

UNIFORM INTERPRETATION OF THE 1980 UNIFORM SALES LAW\*

Franco Ferrari\*\*

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\* Dedicated to Ms. Chiara Modica, for the reasons she knows.

\*\* J.D. (Honors), Bologna; LL.M., Augsburg; Visiting Professor of Law, The University of Georgia School of Law.

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I. FROM *LEX MERCATORIA* TO THE NEED FOR UNIFORM LAW

The origin of the industrialized nations' need to comply with a specific economic policy designed to "transcend national borders in order to maximize the utilization of resources"<sup>1</sup> originated from the consequences of the Industrial Revolution and, more specifically, from over-production due to the ensuing industrial growth.<sup>2</sup> This economic policy "required a correspondent legislative policy able to regulate the economic relationships: this policy, not unlike the economic policy, had to cross national borders."<sup>3</sup> It is for this reason that since the end of the last century and with increasing intensity since the beginning of this century,<sup>4</sup> efforts have been made to "create an internationally uniform discipline for cases linked to a plurality of countries."<sup>5</sup> By doing so, one intended to overcome the nationality of law, both private and commercial, which originated from the emergence of national states in Europe and from the enactment of the first codes<sup>6</sup> (such as the Scandinavian codes, the French code and the Austrian code).<sup>7</sup> The

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<sup>1</sup> Daniela Memmo, *Il contratto di vendita internazionale nel diritto uniforme*, 37 RIVISTA TRIMESTRALE DI DIRITTO ET PROCEDURA CIVILE [RIV. TRIM. DIR. PROC. CIV.] 180, 181 (1983).

<sup>2</sup> For similar reasoning, see MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* 23 (1982), where the authors state that "as Europe emerged from the relative economic stagnation of the Middle Ages . . . there appeared the need for a body of law to govern business transactions."

<sup>3</sup> FRANCESCO GALGANO, *IL DIRITTO PRIVATO FRA CODICE E COSTITUZIONE* 47 (2d ed. 1980).

<sup>4</sup> A similar affirmation can be found in RUDOLF B. SCHLESINGER, *COMPARATIVE LAW* 31 (5th ed. 1987), where the author states that at the beginning of this century "there arose a strong movement favoring . . . the total or at least substantial unification of all civilized legal systems."

<sup>5</sup> Sergio Carbone and Marco Lopez de Gonzalo, *Art. 1, in CONVENZIONE DI VIENNA SUI CONTRATTI DI VENDITA INTERNAZIONALE DI BENI MOBILI* 2 (Cesare Massimo Bianca ed., 1991).

<sup>6</sup> In regard to the consequences of the enactment of the first codes, see RENÉ DAVID & JOHN BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 63-67 (3d ed. 1985), where the authors state that "codes were treated, not as new expositions of the 'common law of Europe,' but as mere generalisations or new editions of 'particular customs' raised to a national level . . . . [T]hey were regarded as instruments of a nationalisation of law." *Id.* at 66.

<sup>7</sup> A similar affirmation can also be found in ALDO FRIGNANI, *IL CONTRATTO INTERNAZIONALE* 9 (1990) and René David, *Il Diritto del Commercio Internazionale: Un Nuovo Compito per i Legislatori Nazionali o Una Nuova Lex Mercatoria?*, 22 RIVISTA DI DIRITTO CIVILE

enactment of these codes infringed upon the transnational character of the law previously in force which constituted a real *lex universalis*<sup>8</sup>: the so-called *lex mercatoria*.<sup>9</sup> This consisted of a practical body of law grounded in usages whose particularity consisted in having been created by the merchants' courts in order to solve problems related to commerce.

It is to the creation of a similar law, a *droit corporatif international*,<sup>10</sup> that both economists and legal scholars direct their efforts. One assists, in other words, in the creation of a "new law merchant"<sup>11</sup> in order to overcome what has been defined as "anarchy upon which international relationships are based."<sup>12</sup> Such a law would overcome the nationality of the law which constitutes "an obstacle to economic relationships which constantly increase among citizens of different countries; an obstacle above all for the

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[Riv DIR. CIV.] 577 (1976).

<sup>8</sup> For a similar definition of the law in force previous to the modern codes, see MICHAEL J. BONELL, *LE REGOLE OGGETTIVE DEL COMMERCIO INTERNAZIONALE* 4 (1976).

<sup>9</sup> The expression *lex mercatoria* seems to be first used in an English collection called *Fleta*; for similar statements, see Herbert Bülck, *Betrachtungen über ein Völkerhandelsrecht*, *ZEITSCHRIFT FÜR HANDELSRECHT* 150, 159 (1868); Helmut Pohlmann, *Die Quellen des Handelsrechts*, in 1 *HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPÄISCHEN PRIVATRECHTSGESCHICHTE* 801, 814 (Helmut Coing ed., 1973).

Thereafter, the term was used in GERARD MALYNES, *CONSUETUDO, VEL LEX MERCATORIA* (1622). For a reference to this book, see, for example, Reinhard Zimmermann, *Der europäische Charakter des englischen Recht Historische Verbindungen zwischen Civil Law und Common Law*, *ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT* 4, 30 (1993).

The modern concept as well as the rediscovery of the aforementioned expression is linked to Professor Berthold Goldman's writings; for a discussion of Professor Goldman's influence on the revival of the concept of *lex mercatoria*, see, for example, FILIP DE LY, *INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA* 211 (1992).

<sup>10</sup> This expression has been used by Edouard Lambert, *Sources du Droit Comparé ou Supranational. Législation Uniforme et Jurisprudence Comparative*, in 3 *RECEUIL D'ÉTUDES SUR LES SOURCES DU DROIT EN L'HONNEUR DE FRANÇOIS GÉNY* 478, 499 (1934), who used it in a similar sense in which one today uses *lex mercatoria*.

<sup>11</sup> The theory of the "new law merchant" has been developed by Professor Schmitthoff who "emphasized the specific character of international business law, where international conventions, uniform laws and usages have a prominent place." DE LY, *supra* note 9, at 209. See, e.g., Clive Schmitthoff, *International Business Law: A New Law Merchant*, in 2 *CURRENT LAW AND SOCIAL PROBLEMS* 129 (1961); Clive Schmitthoff, *Das Neue Recht des Welthandels*, 28 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 47 (1964).

For a collection of articles written by Professor Schmitthoff, see CLIVE M SCHMITTHOFF'S *SELECT ESSAYS ON INTERNATIONAL TRADE LAW* (Chia-Jui Cheng ed. 1988).

<sup>12</sup> RENÉ DAVID, *I GRANDI SISTEMI GIURIDICI CONTEMPORANEI* 9 (1980).

enterprises that are involved in international commerce and that acquire primary resources or distribute goods in different countries which all have different law."<sup>13</sup>

## II. THE *LEX MERCATORIA*

However, even though the trend towards unification of the law governing transnational commerce characterizes the direction twentieth century law is taking, the trend can be traced back to the Middle Ages where it gave rise to the law merchant,<sup>14</sup> "a body of truly international customary rules governing the cosmopolitan community of international merchants who travelled through the civilised world from port to port and fair to fair."<sup>15</sup> This law had five characteristics: "1) it was transnational; 2) its principal source was mercantile customs; 3) it was administered not by professional judges but by merchants themselves; 4) its procedure was speedy and informal; and 5) it stressed equity, in the medieval sense of fairness, as an overriding principle."<sup>16</sup>

Some authors state that the *lex mercatoria* may be considered a revival of even older traditions, such as the *ius gentium*.<sup>17</sup> However, even though there may be some common features—both *ius gentium*<sup>18</sup> and today's *lex mercatoria* refer to transnational trade relations<sup>19</sup>—this theory can be questioned for several reasons. Above all, the Roman *ius gentium*, unlike the

<sup>13</sup> Francesco Galgano, *Il Diritto Uniforme: La Vendita Internazionale*, in *ATLANTE DI DIRITTO PRIVATO COMPARATO* 211, 211 (Francesco Galgano & Franco Ferrari eds., 1992).

<sup>14</sup> According to DE LY, *supra* note 9, at 15 n.33, "[t]he medieval law merchant is also referred to as *lex mercatoria*, *ius mercatorum*, *ius mercatorium*, *ius mercati*, *ius fori*, *ius forense*, *ius negotiatorum*, *ius negotiale*, *stilus mercatorum* or *ius nundinarum*."

<sup>15</sup> Clive Schmitthoff, *The Unification of the Law of International Trade*, 1968 *J. BUS. L.* 105, 105 (1968).

<sup>16</sup> Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 *HARV. INT'L L. J.* 221, 225 (1978).

<sup>17</sup> For a similar statement, see BERTHOLD GOLDMAN, *LEX MERCATORIA* 3 (Deventer, without date).

<sup>18</sup> *Ius gentium* in the sense discussed in the text has been defined as *quod naturalis ratio inter omnes homines constituit . . . quasi quo iure omnes gentes utuntur*, Inst. 1.2.1.

<sup>19</sup> Even this theory has been questioned; according to 1 FRIEDRICH CARL VON SAVIGNY, *TRAITÉ DE DROIT ROMAIN* 405 et seq. (1840), it also applied among Roman citizens.

new law merchant, did not constitute an autonomous set of rules,<sup>20</sup> but rather a part of Roman law.<sup>21</sup>

However, although the revival of this ancient<sup>22</sup> trend towards unification has been criticized by legal scholars,<sup>23</sup> the trend seems irreversible, as evidenced by the fact that in some systems the new *lex mercatoria* has been recognized not only by legal scholars, but also by courts<sup>24</sup> and arbitration tribunals<sup>25</sup> as well as by the legislature. In China, for example, Article 5(3) of the Statute of March 21, 1985 on Transnational Economic Contracts<sup>26</sup> refers to the general principles of transnational commerce as the applicable

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<sup>20</sup> As for a detailed comparison between the new *lex mercatoria* and the *ius gentium*, see DE LY, *supra* note 9, at 9-15. The author points out that "it is hard . . . to conceive of *ius gentium* as a precedent for a present-day autonomous law of international trade." *Id.* at 10-11.

<sup>21</sup> Legal scholars have often pointed out that *ius gentium*'s binding force derives from its being a part of Roman law; see, e.g., W. BUCKLAND, *THE MAIN INSTITUTIONS OF ROMAN PRIVATE LAW* 19 (1931); WERNER KUNKEL, *RÖMISCHE RECHTSGESCHICHTE* 72 (6th ed. 1972); LEOPOLD WENGER, *DER HEUTIGE STAND DER RÖMISCHEN RECHTSWISSENSCHAFT* 4 (2nd ed. 1970).

<sup>22</sup> See for a similar statement, R. H. Graveson, *The International Unification of Law*, 16 AM. J. COMP. L. 4 (1968), where the author states that "[t]he international process of assimilating the diverse legal systems of various countries goes back into ancient history."

<sup>23</sup> For a criticism, see, for example, *id.* at 5-6, where the author stresses that "[i]t may be necessary to correct the assumption that uniform law is good in itself and that the process of unification is one to be encouraged in principle."

<sup>24</sup> As for decisions supposedly recognizing the *lex mercatoria*, see, for example, in Italy, the decision of the Cassazione Civile of February 8, 1982, *RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE* 829 (1982); in England, the decision *Deutsche Schachtbau- und Tiefbohrergesellschaft mbH v. R'As Al Khamaih National Oil Company*, [1987] 3 W.L.R. 1023 (Court of Appeal); in Switzerland, the decision of the Court of Appeal of Zurich of May 9, 1985, *BLÄTTER FÜR ZÜRCHER RECHTSPRECHUNG* 44 (1986).

<sup>25</sup> As far as a discussion of the recognition of the *lex mercatoria* by arbitration tribunals is concerned, see, for example, Klaus Berger, *Lex Mercatoria in der Internationalen Wirtschaftsschiedsgerichtsbarkeit: Der Fall "Compania Valencia,"* *PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS* 281 (1993); DE LY, *supra* note 9, at 255-66; Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L. Q. 747 (1985); Jean Paulsson, *La Lex Mercatoria dans l'Arbitrage C.C.I.*, 1990 *REVUE DE L'ARBITRAGE* 55; Bernd von Hoffmann, "*Lex Mercatoria*" vor Internationalen Schiedsgerichten, *PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS* 106 (1984); PETER F. WEISE, *LEX MERCATORIA. MATERIELLES RECHT VOR DER INTERNATIONALEN HANDELS-SCHIEDSGERICHTSBARKEIT* (1990).

<sup>26</sup> For an English version of the law on Transnational Economic Contracts, see 34 AM. J. COMP. L. 715 (1986).

law, absent choice of law,<sup>27</sup> a provision which has been considered as being a legislative reference to the *lex mercatoria*.<sup>28</sup>

The same phenomenon can also be found in Holland where a new article was introduced into the Civil Procedure Code, Article 1054,<sup>29</sup> according to which in international cases the arbitrators, absent choice of law, "may apply the *lex mercatoria* . . . define[d] . . . as generally accepted usages in international trade, which are autonomous from national law."<sup>30</sup> Therefore, this provision can be interpreted as recognizing the *lex mercatoria* on a legislative level.<sup>31</sup>

From the statements made up to now one can draw two conclusions: it is certain that a tendency exists towards the increase of international exchange and that this tendency can be satisfied, in view of the "increasing dissatisfaction with statutory regulation,"<sup>32</sup> only through a "universal uniform regulation,"<sup>33</sup> for the attainment of which one can make recourse to a variety of techniques,<sup>34</sup> which, however, will not be discussed in this

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<sup>27</sup> See for a reference to the statute mentioned in the text, DE LY, *supra* note 9, at 249 n.221.

<sup>28</sup> Article 5(3) of the Statute on Transnational Economic Contracts has been interpreted as a reference to the law merchant for example by Norbert Horn, *Das Chinesische Außenwirtschaftsvertragsgesetz von 1985*, RECHT DER INTERNATIONALEN WIRTSCHAFT 688, 691 (1985).

<sup>29</sup> This Article was inserted into the Dutch Code of Civil Procedure by the Dutch Arbitration Act of July 2, 1986; for the text of the Arbitration Act, see TUDSCHRIFT VOOR ARBITRAGE 213 (1986).

<sup>30</sup> De Ly, *supra* note 9, at 250 (footnote omitted).

<sup>31</sup> This Article and consequently the recognition of the *lex mercatoria* has been criticized on the ground that the debate regarding the *lex mercatoria* not being over, the legislator should not have taken any position; see for this criticism R. VAN DER VELDEN, LEX MERCATORIA OR IUS COMMUNE? 18 (1986).

Skepticism towards the new provision has been expressed by other authors as well; see, e.g., Aron Broches, *The 1985 UNCITRAL Model Law on International Commercial Arbitration: An Exercise in International Legislation*, 1987 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 3, 46 (1987); A. J. van den Berg, *Wetsontwerp Nieuwe Arbitragewet*, TUDSCHRIFT VOOR ARBITRAGE 200 (1984).

<sup>32</sup> Memmo, *supra* note 1, at 182.

<sup>33</sup> BONELL, *supra* note 8, at 5.

