# RESURRECTING THE PUBLIC GOOD: AMENDING THE VALIDITY EXCEPTION IN THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS FOR THE 21ST CENTURY

*Michael B. Lopez**

*Winner, 2010 Elliot A. Spoon National Business Law Writing Competition*

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* Michael Brandon Lopez is a law student at University of North Dakota School of Law. He previously earned his M.A. in English Literature at the same university where he has taught numerous writing courses as a graduate student instructor. Mr. Lopez has also authored several other pieces including one in the ABA's *The Student Lawyer* magazine. Mr. Lopez's article on the CISG and its validity exception is the winner of 2010 Elliot A. Spoon National Business Law Writing Competition, an annual student writing competition sponsored by the JOURNAL OF BUSINESS & SECURITIES LAW at Michigan State University College of Law.

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> The law is the last result of human wisdom acting upon human experience for the benefit of the public. –Samuel Johnson

## INTRODUCTION

The globalization and internationalization of economic trade, evidenced by regional agreements such as the North American Free Trade Agreement, the European Union, and international organizations like the World Trade Organization show a pattern towards embracing the decreasing (and, arguably, ultimate elimination) of barriers to cross-border transactions. As part of this pattern, the International Institute for the Unification of Private Law (UNIDROIT), originally established by the League of Nations, and the United Nations through the United Nations Commission on International Trade Law (UNCITRAL) have worked to adopt principles of international law, conventions, and progressive goals leading to implementation of principles of international law to support this global economic framework. It has worked to achieve this internationalization through, among other things, the creation of neutral bodies of law to govern commercial, cross-border transactions, with the intended effects of unification and harmonization of law across multiple and distinct legal jurisdictions.

A culmination of this work in the area of cross-border transactions was the drafting, finalization, and deposit of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter "CISG"), which entered into force January 1, 1988.[1] The CISG applies to "contracts of sale of goods between parties whose places of business are in different States,"[2] and as such has the potential to govern a vast array of commercial transactions (provided they fall within the CISG's purview – certain categories of sales are explicitly excluded).[3] And in interpreting the Convention, "regard is to be had to its international character, and the need to promote uniformity in its application and the observance of good faith in international trade."[4] While these lines make up only a small portion of the provisions of the CISG, they convey the lofty hope and functional intention of the treaty – the internationalization of commercial transactions, through the creation of a neutral body of law for dispute resolution, and the progressive realization of uniform interpretation and adoption. Indeed, the Preamble of the treaty makes clear these aspirations "that the adoption of uniform rules which govern contracts for the international sale of goods and [that] take into account the different social, economic, and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade."[5]

As evidence of its potential claim to success, parties to the CISG include, among others, the United States, Canada, Mexico, China, Japan, Germany, Denmark, and Australia.[6] These countries are representatives of both the success of the treaty – a diversity of cultures, languages, political structures, and domestic economic and legal frameworks – and the potential problems inherent in the CISG. While the CISG offers a substantial step forward in the area of unification and harmonization of international trade law, it also offers a glaring omission within its legal framework: the absence – indeed, explicit exclusion – of legal issues pertaining to the validity of contracts.[7] This important provision pertains to, *inter alia*, duress, fraud,

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1. United Nations Convention on Contracts for the International Sale of Goods, Aug. 31, 1981, 1489 U.N.T.S. 3 [hereinafter CISG].

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

3. Certain categories excluded, *inter alia*, include consumer transactions (art. 2(a)), and contracts whose predominant purpose is services (art. 3(2)). The full list of exclusions can be found in CISG arts. 2-4.

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

5. CISG, *supra* note 1, pmbl.

6. United Nations Commission on International Trade Law, *Status* 1980 – *United Nations Convention on Contracts for the International Sale of Goods* (2010), http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html [hereinafter UNCITRAL – Status of CISG].

7. CISG, *supra* note 1, art. 4(a).

unconscionability,[8] and in light of its absence creates uncertainty within the CISG framework and its application to disputes, which in turn makes it less likely that it will, in the end, be a body of law that parties in different countries will choose to adopt to regulate their contracts, thus frustrating, and arguably, defeating the purpose of the CISG.

