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Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?

I. INTRODUCTION

Many commentators are now suggesting that the Vienna Convention on the International Sale of Goods¹ (hereafter "Convention"), 10 years after it has come into force, might be failing to accomplish its task of bringing uniformity and predictability to international sales law. Some commentators argue that the Convention not only fails at its goal of bringing uniformity, but actually harms this goal.² While these commentators point out difficulties with the Convention's ability to bring predictability to international sales law, these difficulties were known when the Convention was created and, furthermore, are not fatal to the usefulness of the Convention.

In general, the Convention governs contracts for the sale of goods between parties from different countries that have signed the Convention.³ It supplants the domestic law of nations as to certain international sales in two areas: 1) the formation of sales contracts and 2) the rights and obligations of the parties to sales contracts.⁴

Drafted by the United Nations Commission on International Trade Law (UNCITRAL) the Convention was adopted by a diplomatic conference in Vienna in 1980. International groups had been trying to create a uniform law for the international sale of goods since 1930.⁵ Two previous attempts to unify international sales law were heavily influenced by the Civil Law traditions of Western Europe, to the neglect of the common law and other world legal traditions, and consequently failed to obtain worldwide approval. Therefore, UNCITRAL set out to draft a set of laws that would consider the views of a wider array of countries. The result was the Convention, which subsequently came into force for eleven countries, including the United States, on January 1, 1988. As of August 20, 1999, there were 57 signatories to the Convention, albeit some with reservations.⁶

To examine the Convention, a good starting point is jurisdiction. Whenever there is a sale of goods between two parties who have their principal place of business in

1. 15 U.S.C.A. Appendix (West Supp. 1997).

2. See Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 Va. J. Int'l L. 743 (1999); James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales*, 32 Cornell Int'l L.J. 273 (1999); Steven Walt, *Novelty and the Risks of Uniform Sales Law*, 39 Va. J. Int'l L. 671 (1999).

3. The Convention does allow reservations to be made and there are other qualifications but this will be discussed further in the paper.

4. Convention art. 4.

5. The two main previous attempts were the Uniform Law on the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). For a discussion of this history see Franco Ferrari, *Uniform Interpretation of The 1980 Uniform Sales Law*, 24 Ga. J. of Int'l & Comp. L. 183, 189 (1994-95).

6. See the Convention database created by Pace University (visited Jan. 1, 2000) <<http://www.cisg.law.pace.edu>>.

different contracting states, the Convention applies unless there is an exception.⁷ The Convention covers commercial purchases of goods, but not "goods bought for personal, family or household use."⁸ Article 4 limits the Convention's scope to the formation of the contract and the rights and obligations of the buyers and sellers. The Convention does not govern some controversial areas of the law that the UNCITRAL committee failed to agree upon, such as validity of the contract and products liability.⁹ Finally, the Convention strongly recognizes the principle of freedom of contract and allows parties to contract out of any provision.¹⁰ In fact, it allows the parties to opt out of the Convention altogether.¹¹ In the United States, the Convention is a self-executing treaty; this means that any time its terms are met, the court must apply it.¹²

II. THE DIFFICULTIES OF ACHIEVING UNIFORM PRIVATE INTERNATIONAL LAW

Creating uniform private international law is an attractive idea. When transacting business with someone from a foreign country, one need not be aware of all the vagaries of the foreign system, but only the one system of law that the whole world transacts business upon. This decreases the legal risk inherent in transacting business on an international scale and consequently creates more profitability in international trade.

There are, however, many obstacles to achieving this utopian notion of a singular law.¹³ Getting many nations to agree to a system of law that is foreign to

7. The Convention does allow reservations to be made. The U.S. made an Article 95 reservation opting out of Article 1(1)(b) of the Convention. Adopting Article 1(1)(b) would have meant that the Convention would apply to contracts between a U.S. party and a party from a non-contracting state when the conflict of law rules led to the application of U.S. law. Perhaps the more important reservation that is allowed is an Article 92 reservation. This allows a state to declare it will not be bound by Part II (Contract Formation) or that it will not be bound by Part III (Sale of Goods) of the Convention. Thus far only the Scandinavian countries have opted out of Part II of the Convention and no countries have opted out of Part III. The Scandinavian countries also made an Article 94 declaration that allows these countries to apply their own transnational laws between themselves and not the Convention. The reservations allowed are found in Part IV of the Convention. For a full list of the countries that have made reservations, see the Convention database, *supra* note 6.