<sup>34</sup> For a discussion of the various techniques used to achieve unification, see, for example, René David, *The Methods of Unification*, 16 AM. J. COMP. L. 13 (1968); René David, *The International Unification of Private Law*, in 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW Ch.5, 107-109 (1971).

paper.<sup>35</sup>

### III. HISTORICAL REMARKS ON INTERNATIONAL SALES LAW<sup>36</sup>

The sales contract being the “mercantile contract *par excellence*”<sup>37</sup> and therefore being the “pillar of the entire system of commercial relations,”<sup>38</sup> it necessarily plays an important role in the ambit of growing international trade as well. This is especially true if one considers how many other contracts are related to it.<sup>39</sup> This underlines the necessity of unifying the substantive law of sales on an international level.

And this necessity has been felt very early: indeed, already at the end of the 1920's, Ernst Rabel<sup>40</sup> suggested to the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT)<sup>41</sup> that it start with the work for the unification of the law of international sales of

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<sup>35</sup> However, one should note that “[i]nternational unification of law has been [generally] approached by doctrine through two means, international conventions and model acts. At times states have bound themselves within certain limits to apply given uniform rules to certain categories of relationships. At other times, the only resort was to persuasion that states would conform their law to a certain model without any international obligation.” David, *The Methods of Unification*, *supra* note 34, at 19.

<sup>36</sup> For a survey on the history of the different steps which lead to the 1980 Vienna Sales Convention, see E. Allan Farnsworth, *The Vienna Convention: History and Scope*, 18 INT'L LAW. 17 (1984); JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES (1989); John O. Honnold, *Uniform Law for International Trade - Progress and Prospects*, 20 INT'L LAW. 635 (1986); Kazuaki Sono, *The Vienna Sales Convention: History and Perspective*, in INTERNATIONAL SALE OF GOODS; DUBROVNIK LECTURES 1 (Petar Sarcevic and Paul Volken eds., 1986) [hereinafter *International Sale of Goods*].

<sup>37</sup> GALGANO, *supra* note 3, at 6 (emphasis added).

<sup>38</sup> Memmo, *supra* note 1, at 181.

For a similar affirmation, see Berman & Kaufman, *supra* note 16, at 229, where the authors state that “[i]n international trade, the sales contract is the core of an export-import transaction.”

<sup>39</sup> See for a similar statement, Berman & Kaufman, *supra* note 16, at 229: “[The sales contract] is . . . always supported by several other related contracts, reflecting the complexity of the transaction and the number of Parties involved.”

<sup>40</sup> Ernst Rabel's role has been stressed by several authors; see, e.g., Michael J. Bonell, *Introduction to the Convention*, in COMMENTARY ON THE INTERNATIONAL SALES LAW; THE 1980 VIENNA SALES CONVENTION 3 (Cesare M. Bianca and Michael J. Bonell eds., 1987).

<sup>41</sup> The International Institute for the Unification of Private Law (UNIDROIT) was set up in Rome in 1926 under the aegis of the League of Nations.

goods. Upon this suggestion, UNIDROIT decided to undertake the necessary preparatory studies that consequently led to the appointment of a commission entrusted with the elaboration of a uniform law<sup>42</sup> and, in 1935, to the first draft of a uniform law on the sale of goods<sup>43</sup> that already distinguished between the provisions related to the duties of the contracting parties and those governing the formation of such contracts.<sup>44</sup>

Work had to be interrupted as a result of World War II,<sup>45</sup> but resumed in 1951 with a conference at the Hague<sup>46</sup> where a new draft uniform law was presented. Other drafts followed this,<sup>47</sup> the last of which formed the subject of the Diplomatic Conference held at the Hague from the first to the twenty-fifth of April, 1964. Twenty-eight States participated and approved two conventions,<sup>48</sup> creating respectively the Uniform Law on the Interna-

<sup>42</sup> For further details relating to the composition of the commission mentioned in the text, see Peter Schlechtriem, *Bemerkungen zur Geschichte des Einheitskaufrechts*, in *EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT* 28 n.6 (Peter Schlechtriem ed., 1987).

<sup>43</sup> For a comment on this draft, see Ernst Rabel, *Der Entwurf eines Einheitlichen Kaufgesetzes*, *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 3 (1935).

<sup>44</sup> See also Schlechtriem, *supra* note 42, at 28.

<sup>45</sup> See Note, *A Practitioner's Guide to the United Nations Convention on the International Sale of Goods*, 16 *INT'L L. & POL.* 81, 85 (1983).

<sup>46</sup> As for more specific details on the 1951 Hague Conference (January 1-10), see, for example, Pietro de Martino, *La vendita internazionale di cose mobili secondo un progetto di legge uniforme*, *RIVISTA DI DIRITTO COMMERCIALE* 111 (1952); Ernst Rabel, *Die Haager Konferenz über die Vereinheitlichung des Kaufrechts*, 17 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 212 (1952); Ernst Rabel, *The Hague Conference on the Unification of Sales Law*, 1 *AM. J. COMP. L.* 58 (1952).

<sup>47</sup> In 1956, another draft was published; for a comment on this draft, see Ernst Rabel, *Der Entwurf zur Internationalen Vereinheitlichung des Kaufrechts*, 22 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 16 (1957). Other drafts followed; see for more detailed information, Bonell, *supra* note 40, at 4; Schlechtriem, *supra* note 42, at 29 n.12.

<sup>48</sup> For comments on the 1964 Hague Conference and its results, see, among others, Ernst von Caemmerer, *Die Haager Konferenz über die internationale Vereinheitlichung des Kaufrechts vom 2.-25. April 1964: Die Ergebnisse der Konferenz hinsichtlich der Vereinheitlichung des Rechts des Abschlusses von Kaufverträgen*, 29 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 101 (1965); Gyula Eörsi, *The Hague Conventions of 1964 and the International Sale of Goods*, *ACTA JURIDICA ACADEMIAE SCIENTIARUM HUNGARICAE* 321 (1969); John O. Honnold, *The 1964 Hague Conventions and Uniform Laws on the International Sale of Goods*, 13 *AM J. COMP. L.* 451 (1964); John O. Honnold, *The Uniform Law for the International Sale of Goods: The Hague Convention of 1964*, 30 *LAW CONTEMP. PROBS.* 326 (1965); Philippe Kahn, *La convention de la Haye du*



tional Sale of Goods (ULIS)<sup>49</sup> and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).<sup>50</sup>

These laws, even though they constituted the most important point of reference for the discipline of international trade in that era, were not as successful as expected.<sup>51</sup> Indeed, they were given force in only nine countries,<sup>52</sup> only one-third of the states which participated at the Hague Conference. Such failure<sup>53</sup> can in part be attributed to the scarce role that both Socialist and the Third World countries played in the elaboration and

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*1er juillet 1964 portant loi uniforme sur la vente internationale des objets mobiliers corporels*, 17 REVUE TRIMESTRIELLE DE DROIT COMMERCIAL 689 (1964); KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT (Hans Dölle ed., 1976); Otto Riese, *Die Haager Konferenz über die internationale Vereinheitlichung des Kaufrechts vom 2. bis 25. April 1964. Verlauf der Konferenz und Ergebnisse hinsichtlich der materiellen Vereinheitlichung des Kaufrechts*, 29 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 1 (1965); R.H. GRAVESON ET AL., THE UNIFORM LAW OF INTERNATIONAL SALES ACT 1967 (1968); UNIFICATION OF LAW GOVERNING INTERNATIONAL SALE OF GOODS (John O. Honnold ed., 1966).

<sup>49</sup> See Convention Relating to a Uniform Law of International Sale of Goods, July 1, 1964, with Annex, Uniform Law on the International Sale of Goods, 834 U.N.T.S. 109, reprinted in 13 AM. J. COMP. L. 453 (1964).

<sup>50</sup> See Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, with Annex, Uniform Law on the Formation of Contracts for the International Sale of Goods, 834 U.N.T.S. 123, reprinted in 13 AM. J. COMP. L. 472 (1964).

<sup>51</sup> For a similar evaluation, see, for example, Michael J. Bonell, *La convenzione di Vienna sulla vendita internazionale: origine, scelte e principi fondamentali*, 44 RIV. TRIM. DIR. PROC. CIV. 715, 716 (1990); BURGHARD PILTZ, INTERNATIONALES KAUFRECHT. DAS UNKAUFRECHT (WIENER ÜBEREINKOMMEN VON 1980) IN PRAXISORIENTIERTER DARSTELLUNG 8 (1993).

<sup>52</sup> The Hague Conventions were enacted in Belgium, Great Britain, Federal Republic of Germany, Gambia, Holland, Israel, Italy, Luxembourg and San Marino. Note that according to Isaak I. Dore and James E. Defranco, *A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code*, 23 HARV. INT'L L. J. 49, 50 (1982), the ULIS was enacted only in eight states. For a list of only eight contracting states, see also Harold J. Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 2 J. INT'L DISP. RESOL. 235, 290 n.160 (1988).

<sup>53</sup> One must note, however, that where the 1964 Hague Conventions were enacted, they played a very important role, since the courts paid much attention to them. For a collection of the court decisions relating to the aforementioned Conventions, see PETER SCHLECHTRIEM and ULRICH MAGNUS, INTERNATIONALE RECHTSPRECHUNG ZUM EKG UND EAG (1987).

compilation of the aforementioned Conventions,<sup>54</sup> and which resulted in those countries' refusal to enact the 1964 Hague Conventions which they considered as being modelled on the sole exigencies of the industrialized nations.<sup>55</sup>

The continuing dissatisfaction produced by the foregoing laws was manifested not only in the already-noted scarce number of contracting states, but also in the refusal on the part of other states, such as the United States<sup>56</sup>

<sup>54</sup> For a similar evaluation of the role of the Socialist and Third World countries, see PILTZ, *supra* note 51, at 7.

<sup>55</sup> A similar justification of the Socialist and Third World countries' refusal to enact the 1964 Hague Conventions can be found in Stephen Bainbridge, Note, *Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions*, 24 VA. J. INT'L L. 619, 632 (1984), where it is stated that the Third World and Socialist states "objected to the domination of the [1964 Hague] Conference by the developed Western European nations, asserting that the domination resulted in a ULIS Convention strongly favoring the industrial states" (footnotes omitted).

For similar statements, see also Newell E. Cumming, Comment, *United Nations Commission on International Trade Law: Will a Uniform Law in International Sales Finally Emerge?*, 9 CAL. W. INT'L L. J. 157, 165 (1979); Martin L. Ziontz, Comment, *A New Uniform Law for the International Sale of Goods: Is it compatible with American Interests?*, 2 NW. J. INT'L L. & BUS. 129, 134 (1980).

<sup>56</sup> The reasons the United States "did not seriously consider ratification of either the ULIS or its companion Uniform Law on the Formation of Contracts," Bainbridge, *supra* note 55, at 620,

have been summarized as follows:

[t]he United States was unable to participate in the drafting effort because it could not be represented at the conference until it had been authorized by Congress to become a member of the Rome Institute [UNIDROIT]. The authorization was given by a joint resolution of Congress, Act of Dec. 30, 1963, Pub. L. No. 88-224, 77 Stat. 775 (codified at 22 U.S.C. 269(g) (1976). Thus, the United States delegation, having barely three months to prepare for the conference, stated that "there was no possibility of arranging for a comprehensive review of the legal issues involved with a view to formulating positions to be taken by the United States Government at the Conference."

Dore & DeFranco, *supra* note 52, at 50 n.4.

And that is why the United States delegation concluded that "it would appear unlikely that the Uniform Act will prove acceptable to America's governmental, commercial, and legal organizations because its many unclear and unworkable provisions do not meet the current needs of commerce and because it varies so markedly in its approach and content from our Uniform Commercial Code." KEARNEY, REPORT OF THE UNITED NATIONS DELEGATION TO THE UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 10 (1981).

and France, to ratify those conventions. This led, still before their enactment in 1972, the United Nations Commission on International Trade Law (UNCITRAL),<sup>57</sup> established by the United Nations in 1966<sup>58</sup> with the task of promoting the progressive harmonization and unification of the law of international trade by promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws, to attempt the revision of the Hague Uniform Laws. However, when it became apparent that such uniform laws would not be accepted without substantial alterations, “[a] fourteen-member Working Group was established to begin drafting a new text.”<sup>59</sup>

In the following years, UNCITRAL proposed various drafts, the last of which—dating back to 1978<sup>60</sup>—was the draft upon which the General Assembly of the United Nations authorized the convening of a diplomatic conference,<sup>61</sup> held from March 10 to April 11, 1980 in Vienna. At the end

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<sup>57</sup> For UNCITRAL’s history, its structure, and its goals, see E. Allan Farnsworth, *UNCITRAL—Why? What? How? When?*, 20 AM. J. COMP. L. 314 (1972); Gerold Herrmann, *The Contribution of UNCITRAL to the Development of International Trade*, in *THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS* 35 (Norbert Horn & Clive M. Schmitthoff eds., 1982); John O. Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, 27 AM. J. COMP. L. 201 (1979).

For UNCITRAL’s contribution to the development of a uniform law on international sales, see Rolf Herber, *Die Arbeiten des Ausschusses der Vereinten Nationen für internationales Handelsrecht (UNCITRAL)*, *RECHT DER INTERNATIONALEN WIRTSCHAFT* 577 (1974); Kazuaki Sono, *UNCITRAL and the Vienna Sales Convention*, 18 INT’L LAW. 7 (1984); Kazuaki Sono, *The Role of UNCITRAL*, in *INTERNATIONAL SALES. THE UNITED NATIONS CONVENTIONS ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS § 4-1* (Nina M. Galston and Hans Smit eds., 1984) [hereinafter *INTERNATIONAL SALES*].

<sup>58</sup> See G. A. Res. 2205, reprinted in 1 UNCITRAL YEARBOOK 65 (1970).

<sup>59</sup> Bainbridge, *supra* note 55, at 635.

For the reasons which led to the drafting of a new text, see also JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 53-54 (2d ed. 1991), where the author states that “[t]he crucial question was this: Would it be possible to obtain widespread adoption of the 1964 Conventions? . . . It became evident that the 1964 Conventions, despite the valuable work they reflected, would not receive adequate adherence. . . . UNCITRAL thereupon established a Working Group of 14 States . . . and requested the Working Group to prepare a [new] text.”

<sup>60</sup> Whereas earlier drafts distinguished between the rules relating to the formation of international sales contracts and those relating to the rights and obligations arising from international sales contracts, this draft was a result from the Commission’s decision “to integrate the draft convention on the formation of contracts and the draft convention on international sale of goods into a simple text.” Sono, *supra* note 36, at 5.

<sup>61</sup> See Bonell, *supra* note 40, at 6; HONNOLD, *supra* note 59, at 54.

of the conference, which was attended by representatives of 62 States,<sup>62</sup> after the Convention had been voted upon in Plenary article by article,<sup>63</sup> it was, as a whole, submitted to a roll-call vote and was approved unanimously. The Convention, which is officially<sup>64</sup> known as the "United Nations Convention on Contracts for the International Sale of Goods," came into force January 1, 1988.