This paper argues that filling in that glaring gap is essential to the future success of the CISG, and it proposes how the gap can be filled through amending the treaty to provide for validity provisions and an arbitral body to interpret them. Part II will discuss the history of the CISG and set forth an outline of its provisions. It will also discuss why the Convention contains no provisions relating to validity. Part II will explain why the purpose and text of the CISG call for inclusion of validity provisions, and moreover, it will demonstrate how the absence of such provisions is currently thwarting the effective functioning of the Convention in certain key areas. Finally, Part III will suggest a solution: amending the Convention to include a hybridized set of validity provisions that will accommodate the relevant legal systems and an arbitral body that will ensure uniform and systematic interpretation of those terms.

## I. THE ROAD TO THE CISG: HISTORY TO PRESENT

### A. The Historical Origins of Commercial Law

#### 1. Lex Mercatoria

The road towards a unified law of commercial transactions is an ancient one. Arguably, the beginning movements towards codification were found in the *lex mercatoria* of medieval Europe. During this time, "international trade was largely governed by transnational commercial law."[9] This was a great age that witnessed a resurgence in trade amongst the merchants of various European cultures, which necessitated a method by which dispute resolution could be attained in the fairest and most expeditious manner possible. As Henry Mather states, "in order to maintain the growth of international trade, merchants needed a new commercial law. It had to be fairly simple. It had to be a uniform commercial law, an international body of law that could protect merchants from the vicissitudes

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8. Peter Schlechtriem, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 65-69 (Peter Schlechtriem & Ingenborg Schwenzer eds., 2d ed. 2005).

9. Henry Mather, *Choice of Law for International Sales Issues Not Resolved by the CISG*, 20 J.L. & COM. 155, 178 (2001).

of local law."[10] Thus was born the *lex mercatoria* (law merchant), at once a symbol of the coalescence of commercial law into uniformity and harmonization, and the functional recognition by merchants trading in foreign jurisdictions of the ability to obtain a fair and impartial arbiter of, and perhaps most importantly, a neutral-merchant body of law.[11]

It was through *lex mercatoria* that merchants created a relevant body of law understood universally by European merchants that would be applied to their disputes, based on "mercantile custom and notions of good faith and fair dealing, rather than strict legal rules."[12] These classical normative values of good faith and fair dealing are strikingly similar to those found in the UNIFORM COMMERCIAL CODE of the United States.[13] This modern code is influenced by the norms of commercial practice, and underpinning – in every transaction – its breadth and scope are the implied obligations of good faith and fair dealing, especially between merchants.[14]

2. *Nationalizing the* Lex Mercatoria *and the Common Law*

Nevertheless, as Mather notes, "although the medieval *lex mercatoria* worked quite well as an international system, it disintegrated in the modern era as commercial law became nationalized."[15] This decline was hastened (at least in the United Kingdom – a notably absent party to the CISG),[16] Mather points out, by the famed British jurist Edward Coke, who "began to submerge mercantile law into the common law."[17] In submerging *lex mercatoria* into the common law, the nationalization of commercial transactions hitherto within the purview of the law merchants became subject to the specific demands of individual, national jurisdictions. In other words, the *locus* for commercial transactions was less on commercial expediency, through specialist merchant-arbiters applying a merchant-neutral body of law, but instead on jurists acting in accord with the

10. *Id.*
11. *Id.* at 179.
12. *Id.*
13. In fact, U.C.C. § 2-104 cmt. 2 (2002) specifically remarks that: "The term 'merchant' as defined here roots in the 'law merchant' concept of a professional business."
14. U.C.C. § 1-203 cmt. 20 (2002) ("the definition of 'good faith' in this section merely confirms what has been the case for a number of years as Articles of the UCC have been amended or revised – the obligation of 'good faith,' applicable in each Article, is to be interpreted . . . as including both the subjective element of honesty in fact and the objective element of the observance of reasonable commercial standards of fair dealing.").
15. Mather, *supra* note 9, at 179.
16. *See* UNCITRAL – Status of CISG, *supra* note 6.
17. Mather, *supra* note 9, at 179.