8. Convention arts. 2 and 3 set the parameters for which goods come within the ambit of the Convention. The Convention excludes, among other items, investment securities, negotiable instruments and ships, vessels, hovercraft or aircraft. Convention art. 2.

9. See Convention arts. 3, 4 and 5 for specific areas that the Convention does not cover.

10. Convention art. 6: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."

11. *Id.*

12. To exclude the application of the Convention from a contract, one should not make the simple statement that the law of the U.S. will apply or the law of Louisiana will apply to this contract because the law will point to the Convention. Instead one should explicitly say that the Convention would not apply to this contract.

13. For some articles discussing the difficulty of uniformity with the Convention see Ferrari, *supra* note 5; Robert A. Hillman, *Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity*, Cornell Rev. of the Convention on Cont. for the Int'l Sale of Goods 21 (1995); John Honnold, *The Sales Convention In Action—Uniform International Words: Uniform Application?*, 8 J.L. & Com. 207 (1988); John Honnold, *The Sales*

their own is difficult in the first place. In tackling this barrier one must also overcome language and cultural differences. And even if it is possible to find agreement to a uniform set of laws, one still has to determine how to maintain this uniformity in the interpretation of the law. This paper will focus on the latter difficulty.

There are different ways one can try to insure uniformity. One might use a supreme court, or some similar body, to hand down the "true" interpretation of a law. One might use a principle similar to the common law concept of *stare decisis* making case law binding upon future courts. The Convention, however, does not provide for any superior body to provide the "true" interpretation of its rules. There is also little interest in creating a body to review decisions under the Convention because merchants generally prefer quick, efficient settlements to their disputes; such a body would create delay.¹⁴

The Convention instead allows domestic courts and arbitrators to be the sole interpreters. It directs these interpreters, in Convention Article 7(1), to keep in mind the "international character [of the Convention], the need to promote uniformity . . . and the observance of good faith in international trade." This is the primary means by which the Convention seeks to ensure uniformity of interpretation. Domestic courts and arbitrators must rise to the occasion, follow the directive of Article 7(1), and interpret the Convention in a uniform manner. This means interpreting the Convention autonomously from domestic conceptions of sales law.

Early commentators were optimistic and excited about the Convention. They were excited that so many countries were able to agree on a uniform sales law and optimistic that, with this worldwide agreement, international sales law would become much more unified.¹⁵ These commentators were aware of the difficulties that lay ahead in achieving the desired uniformity, in particular the difficulty of getting national judges to interpret the Convention autonomously and not through the lense of domestic law. However, the commentators believed that, with proper care, this could be accomplished.

After ten years of case law, some commentators have grown pessimistic in their appraisal.¹⁶ Given the scarcity of case law in some jurisdictions,¹⁷ the use in some jurisdictions of domestic law to interpret the Convention,¹⁸ and a tendency in some

Convention: From Idea to Practice, 17 J.L. & Com. 181 (1998).

14. John Honnold, *Uniform Laws for International Trade: Early "Care and Feeding" for Uniform Growth*, 1 Int'l Trade & Bus. L.J. 1, 5 (Australia 1995).

15. See Professor John Honnold's introduction in his treatise, *Uniform Law for International Sales: Under the 1980 United Nations Convention* (1982).

16. See *supra* note 2.

17. Most notably, in the U.S. only 16 cases discuss the Convention, several mentioning it only in passing. For a current update of case law from around the world, see the Convention database, *supra* note 6.

18. For a U.S. court proceeding in this manner see *Calzaturificio Claudia, S.n.c. v. Olivieri Footwear, Ltd.*, No.96-8052, 1998 WL 164824 (S.D.N.Y. Apr. 7, 1998) (stating "Article 2 of the [UCC] may . . . be used to interpret the CISG where the provisions in each statute contain similar language.").

jurisdictions to ignore the Convention where it is applicable,¹⁹ some commentators now believe that obstacles to uniformity are greater than once thought, suggesting that the Convention might not be a success. As noted previously, there are some who claim the Convention actually harms the goal it attempts to promote—decreasing legal risk by imposing a body of law that is less specific and less defined than current domestic systems of law.²⁰ Indeed, because the Convention is new and limited as to case law or commentary, the Convention arguably brings more confusion to international sales law. In other words, the international community, by enacting the Convention, created more legal risk and more uncertainty by creating a new set of laws.