Today, this example of a so-called self-executing treaty,<sup>65</sup> is in force in more than thirty States, among which are some of the major commercial

<sup>62</sup> The 62 States encompassed all countries with significant commercial interests. International organizations attended the Vienna Conference as well. The international organizations were: the Hague Conference on Private International Law; UNIDROIT, ICC, the European Economic Community, the Council of Europe, World Bank, Bank for International Settlements and the Central Office for International Railway Transport.

<sup>63</sup> For a more detailed reference to the rules of the Conference governing the approval process, see HONNOLD, *supra* note 59, at 56.

<sup>64</sup> Even though several translations can be found, there are only six official versions of the "United Nations Convention on Contracts for the International Sale of Goods" [hereinafter CISG]: the English, French, Spanish, Russian, Arabic and Chinese versions. The official versions are reprinted in COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* note 40, at 681-806; THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS: A HANDBOOK OF THE BASIC MATERIALS 169-246 (Daniel Barstow Magraw & Reed R. Kathrein eds., 2d ed. 1990). The English text is reprinted in 52 Fed. Reg. 6264 (1987); 19 I.L.M. 668 (1980).

<sup>65</sup> For this qualification, V. Susanne Cook, Note, *The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 50 U. PITT. L. REV. 197, 204 note 39 (1988) ("There are two types of treaties: those that are *self-executing* and those that are not *self-executing*. A *self-executing* treaty 'operates of itself, without the aid of any legislative provision'—without any enabling legislation. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). The Convention is a *self-executing* treaty." (emphasis added)).

Paul Volken, *The Vienna Convention: Scope, Interpretation, and Gap-Filling*, in INTERNATIONAL SALE OF GOODS, *supra* note 36, at 20, defines the CISG as a *self-executing* treaty, but he stresses that it constitutes a *law-making* treaty as opposed to a *contractual* treaty and that "[i]n this respect [it] differ[s] from the Hague Conventions of 1 July 1964 which, in fact, did not contain any rules on contracts. All they did was to oblige the Contracting States to incorporate the Uniform Law on the International Sale of Goods (ULIS) or the Uniform Law on the Formation of Contracts for the International Sale of Goods (U.L.F.) into their own domestic legislation." *Id.* at 21-22 (footnote omitted).

Note, however, that there are also countries which do not regard the Vienna Sales Convention as being a self-executing treaty, since they regard a convention as executing only if enacted by their legislature. This is true, for instance, in England.

partners of the United States, such as China, France, Germany, and Italy.<sup>66</sup>

#### IV. THE HAGUE AND VIENNA CONVENTIONS: STRUCTURAL DIVERSITY AND COMMON FEATURES

As evidenced by what has so far been discussed, the 1980 Vienna Sales Convention and the 1964 Hague Conventions represent the most important attempts to create a uniform law on international sales, even though there have been other attempts as well. It is sufficient to remember that in 1953 in Latin America the "Proyecto de Buenos Aires" was published. The "Proyecto" was a skeletal Convention with the objective of unifying the discipline of international sales within the members of the Organization of American States.<sup>67</sup>

As far as the Hague and Vienna Conventions are concerned, it must be noted that they differ from each other not only in regard to substantial issues—even though there are subjects dealt with in the same manner in the various Conventions<sup>68</sup>—but also as far as their compilation technique is concerned,<sup>69</sup> which results in a more simple text of the 1980 Vienna Sales

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<sup>66</sup> The CISG came into force in Argentina (Jan. 1, 1988); Australia (Apr. 1, 1989); Austria (Jan. 1, 1989); Belarus (Nov. 1, 1989); Bosnia-Herzegovina (Mar. 6, 1992); Bulgaria (Aug. 1, 1991); Canada (May 1, 1992); Chile (Mar. 1, 1991); China (Jan. 1, 1988); Czech Republic (Jan. 1, 1993); Denmark (Mar. 1, 1990); Ecuador (Feb. 1, 1993); Egypt (Jan. 1, 1988); Estonia (Oct. 1, 1994); Finland (Jan. 1, 1989); France (Jan. 1, 1988); Germany (Jan. 1, 1991); Guinea (Feb. 1, 1992); Hungary (Jan. 1, 1988); Iraq (April 1, 1991); Italy (Jan. 1, 1988); Lesotho (Jan. 1, 1988); Mexico (Jan. 1, 1989); the Netherlands (Jan. 1, 1992); Norway (Aug. 1, 1989); Romania (June 1, 1992); Russian Federation (Sept. 1, 1991); Slovakia (Jan. 1, 1993); Slovenia (June 25, 1991); Spain (Aug. 1, 1991); Sweden (Jan. 1, 1989); Switzerland (Mar. 1, 1991); Syrian Arab Republic (Jan. 1, 1988); Uganda (Mar. 1, 1993); Ukraine (Feb. 1, 1991); United States (Jan. 1, 1988); Yugoslavia (Jan. 1, 1988); Zambia (Jan. 1, 1988).

For a list of the contracting states which also includes a list of the reservations made by the states, see *Journal of Law & Commerce CISG Contracting States and Declarations Table*, 12 J. L. & COM. 285 (1993).

<sup>67</sup> For a more detailed reference to the "Proyecto de Buenos Aires", see ALEJANDRO M. GARRO & G. ZUPPI, *COMPRAVENTA INTERNACIONAL DE MERCADERIAS* 41 (1990); PILTZ, *supra* note 51, at 7.

<sup>68</sup> The formation of contracts, for example, is governed by similar rules in the U.L.F. and the Vienna Sales Convention. For a similar affirmation, see, for example, FRANCO FERRARI, *LA VENDITA INTERNAZIONALE. PARTE I. AMBITO DI APPLICAZIONE. DISPOSIZIONI GENERALI* 15 (1994) (stating that in its outlines, Part II of the 1980 Convention corresponds to the ULF).

<sup>69</sup> This has been also pointed out by Memmo, *supra* note 1, at 188.

Convention.<sup>70</sup> Indeed, besides having reduced the number of the provisions, the 1980 Vienna Sales Convention consolidated the provisions on the formation of contracts and those on the rights and duties of the parties—which earlier were divided into two different texts, the ULIS and ULF<sup>71</sup>—in a single text.

Despite many differences,<sup>72</sup> the Hague and Vienna Conventions have some common features: they only apply to contracts for the sale of goods which have international character,<sup>73</sup> a choice that has often been criticized,<sup>74</sup> even though it is just such character from which the uniform sales law derives the greatest interest.<sup>75</sup> It was said, for example, that the creation of a special body of rules governing contracts for the international sale of goods could not be justified any longer, since the “substantial differences between import and export transactions and the purchase and sale

<sup>70</sup> For an evaluation of the 1980 Vienna Sales Convention in terms of “major simplicity,” see also Ulrich Magnus, *Reform des Haager Einheitskaufrechts*, ZEITSCHRIFT FÜR RECHTSPOLITIK 129 (1978).

<sup>71</sup> As for the reasons which induced the drafters to differentiate between the provisions on the rights and duties of the parties and those on the formation of contracts, see Michael J. Bonell, *La revisione del diritto uniforme della vendita internazionale*, RIVISTA DI DIRITTO COMMERCIALE 120 (1980).

<sup>72</sup> As for a comparison between the 1964 Hague Conventions and the 1980 Vienna Convention, see, for example, Bainbridge, *supra* note 55, *passim*; F. J. A. van der Velden, *The Law of International Sales: The Hague Conventions 1964 and the Uncitral Uniform Sales Code 1980—Some Main Items Compared*, in 4 HAGUE-ZAGREB ESSAYS 46 (C. C. A. Voskuil & J. A. Wade eds., 1983).

<sup>73</sup> However, it has been pointed out that even though the 1980 Vienna Sales Convention intends to lay down the rules for the mere international sales contract, it provides for some rules which could be applicable to all kinds of transnational business contracts; for this affirmation, see Aleksandar Goldstajn, *Usages of Trade and other Autonomous Rules of International Trade According to the UN (1980) Sales Convention*, in INTERNATIONAL SALE OF GOODS, *supra* note 36, at 55, where the author states that “[t]he United Nations Convention on the International Sale of Goods (1980), although formally confined to contracts for the international sale of goods, contains provisions which could be applied to all kinds of international commercial transactions.” There are different reasons for this view, one of which is “that this Convention, which deals with international commercial contracts, includes some general provisions that in domestic legislation belong to the general part of the law of contract.” *Id.*

<sup>74</sup> For a discussion of such criticism, see, above all, Michael J. Bonell, *La convenzione di Vienna sulla vendita internazionale: origine, scelte e principi fondamentali*, 44 RIV. TRIM. DIR. PROC. CIV. 715, 717-22 (1990).

<sup>75</sup> For a similar statement, see Memmo, *supra* note 1, at 198.

of the same products in the domestic sphere"<sup>76</sup> did not exist any more. In addition, it was asserted that the criteria used to establish whether a sale was considered to be international, were unsatisfactory.<sup>77</sup> However, considering on the one hand the difficulties of agreeing upon a discipline that could also be a substitute for the various national laws, i.e., the difficulties of creating a uniformity also with reference to "internal" contracts, and, on the other hand, the necessity of offering a uniform discipline that satisfies the exigencies of international trade, the elaboration of a set of rules such as the 1980 Vienna Sales Convention has nevertheless been considered a great accomplishment, even if limited to regulating only "international" sales.<sup>78</sup>

## V. THE ISSUE OF INTERPRETATION

Every convention which "does not constitute an exhaustive source of its

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<sup>76</sup> Bonell, *supra* note 40, at 9.

<sup>77</sup> For this criticism, see Volken, *supra* note 65, at 26-29. The author states that [t]he basic criterion, according to which a sale is considered international if the parties to the contract have their places of business in different States, is too broad, yet at the same time, too restrictive.

The criterion is too broad in the sense that it considers even those sales as international in which the goods, from their fabrication to consumption, have never left the original country . . . [if] the parties have their place of business in different States. . . .

On the other hand, the basic criterion is too restrictive in that it excludes all sales from the Convention between two parties which import or export goods but have their places of business in the same State.

*Id.* (emphasis in original).

<sup>78</sup> For a similar conclusion, see Bonell, *supra* note 40, at 8, where it is stated that [t]he principal reason for which the Convention has been limited solely to international transactions rests in the impossibility, at the present time, of agreeing, with respect to sales contracts no less than to other commercial contracts, on uniform rules intended to replace entirely the different national laws. . . . At a universal level, the only realistic approach is that of limiting the attempts at unification to international transactions, leaving States free to continue regulating purely domestic relations according to their own special needs.

See also FERRARI, *supra* note 68, at 18 (stating that even though the Vienna Sales Convention's sphere of application is limited to international contracts, the Convention itself must be considered a success).

subject, but regulates only certain issues of it excluding others,"<sup>79</sup> and which "does not want to identify itself with any legal system, because it wants to conjugate with all,"<sup>80</sup> can easily give rise to problems concerning the precise meaning of its provisions and to problems concerning the necessity of filling the gaps in which an incomplete discipline will inevitably result. It seems evident that these issues may arise in relation to any international convention, but they are most accentuated in the uniform sales law as resulting from the 1980 Vienna Sales Convention, since such issues generally arise in proportion to the number of legal systems represented by the various contracting States.<sup>81</sup>

Of course, interpretive problems can arise in relation to national legal systems as well,<sup>82</sup> but such problems are much more prevalent when it comes to the determination of the precise meaning of a law which, like the 1980 Vienna Sales Convention, has been drafted on an international level.<sup>83</sup>

#### VI. INTERPRETATION AND THE 1980 VIENNA SALES CONVENTION: GENERAL REMARKS

For a long time, there has been dispute on the interpretation of the international conventions,<sup>84</sup> a dispute which demonstrates a contrast

<sup>79</sup> Giuseppe Benedetti, *Art. 4, in CONVENZIONE DI VIENNA SUI CONTRATTI DI VENDITA INTERNAZIONALE DI BENI MOBILI*, *supra* note 40, at 9.

<sup>80</sup> *Id.* at 15.

<sup>81</sup> For a similar affirmation, see BERNARD AUDIT, *LA VENTE INTERNATIONALE DE MARCHANDISES* 47 (1990), where the author states that "the more often the convention must be applied in . . . countries representing different legal and political systems and different economies, the higher is the risk" that it is necessary to determine the exact meaning of the convention's provisions.

<sup>82</sup> See Bonell, *Art. 7, in COMMENTARY ON THE INTERNATIONAL SALES LAW*, *supra* note 40, at 65.

<sup>83</sup> The reason for this can be found in that while in "applying domestic statutes, one can rely on long established principles and criteria of interpretation to be found within each legal system[,] [t]he situation is far more uncertain with respect to an instrument which, although formally incorporated in the various national legal systems, has been prepared and agreed upon at an international level." *Id.*

<sup>84</sup> The problems of differing interpretations of the same uniform law as well as the reasons for such differences have been studied for a long time. There are multiple causes which can give rise to diverging interpretations. In this regard, it has been pointed out that some of the problems have their source in the uniform laws themselves, since generally there are different official versions of the same uniform law, a circumstance which can by itself give rise to interpretive doubts. For a reference to this reason, see, for example, Michael F.



between the supporters of the thesis according to which "in virtue of national proceedings, the conventions transform themselves into domestic law and therefore their interpretation and integration must take place according to the interpretive techniques . . . of the domestic system in which they are transplanted and will be applied,"<sup>85</sup> and the supporters of the thesis that international conventions must be interpreted "in an autonomous manner,"<sup>86</sup> i.e., without making reference to the meaning one generally attributes to certain expressions within the ambit of a determined system, because otherwise the result would not only be a lack of uniformity, but also the promotion of forum shopping.<sup>87</sup>

While the 1964 Hague Conventions did not deal with the issue of interpretation in a direct way,<sup>88</sup> the 1980 Vienna Sales Convention dictates a discipline which provides that the interpretation must occur with regard to the international character of the convention and to the necessity of

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Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 VA. J. INT'L L. 729, 731 n.13 (1986) (stating that "textual differences . . . undeniably impede uniformity").

There are, however, other reasons which can lead to diverging interpretations and which are independent from the uniform law itself. In this regard it has been said that the interpretive differences can also result from different national interests which the different interpreters want to prevail over national interests of other States; *see, e.g.*, Alejandro Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443, 450 (1989) (asserting that "[t]he disparity of economic, political, and legal structure of the countries represented at the Vienna Conference suggests the difficulty of achieving legal uniformity").

<sup>85</sup> Sergio Carbone, *L'ambito di applicazione ed i criteri interpretativi della convenzione di Vienna*, in LA VENDITA INTERNAZIONALE. LA CONVENZIONE DELL'11 APRILE 1980 84 (1981).

<sup>86</sup> For a similar affirmation, *see* AUDIT, *supra* note 81, at 47; Michael J. Bonell, *Art. 7*, in CONVENZIONE DI VIENNA SUI CONTRATTI DI VENDITA INTERNAZIONALE DI BENI MOBILI, *supra* note 5, at 21.

<sup>87</sup> The danger of forum shopping as a result of divergent interpretations has been also pointed out by HONNOLD, *supra* note 59, at 142, where the author states that "[t]he settlement of disputes would be complicated and litigants would be encouraged to engage in forum shopping if the courts of different countries persist in divergent interpretations of the Convention."

