the CISG.

71. *See* OLG Frankfurt, UNILEX, No. 13 U 51/93 (Apr. 20, 1994).

of trade. Article 35(2)(a) is an example of a provision in which the drafters intentionally tried to accommodate a certain amount of non-uniformity in order to allow the CISG to function in the vast variety of contexts and conditions in which international trade occurs. The idea that the uniformity principle of Article 7(1) demands one universal standard of fitness for ordinary purposes, and that local regulations effecting the buyer's ability to resell must be ignored in deference to this rigid standard, is a strange one. I would argue, for example, that whether an electric shaver designed to run on current of 220 volts is fit for its ordinary purposes will vary, depending on whether it will be used in North America or Europe. It is worthwhile to note that, on appeal to the Supreme Court (the Bundesgerichtshof), the decision of the OLG Frankfurt am Main was affirmed, but on far more defensible reasoning. The fact that goods failed to meet public regulations in the buyer's state, the Supreme Court asserted, was relevant to the goods' conformity under Article 35 of the Convention, but only if the buyer drew the seller's attention to the regulations, or the same regulations existed in the seller's state.[72]

Another example of an unduly rigid view of the uniformity principle leading to unjustified conclusions involves the interpretation of the rule in Article 4 that questions of contractual "validity" are beyond the scope of the Convention, and are governed by applicable national law. As has already been noted, this provision poses a significant threat to uniform results in transactions governed by the CISG.[73] To counteract this threat, a leading commentator has argued that the reach of the validity exception should be limited by confining the term "validity" to issues that are almost universally treated as a matter of validity in the various national legal systems.[74] The drafters' purpose in creating the "validity" exception, however, was to preserve the applicability of national rules deemed important enough by individual states that the rules were not, under the state's domestic law, subject to contrary agreement of the parties.[75] The restrictive approach to the validity exception proposed by the commenta-

72. *See* BGH, UNILEX, No. VIII ZR 159/94 (Mar. 8, 1995). Compare the Cour de Cassation, UNILEX, No. 173 P (Jan. 23, 1996), in which the French Supreme Court dealt with a delivery of wine adulterated by sugar added to increase the alcohol content—a process called "chaptalization." The court stated that the wine was unfit for consumption ("impropre à la consommation"), although it did not specifically invoke the French rules regulating chaptalization. *Id.* It held that the delivery violated CISG Article 35, and that avoidance of the contract was justified. *Id.*

73. *See supra* text accompanying note 43.

74. Peter Schlechtriem, *Unification of the Law for the International Sale of Goods*, *in* XIITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW (GERMAN NATIONAL REPORT) 121, 127 (1987), discussed in Hartnell, *supra* note 41, at 48.

75. *See supra* text accompanying note 42.

tor would, in the name of uniformity, allow the Convention to displace national rules of validity unless those rules had gained almost universal acceptance. This stands the "autonomous interpretation" of the CISG on its head by ignoring the drafters' expressed intent to defer to national law on matters of validity. Nothing in the uniformity principle of Article 7(1) justifies such an attempt to undermine the purposes behind the validity exception.

Another commentator has, I believe, misconceived the requirements of the uniformity principle in describing the precedential value of decisions that apply the CISG. According to this commentator:

> The Convention envisioned the use of an informal system of stare decisis to help ensure uniformity of interpretation. . . . The drafters envisioned that the national trial courts called on to interpret the Convention would act as informal international appellate courts. . . .
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> . . . .
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> . . . The uniformity of decision mandated by the CISG requires U.S. courts to apply foreign decisions over conflicting domestic decisions. . . .[76]

The suggestion in these statements that the uniformity principle demands that CISG decisions by the courts of one country have *binding precedential effect* in the courts of another country, although softened elsewhere by their author,[77] overstates the requirements of the uniformity provision of Article 7(1). Having "regard" for the "need to promote uniformity" in applying the Convention—the standard articulated in Article 7(1)—surely does *not* require that a foreign decision, even an ill-conceived one, be treated as binding authority just because it happens to appear first. Indeed, the approach of the quoted statements may exhibit an unfortunate "homeward trend" reflecting a common law approach to the precedential authority of cases—a view not fully shared by those in, e.g., a civil law system.[78]

At any rate, the approach suggested by the quoted passages would yield unpalatable results. For example, does the uniformity principle of the Convention really demand adherence, as a matter of *stare decisis*, to a decision like the one rendered by the Hungarian Supreme Court in the

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76. Larry A. DiMatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 YALE J. INT'L L. 111, 136, 167 (1997).