While there is perhaps some credence to the argument that the Convention creates more legal risk because it has a less defined area of case law, this objection should fade with time, as a body of case law builds around the Convention. Indeed, there are now over 400 decisions world-wide discussing the Convention. Given that case law and commentary will continue to build, the Convention may one day have as deep an analysis as any country's code of laws.

As for the commentators who are now concerned that countries will not be able to divorce their domestic ideas of sales law from their analysis of the Convention, there needs to be a reappraisal of the uniformity that we expect to achieve through the Convention.²¹ The Convention does not cover all areas of sales law and, in fact, leaves some extremely important areas of sales law, such as the validity of the contract and products liability to individual countries. It also allows a court to turn to private international law if the court is unable to find a provision or a general principle that governs a particular situation. Proceeding in this way, there is no way for the Convention to achieve perfect uniformity. Even in those areas that the Convention clearly governs, there will be differences of interpretation, just as courts within domestic systems have differences of interpretation of their "uniform law." This is not detrimental to the goal of the Convention.

The Convention provides a modern, uniform text of rules that govern international sales contracts and, in particular, allows the party's contracts and customs to rule their affairs. It provides the international legal and business community with a good text and structure that they can debate on common ground and thereby arrive at a greater level of uniformity in international sales law. However, because of the diverse group of countries that are interpreting its provisions, the Convention will not and can not bring to international sales a perfect or even a high level of uniformity. This is not to say that it will not provide a useful level of uniformity. What is needed now is patience and work towards making signatory countries' courts and lawyers aware of the Convention and its unique problems of interpretation.

19. See *Nova Tool & Mold Inc. v. London Indus., Inc.*, No. 97-GD-41311 Ontario Court (General Division) Dec. 16, 1998 (Canadian decision mentioning that the Convention might apply to this transaction but then quoting only Canadian law and cases in deciding the case).

20. See Stephan, *supra* note 2, at 760; see also Walt, *supra* note 2, at 672.

21. For an article discussing this thesis see Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & Com. 187 (1998).

III. HOW TO INTERPRET THE CONVENTION TO BRING ABOUT A USEFUL LEVEL OF UNIFORMITY

Assuming that the Convention will not effect perfect uniformity in international sales law, how should one go about interpreting the Convention in order to obtain a useful level of uniformity? The interpretation should start with the text. But when looking to the text, the court should consider the international character of the Convention as Article 7 directs the court to do. When interpreting the Convention, courts must not only consider the difference between Common and Civil law, but they must also consider the difference between the East and the West, third-world countries and industrialized nations, and socialist and free-market countries.²² The temptation to turn to domestic sales law, being the law with which one is familiar, to interpret the Convention should be avoided.

The European Court of Justice expressed a concept of interpretation of European Community law that interpreters of the Convention could benefit from. In *Srl Cilfit v. Ministry of Health*,²³ the court stated "[E]very provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied."²⁴ This is an organic concept of Community law. There is no one true static interpretation of Community law. Instead, interpretations are made in relation to the written laws, history, and current status of the European Community and its objectives.

One might argue that the Convention is different from the European Community because the Convention is an unchanging code while the European Community is changing as new laws and treaties are written. Therefore, it is natural to have an evolving European Community while the true Convention requirements should remain static. A fair analysis of the Convention, however, will show that the Convention has the intention of growing and evolving with international sales law. It places primary importance on the contract as it is written, but perhaps more importantly on the customs and usages that the parties have adopted within their industry. Only after observing these matters do the Convention's provisions apply.

Customs and usages are not static matters. The international trade community's customs and usages are always evolving. Therefore, the terrain to which the Convention applies will inevitably change and the interpretations of the Convention will have to change accordingly. That which is reasonable or a fundamental breach at one time may not be so at a later date. Thus, it is natural to conceive of the Convention, based on its own terms, as an evolving set of laws, instead of one static code that has one uniform interpretation that may be applied. Thinking about the

22. See Sara G. Zwart, *The New International Law of Sales: A Marriage Between Socialist, Third World, Common, and Civil Law Principles*, 13 N.C. J. Int'l L. & Com. Reg. 109 (1988).

23. Case 238/81, (1982) E.C.R. 3415.

24. *Id.* at #20.