<sup>88</sup> In regard to the origins of Art. 7, it has been pointed out that it is not based upon any provision of ULIS which did not expressly deal with the problem of interpretation; *see, e.g.*, *id.* at 135 n.1, ("Paragraph (1) of Art. 7 is substantially the same as Art. 6 of the 1978 Draft Convention. Paragraph (2) was added at the Diplomatic Conference. . . . ULIS has no provision like paragraph (1).").

promoting uniformity in its application and observance of good faith in international commerce;<sup>89</sup> the Convention opted, in other words, for an "autonomous interpretation"<sup>90</sup>, i.e., independent from the particular concepts of a specific legal system. And this is true "[e]ven in the exceptional cases where terms or concepts were employed which are peculiar to a given national law,"<sup>91</sup> such as "reasonable," "avoidance," and "*dommages-intérêts*."

Opting for the "autonomous" interpretation rather than for the "nationalistic"<sup>92</sup> interpretation which would have buried the convention does not resolve, however, all the interpretive problems, since this choice is not one of interpretive technique or method, but rather one of policy.<sup>93</sup> Indeed, Art. 7(1) of the Convention does not identify a method, but rather the goals of the Convention (the most important of which is the promotion of uniformity in which regard is to be had to the Convention's international character), with which any interpretation must comply.

To have regard for the Convention's international character means that the interpreter should not apply domestic law to solve interpretive problems,<sup>94</sup>

<sup>89</sup> Article 7, which deals with the interpretation issue states:

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

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

<sup>90</sup> See *supra* note 86 and accompanying text.

<sup>91</sup> Bonell, *supra* note 82, at 74; Bonnell, *supra* note 86, at 21.

<sup>92</sup> For this expression, see Michael J. Bonell, *La nouvelle Convention des Nations-Unies sur les contrats de vente internationale de marchandises*, 7 DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL 7, 14 (1981).

<sup>93</sup> For a similar evaluation of the rules contemplated in Art. 7 of the 1980 Vienna Sales Convention, see Gyula Eörsi, *General Provisions*, in INTERNATIONAL SALES, *supra* note 57, at 2-5, where the author states that "the paragraph [7(1)] is necessarily vague and therefore open to surprising results. Nevertheless, a considerable merit of the paragraph lies in the fact that it proclaims an up-to-date *policy* in harmony with the exigencies of world trade which postulates that no recourse to national law should be admitted in interpretation." (emphasis added, footnote omitted).

<sup>94</sup> A similar affirmation can be found in HONNOLD, *supra* note 59, at 136 ("[T]he reading of a legal text in the light of the concepts of our domestic legal system[] [is] an approach that would violate the requirement that the Convention be interpreted with regard 'to its

i.e., he should not read the Convention through the lenses of domestic law,<sup>95</sup> but should project the interpretive problems against an international background.<sup>96</sup>

From this rule it results, for example, that it is irrelevant whether the terms or concepts employed in the Convention correspond to terms which within a domestic legal system have a determined meaning,<sup>97</sup> since the expressions employed in the Convention were intended to be neutral.<sup>98</sup> Furthermore, one must not forget that the choice of one term rather than another is the result of a compromise<sup>99</sup> and does not necessarily correspond to the

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*international character.*” (emphasis in original).

Similar statements can be found in a recent decision of the English House of Lords; see *Fothergill v. Monarch Airlines*, [1980] 2 All E.R. 696 (H.L.), [1980] W.L.R. 209.

<sup>95</sup> See, for the danger growing out of reading the Convention through the lenses of domestic law, John O. Honnold, *The Sales Convention in Action—Uniform International Words: Uniform Application?*, J.L. & COM. 208 (1988), where the author states that “one threat to international uniformity in interpretation is a natural tendency to read the international text through the lenses of domestic law.”

<sup>96</sup> See also HONNOLD, *supra* note 59, at 136 (“To read the words of the Convention with regard for their ‘international character’ requires that they be projected against an international background.”).

<sup>97</sup> For similar conclusions, see, for example, ROLF HERBER & BEATE CZERWENKA, *INTERNATIONALES KAUFRECHT. KOMMENTAR ZU DEM ÜBEREINKOMMEN DER VEREINTEN NATIONEN VOM 11. APRIL 1980 ÜBER VERTRÄGE ÜBER DEN INTERNATIONLEN WARENKAUF* 47 (1991); PILTZ, *supra* note 51, at 66.

For somewhat different conclusions, see, however, F.J.A. van der Velden, *Indications of the Interpretation by Dutch Courts of the United Nations Convention on Contracts for the International Sale of Goods 1980*, in *NETHERLANDS REPORTS TO THE TWELFTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW: SIDNEY-MELBOURNE 1986* 21, 33-34 (Hondius et al. eds., 1987) (stating that where a source of uniform law is a specific provision of national law, recourse to its domestic interpretation is a logical aid to interpretation of the uniform law); F. A. Mann, *Uniform Statutes in English Law*, 99 L. Q. REV. 376, 383 (1983) (stating that “[i]t is simply common sense that if the Convention adopts a phrase which appears to have been taken from one legal system . . . where it is used in a specific sense, the international legislators are likely to have had that sense in mind and to intend its introduction into the Convention”).

<sup>98</sup> The neutrality of the language employed has also been pointed out by Bonell, *supra* note 82, at 74 (“When drafting the single provisions these experts had to find sufficiently neutral language on which they could reach a common understanding.”). A similar statement can be found in HONNOLD, *supra* note 59, at 136.

<sup>99</sup> It has been said that as far as the Convention is concerned, one can distinguish different kind of compromises. They have been classified as follows: “(1) those that are clear and recognizable; (2) those that are detectable only by initiates with access to Conference

reception of a concept peculiar to specific domestic law:<sup>100</sup> the interpreter has to be aware of so-called *faux-amis*.<sup>101</sup>

From the general rule according to which in the interpretation of the Convention regard is to be had to its international character, it results above all that the interpreters<sup>102</sup> cannot make recourse to interpretive techniques employed under domestic law<sup>103</sup> as this would lead to results contrary to those desired. In that regard, it suffices to give one example: in most *common law* countries statutes are generally interpreted restrictively,<sup>104</sup> consequently, "by doing so, the provisions of the *statutory law* become framed within the principles of the *judge made law*."<sup>105</sup> However,

[c]ontrary to ordinary domestic legislation, which courts may still consider an infringement of 'their' case law, the Convention, once adopted, is intended to replace all the rules in their legal systems previously governing matters within its scope, whether deriving from statutes or from the case law. This means that in applying the Convention there is no valid reason to adopt a narrow interpretation.<sup>106</sup>

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documents; (3) those entered with mental reservations on each side, each side keeping its own view of what was agreed; and (4) those masking continuing disagreement and hence merely illusory." Garro, *supra* note 84, at 452 (summarizing a classification conceived by Gyula Eörsi, Comment, *A Propos the 1980 Vienna Convention on Contracts for the International Sales of Goods*, 31 AM. J. COMP. L. 333, 346, 353-356).

<sup>100</sup> See also FRITZ ENDERLEIN ET AL., INTERNATIONALES KAUFRECHT 61 (1991); Herber, Art. 7, in KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT 89 (Peter Schlechtriem ed., 1990).

<sup>101</sup> For this expression, see HONNOLD, *supra* note 59, at 136.

<sup>102</sup> The interpreters are not only judges but the contracting parties as well; see, for a similar affirmation, FRITZ ENDERLEIN & DIETER MASKOW, INTERNATIONAL SALES LAW 55 (1992), where the authors state that "[t]o have regard to the *international character* of the Convention means, above all, not to proceed in interpreting it from national juridical constructions and terms . . . . This does not only refer to judges but also to the parties which in settling their differences of opinion first and foremost have to interpret the applicable rules."

<sup>103</sup> This point has been stressed by Bonell, *supra* note 82, at 72 (affirming that "[t]o have regard to the 'international character' of the Convention means first of all to avoid relying on the rules and techniques traditionally followed in interpreting ordinary domestic legislation").

<sup>104</sup> See, for a similar affirmation, AUDIT, *supra* note 81, at 47 n.2.

<sup>105</sup> Francesco Galgano, *Civil law e common law. Generalità*, in ATLANTE DI DIRITTO PRIVATO COMPARATO, *supra* note 13, at 1.

<sup>106</sup> Bonell, *supra* note 82, at 73.

## VII. THE PROMOTION OF THE UNIFORM APPLICATION OF THE CONVENTION AND FOREIGN CASE LAW

The goal set down in Art. 7(1)—to reach the broadest degree of uniformity in the application of the 1980 Vienna Sales Convention, which has been said to be the supreme goal of the Convention<sup>107</sup>—is strictly linked to its interpretation in which regard is to be had to its international character. Indeed, it is undeniable that the “autonomous” interpretation of the uniform law itself promotes, up to a certain point, the uniformity of its application.<sup>108</sup> In fact, as far as uniform application is concerned, the “nationalistic” interpretation of the Convention would only entail consequences that certainly are contrary to the goals intended to be achieved by the elaboration of a uniform law.<sup>109</sup>

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<sup>107</sup> For this definition, see Cook, *supra* note 65, at 216.

<sup>108</sup> If it is true that “autonomous” interpretation influences (*rectius*: promotes) uniformity in the application of the Convention, it is also true that the exigency of promoting its uniform application had some influence on the choice of “autonomous” interpretation rather than “nationalistic” interpretation.

For a similar conclusion, see Bonell, *supra* note 82, at 74-75, where the author states [a]nother and more important reason for the autonomous interpretation of the Convention relates to the Convention’s ultimate aim, which is to achieve world-wide uniformity in the law of international sale contracts. To this end it is not sufficient to have the Convention adopted by the single States. It is equally important that its provisions will be interpreted in the same way in various countries. This result would be seriously jeopardized if those called on to apply the Convention would resort, in case of ambiguities or obscurities in the text, to principles and criteria taken from a particular domestic law.

<sup>109</sup> For the consequences and the reasons of “nationalistic” interpretation, see Sturley, *supra* note 84, at 733, where the author states

independent domestic legal concerns push national courts into differing interpretations of supposedly uniform laws. Each court considers itself bound to interpret and apply international uniform law in a manner that will avoid inconsistency or tension with its own domestic law. Constrained by substantively different domestic laws, national courts allow their desire to minimize the disruptive effects of international [uniform] law to overwhelm their mandate to maintain uniformity. Diverging interpretations of the international [uniform] law are the result.

For a similar statement, see also Michael J. Bonell, *International Uniform Law in Practice—Or Where the Real Trouble Begins*, 38 AM. J. COMP. L. 865, 879 (1990).

The negative consequences of a “nationalistic” interpretation have been pointed out by courts as well. See, for example, the British House of Lords decision *Scruttons Ltd. v.*

However, to succeed in the uniform application of the Vienna Sales Convention, as in any convention of uniform law, it does not suffice that the Convention is considered an autonomous body of rules, since it still can be interpreted in diverse ways in various systems.<sup>110</sup> This can occur, for example, when the convention itself can give rise to different autonomous interpretations. In this case, the uniformity of the result would be a very unlikely coincidence. Where, for instance, there are three equally plausible autonomous interpretations and two interpreters who construe the same provision independently, the chance that there will be a uniform result amounts only to 33%, or, in other words, the probability of diverging interpretations is 67%.<sup>111</sup>

From what has been said, it results that uniformity can only be attained if the interpreter in interpreting the provisions has regard to the practice of the other contracting States.<sup>112</sup> The interpreter must consider "what others have already done,"<sup>113</sup> i.e., he must consider the decisions rendered by

Midland Silicones Ltd., [1962] A.C. 446, 471, where it is stated that "it would be deplorable if the nations should, after protracted negotiations, reach agreement . . . and that their several courts should then disagree as to the meaning of what they appeared to agree upon."

<sup>110</sup> For a similar conclusion, see R.J.C. Munday, Comment, *The Uniform Interpretation of International Conventions*, 27 INT'L & COMP. L.Q. 450 (1978), where it is stated that "[t]he principal objective of an international convention is to achieve uniformity of legal rules within the various States party to it. However, even when outward uniformity is achieved following the adoption of a single authoritative text, uniform application of the agreed rules is by no means guaranteed, as in practice different countries almost inevitably come to put different interpretations upon the same enacted words."

<sup>111</sup> For similar conclusions, see Sturley, *supra* note 84, at 738, where the author states that "[s]ome commentators suggest more directly that international conflicts in interpretation are random occurrences. The idea is simply that, when so many national courts construe uniform laws, a form of judicial centrifugal force makes diverging interpretations inevitable. The logic of this theory is apparent, for a simple numerical example can illustrate the potential impact of random distribution. Suppose a uniform law provision has five equally plausible interpretations. The first court to construe it will adopt one of them. If a foreign court independently construes the same provision, there is only a 20% chance it will adopt the same interpretation. Thus there is an 80% chance that a conflict will develop."

(footnotes omitted).

<sup>112</sup> Similar affirmations can be found in Herber, *supra* note 100, at 89.

<sup>113</sup> Dieter Maskow, *The Convention on the International Sale of Goods from the Perspective of the Socialist Countries*, in LA VENDITA INTERNAZIONALE, *supra* note 85, at 54.

judicial bodies of other contracting States, since it is possible that the same or analogous question has already been examined by other States' courts,<sup>114</sup> in which case such decisions can have either the value of precedent<sup>115</sup>—“[i]f there is already a body of international case law,”<sup>116</sup> or a persuasive value.<sup>117</sup>

There is no doubt that in practice taking foreign decisions into account—independently from whether one attributes persuasive or binding authority to them—can generate difficulties, both because of the difficulties in finding foreign decisions and because of the language barrier. And it was to obviate this problem that, after rejecting the idea of creating an international tribunal to make rulings on such cases,<sup>118</sup> UNCITRAL, in its twenty-

<sup>114</sup> For the necessity of having regard to other countries' decisions, see, for example, HERBER & CZERWENKA, *supra* note 97, at 48; ALBERT H. KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 109 (1989); Cook, *supra* note 65, at 199; PILTZ, *supra* note 51, at 66.

<sup>115</sup> However, with regard to *common law*, there is dispute among scholars and courts as to whether decisions rendered by foreign courts have persuasive or binding authority; see, for a discussion of this problem, Cook, *supra* note 65, at 218-20.

<sup>116</sup> Bonell, *supra* note 82, at 91.

<sup>117</sup> As for a reference to the persuasive power of foreign court decisions, see also ENDERLEIN & MASKOW, *supra* note 102, at 56, where the authors state that “[w]hat matters . . . is not a prejudicial effect of rulings by foreign courts or arbitral tribunals and not that the decision taken by an organ, which by accident was entrusted first to deal with a specific legal issue, is attached a particularly great importance; rather, the existing material in regard to relevant rulings has to be taken account of when giving the reasons for a decision.”

<sup>118</sup> This issue arose under the 1964 Hague Conventions as well; see, for example, Graveson, *supra* note 22, at 12, where the author states that “[a]llowing for the necessary and inevitable divergence of human decision, a problem still remains of ensuring that any tendencies towards divergence in the application of uniform laws shall be corrected at appropriate times and in suitable ways. How then shall continuing uniformity be ensured? *Shall it be done by giving ultimate jurisdiction to an international court, such as the International Court of Justice?*” (emphasis added).