77. In other passages Professor DiMatteo describes the role of foreign decisions as mere "guidance," *id.* at 136, and he suggests that the uniformity required by the CISG is analogous to the "relatively uniform jurisprudence" achieved under the U.C.C., *id.* at 167.

78. *See, e.g.*, 1 KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 267-73 (2d revised ed. 1987); RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 136-37 (3d ed. 1985).

Malev litigation?[79] In that case, a U.S. manufacturer of jet engines (Pratt & Whitney) made a written proposal to the Hungarian national airline (Malev Airlines) to supply jet engines for new aircraft that Malev was purchasing. The proposal covered engines for two aircraft and a spare engine, with options to purchase engines for an additional aircraft plus an additional spare. The exact engine model selected would depend on whether Malev purchased aircraft manufactured by Airbus or by Boeing. The written proposal stated prices per engine for each of the various engine models covered. Later, the proposal was amended to cover an additional engine option for Boeing aircraft, but a price for this additional engine option was not stated. The Malev general manager signed and telexed a letter stating that, pursuant to the written proposal, Malev had chosen Pratt & Whitney engines for the aircraft it was purchasing. Malev opted to purchase Boeing aircraft, after which it engaged in various planning exchanges with Pratt and Whitney concerning engine maintenance and establishing a spare parts pool in Hungary. Approximately three months after signing the acceptance letter, however, Malev announced that it would not purchase the Pratt & Whitney engines.

Pratt & Whitney commenced an action in Hungary, and obtained a declaration from the Metropolitan Court of Budapest that a valid contract existed under the CISG.[80] On appeal, however, the Hungarian Supreme Court reversed and found that no valid contract had been formed. The court relied primarily on the language of Article 14(1) of the CISG stating that, to constitute an offer, a proposal must be "sufficiently definite," and that a proposal is sufficiently definite if it, inter alia, "expressly or implicitly fixes or makes provision for determining the quantity and the price."[81] The court cited the fact that a price was not stated for the additional Boeing engine option that Pratt and Whitney had added to the contract, and the fact that the price stated for Airbus engines (the alternative that Malev did not choose!) failed to cover the engine housing and certain required additional equipment. It then concluded that Pratt & Whitney's proposal lacked a sufficient price term and thus could not constitute an offer under the CISG. The court's analysis was not effected by CISG Article 55, which provides that, where a validly concluded contract

79. Judgment of September 25, 1992, Legfes{C0}{04}{9C}bb Bíróság (Hungary), *translated in* 13 J.L. & Com. 31 (1993); *see also* Paul Amato, *U.N. Convention on Contracts for the International Sale of Goods—The Open Price Term and Uniform Application: An Early Interpretation by the Hungarian Courts*, 13 J.L. & Com. 1 (1993).

80. Judgment of January 10, 1992, Megyel biróságok és Budapest, *translated in* 13 J.L. & Com. 49 (1993).

81. CISG, *supra* note 1, art. 14(1).

fails to set a price, the parties are presumed to have intended "the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned."[82] The court concluded that Article 55 could not supply the missing prices because "jet engine systems have no market prices." The court not only denied Pratt & Whitney any recovery, but it ordered the U.S. company to reimburse Malev for the costs of the litigation.

Given the apparently contradictory provisions of Articles 14 and 55 concerning the validity of open price contracts, the question of whether such contracts are enforceable under the Convention has been hotly debated.[83] The *Malev* decision has charitably been described as setting a " 'high water mark' in regard to the requirement of definite price terms in contract proposals."[84] Less charitably, the decision is subject to several criticisms. First, it rewards Malev's bad faith in repudiating an agreement that, when made, the buyer almost certainly assumed was binding. Imagine if the tables were turned, and it was Pratt and Whitney who refused to sell the engines after Malev had committed to purchase Boeing aircraft. Second, the decision ignores the international character of the Convention by straining for an interpretation favorable to the party of the same nationality as the court. Is it now required, in the name of a rigid construction of the uniformity principle of Article 7(1), that the important controversy over open price contracts under the CISG be deemed definitively settled by a decision that seems to flout the principles of internationality and good faith, which share equal place with the uniformity principle in Article 7? Is this required merely because the *Malev* decision happened to appear among the early decisions on the Convention?

As has been shown, overemphasizing the demands of the Convention's uniformity principle can lead, and in several instances has led, to misconstruction of the CISG and the judicial apparatus through which it is applied. What is needed, and what is now more feasible from the perspective of ten years' experience with the Convention in action, is a more careful and precise understanding of the uniformity principle within the larger scheme of the CISG. A full elaboration is not possible here, but I hope to provide at least some preliminary observations toward a better understanding of the mandate of Article 7(1) regarding uniform application of the Convention.