Convention in this way allows one to escape from the rigid concept of uniformity that many commentators seem to urge or think is the goal of the Convention.

Although there is no one static interpretation of the Convention, it does provide a clear structure for courts to use when interpreting its provisions. The Convention is intended to fully govern the law of the formation of a contract and the rights and obligations of the parties to a contract.²⁵ When it has not answered a question within this realm directly, then one should decide the case in conformity with general principles of the Convention. Article 7(1)'s requirements of regard to international character, uniformity of application and observance of good faith in international trade should guide the search for general principles. Only when the Convention yields no governing principle should the judge consult outside sources.²⁶ Article 7(2) refers not to "the gaps *intra legem*, i.e., the matters that are excluded from the scope of application of the Convention, such as (validity of the contract), but the gaps *praeter legem*, i.e., issues to which the Convention applies but which it does not expressly resolve."²⁷

There is still some disagreement over how to fill *praeter legem* gaps. Advocates from common-law countries have argued that gaps should be filled by domestic legislation even when a solution can be found within the principles of the Convention.²⁸ This is generally the method that a common-law judge would apply to a statute that does not expressly prescribe the law; he would turn to the common law for the answer and not some principle garnered from the statute. The Convention, however, clearly adopts in Article 7(2) more of a Civil-Law approach by directing the interpreter of the Convention to decide the case in conformity with general principles from the Convention. It is like a code that preempts a field of law. It requires the judge to look to the general principles first, and only "in the absence of such principles, [then] in conformity with the law applicable by virtue of the rules of private international law." This compromise was intended to appease the common-law countries. Looking to private international law would mean that where there was an absence of general principles to be found in the Convention, the court should look to the country's conflict-of-law rules and apply the proper domestic legislation. This, however, should be the rare case. A judge normally should be able to find a general principle to fill the gap.

What sources can help to interpret the Convention when a gap needs to be filled? First, as already mentioned, one should proceed by analogy using the general principles of the Convention. While there are sometimes conflicts, there are some general principles that can be derived such as freedom of contract, the duty to act reasonably, and the duty to perform in good faith.²⁹ One can also interpret the Convention by consulting doctrine, prior case law,³⁰ and *travaux préparatoires*, i.e.

25. See Convention arts. 1 and 7(2). Specific questions within the realm of formation of the contract and the obligations of the parties to a sale are prescribed by the Convention.

26. See Convention art. 7(2).

27. Ferrari, *supra* note 5, at 217.

28. See Hillman, *supra* note 13.

29. *Id.* at 23.

30. This prior case law could come from any jurisdiction.

legislative history of the Convention.³¹ Finally, one should always keep in mind that the contract is governed by any usage "which the parties knew or ought to have known and which in international trade is widely known to and regularly observed by parties to contracts of the type involved in the particular trade concerned."³²

Many authors have argued that using prior case law to interpret the Convention is a useful means of ensuring uniform interpretations. However, there is question as to whether this case law should be binding or simply persuasive. The argument for making it binding is that it would be a means of making the interpretation of the Convention uniform. Some authors have pointed out the danger of using case law as precedent.³³ Their concern is that one should not be locked into a foolish interpretation of the Convention for the sake of uniformity. They argue, further, that the goal of the Convention is not, as stated in its own terms, uniformity alone, but also concern for interpreting a contract with its international character in mind and with the purpose of promoting good faith.³⁴

It cannot be argued that the Convention itself requires the courts to apply the principle of *stare decisis* and make prior case law binding. The only Article that might be interpreted to require *stare decisis* would be Article 7(1)'s directive to have "regard" to uniformity when interpreting the Convention. However the word chosen is "regard" which does not suggest a requirement to achieve uniformity at all costs. Therefore, a reasonable reading of this Convention directive would be that it requires a principle similar to *jurisprudence constante*, a principle from Civil-Law legal systems. This principle holds that case law is not a binding source of law, but a persuasive source of law. This would mean that when interpreting the Convention, a court should look to other court's interpretations of the Convention, including the interpretations of courts from other countries. These interpretations, however, would not be binding, but only persuasive.

The use in the U.S. of case law to interpret the Uniform Commercial Code (UCC) can serve as a model for courts using case law to interpret the Convention.³⁵ No state within the U.S. is bound by an interpretation of the UCC from another state, but the interpretations of the UCC from other jurisdictions are extremely persuasive. While this method does not achieve exact uniformity, the U.S. has achieved a level of uniformity of sales law that is useful to companies transacting business in many states.