However,

a similar solution can hardly be conceived with respect to the present Convention. This Convention, like other international conventions elaborated under the auspices of the United Nations or other international organizations . . . is intended to receive a world-wide acceptance. To expect that all adhering States, notwithstanding their different social, political and legal structure, could even agree on conferring to an international tribunal the exclusive competence to resolve divergencies between the national jurisdictions in the interpretations of the uniform

first working session (1988),<sup>119</sup> decided to adopt a procedure in which the decisions rendered in the application of the uniform law in the various Contracting States are all gathered by so-called *national correspondents* who then "send to the UNCITRAL Secretariat the full text of the decisions in their original languages; the Secretariat will make these decisions accessible to any interested person,"<sup>120</sup> among others, by preparing abstracts of them and by translating them into the various official languages of the United Nations and by distributing them to all the contracting States which then will have to publish them.<sup>121</sup> This procedure undoubtedly will promote the uniform application of the Vienna Sales Convention. However, since this procedure presupposes the existence of decisions, it will bring practical results only with the passage of time, i.e., after decisions have been rendered.<sup>122</sup>

#### VIII. INTERPRETATION OF THE VIENNA SALES CONVENTION, LEGISLATIVE HISTORY, AND SCHOLARLY WRITINGS

However, there are other "antidotes"<sup>123</sup> to the danger of differing interpretations of uniform law. Another useful guide is the procedure that resulted in the drafting of the definitive text of the Convention, in other words, the study of the *travaux préparatoires*.<sup>124</sup> It must be noted, however, that recourse to such materials must not be overestimated in

rules, would be entirely unrealistic.

Bonell, *supra* note 82, at 89.

<sup>119</sup> See REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON THE WORK OF ITS TWENTY-FIRST SESSION 98 (1988).

<sup>120</sup> HONNOLD, *supra* note 59, at 145.

<sup>121</sup> For a reference to this procedure, see also Bonell, *supra* note 109, at 878; HERBER & CZERWENKA, *supra* note 97, at 48.

<sup>122</sup> Even though the Vienna Sales Convention came into force only on January 1, 1988, one can already find decisions. For an overview of early decisions, see Burghard Piltz, *Neue Entwicklungen im UN-Kaufrecht*, NEUE JURISTISCHE WOCHENSCHRIFT 1101 (1994); Gert Reinhart, *Zum Inkrafttreten des UN-Kaufrechts für die Bundesrepublik Deutschland. Erste Entscheidungen deutscher Gerichte*, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 289 (1990).

<sup>123</sup> This expression can be found in Honnold, *supra* note 95, at 208.

<sup>124</sup> Among civil law commentators, it is common teaching that in interpreting uniform law one must take into account legislative history; see, for instance, AUDIT, *supra* note 81, at 48; ENDERLEIN ET AL., *supra* note 100, at 61; HERBER & CZERWENKA, *supra* note 97, at 49; MARTIN KAROLLUS, UN-KAUFRECHT 11 (1991); PILTZ, *supra* note 51, at 67.



interpreting the Vienna Sales Convention (or any other convention).<sup>125</sup> Not only because once adopted, "the Convention, like any other law, has its own life,"<sup>126</sup> but also because not all countries' rules on treaty interpretation are the same.<sup>127</sup> In fact, while in *civil law* countries the possibility of resolving an interpretive problem by making reference to the legislative history has never been doubted,<sup>128</sup> problems are posed in certain *common law* countries, where one has to "face a conflict over the legitimacy of legislative history."<sup>129</sup>

In the United States, the possibility of referring to the legislative history has long been admitted.<sup>130</sup> Only a few years ago, the Supreme Court of the United States confirmed that treaties "[may be] construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty."<sup>131</sup>

In England, by contrast, not unlike in other *common law* countries, the meaning of any provision must generally be inferred solely from the words of the statute, according to the so-called "literal rule," at least as far as domestic legislation is concerned.<sup>132</sup> With reference to the interpretation

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<sup>125</sup> A similar conclusion can be found in HONNOLD, *supra* note 59, at 141-42.

<sup>126</sup> Bonell, *supra* note 86, at 22.

<sup>127</sup> For a similar statement, see Sturley, *supra* note 84, at 740 (pointing out that some authors argue that "conflicts arise through differences in the methodology of treaty interpretation").

<sup>128</sup> For similar statement see, above all, John O. Honnold, *Uniform Words and Uniform Application. The 1980 Sales Convention and International Juridical Practice*, in EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT, *supra* note 42, at 133, where the author summarizes the various reports to the Twelfth International Congress of Comparative Law (Australia, 1986) and states that "[r]eporters from jurisdictions primarily of civil law background report free use of *travaux préparatoires* even in construing domestic legislation."

<sup>129</sup> HONNOLD, *supra* note 59, at 138.

<sup>130</sup> For similar affirmations made by *civil law* scholars, see, for example, Otto Riese, *Einheitliches Gerichtsbarkeit für vereinheitlichtes Recht?*, 26 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES RECHT 604, 609 (1961); Wahl, *Art. 17*, in KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT, *supra* note 48, at 129.

<sup>131</sup> *Air France v. Saks*, 470 U.S. 392, 396 (1985). For a reference to this case in scholarly writing, see HONNOLD, *supra* note 59, at 138.

<sup>132</sup> For similar statements, see, for instance, KEITH J. EDDEY, *THE ENGLISH LEGAL SYSTEM* 121 (4th ed., 1987) (stating that "[t]he first principle [in interpreting statutes] is that the judge should apply the words according to their 'ordinary, plain and natural meaning.' This is known as the literal rule, the application of '*litera legis*.' "); KENNETH SMITH and DENIS KEENAN, *ENGLISH LAW* 111 (5th ed., 1975) (affirming that "[a]ccording to this rule [the literal rule], the working of the Act must be construed according to its literal and

of international conventions one must point out that the rigidity of the literal rule—that for a long time excluded recourse to the legislative history<sup>133</sup>—has recently been eased not only in England, but also in other *common law* countries.<sup>134</sup> To that end it is sufficient to recall the English case of *Fothergill v. Monarch Airlines*,<sup>135</sup> where four of five judges of the House of Lords made reference to the legislative history in order to interpret a provision of an international convention.<sup>136</sup>

There are other means which, when used properly, can neutralize the danger of differing interpretations of a uniform law. One of those is the recourse to doctrine<sup>137</sup> which seems to be nearly unlimited as far as the Vienna Sales Convention is concerned.<sup>138</sup> In *civil law*, one has always made recourse to doctrine as an instrument for interpretation.<sup>139</sup> And recourse to scholarly writing seems to have become more and more common

grammatical meaning whatever the result may be."); PHILIP S. JAMES, INTRODUCTION TO ENGLISH LAW 10 (12th ed., 1989) (pointing out that "[t]he cardinal rule is that the words of an enactment must *prima facie* be interpreted in their *ordinary, literal or grammatical* sense. And provided that so to interpret them does not give rise to some absurdity, repugnancy, inconsistency or ambiguity the court is not entitled to construe them loosely or fancifully, even if a strict construction appears to it to lead to a wrong result.") (emphasis in original).

<sup>133</sup> For a similar statement made with reference to English law, see Volken, *supra* note 65, at 39-40, where the author states that "[i]t is common knowledge that common law judges seem traditionally less willing to take recourse to preparatory materials or to refer to the genesis of a statute and its rules," since " '[t]he meaning of legislation must be deduced solely from the word of the statute.' " (endnote omitted; emphasis in original).

<sup>134</sup> A similar conclusion can be found in Honnold, *supra* note 128, at 131, where the author refers to Canada, Australia and New Zealand.

<sup>135</sup> *Fothergill v. Monarch Airlines*, [1980] 2 All E.R. 696 (H.L.) (The departure from the literal rule was justified on the ground that "the language . . . has not been chosen by an English draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges.").

<sup>136</sup> For a more detailed examination of this decision concerning the interpretation of an Act of Parliament which gave effect to the Warsaw Convention of 1929 (amended at the Hague in 1955) on the Liability for Carriage of Goods by Air, see HONNOLD, *supra* note 59, at 138-41.

<sup>137</sup> As for a recent definition of doctrine, see 4 GUIDE TO AMERICAN LAW 164 (1984).

<sup>138</sup> For bibliographies concerning the 1980 Vienna Sales Convention, see, for example, MICHAEL J. WILL, INTERNATIONALE BIBLIOGRAPHIE ZUM UN-KAUFRECHT (2nd ed., 1989); Peter Winship, *A Bibliography of Commentaries on the United Nations International Sales Convention*, 21 INT'L LAW. 585 (1987); Peter Winship, *The UN Sales Convention: A Bibliography of English-Language Publications*, 28 INT'L LAW. 401 (1994).

<sup>139</sup> See HONNOLD, *supra* note 59, at 144.

in *common law* countries, such as in England<sup>140</sup> and America,<sup>141</sup> where judges have been historically reluctant to make recourse to scholarly writing.<sup>142</sup>

It is, on the contrary, doubtful whether the study of comparative law can be useful for the uniform application of uniform law.<sup>143</sup> In that regard one must agree with those scholars who affirm that both the study and the comparison of concepts belonging to different legal systems could result in consequences contrary to those the 1980 Uniform Sales Law intended to achieve. Indeed, through such study one increases the risk of diverging interpretations of the expressions employed in the Convention—which the draftsmen intended to be free from any legal connotation.<sup>144</sup> Recourse to the study of the concepts of foreign law should, however, be admissible when either the legislative history or the Convention itself lead to the conclusion that the drafters referred to concepts peculiar to a specific domestic legal system.<sup>145</sup>

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<sup>140</sup> For a reference to the departure from the refusal to make recourse to doctrine by English judges, see Honnold, *supra* note 128, at 126, where the author states that “in the United Kingdom, the former practice against citation of living authors has been relaxed. . . . [C]ourts resort to writers if there is no judicial statement on the point or (a point significant for our topic) in considering decisions of foreign courts in a foreign tongue.”

<sup>141</sup> In reference to the United States it has been pointed out by Honnold, *supra* note 95, at 208, that “[t]raditional barriers to the use of scholarly writing in legal development broke down a long time ago in this country and is breaking down in citadels of literalism in other parts of the common law world, especially in the handling of international legal materials.”

<sup>142</sup> See Edgar Bodenheimer, *Doctrine as a Source of the International Unification of Law*, 34 AM. J. COMP. L. (Supplement) 67 (1986), where the author examines in detail from a comparative point of view the question “whether doctrinal writings may be considered primary authorities of law on a par with legislation and (in some legal systems) court decisions, or whether they must be relegated to the status of secondary sources.” *Id.* at 71.

<sup>143</sup> The possibility of employing comparative law methods in order to promote the uniform application of uniform law has been rejected for example by ENDERLEIN & MASKOW, *supra* note 102, at 60 (stating that “[t]he wording of the Convention does in no way support the application of this method”); for a similar conclusion, see also HERBER & CZERWENKA, *supra* note 97, at 49.

Bonell, *supra* note 82, at 81, seems, however, to take a different point of view.

<sup>144</sup> A similar statement can be found in HONNOLD, *supra* note 59, at 136, where it is stated that “[t]he ideal [was] to use plain language that refers to things and events for which there are words of common content in the various languages.”

<sup>145</sup> The same conclusion can be found in Herber, *supra* note 100, at 92, where the author states that “the meaning within a domestic system is relevant only when it could be recognized by the participants of the Conference.”

## IX. GOOD FAITH AS AN INSTRUMENT OF MERE INTERPRETATION

According to Art. 7(1) of the 1980 Vienna Sales Convention, in interpreting its provisions one must have regard not only to the necessity of promoting the Convention's uniform application, but also to the need of promoting the observance of good faith in international trade. This provision represents a compromise between the views of those representatives "who would have preferred a provision imposing directly on the parties the duty to act in good faith, and those who on the contrary were opposed to any explicit reference to the principle of good faith in the Convention."<sup>146</sup> The question that one has to raise is how does one interpret the result of the compromise: is good faith relevant only with reference to the interpretation of the Convention or is it also relevant as far as the parties' behavior is concerned?<sup>147</sup>

According to some authors, good faith is relevant solely as an additional tool of interpretation to which judges must make recourse and which must be employed by them to neutralize the danger of reaching inequitable results.<sup>148</sup> One must note, however, that even if conceived as a mere instrument of interpretation, good faith may pose some problems and conflict with the "ultimate" goal of the Convention, i.e., the promotion of its uniform

<sup>146</sup> Bonell, *supra* note 82, at 83-84.

For similar affirmations, see also HONNOLD, *supra* note 59, at 146, according to whom Art. 7(1) "was adopted as a compromise between two divergent views: (a) Some delegates supported a general rule that, at least in the formation of the contract, the parties must observe principles of 'fair dealing' and must act in 'good faith'; (b) Others resisted this step on the ground that 'fair dealing' and 'good faith' had no fixed meaning and would lead to uncertainty."

<sup>147</sup> The opposition to the introduction of a "good faith provision" had also been raised in the occasion of the 1964 Hague Conference; see, for example, Garro, *supra* note 84, at 466, where the author recalls that "as early as the Hague Diplomatic Conference in 1964, explicit reference to good faith as a general principle was opposed by the French delegate[[who] asserted that the principle of good faith might lead to divergent and even arbitrary interpretations by national courts, and thus would impair uniformity."

<sup>148</sup> For a concern expressed in regard to the results to which a "good faith provision" may lead, see E. Allan Farnsworth, *The Convention on the International Sale of Goods from the Perspective of the Common Law Countries*, in LA VENDITA INTERNAZIONALE, *supra* note 85, at 18, where the author draws his attention to the disadvantages of a provision of the aforementioned kind and states that "the terms 'good faith' and 'fair dealing' are vague that their meaning cannot help but vary widely from one legal system to another. Their use on operative provisions phrased in the laconic drafting style of the CISG would surely lead to confusion and non-conformity."

application. In fact, because the concept of good faith is very vague,<sup>149</sup> "courts will be unable to develop a common definition,"<sup>150</sup> which is true even as far as domestic law is concerned.<sup>151</sup> This will inevitably lead to differing interpretations of the Convention's uniform provisions.<sup>152</sup> This danger appears very clearly if one considers the variety of good faith definitions one can find in a comparative setting.<sup>153</sup> To that purpose it suffices to remember that in the United States, where, by virtue of the influence of *civil law* teachings<sup>154</sup>, the principle of good faith was adopted by both the Uniform Commercial Code<sup>155</sup> and the Restatement (Second)

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<sup>149</sup> The vagueness of the concept of good faith has been criticized, for instance, by Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L. J. 265, 289, where the author also points out "the multiple meanings of good faith and the differing connotations the doctrine possesses in different legal systems" (footnote omitted).

<sup>150</sup> Dore & Defranco, *supra* note 52, at 63. For a similar conclusion, see also Gyula Eörsi, *Problems of Unified Law on the Formation of Contracts for the International Sale of Goods*, 27 AM. J. COMP. L. 311, 314 (1979).