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82. *Id.* art. 55.

83. An account of this controversy is given in Amato, *supra* note 79, at 5-11.

84. *Id.* at 27.

IV. A "FEDERALIST APPROACH" TO THE UNIFORMITY PRINCIPLE

It is worthwhile to recall the text of Article 7(1), which provides that, "[i]n the interpretation of this Convention, regard is to be had . . . to the need to promote uniformity in its application."[85] As I noted earlier, this treats uniform application of the CISG as a consideration, or a factor to be weighed. In other words, the uniformity principle in Article 7(1) is a matter of *process*—specifically, the decision-making process of those interpreting the Convention, which is supposed to be informed with an awareness of the value of uniform application, as well as an awareness of other values articulated in Article 7(1). Complying with the Article 7(1) mandate to consider the need to promote uniform application when interpreting the Convention is unlikely to result in the strict and absolute uniformity of international sales rules that some seek. It should, however, permit those applying the CISG an opportunity to identify and avoid unintended and undesirable non-uniformity, and will thus facilitate progress toward the ideal of a uniform system of general rules with sufficient flexibility to accommodate the extraordinarily diverse types and conditions of international sales transactions. What Article 7(1) envisions is relative, not absolute, uniformity.

Some reasons to be hopeful about the possibility of maintaining a relatively high level of uniformity by following the process-oriented mandate of Article 7 can be found in the experience of U.S. courts applying Article 2 of our Uniform Commercial Code (U.C.C.). The analogies between the CISG and U.C.C. Article 2 are striking, and have been noted by other participants in this symposium.[86] Both sales regimes were promulgated for the purpose of increasing the uniformity of sales law,[87] they were adopted by separate sovereign governments in textual versions that varied to some degree,[88] and they are interpreted and applied by multiple independent judicial systems. Despite the obstacles created by the fact that the U.C.C. is embodied in multiple state laws rather than a single federal law—obstacles that are in many cases analogous to the sources of CISG non-uniformity I have described in this paper—I think

85. CISG, *supra* note 1, art. 7(1).

86. *See generally* John O. Honnold, *The Sales Convention: From Idea to Practice*, 17 J.L. & COM. 181 (1998); John E. Murray, Jr., *The Neglect of CISG: A Workable Solution*, 17 J.L. & COM. 365 (1998).

87. U.C.C. § 1-102(2)(c) states that one of the underlying purposes and policies of the Code is "to make uniform the law among the various jurisdictions."

88. For discussion of variations in the text of the U.C.C. as enacted in the various jurisdictions see JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE *Introduction* § 3 at 7-8 (3d ed. 1988).

most would agree that the U.C.C. has, on the whole, succeeded in creating an acceptable level of uniformity in internal U.S. sales law.

Of course the uniformity achieved under the U.C.C. is by no means perfect. The imperfections have arisen, furthermore, despite the shared language and legal culture of those interpreting the U.C.C., advantages not available under the CISG. Nevertheless, as an experiment in nurturing a uniform regime of sales law through the promulgation of a relatively uniform text to be adopted by independent sovereigns and applied by independent judiciaries, the U.C.C. experience is a hopeful one. The attitude of the judges who construe the U.C.C. has, I believe, been the key to this success. Although courts in one state are not bound by decisions of courts in other states, judges show a healthy respect for the decisions of sister states construing the U.C.C. This respect is informed by appreciation for the importance of maintaining a relatively uniform national system of sales laws.[89] Respect for the demands of uniformity, however, is balanced against a regard for proper results, and the balance sometimes favors a departure from the approach in other jurisdictions.[90] Despite such deviations, a workably uniform system of sales law—one that may in fact be enriched over the long term by the opportunity for experimenting with alternative solutions in different jurisdictions—has resulted. This "federalist" vision of uniform law may produce a weaker version of uniformity but, over time, a stronger substantive law. It is a vision that could easily be applied to the CISG, and that seems particularly well suited to the conditions of Convention and to the uniformity principle articulated in Article 7(1).

The key to honoring the mandate of the uniformity principle in Article 7(1) is ensuring that the deliberations of decision-makers are informed by knowledge of how pertinent issues have been handled by others, particularly courts and commentators representing different legal traditions. This requires developing both a research methodology that unearths such materials, and a decision-making process that takes them into account. The evidence to date is that we in the United States have not

89. "Although precedent from other jurisdictions is, of course, not binding upon us, we nonetheless are mindful of the fact that a basic objective of the Uniform Commercial Code is to promote national uniformity in the commercial arena and that this objective would be undermined should we decline to follow the stated intent of the Code's drafters and the reasoned decisions of a number of other jurisdictions." ABM Escrow Closing & Consulting, Inc. v. Matanuska Maid, Inc., 659 P.2d 1170, 1172 (Alaska 1983).