There have been calls for the addition of comments to the Convention as the U.S. has for its UCC, and there has also been a call to have a body within UNCITRAL to issue opinions as to the correct interpretation of the Articles of the Convention.³⁶ Although both ideas might be useful, it is rather unlikely that either will occur. With fifty-seven countries party to the Convention, finding agreement as to this matter would be difficult. The two ideas, however, are not necessary to

31. The Convention database, *supra* note 6, provides an extensive database of these sources.

32. Convention art. 9(2).

33. See Hillman, *supra* note 13; see also Flechtner, *supra* note 21, at 211.

34. See Flechtner, *supra* note 21, at 214.

35. *Id.*

36. Bailey, *supra* note 2, at 276.

the goal of uniformity. As mentioned, doctrine and legislative history are perfectly reasonable, instructive sources and both will provide guidance to the judge looking for the proper interpretation. Many universities and institutions around the world, including Pace University, have established databases that have much of this information online for ready access.³⁷

Judges and lawyers should remember that the object of the Convention is to bring about an international trade community, and interpret it accordingly.³⁸ When a domestic court is interpreting the Convention, it should realize that it is contributing to this text on an international level. While it will continue to be difficult to achieve uniformity, one can come closer to reaching this international community through an international discussion between courts and scholars, always recognizing the other systems at hand.

IV. REVIEW OF SELECT CASE LAW ARISING UNDER THE CONVENTION

The current state of jurisprudence under the Convention suggests that it is going to take some time before signatory countries to the Convention understand how to interpret the Convention properly. Thus far, companies, attorneys and judges from the U.S. have been slow to adopt the Convention into usage and have not always interpreted the Convention properly.³⁹ There are some cases, however, that suggest that U.S. courts can and will move in the direction of interpreting the Convention in conformity with its international character.⁴⁰ There is further evidence that healthy debates are occurring on an international level regarding the Convention.⁴¹ This section will discuss these issues.

Most cases involving the Convention have occurred in European courts, especially in Germany.⁴² To date, only seventeen cases in the U.S. discuss the Convention, several mentioning it only in passing.⁴³ This is strange considering the U.S. presence in international transactions. John Honnold, a Convention scholar and a member of the committee that drafted the Convention, has suggested a few reasons for this scarcity in the U.S.:

- (1) Our lawyers are not litigious; [laughter]
- (2) Our court dockets are so overcrowded that protracted delays discourage suit and encourage

37. See Convention database, *supra* note 6.

38. See Amy H. Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, 8 Nw. J. Int'l L. & Bus. 574 (1988).

39. See text accompanying *infra* notes 46-50 discussing *Beijing Metals & Minerals v. American Bus. Ctr., Inc.*, 993 F.2d 1178 (5th Cir. 1993).

40. See text accompanying *infra* notes 58-62 regarding *Medical Mktg. Int'l, Inc. v. Internazionale Medico Scientifica, S.R.L.*, No. 99-0380, 1999 U.S. Dist. LEXIS 7380 (E.D. La. May 17, 1999) (first U.S. case to interpret the Convention with guidance from a court outside the U.S.).

41. See text accompanying *infra* notes 63-64 regarding the debate over what the term interest means.

42. For a current update of case law from around the world, see Convention database *supra* note 6.

43. *Id.*

settlement; and (3) The great majority of cases are in central Europe—countries that had a decade or so of satisfactory experience with the predecessor to the CISG, the 1964 Hague Convention that provided uniform rules for international sales. [Discussion from the floor by the European scholars supported the third alternative.]⁴⁴

Adding to the third reason suggested by Honnold is that many American lawyers appear hesitant to recommend that a client make the Convention applicable to their contract because of the sparse case law on the matter and the consequent uncertainty.⁴⁵ They would prefer to use a body of law with which they are familiar.