<sup>151</sup> In America, for instance, the good faith principle has been employed by the courts in order to prevent one party from exercising discretion in a way incompatible with the purpose of the contract. For courts' decisions regarding the use of discretionary power and good faith, see *R. A. Weaver & Assoc., Inc. v. Asphalt Constr., Inc.*, 587 F.2d 1315 (D.C. Cir. 1978); *Homestake Mining Co. v. Washington Pub. Power Supply Sys.*, 476 F. Supp. 1162 (N.D. Cal. 1979); *Neumiller Farms, Inc. v. Cornett*, 368 So. 2d 272 (Ala. 1979).

However, the good faith principle has also been employed to "avoid inequitable results caused by an overly literal application of a statute or contract provision. Moreover, courts have used the provision to prevent a party from taking advantage of his own actions taken in bad faith." Dore & Defranco, *supra* note 52, at 62 (footnotes omitted).

<sup>152</sup> Regarding this risk, see Note, *supra* note 45, at 89, where it is stated that "the vagueness of a good faith provision may create problems for courts trying to decide when and how to apply it; in addition, overuse or underuse of the principle may lead to inconsistent results or to outright abuse."

<sup>153</sup> For a comparative overview on good faith, see, for example, R. Newman, *The General Principles of Equity*, in *EQUITY IN THE WORLD'S LEGAL SYSTEMS: A COMPARATIVE STUDY* 589 (R. Newman ed., 1973).

<sup>154</sup> For a similar statement, see HONNOLD, *supra* note 59, at 147, where the author states that the "general requirements of 'good faith' is not [sic] typical of common-law statutory drafting; [it] reveals the unstated influence of some of the civil law codes."

<sup>155</sup> See U.C.C. § 1-203 (1978) ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."). For a detailed discussion of the good faith provision in the U.C.C., see Steven J. Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 IOWA L. REV. 1 (1981); E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness under the*

of Contracts,<sup>156</sup> its area of operation is limited to the performance of the contract.<sup>157</sup> In *civil law* systems, as well as in socialist systems,<sup>158</sup> on the contrary, there is not only a "common law duty to perform in good faith,"<sup>159</sup> but the good faith principle operates also with regard to the interpretation and the formation of contracts.<sup>160</sup> However, "even where . . . the principle as such is expressly stated with respect not only to performance but also to formation and interpretation of the contract . . . its specific applications in practice may differ considerably."<sup>161</sup> In that regard it is sufficient to recall the importance of the good faith principle set down in § 242 of the German Civil Code<sup>162</sup> and the effect it had on the elaboration of such principles as the *culpa in contrahendo*<sup>163</sup> and the *positive Forder-*

*Uniform Commercial Code*, 30 U. CH. L. REV. 666 (1963); Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

<sup>156</sup> See Restatement (Second) of Contracts § 205 ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

<sup>157</sup> See, e.g., Farnsworth, *supra* note 148, at 18 ("[T]he American rules on good faith go to the performance of the contract.").

<sup>158</sup> For a comparative discussion of good faith in the bargaining and formation process, see, for example, E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements—Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987); Friedrich Kessler and Edith Fine, *Culpa In Contrahendo, Bargaining In Good Faith, And Freedom Of Contract*, 77 HARV. L. REV. 401 (1964); Rolf Nirk, *Rechtsvergleichendes zur Haftung für culpa in contrahendo*, 18 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 310 (1953).

<sup>159</sup> For this expression, see Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980).

<sup>160</sup> See Rosett, *supra* note 149, at 290 ("In continental and socialist systems the concept [of good faith] may have broader connotations. In particular, the notion of good faith is not limited to the performance of completed agreements, but extends to the process of formation. It operates as a limit on the right of a party to terminate the formation process.").

<sup>161</sup> Bonell, *supra* note 82, at 85-86.

<sup>162</sup> See § 242, German Civil Code [hereinafter BGB]: "The debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage."

<sup>163</sup> For a discussion of the *culpa in contrahendo* doctrine in Germany based on Ihering's teachings (see Rudolf Ihering, *Culpa in contrahendo oder Schadenersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen*, 4 IHERINGS JAHRBÜCHER 1 (1861)), see Gottwald, *Die Haftung für culpa in contrahendo*, JURISTISCHE SCHULUNG 877 (1982); Karl Larenz, *Culpa in Contrahendo, Verkehrssicherungspflicht und "sozialer Kontakt"*, MONATSSCHRIFT FÜR DEUTSCHES RECHT 515 (1954); Rolf Nirk, *Culpa in Contrahendo—Eine geglückte richterliche Rechtsfortbildung—Quo Vadis?*, in FESTSCHRIFT FÜR PHILIPP MÄHRING 71

ungsverletzung.<sup>164</sup>

## X. GOOD FAITH IN THE RELATIONS BETWEEN THE PARTIES

While some authors, as mentioned, hold that good faith operates solely as an instrument of interpretation of the 1980 Vienna Sales Convention, other authors affirm that the reference to the necessity of promoting the observance of good faith in international trade<sup>165</sup> (Art. 7(1)) is "also necessarily directed to the parties to each individual contract of sale,"<sup>166</sup> despite the reference to good faith being incorporated in the provision dedicated to the interpretation of the Convention.<sup>167</sup> In support of this thesis according to which good faith can also be considered as being one of the "general principles" on which the Uniform Sales Law is based,<sup>168</sup> it is sufficient to recall that there are several provisions which represent a particular applica-

(Hefermehl et al. eds., 1975); Hans Stoll, *Tatbestände und Funktionen der Haftung für culpa in contrahendo*, in *FESTSCHRIFT FÜR ERNST VON CAEMMERER* 435 (Ficker ed., 1978).

<sup>164</sup> Several articles have been written on the *positive Vertragsverletzung* and its relation to the *culpa in contrahendo* doctrine and good faith; see, e.g., Gerhardt, *Der Haftungsmaßstab im gesetzlichen Schuldverhältnis (Positive Vertragsverletzung, culpa in contrahendo)*, *JURISTISCHE SCHULUNG* 597 (1970); Picker, *Positive Forderungsverletzung und culpa in contrahendo*, 183 *ARCHIV FÜR DIE CIVILISTISCHE PRAXIS* 369 (1983).

<sup>165</sup> As far as the notion "good faith in international trade" is concerned, it has been pointed out that the reference to international trade prevents national courts from being allowed to draw on domestic conceptions of good faith; but see Note, *Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods*, 97 *HARV. L. REV.* 1984, 1991 (1984), where the contrary has been stated: "In applying the [good faith] rule, national courts remain free to draw on domestic—and hence diverse—conceptions of 'good faith'."

<sup>166</sup> Bonell, *supra* note 82, at 84; see, for similar statements, PETER SCHLECHTRIEM, *UNIFORM LAW OF SALES—THE U.N.-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 39 (1986); PETER SCHLECHTRIEM, *EINHEITLICHES UN-KAUFRECHT* 25 (1981).

<sup>167</sup> See, for a similar statement, Eörsi, *supra* note 93, at 2-8 ("[T]he good faith clause may play an active role in spite of its location in the Convention."). The same has been said by Ulrich Huber, *Der UNCITRAL-Entwurf eines Übereinkommens für internationale Warenkaufverträge*, 43 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 413, 432 (1979); Laszlo Réczei, *The Rules of the Convention Relating to its Field of Application and to its Interpretation*, in *PROBLEMS OF UNIFICATION OF INTERNATIONAL SALES LAW* 86 (1980).

<sup>168</sup> This has also been asserted by Herber, *supra* note 100, at 93.

tion of the aforementioned principle,<sup>169</sup> such as Art. 16(2)(b).<sup>170</sup> In fact, it is undeniable that the aforementioned provision is grounded on the principle of good faith to the extent that it provides that a proposal is irrevocable where it was reasonable for the offeree to rely upon the offer being held open and the offeree acted in reliance on the offer.<sup>171</sup>

Those who argue in favor of a similar notion of good faith, i.e., good faith as one of the general principles of the convention rather than an instrument of mere interpretation,<sup>172</sup> risk, however, being driven to the conclusion that "[a]s such it may even impose on the parties additional obligations of a positive character,"<sup>173</sup> such as acting in good faith in the bargaining and

<sup>169</sup> Similar statements can be found in AUDIT, *supra* note 81, at 49; HONNOLD, *supra* note 59, at 147; KRITZER, *supra* note 114, at 111.

<sup>170</sup> Art. 16(2)(b) provides, in pertinent part, "(2) [A]n offer cannot be revoked: . . . (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer."

<sup>171</sup> For a list of further applications of the good faith principle in particular provisions of the Convention, see OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS. VIENNA, 10 MARCH - 11 APRIL 1980 18 (1981), where it is stated that "[a]mong the manifestations of the requirement of the observance of good faith are the rules contained in the following articles:

- article 19(2) [which became final art. 21(2)] on the status of a late acceptance which was sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time;
- article 27(2) [which became final art. 29(2)] in relation to the preclusion of a party from relying on a provision in a contract that modification or abrogation of the contract must be in writing;
- article 35 and 44 [which became final articles 37 and 48] on the rights of a seller to remedy non-conformities in the goods;
- article 38 [which became final art. 40] which precludes the seller from relying on the fact that notice of non-conformity has not been given by the buyer in accordance with articles 36 and 37 [which became final articles 38 and 39] if the lack of conformity relates to facts of which the seller knew or could not have been unaware and which he did not disclose to the buyer;
- articles 45(2), 60(2) and 67 [which became final articles 49(2), 64(2) and 82] on the loss of the right to declare the contract avoided;
- articles 74 and 77 [which became final articles 85 and 88] which impose on the parties obligations to take steps to preserve the goods."

<sup>172</sup> A similar notion seems to be supported, for instance, by Dore & Defranco, *supra* note 52, at 61, where the authors state that the good faith provision does not constitute a mere instrument of interpretation, but rather, it "appears to be a pervasive norm analogous to the good faith obligation of the U.C.C."

<sup>173</sup> Bonell, *supra* note 82, at 85.



formation process.<sup>174</sup>

The aforementioned possibility of imposing on the parties additional obligations must not be admitted. However, this does not mean that one should adopt the view according to which good faith represents merely an instrument of interpretation. On the contrary, the parties' behavior must be measured on a good faith standard,<sup>175</sup> limited by the Convention's scope of application *ratione materiae*.<sup>176</sup>

## XI. ARTICLE 7(2) AND GAPS *PRAETER LEGEM*

Notwithstanding "[o]ne of the reasons for enacting the Convention is to provide a uniform body of law in the event the parties fail to consider, or agree on, the applicable body of law,"<sup>177</sup> the Convention does not "constitute an exhaustive body of rules,"<sup>178</sup> i.e., it does not provide solutions for all the problems which can originate from an international sale. Indeed, the issues governed by the 1980 Uniform Sales Law are limited to the formation of the contract and the rights and obligations of the parties resulting from

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<sup>174</sup> The view that Art. 7(1) imposes on the parties the duty of good faith bargaining has been taken, for instance, by Pedro Silva-Ruiz, *Some Remarks about the 1980 Vienna Convention on Contracts for the International Sale of Goods—Emphasis on Puerto Rico*, 4 ARIZ. J. INT'L & COMP. L. 137, 141 (1987), where the author states that "Article 7 makes good faith applicable not only to the performance and enforcement of contracts but also to their formation" and (by referring to Gert Reinhart, *Development of the Law for the International Sale of Goods*, 14 CUMB. L. REV. 89, 100 (1983)) that the *culpa in contrahendo* principle "may be incorporated into the Convention by the court even though not expressly adopted by the Convention."

*Contra*, in the sense that they expressly deny the existence of a duty of good faith bargaining imposed on the parties by virtue of Article 7, Monique Jametti Greiner, *Der Vertragsabschluss*, in *DAS EINHEITLICHE WIENER KAUFRECHT* 46 (Hans Hoyer and Willibald Posch eds., 1992); Herber, *supra* note 100, at 74.

<sup>175</sup> Maskow, *supra* note 113, at 55, seems to reach the same conclusion by stating that "the most objective criterion for what the principle of good faith in international trade means is the Convention itself."

<sup>176</sup> For an overview on the 1980 Vienna Sales Convention's scope of application *ratione materiae*, see, above all, Giorgio De Nova, *L'ambito di applicazione "ratione materiae" della convenzione di Vienna*, 44 RIV. TRIM. DIR. PROC. CIV. 749 (1990); Franco Ferrari, *L'ambito de applicazione della convenzione di Vienna sulla vendita internazionale*, 48 RIV. TRIM. DIR. PROC. CIV. 893 (1994).

<sup>177</sup> KRITZER, *supra* note 114, at 31.

<sup>178</sup> Benedetti, *supra* note 79, at 9.

such a contract.<sup>179</sup> Surely this limitation will give rise to problems relating to the necessity of filling gaps in which any type of incomplete body of rules will result.<sup>180</sup> It is to comply with such necessity that the 1980 Vienna Sales Convention provides that "[q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."<sup>181</sup>

The aim of this provision is not very different from that which the interpretation rules are pursuing,<sup>182</sup> i.e., uniformity in the Convention's application. Since this is the ultimate goal, "[i]n accordance with the basic criteria established in paragraph (1), first part, for the interpretation of the Convention in general, not only in the case of ambiguities or obscurities in the text, but also in the case of gaps, courts should to the largest possible

<sup>179</sup> See CISG Art. 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. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

- (a) the validity of the contract or of any of its provisions or of any usage;
- (b) the effect which the contract may have on the property in the goods sold.

<sup>180</sup> One must note that the possible existence of gaps does not only characterize international conventions, such as the one *de quo*; indeed, as has been pointed out by Jaubert, *Report Dion 30 ventôse An XII to the Legislative Body, in RECEUIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL* (P. Fenet ed., 1827), it is impossible to foresee everything, "especially in the field of contract, as contracts have infinite variety; it is even dangerous to descend into particulars." (*quoted and translated in ARTHUR VON MEHREN & JAMES GORDLEY, THE CIVIL LAW SYSTEM 55* (2nd ed., 1977)).

<sup>181</sup> CISG Art. 7 (2). For a justification of the existence of such a rule, see Eörsi, *supra* note 93, at 2-11, where it is stated that "the justification for such a provision can be derived from the fact that it is hardly possible for an international group to draft a voluminous and complicated piece of legislation without leaving gaps behind."

<sup>182</sup> For a discussion of the relationship between Art. 7(1) on interpretation and Art. 7(2) on gap filling, see Eörsi, *supra* note 93, at 2-9, where the author, after having discussed Art. 7(1), states "[a]s a transition to Article 7(2), it might be mentioned that gaps in the law constitute a danger in respect of interpretation of the Convention, since one way to follow the homeward trend is to find gaps in the law. On the other hand, if a gap is detected, the problem arising thereby should be solved by way of interpretation of the Convention. This must be the means whereby gaps are filled."

extent refrain from resorting to the different domestic laws and try to find a solution within the Convention itself."<sup>183</sup>

However, before discussing the meaning of the rule that questions concerning matters governed by the Vienna Sales Convention which are not expressly settled in it have to be settled "in conformity with its general principles," one must identify the matters to which that rule applies.