90. *See, e.g.*, First Nat'l Bank v. Ford Motor Credit Co., 748 F. Supp. 1464, 1472-73 (D. Colo. 1990) ("Even though the policy of uniformity is important and facilitates inter-state commercial transactions, a court should nonetheless decline to follow a decision of another jurisdiction if it is convinced that the decision is a clear misinterpretation of the UCC.").

done a good job in this regard,[91] although that certainly does not doom future efforts. In this country, realizing the process-oriented mandate of the uniformity principle articulated in Article 7(1) will probably depend much more on the practicing bar rather than judges and scholars. In this time of crowded dockets, it is the litigators who must, in their briefs and arguments, bring to a court's attention relevant foreign commentary and case law, and incorporate those sources into arguments that the court may find persuasive. And it is legal counsel who must have an awareness of foreign authority in order to give sound advice to clients. To serve their clients properly with respect to Convention issues, practicing lawyers must make the effort to master unfamiliar research sources and to grapple with language problems. They should be encouraged by the knowledge that implementing the vision of a truly international CISG jurisprudence—one that will foster a shared vision of sales law and thus uniform application of the Convention—is increasingly practicable. Furthermore, their pioneering efforts in creating an international law methodology appropriate for the CISG may well facilitate the success of future initiatives directed to international unification of law.

V. CONCLUSION

Compared to the "Babel of diverse domestic legal systems"[92] that it replaced, the Convention represents vast progress towards a uniform international sales law. However, it does not and could not achieve perfect uniformity. The uniformity principle of Article 7(1) recognizes this significant but incomplete achievement. It does not mandate an absolutist approach to uniformity, but rather requires a process and a mind set—a "regard" for "the need to promote uniformity." This mandate is quite in keeping with the fact that the Convention will be applied by autonomous judicial systems and arbitral tribunals not answerable to a single final authority. Attempts to promote a more authoritarian vision of uniformity in the Convention not only misconstrue Article 7, but also could be harmful in a broader sense. They can undermine the flexibility required to allow the CISG to deal with the vast diversity of trading conditions around the

91. *See* V. Susanne Cook, *The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity*, 16 J.L. & COM. 257, 261 (1997) (criticizing a federal appeals court decision interpreting the Convention because it "proceeded in its analysis in much the same manner as if it had been interpreting the Uniform Commercial Code or any other purely domestic statute. For guidance, it consulted exclusively U.S. decisions and U.S. commentators. In its approach, no international trace, such as non-U.S. sources or methods of analysis, can be found anywhere.").

92. DOCUMENTARY HISTORY, *supra* note 3, at 1.

world, and they can sacrifice the sometimes slow development of well-conceived and just principles to the false god of absolute conformity.

Implementation of the Article 7 uniformity principle along the lines described here could be an important step in spreading acceptance of an international law methodology—a methodology that, by mandating knowledge of and respect for (but not necessarily submission to) the perspectives of legal systems beyond one's national boundaries, clears the way for more ambitious ventures in international law. As Professor Honnold has written, "international acceptance of the same rules gives us a common medium for communication—a *lingua franca*—for the international exchange of experience and ideas. It is not too much to expect that this dialogue will contribute to a more cosmopolitan and enlightened approach to law."[93]

Of course, Professor Honnold has long beaten me to all my punches. Ten years ago in his concluding remarks at the first University of Pittsburgh Symposium on the CISG, he said:

> Throughout the work on uniform laws realists have told us: Even if you get uniform laws you won't get uniform results. . . .
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> . . . As our sad-faced realists predicted, international unification *is* impossible. But before we despair, perhaps we should consider the alternatives: "conflicts" rules that are unclear and vary from *forum to forum*; national systems of substantive law expressed in doctrines and languages that, for many of us, are impenetrable. The relevant question is surely this: Is it possible to make law for international trade a bit more accessible and predictable?[94]

Improvements to the accessibility and predictability of the law governing international trade not only are possible, but through the efforts of those involved with the CISG—Professor Honnold in particular—they have been achieved to a far greater extent than any of us could reasonably have expected when work on the Convention began.

93. Honnold, *supra* note 5, at 212.

94. *Id.* at 207-08.