This sparse case law makes it hard to detect any real trends in U.S. Convention jurisprudence. From what case law exists, *Beijing Metals & Minerals v. American Business Center, Inc.*⁴⁶ illustrates the fears of the commentators that courts will turn to domestic law to interpret the Convention rather than providing an autonomous interpretation. The court in *Beijing Metals* found that the Texas parol evidence rule applied to a dispute whether the Convention was involved or not.⁴⁷

A Chinese manufacturer (Beijing) had entered into a contract with an American company (ABC) to supply weight lifting equipment. Beijing sued ABC for failure to pay on the contract. ABC argued that oral agreements between the parties had been made that were a defense to their failure to pay on the contract. The court applied the Texas parol evidence rule and excluded the oral agreements as a possible defense.⁴⁸ In a footnote, however, it said the Convention might apply to this dispute, but “we need not resolve this choice of law issue, because our discussion is limited to application of the parol evidence rule [which applies regardless].”⁴⁹ Thus, without any analysis of the Convention articles, the court asserted that the Convention included Texas’ parol evidence rule.⁵⁰

While it has been argued that the parol evidence rule is consistent with the Convention,⁵¹ most authorities agree that the American substantive rule of parol

44. John O. Honnold, *Symposium—Ten Years of the United Nations Sales Convention, The Sales Convention: From Idea to Practice*, 17 J.L. & Com. 181, 183 (1998).

45. Kritzer International Contract Manual: International Sales Law Reporter: Guides to Practical Application of the CISG (1989).

46. 993 F.2d 1178 (5th Cir. 1993).

47. *Id.* at 1182-83 n.9.

48. *Id.* at 1182-83.

49. *Id.* at 1182-83 n.9.

50. It is questionable whether the Convention should have even been applied to this case. Although the original contract was a contract for the sale of goods, the contract in dispute was characterized by the court as a novation of the original contract into a contract to settle a disputed claim. While if the later agreement were simply a modification of the first contract of sale, the Convention would still apply, but where the contract has been novated, a contract of sale is no longer implicated and the Convention would not apply. See Joseph Lookofsky, *Understanding the CISG in the USA*, 13 (1995).

51. See David H. Moore, *The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*, BYU L. Rev. 1347 (1995).

evidence is not part of the Convention.⁵² However, regardless of whether the parol evidence rule could be included as a general principle of the Convention, the wild assertion that it is part of the Convention, without any analysis, is just the type of interpretation that Article 7 directs courts away from. Fortunately, other U.S. courts have found that the parol evidence rule is inconsistent with the Convention and have not followed the precedent of *Beijing Metals*.⁵³

U.S. courts have also been guilty of making the general, misleading assertion that where language from the Convention is analogous to a domestic provision, the Convention can be interpreted in line with the domestic provision. One court has said, "caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code ("UCC"), may also inform a court where the language of the relevant CISG provisions tracks that of the UCC."⁵⁴ While this is not an unqualified endorsement of the proposition that the UCC and the Convention mean the same thing, it is a misleading statement.⁵⁵ As discussed previously, interpretation of the Convention should be a wholly autonomous matter. Turning to domestic law for interpretive authority has the strong possibility of tainting the interpretation of the Convention.

For instance, the UCC and the Convention on some points reach quite different results in sales law problems, notably the "battle of the forms" problem. In contract formation, the Convention adopted the "mirror image" rule.⁵⁶ This means that someone must accept an offer in the exact material terms in which the offer was made. If there are any material differences, the "acceptance" is a counter-offer instead of an actual acceptance. There is no doubt that the term "material" will lead to much litigation, but the general tenor of the Article is that acceptance must be substantially similar to the offer. With the UCC, however, one can quite easily accept an offer with different terms than in the offer if the offeror does not timely object.⁵⁷ If a court interpreted the Convention in light of the UCC provision on formation of contract, one would have a more liberal approach to contract formation than the Convention Articles indicate should be applied.

While U.S. courts have not always approached the Convention with the international perspective that Article 7 directs the courts to adopt, the U.S. does have one of the few cases internationally that actually looks to case law from another country. This key U.S. arbitration case, the first in the U.S. to cite Convention case law from a foreign tribunal, occurred in Louisiana.⁵⁸ In 1993,

52. See Honnold, *supra* note 15, at 110; Lookofsky, *supra* note 50, at 44.

53. See *Filanto S.p.A. v. Chilewich Int'l Corp.*, 984 F.2d 58 (2d Cir. 1993).

54. *Delchi Carrier S.p.A. v. Rotorex Inc.*, 71 F.3d 1024, 1028 (2d Cir. 1995).

55. That statement, in fact, lead a later court to say, "Article 2 of the [UCC] may . . . be used to interpret the CISG where the provisions in each statute contain similar language." *Calzaturificio Claudia S.n.c. v. Olivieri Footwear Ltd.*, No. 96-8052, 1999 WL 164924 (S.D.N.Y. Apr. 6, 1998).