It has to be pointed out from the very beginning that the gaps to which the rule refers are not the gaps *intra legem*, i.e., the matters that are excluded from the scope of application of the Convention, such as the matters contemplated in Articles 4<sup>184</sup> and 5<sup>185</sup> of the Convention, but the gaps *praeter legem*,<sup>186</sup> i.e., issues to which the Convention applies but which it does not expressly resolve.<sup>187</sup>

To fill similar gaps (*praeter legem*), i.e., similar "open texture borderlines"<sup>188</sup> in international conventions as well as in domestic law, three

<sup>183</sup> Bonell, *supra* note 82, at 75.

<sup>184</sup> For the text of Art. 4, see *supra* note 179.

<sup>185</sup> It is common understanding that Art. 5 (stating "[t]his Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person") excludes product liability from coverage by the 1980 Uniform Sales Law; see, for a similar view, at least as far as "damage claims for death or personal injury caused by the goods" [are concerned], Peter Schlechtriem, *Recent Developments in International Sales Law*, 18 ISRAEL L. REV. 309, 320 (1983) ("It is still doubtful, however, what to do with property damage caused by defects of the goods; thus, whether—as in the old example from the digests (D.19.1.13 pr.)—the buyer of sick cattle can recover for the loss of his healthy herd only according to the uniform sales law, or whether he can have recourse to the domestic law of torts in a case where he has failed, for example, to give timely notice."). This problem should be solved according to the domestic law to which international private law rules refer. For a discussion of the different rules governing the interaction between tortious and contractual liability and Art. 5, see Peter Schlechtriem, *The Borderland of Tort and Contract—Opening a New Frontier?*, 21 CORNELL INT'L L. J. 467 (1988).

<sup>186</sup> For the distinction between gaps *praeter legem* and gaps *intra legem*, see Henri Deschenaux, *Der Einleitungstitel*, in 2 SCHWEIZERISCHES PRIVATRECHT 95 (Max Gutzwiller et al. eds., 1967); Wahl, *supra* note 130, at 126.

<sup>187</sup> Bonell, *supra* note 82, at 75 also stresses that "[a] first condition for the existence of a gap in the sense of Article 7(2) is that the case at hand relates to 'matters governed by [the] Convention.' Issues which are not within the scope of the Convention have been deliberately left to the competence of the existing non-unified national laws."

<sup>188</sup> This expression is borrowed from H. HART, *THE CONCEPT OF LAW* 124 (1961), where the author states that "[w]hichever device, precedent or legislation, is chosen for the communication of standards of behavior, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*. . . . [U]ncertainty at the

different approaches exist which are based respectively (a) on the application of the general principles of the convention, i.e., on the "true code approach",<sup>189</sup> (b) on external legal principles,<sup>190</sup> i.e., on the "meta-Code" approach,<sup>191</sup> and (c) on a combination of the foregoing approaches according to which one is supposed to first apply the general principles of the convention, in the absence of which, however, the judge will resort to the rules of international private law.<sup>192</sup>

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borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact." (emphasis in original).

<sup>189</sup> According to the "true code approach" (the terminology is borrowed from William D. Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L. F. 291, 292 (1962)), which corresponds to the so-called "internal analogy approach" (see, as for the use of the latter expression, KRITZER, *supra* note 114, at 117), "a court should look no further than the code [or any other kind of legislation] itself for solution to [sic] disputes governed by it—its purposes and policies should dictate the result even where there is no express language on point" (Robert A. Hillman, *Construction of the Uniform Commercial Code: UCC Section 1-103 and "Code" Methodology*, 18 B.C. IND. & COMM. L. REV. 655, 657 (1977)). In other words, a true code "is comprehensive in that it is sufficiently inclusive and independent to enable it to be administered in accordance with its own basic policies." Hawkland, *supra* at 292 (footnote omitted).

<sup>190</sup> This approach seems to be favored in *common law*; see, for example, Dore & Defranco, *supra* note 52, at 63, where the authors also assert that U.C.C. § 1-103, which provides that "[u]nless displaced by the particular provisions of the Act, the principles of law and equity . . . shall supplement its provisions," "appears to support [the thesis of the U.C.C. being based on] the common law approach." *Id.* at 64.

However, other commentators, basing their thesis on U.C.C. § 1-102(1) (which states that "[t]his Act shall be liberally construed and applied to promote its underlying purposes and policies") affirm that "[t]he effect of this language [§ 1-102] is that the code not only has the force of law, but is itself a source of law" (Mitchell Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 330, 333 (1951), i.e., that the U.C.C. is based on the *civil law* approach. The solution of the problem concerning the methodology adopted by U.C.C. depends on approach one takes to solve "[t]he tension that exists between section 1-103, which directs the courts to supplement the Code with outside law, and the true code methodology of section 1-102(1), in which courts find answers *within* the Code framework" (Hillman, *supra* note 189, at 659) (emphasis in original).

<sup>191</sup> For this expression see Steve H. Nickles, *Problems of Sources of Law Relationships under the Uniform Commercial Code—Part I: The Methodological Problem and the Civil Law Approach*, 31 ARK. L. REV. 1 (1977).

<sup>192</sup> For references to the three approaches, see, for example, KRITZER, *supra* note 114, at 117; Jan Kropholler, *Der Ausschluß des IPR im Einheitlichen Kaufgesetz*, 38 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 372, 382 (1974).

As can easily be deduced from the rules contemplated in Articles 2 and 17 of the 1964 Uniform Law on International Sale of Goods, the drafters of the 1964 Hague Conventions, in line with earlier drafts,<sup>193</sup> chose the first approach. Indeed, "Article 2 of the ULIS excludes the application of rules of international private law except in a few instances,"<sup>194</sup> and ULIS Article 17 provides that "the general principles underlying the [1964] Uniform Law are to be used to fill the law's gaps. This has the intended negative implication that courts may not refer to the domestic law of the country whose law would otherwise apply under the rules of private international law."<sup>195</sup>

## XII. GENERAL PRINCIPLES IN *CIVIL LAW AND COMMON LAW*

The 1980 Vienna Sales Convention has chosen a solution different from the criticized one<sup>196</sup> upon which the ULIS was based. Indeed, it adopted the approach which combines the recourse to general principles with an eventual recourse to the rules of international private law,<sup>197</sup> a choice that

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<sup>193</sup> The Hague Conventions' approach has already been promoted on the occasion of the elaboration of earlier drafts, such as the one discussed on the occasion of the 1951 Hague Conference mentioned *supra* note; see, for example, Rabel, *supra* note 46, at 60, where the author states that "[w]ithin its concerns, however, the text must be self-sufficient. Where a case is not expressly covered the text is not to be supplemented by the national laws—which would at once destroy unity—but be construed according to the principles consonant with its spirit."

<sup>194</sup> Harold J. Berman, *The Uniform Law on International Sale of Goods: A Constructive Critique*, 30 *LAW & CONTEMP. PROBS.* 354, 359 (1965) (footnote omitted). For a similar affirmation, see also Wahl, *supra* note 130, at 126, where the author, after having listed the three different approaches to filling gaps *praeter legem*, states that "the ULIS has adopted the first method. The text of Article 17, its legislative history as well as the provision contemplated in Article 2 show that the application of the rules of international private law had to be limited."

<sup>195</sup> Peter Winship, *Private International Law and the U.N. Sales Convention*, 21 *CORNELL INT'L L. J.* 487, 492 (1988).

<sup>196</sup> The solution adopted by the ULIS has not only been criticized, it has even been considered as being one of the reasons which led to the rejection of the ULIS. For a similar affirmation, see Dore & Defranco, *supra* note 52, at 63, where the authors state that "ULIS's failure to outline an acceptable method of dealing with omissions was a factor contributing to its rejection."

<sup>197</sup> For a similar statement, see KRITZER, *supra* note 114, at 117, affirming that "[w]hen a matter is governed by the Convention but not expressly settled in it, the Convention's solution is (i) internal analogy where the Convention contains an applicable general principle;

is based upon the consideration that "the absolute independence from domestic law that ULIS had pursued was considered as being unreach-able."<sup>198</sup>

As far as the recourse to general principles in filling the gaps is concerned, one must note that it constitutes a method well-known in *civil law* countries.<sup>199</sup> In fact, the recourse to general principles in order to fill gaps "finds precedent in many codes of the Roman-Germanic legal systems, even though among such codes there are differences."<sup>200</sup> It is sufficient to recall Article 12(2) of the Italian Civil Code's Preliminary Provisions which states that "if a controversy cannot be decided on the ground of a specific provision, one can resort to similar provisions or analogous matters; if the question remains doubtful, it shall be settled in conformity with the general principles of the legal system of the [Italian] State." A similar approach has also been introduced in other *civil law* systems, such as that of Austria,<sup>201</sup> Czechoslovakia,<sup>202</sup> Egypt,<sup>203</sup> Spain,<sup>204</sup> and others.<sup>205</sup>

and (ii) reference to external legal principles (the rules of private international law) where the Convention does not contain an applicable general principle."

<sup>198</sup> FRIGNANI, *supra* note 7, at 309.

<sup>199</sup> See, apart from the authors quoted *supra* note 189, HONNOLD, *supra* note 59, at 149, where the author underlines that the provision contemplating the settlement of questions in conformity with the general principles of the Convention "reflects the approach established for civil law codes."

<sup>200</sup> FRIGNANI, *supra* note 7, at 308.

<sup>201</sup> See Art. 7 of the Austrian Civil Code [hereinafter ABGB] (1811) ("Where a case cannot be decided either according to the literal text or the plain meaning of a statute, regard shall be had to the statutory provisions concerning similar cases. . . . If the case still remains doubtful, it shall be decided . . . on the ground of principles of natural law.").

<sup>202</sup> See, for a similar affirmation, Honnold, *supra* note 128, at 139 (stating that "[t]he Czechoslovak International Trade Code, drafted under the influence of the 1964 Hague Convention, calls for the use of the "principles governing" the Trade Code in dealing with gaps").

<sup>203</sup> See Article 1(2) of the Egypt Civil Code (1948). For a reference to this article, see also Bonell, *supra* note 82, at 77.

<sup>204</sup> See Article 6(2) of the Spanish Civil Code ("Whenever there is no directly applicable statutory provision, usages must be applied and, absent such usages, the general principles of the law.").

<sup>205</sup> One must note that even

in countries such as France or the Federal Republic of Germany, where the approach is not formally imposed by statute, it is taken for granted that a Code or any other legislation of a more general character must be considered as more than the mere sum of its individual provisions. In

In *common law*, the notion of general principles is different from that in *civil law*,<sup>206</sup> in part, because of the "diverse notion and function of the 'general principles' ",<sup>207</sup> and in part because of the different sources from which the general principles are derived. In fact, in *civil law* the source is the *legislation*, whereas in Anglo-American law, the source is represented by *case law*.<sup>208</sup> In effect, in common law

statutory law is seen as only fixing rules for defined situations, not as a possible source of general principles. As such, not only are the statutes traditionally interpreted in a very strict sense, but if there is no provision specifically regulating the case at hand, the gap will immediately be filled by principles and rules of the judge-made common law.<sup>209</sup>

### XIII. THE GENERAL PRINCIPLES OF THE VIENNA SALES CONVENTION

As has already been pointed out, the solution adopted by Article 7(2) of the Vienna Sales Convention is influenced by those that can be found in the codes of continental Europe.<sup>210</sup> This is no surprise, considering that "[t]he Convention represents a veritable codification of the law on international sales contracts, intended to replace with respect to the matters governed by it the existing domestic laws, whether they are embodied in statutes or

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fact, it must be interpreted and, if necessary, supplemented on the basis of the general principles which underlie its specific provisions.

Bonell, *supra* note 82, at 77. See also 1 KONRAD ZWEIGERT & HEIN KÖTZ, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG AUF DEN GEBIETE DES PRIVATRECHTS* 103 (2nd ed., 1982).

<sup>206</sup> It has even been said that "the term [general principles] sounds alien to English lawyers." Neville Brown, *General Principles of Law and the English Legal System*, in *NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE* 174 (Mauro Cappelletti ed., 1978).

<sup>207</sup> FRIGNANI, *supra* note 7, at 308.

<sup>208</sup> For a similar statement, see Otto Kahn-Freund, *Common Law and Civil Law—Imaginary and Real Obstacles to Assimilation*, in *NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE*, *supra* note 206, at 154 (stating that "in the common law world, the lawyer looks for his principles in the 'cases,' and the statutes merely fill in details, the "case law" playing the role of the Codes on the Continent").

<sup>209</sup> Bonell, *supra* note 82, at 77-78.

<sup>210</sup> See FRIGNANI, *supra* note 7, at 308 (affirming that the solution adopted by the continental European codes influenced the solution upon which Article 7(2) first part is based).

developed by case law. If there are gaps, it is only logical to try to find a solution whenever possible within the Convention itself,"<sup>211</sup> a solution that complies with the ultimate aim contemplated in Article 7(1), i.e., the promotion of the Convention's uniform application.

However, to fill the gaps, one can resort to various types of logical reasoning in order to find a solution within the Convention itself.<sup>212</sup> In this respect, recourse to general principles constitutes only one method of gap-filling. Therefore one must determine whether Article 7(2) of the Vienna Sales Convention must be interpreted broadly, i.e., whether it covers other methods of legal reasoning as well, such as analogical application,<sup>213</sup> or whether it is to be interpreted restrictively.<sup>214</sup>

As to this question, one can share the opinion of those legal scholars who assert not only that the Convention permits both methods, but also that "[i]n the case of a gap in the Convention the first attempt to be made is to settle the unsolved question by means of an analogical application of specific provisions."<sup>215</sup> However, when the matters expressly settled in the Convention and the matter *de quo* are not so closely related that it would not be unjustified to adopt a different solution,<sup>216</sup> one must resort to the general

<sup>211</sup> Bonell, *supra* note 82, at 78. A similar conclusion can also be found in AUDIT, *supra* note 81, at 50; FRIGNANI, *supra* note 7, at 309.

<sup>212</sup> ENDERLEIN & MASKOW, *supra* note 102, at 58, point out that Article 7(2)'s major concern is to make sure that the gaps are "closed . . . from within the Convention. This is in line with the aspiration to unify the law which . . . is established in the Convention itself" (emphasis in original).

<sup>213</sup> For a clear distinction between analogical application and the recourse to general principles, see JAN KROPHOLLER, INTERNATIONALES EINHEITSRECHT 292 (1975).

<sup>214</sup> For a brief discussion of this problem see FRIGNANI, *supra* note 7, at 309.

<sup>215</sup> Bonell, *supra* note 82, at 78.

The analogical application as a method of gap-filling has been admitted by other authors as well; see, for example, ENDERLEIN & MASKOW, *supra* note 102, at 58, where the authors state that

gap-filling can be done, as we believe, by applying such interpretation methods as extensive interpretation and analogy. The admissibility of analogy is directly addressed in the wording contained in the CISG because it is aimed at obtaining, from several comparable rules, one rule for a not expressly covered fact and/or a general rule under which the fact can be subsumed."

<sup>216</sup> For a similar criterion employed in order to distinguish the analogical approach from the recourse to general principles, see Bonell, *supra* note 82, at 79 (stating that if cases expressly settled by specific provisions and the case in question are so analogous "that it would be inherently unjust not to adopt the same solution," the gap should be closed by



principles as contemplated in Article 7(2) of the Convention. This procedure differs from the analogical application in that it does not resolve the case at hand solely by extending specific provisions dealing with analogous matters, "but on the basis of principles and rules which because of their general character may be applied on a much wider scale."<sup>217</sup>

What, however, are the general principles upon which the 1980 Uniform Sales Law is based? Some general principles can be easily identified since they are expressly provided for by the Uniform Sales Law itself. One such principle is the principle of good faith<sup>218</sup> which had already been considered a general principle under the regime of the ULIS.<sup>219</sup> There are, however, other general principles expressly outlined by the Convention. One of those is represented by the parties' autonomy,<sup>220</sup> which has been defined as the most important general principle of the Convention.<sup>221</sup> This is no surprise, considering that some legal writers have inferred from this principle that the Convention plays solely a subsidiary role<sup>222</sup> as it provides only for those cases which the parties neither contemplated nor foresaw. If that is

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resorting to the general principles). For a criticism of this criterion, see Mark N. Rosenberg, *The Vienna Convention: Uniformity in Interpretation for Gap-Filling—An Analysis and Application*, 20 AUSTRALIAN BUS. L. REV. 442, 451 (affirming that "[t]here are inherent problems with an 'inherently unjust' test").

<sup>217</sup> Bonell, *supra* note 82, at 80.

<sup>218</sup> The good faith principle has been recognized as one of the general principles expressly laid down by the Convention, for example, by AUDIT, *supra* note 81, at 51 (stating that good faith is one of the general principles, even though it must be considered a mere instrument of interpretation); ENDERLEIN & MASKOW, *supra* note 102, at 59 (where the authors list the good faith principle among those general principles "which do not necessarily have to be reflected in individual rules"); HERBER & CZERWENKA, *supra* note 97, at 49 (affirming that the good faith principle represents the only general principles expressly provided for by the Convention).

<sup>219</sup> "Good faith" has been considered a general principle under the ULIS for example by Wahl, *supra* note 130, at 135.

<sup>220</sup> The parties' autonomy has been considered a general principle for example by HONNOLD, *supra* note 59, at 47, who even stated that "[t]he dominant theme of the Convention is the role of the contract construed in the light of commercial practice and usage—a theme of deeper significance than may be evident at first glance."

<sup>221</sup> For a reference to this definition, see KRITZER, *supra* note 114, at 114.

<sup>222</sup> For this thesis, see, for example, HONNOLD, *supra* note 59, at 48 (stating that "the Convention's rules play a supporting role, supplying answers to problems that the parties have failed to solve by contract"). For a similar conclusion, see Sono, *supra* note 36, at 14 (affirming that "the rules contained in the Convention are only supplementary for those cases where the parties did not provide otherwise in their contract").

true, the conclusion which inevitably must be drawn is that in case of conflict between the parties' autonomy and any other general principle, the former always prevails,<sup>223</sup> "a result contrary to the Uniform Commercial Code where principles of 'good faith, diligence, reasonableness and care' prevail over party autonomy."<sup>224</sup>

There are also other expressly enunciated general principles, such as the principle according to which "the agreement between the parties is not subject to any formal requirement (Articles 11 and 29(1)),<sup>225</sup> except for the cases provided for by Article 12; the principle according to which widely known and largely observed usages must be taken into account (Article 9);<sup>226</sup> the principle on the ground of which if a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it (Article 78).<sup>227</sup> One also finds the principle "according to which any notice or other kind of communication made or given after the conclusion of the contract becomes effective on dispatch (Article 27)."<sup>228</sup>

Nevertheless, most general principles have not been expressly provided for by the Convention.<sup>229</sup> Consequently, they must be deduced from its specific provisions by the means of an analysis—however, not comparative<sup>230</sup>—of the contents of such provisions "in order to see whether they can be considered as an expression of a more general principle, as such capable of being applied also to cases different from those specifically regulated,"<sup>231</sup> a method which has permitted the extraction of several

<sup>223</sup> E. Allan Farnsworth, *Rights and Obligations of the Seller*, in WIENER ÜBEREINKOMMEN VON 1980 ÜBER DEN INTERNATIONALEN WARENKAUF 84 (1985), draws the same conclusion ("[I]n case of a conflict between the contract and the Convention, it is the contract—not the Convention—that controls.").

<sup>224</sup> KRITZER, *supra* note 114, at 115.

<sup>225</sup> Bonell, *supra* note 82, at 80.

<sup>226</sup> See, for a similar affirmation, Herber, *supra* note 100, at 94.

<sup>227</sup> For this principle, see AUDIT, *supra* note 81, at 51.

<sup>228</sup> Bonell, *supra* note 82, at 80.

<sup>229</sup> This is common understanding; see, for all, AUDIT, *supra* note 81, at 51.

<sup>230</sup> One cannot share the opinion according to which comparative law could be useful in order to identify such general principles; for this opinion see, for example, Bonell, *supra* note 82, at 81. Indeed, "[i]t is . . . not possible to obtain the Convention's general principles from an *analysis prepared by comparison of the laws* of the most important legal systems of the Contracting States . . . as it was supported, in some cases, in regard to Article 17 ULIS. . . . The wording of the Convention does in no way support the application of this methods [sic] (emphasis in original)." ENDERLEIN & MASKOW, *supra* note 102, at 60.

<sup>231</sup> Bonell, *supra* note 82, at 80.

general principles. Among those are, for instance, the concept of "reasonableness"<sup>232</sup> according to which "the parties must conduct themselves according to the standard of the reasonable person."<sup>233</sup> However, even though it cannot be doubted that the concept of "reasonableness" is a general principle<sup>234</sup> (it has even been defined as a "fundamental principle" of the Convention<sup>235</sup>), it is uncertain what kind of reasonableness one must take into account. This problem must be solved by taking the Convention's international character into account.<sup>236</sup>

There are other general principles which can be extracted from the provisions dealing with specific matters. For example, one can recall the principle of "mitigation"<sup>237</sup> which provides that the parties must take reasonable measures to limit damages resulting from the breach of the contract (Article 77).<sup>238</sup> One is also reminded of the principle according to which the parties must not *venire contra factum proprium*<sup>239</sup> which results in preventing "a person from contradicting a representation on which another person has reasonably relied."<sup>240</sup> One also finds the principle of the *favor contractus*<sup>241</sup> "which means that, whenever possible, a solution should be adopted in favour of the valid existence of the contract and against its premature termination on the initiative of one of the parties."<sup>242</sup> There

<sup>232</sup> It is common understanding that the concept of "reasonableness" constitutes a general principle; see, e.g., AUDIT, *supra* note 81, at 51; FRIGNANI, *supra* note 7, at 308; Herber, *supra* note 100, at 94.

<sup>233</sup> SCHLECHTRIEM, UNIFORM LAW OF SALES, *supra* note 166, at 39.

<sup>234</sup> See Maskow, *supra* note 113, at 57 ("[N]obody can doubt that the concept of reasonableness is a general principle of the convention.").

<sup>235</sup> As for this evaluation, see SCHLECHTRIEM, EINHEITLICHES UN-KAUFRECHT, *supra* note 166, at 25.

<sup>236</sup> In that regard one could say that the concept of reasonableness must be interpreted in a way that its acceptance in the different groups of States is most probable.

<sup>237</sup> For this principle, see, for example, HONNOLD, *supra* note 59, at 155.

<sup>238</sup> This principle is considered one of the general principles of the Convention also by AUDIT, *supra* note 81, at 52; FRIGNANI, *supra* note 7, at 308.

<sup>239</sup> For similar affirmations, see, for example, Eörsi, *supra* note 93, at 2-12; Herber, *supra* note 100, at 94; Maskow, *supra* note 113, at 57.

<sup>240</sup> HONNOLD, *supra* note 59, at 153.

<sup>241</sup> For a reference to the *favor contractus* principle, see Rosenberg, *supra* note 216, at 452, where the author defines the *favor contractus* principle as a rule according to which "where possible, solutions favouring the maintenance of the contract should be adopted in preference to solutions resulting in the premature termination of the contract on the initiative of one party."

<sup>242</sup> Bonell, *supra* note 82, at 81.

is also the civil law-based<sup>243</sup> rule that limits reparable damages to those that are foreseeable,<sup>244</sup> as well as the principle according to which the parties must provide the cooperation needed "in carrying out the interlocking steps of an international sales transaction,"<sup>245</sup> a duty which is closely related to the one which calls for "communication of information that is obviously needed by a trading partner."<sup>246</sup>

Of course, other rules are considered general principles as well, but generally there is no common understanding as far as their qualification is concerned.<sup>247</sup>

#### XIV. GAPS *PRAETER LEGEM* AND PRIVATE INTERNATIONAL LAW

Article 7(2) states the gaps *praeter legem* are to be filled in conformity with the Convention's general principles. *Quid iuris* in the case in which the

<sup>243</sup> Some authors consider the foreseeability rule outlined by the Vienna Sales Convention as being based on common law; see, for example, HERBER & CZERWENKA, *supra* note 97, at 333 ("[T]he limitation to foreseeable damages comes from Anglo-American law."); GERT REINHART, UN-KAUFRECHT 170 (1991) (stating the same).

This view has been opposed by several authors favoring the view that the foreseeability rule is based upon French law, in particular upon Pothier's teachings. In that regard it has been stated that "Pothier's views, as usual, were avidly received by the 19th-century English courts and formed the basis, in this instance, of the contemplation doctrine, as formulated in the celebrated decision of *Hadley v. Baxendale*." REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS. ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 830 (1988). For a more detailed discussion of the origin of the foreseeability rule and its reception in different countries, see Reinhard Zimmermann, *Der Einfluß Pothiers auf das römisch-holländische Recht in Südafrika*, 102 ZEITSCHRIFT DER SAVIGNY-STIFTUNG. GERMANISTISCHE ABTEILUNG 178-185 (1985); Franco Ferrari, *Comparative Ruminations on the Foreseeability of Damages in Contract Law*, 53 LA. L. REV. 1257 (1993); Franco Ferrari, *Prevedibilità del danno e contemplation rule*, CONTRATTO E IMPRESA 760 (1993); Detlef König, *Voraussehbarkeit des Schadens als Grenze vertraglicher Haftung*, in DAS HAAGER EINHEITLICHE KAUFGESETZ UND DAS DEUTSCHE SCHULDRECHT. KOLLOQUIUM ZUM 65. GEBURTSTAG VON ERNST VON CAEMMERER 75 (Hans G. Leser & Wolfgang Frhr. Marschall von Bieberstein eds., 1973).

<sup>244</sup> FRIGNANI, *supra* note 7, at 308, lists this rule among the general principles of the Convention. The same is true in regard to Maskow, *supra* note 113, at 57.

<sup>245</sup> KRITZER, *supra* note 114, at 115.

<sup>246</sup> HONNOLD, *supra* note 59, at 155.

<sup>247</sup> It has been suggested, for instance, that the orientation toward specific performance is also a general principle; ENDERLEIN & MASKOW, *supra* note 102, at 60, favor this thesis. In contrast, specific performance does not seem to be considered a general principle by FRIGNANI, *supra* note 7, at 308, where the author does not include it in his list of general principles.

interpreter cannot make recourse to similar principles in solving the case at hand?

To solve such problems, the 1980 Vienna Sales Convention, after some uncertainties,<sup>248</sup> laid down the rule according to which, absent general principles, the interpreter must resort to the "law applicable by virtue of the rules of private international law (Article 7(2))." This "subsidiary method"<sup>249</sup> found support under the 1964 Hague Conventions,<sup>250</sup> even though the prevalent opinion was to the contrary.<sup>251</sup> Indeed, most authors supported the view that, absent general principles of the convention with which to fill the gaps, such gaps should be filled not by making recourse to the rules of private international law, but by resorting to the general principles of the law,<sup>252</sup> i.e., to the so-called *allgemeine Rechtsgrundsätze*,<sup>253</sup> defined for the occasion as "principles and rules which are most commonly adopted within the different Contracting States and/or particularly suited for the case at hand."<sup>254</sup> However, this approach has been justly criticized as well. In fact, it was argued that the identification of such principles by interpreters would be difficult if not even impossible, considering that not even specialists have been able to identify such principles.<sup>255</sup>

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<sup>248</sup> For an overview of the dispute which finally led to the solution adopted by the Uniform Sales Law, see SCHLECHTRIEM, *EINHEITLICHES UN-KAUFRECHT*, *supra* note 166, at 23.

<sup>249</sup> For this qualification, see AUDIT, *supra* note 81, at 52.

<sup>250</sup> For an overview of the authors who supported the possibility of making recourse to the rules of private international law even under the Hague Conventions, see Herber, *supra* note 100, at 93.

<sup>251</sup> For a similar conclusion, see Bonell, *supra* note 82, at 82 ("With respect to ULIS it was already questioned whether turning to domestic law should be permitted if a gap could not be filled by general principles which could be extracted from the uniform law itself. The prevailing view was opposed to this approach.").

<sup>252</sup> For a recent discussion of the notion of "general principles of law," see Guido Alpa, *General Principles of Law*, 1 ANN. SURV. INT'L & COMP. L. 1 (1994).

<sup>253</sup> This expression is borrowed from Wahl, *supra* note 130, at 139.

<sup>254</sup> Bonell, *supra* note 82, at 82.

<sup>255</sup> For a similar criticism, see Jan Kropholler, *Der "Ausschluß" des IPR im Einheitlichen UN-Kaufrecht*, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 380 (1974).

Nowadays, such disputes have no reason to exist: the convention states that, absent general principles of the Convention, i.e., as *ultima ratio*,<sup>256</sup> one not only is allowed to make recourse to the rules of private international law: one is obliged to do so.<sup>257</sup> This does not mean that recourse to the rules of private international law, absent general principles, should be abused.<sup>258</sup> Recourse to the rules of private international law "represents under the . . . uniform law a last resort to be used only if and to the extent that a solution cannot be found either by analogical application of specific provisions or by the application of "general principles" underlying the uniform law as such."<sup>259</sup>

From what has been said so far, one main conclusion can be drawn: ultimately, it is the interpreter's task to decide whether the 1980 Uniform Sales Law is really a uniform law, i.e., whether universalism prevails over nationalism, whether any progress has been made since the enactment of the national codes which overturned what could have been a basis for a new *ius commune*. Unlike the Hague Conventions, the 1980 Vienna Sales Convention provides an ideal framework which should permit a positive answer to the foregoing question.

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<sup>256</sup> For a similar evaluation, see Bonell, *supra* note 86, at 25; Herber, *supra* note 100, at 93.

<sup>257</sup> For a similar conclusion, see Bonell, *supra* note 82, at 83, stating that the "recourse to domestic law for the purpose of filling gaps under certain circumstances is not only admissible, but even obligatory."

<sup>258</sup> The danger of an abuse of the recourse to the rules of private international law is considerable, since the gaps can easily be filled by virtue of the rules of private international law: "It is enough to state that no general principles can be found and therefore the only way out is to resort to private international law." Eörsi, *supra* note 93, at 2-12.

<sup>259</sup> Bonell, *supra* note 82, at 83.