56. See Convention art. 19.

57. See U.C.C. § 2-207.

58. *Medical Marketing International, Inc. v. Internazionale Medico Scientifica, S.R.L.*, No. 99-0380, 1999 U.S. Dist. LEXIS 7380 (E.D. La. May 17, 1999).

Medical Marketing International, (MMI), a Louisiana corporation, entered into an agreement with Internazionale Medico Scientifica, (IMS), an Italian corporation that manufactured radiology devices in Italy. IMS granted MMI the exclusive rights to market its mammography unit in the United States. In 1996, after MMI had purchased some units, the Food and Drug Administration (FDA) determined that IMS was not in compliance with the FDA's Good Manufacturing Practices for Medical Device Regulations.

MMI declared IMS in breach and cancelled the contract. The parties disagreed as to who was responsible for ensuring that the units met the standards of the FDA. When they were unable to work out their differences, MMI submitted the case to an arbitration panel pursuant to the contract. The arbitrators found that the Convention applied to the case. Though the Convention was not clear on the point of responsibility for meeting the standards, the arbitrators cited a German case that held that the buyer was generally responsible. However, the arbitrators found that under an exception to the rule cited by the German court, IMS had breached the contract because it either knew or should have been aware of the FDA regulations.

On appeal to the U.S. District Court, IMS argued that the arbitration panel improperly applied the Convention by not adhering to the German Federal Supreme Court holding. The District Court held, however, that the arbitration panel properly followed the German precedent, but that this case fit within the exception to the rule. The question presented to the arbitration panel was which party should be responsible for meeting specific regulations when the contract did not state who should bear this burden. In a different sense, the question was whether the goods provided by IMS conformed to the contract. The arbitrators believed Article 35 of the Convention, which determined whether the good was of the quality specified of the contract, was the applicable provision.⁵⁹

The arbitrators, at the prompting of IMS's counsel, looked to a German Federal Supreme Court interpretation of Article 35.⁶⁰ In this German case, a German buyer purchased mussels from a Swiss seller. Over a month after delivery of the mussels, the buyer notified the seller that the mussels were not of the proper quality. When the buyer refused to pay for the mussels, the seller sued for the price of the mussels.

59. Convention art. 35 states in pertinent part:

- (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
- (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
 - (a) are fit for the purposes for which the goods of the same description would ordinarily be used;
 - (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement.

60. Entscheidung des Bundersgerichtshofs in Zivilsachen(BGHZ) 129, 75 (1995).

The court found that under Article 39(1)⁶¹ the buyer had failed to give notice of non-conformity within a "reasonable time." Although Article 39(1) had settled the case, the court also interpreted Article 35. The court held that a seller is normally not responsible for the regulations in the buyer's country, but special circumstances may provide an exception to this rule, particularly if the seller knew or should have known of the regulations of the buyer's country.⁶²

Using the German interpretation of Article 35, the arbitrators in *Medical Marketing International v. Internazionale Medico Scientifica* concluded that IMS was aware of the FDA regulations from prior sales of equipment in the U.S. and was, therefore, responsible for meeting the regulations. They noted that IMS had made indications to MMI in 1992 that its equipment met all the requirements of the FDA, allowing MMI to reasonably rely on this statement. The arbitrators stated, "we conclude that the combination of the foregoing factors amounts to 'special circumstances' which constitute an exception to the general rule under the CISG that a seller is not responsible for compliance with governmental safety regulations enforced at the buyer's place of business."

This case raises the question of the importance, previously discussed, of case law in the interpretation of the Convention. Should courts apply *stare decisis* and consider prior case law binding? Or, should case law serve only as persuasive authority? The Convention does not indicate that case law is the law or becomes a part of the Convention. It simply directs courts to regard the need to promote uniformity and recognize the fact that the Convention is a body of law to be applied internationally. This does not lead to the conclusion that *stare decisis* should apply to interpretations of the Convention. Instead, the language of Article 7 suggesting that a court have "regard" to uniformity indicates that case law only provides persuasive value similar to that embodied in the concept of *jurisprudence constante* of civil law systems.

The fact that the arbitrators looked to a foreign tribunal's decision in an effort to interpret a Convention article is justified. This is the first time that this has occurred in the U.S. and one of the few times that it has occurred in Convention jurisprudence. Proceeding in this manner is part of Article 7's directive. However, if the arbitrator's holding stands for the proposition that the German interpretation of Article 35 was binding, then this is going a bit too far. A better analysis would have consisted of looking at the text of Article 35, and considering it in light of the general principles of the Convention and the German

61. "The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it."

62. The exceptions included:

(1) if the public laws and regulations of the buyer's state are identical to those enforced in the seller's state; (2) if the buyer informed the seller about those regulations; or (3) if due to "special circumstance," such as the existence of a seller's branch office in the buyer's state, the seller knew or should have known about the regulations at issue.

Translation quoted from *Medical Marketing International, INC. v. Internazionale Medico Scientifica*, S.R.L., No. 99-0380, 1999 U.S. Dist. LEXIS 7380 (E.D. La. May 17, 1999).

court's interpretation of the Article. The arbitrators could then determine that the German court's interpretation was a wise one and follow its lead.

Clearly enunciating and following a correct procedure in interpreting the Convention is particularly important with international sales law that is intended to be uniform. Future courts and arbitrators from around the world will be reviewing the case law and will be inevitably influenced by how the Convention has been interpreted. With the language and cultural barrier involved, being unclear in analysis can only lead to a breakdown in our ability to communicate our understanding of the Convention with other legal systems. If this breaks down, we lose the value of a uniform sales law because each country interprets it in its own way.

A great example, in Convention case law, of the discussion that can go on internationally as to the provisions of the Convention has occurred in a debate over the definition of "interest" in Convention Article 78. It requires delinquent payors to pay interest on the money they failed to pay.⁶³ The Article, however, does not define what interest is owed. Many courts have found that this issue is settled neither by the express articles of the Convention, nor by the general principles of the Convention. Therefore, the court must turn to the rules of private international law.⁶⁴ The court would consult its conflict-of-law rules and apply the interest provisions of the country to which those rules pointed.

An Austrian arbitration case however made an interesting contrary finding.⁶⁵ The arbitrator, a Convention scholar named Professor Bonell, found that a buyer was allowed to recover interest and held that the interest to be paid was a matter to be defined by the Convention and not a gap to be filled by domestic law. He reasoned that because domestic law could occasionally provide that no interest was due—a conclusion contrary to the Convention—that the rule must be within the Convention instead. The general principle he argued was that someone should be fully compensated for his loss. Because the damaged party would likely have to borrow from a local bank, the interest rate of the damaged party's country should be used as the proper rate of interest.

While these may be conflicting decisions, and therefore not "uniform," they show a healthy debate as to what the Convention requires. Just as the U.S. has within its law a majority and minority view on many topics of law, including the UCC, the Convention will also have different views as to what the Convention requires. The lack of certainty in this provision does not show that the Convention

63. Convention art. 78: "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, without prejudice to any claim for damages recoverable under Article 74."

64. For an example of a court making this argument see Arbitration Court of Budapest Chamber of Commerce and Industry (Case law on UNCITRAL texts (CLOUT) abstract no. 163 MAGYAR KERESKEDELMI ÉS IPARKAMARAMellett szervezett VÁLASZTOTTBIRÓSÁG Dec.10, 1996 VB/96074).

65. AUSTRIA: Arbitral Tribunal—Vienna June 15, 1994, SCH-4318 (Case law on UNCITRAL texts (CLOUT) abstract no. 94).

is a useless document that cannot lead to uniformity but instead is a symptom of the impossibility of providing absolute certainty with words. What the debate does show is that the Convention provides a uniform document that did not exist before, that can allow courts and scholars to discuss international law with a common vocabulary. In this way, the international community can come closer to the vision of a uniform law of sales.

IV. CONCLUSION

The Convention has not brought perfect uniformity to the international law of sales. This is an impossible goal. Its goal of bringing more predictability to international sales law, however, is a useful and possible goal. As more case law and commentary on the Convention develops, courts will apply the Convention with more regularity, and practitioners will be more likely to recommend the use of the Convention. This will bring more predictability to international sales law. Getting courts and practitioners from 57 countries to use and properly apply the Convention is not something that can happen overnight or even within ten years. What is essential is that scholars continue to write articles critiquing court decisions and making broad analysis of Convention articles. By focusing first on the words of the Convention and the principles found therein, courts will go a long way towards meeting the directive of achieving uniformity in the law.

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