historical, political, and economic developments and trends of the day in their domestic jurisdictions.[18]

3. *UNIDROIT and UNCITRAL*

Nonetheless, economic and commercial needs prevailed, and the historical development of uniform frameworks dealing with cross-border transactions rapidly advanced in the 20th century. Among the earliest of these developments was the founding of the International Institute for the Unification of Private Law (now, UNIDROIT), in 1928. There, "Ernst Rabel proposed to work towards a unification of international sales law."[19] "On April 29, 1930, a committee consisting of representatives from different legal systems was founded. The first draft of a uniform sales law was published in 1935."[20] Rabel continued his work until the outbreak of World War II, which in turn disrupted the efforts towards unification of commercial law. Temporarily disrupted, though not ended, it was not until 1951, when a special conference on unifying sales law was held by the Dutch, at The Hague, that the process once again gained momentum.[21] From that point the development of agreements concerning the unification of international sales law was rapid, with UNIDROIT distributing various draft agreements for ratification.

However, these efforts were met with limited success, as common law countries such as the United States, which were suspicious of the European, civil-code dominated drafting committees, resisted accession to these agreements.[22] It was not until the founding of the United Nations Commission on International Trade Law (UNCITRAL) that the modern sales unification movement was born, with increased participation from, among others, the United States, culminating in serious drafting sessions from 1968 to the creation of the CISG.[23] The objectives underlying the creation of UNCITRAL and the development of an international framework like the CISG were "the construction of model and uniform laws, and the use of standard trade terms 'in order to eliminate legal obstacles to international trade and to ensure an orderly development of economic

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18. *Id.* (noting that "On the continent, some aspects of commercial law were preserved in a distinctive body of law (even in the 19th century codification), but all commercial law was nationalized.").

19. Ingenborg Schwenzer & Pascal Hachem, *The CISG – Successes and Pitfalls*, 57 AM. J. COMP. L. 457, 459 (2009).

20. *Id.*

21. *Id.*

22. *Id.*

23. Michael Kabik, *Through the Looking-Glass: International Trade in the "Wonderland" of the United Nations Convention on Contracts for the International Sale of Goods*," 9 INT'L TAX & BUS. LAW 408, 416 (1992).

activities on a fair and equal basis.'"[24] Indeed, despite the United States' relative lack of participation and hesitation in many of the historical trends that laid the groundwork for the culminating achievement of the CISG, the CISG nevertheless is a self-executing treaty, ratified by the United States, and is the supreme law, required to be applied, where appropriate, by all state and federal jurisdictions.[25]

B. Negotiating A Universal Approach to Commercial Law – The CISG

If the breadth, purpose, scope, and objective of the CISG immediately display anything within its kaleidoscopic view of international, cross-border transactions, it is that there is a bold effort to unify and harmonize international sales law. When States are party to the CISG,[26] then unless specifically excluded by the parties to a transaction in the sale of goods, whose principal place of business is in a different contracting State, the CISG automatically applies to their "contracts of sale of goods."[27] This Article belies the thematic force of the treaty, and its potentially massive scope of substantive application.[28] Throughout the global economic system, discounting those states that are not parties to the treaty, the CISG applies, as a default-body of law (in the event the parties have, in fact, *not* specifically excluded its application), to a cross-border, sales transaction. Furthermore, in the event of a dispute, "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."[29] This is a tremendous impetus for global economic development, but insufficient attention has been paid to the truly remarkable achievement that the CISG represents – an effort towards unifying disparate legal regimes into a neutral body of law, in order to secure universal economic and social development.

Arguably, however, there is a legitimate reason for failing to focus on the achievement of the CISG, in favor of examining what it is not. While some commentators declare with unqualified enthusiasm that "the United Nations Convention on Contracts for the International Sale of Goods – the

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24. *Id*. (*quoting* Kazuaki Sono, *UNCITRAL and the Vienna Sales Convention*, 18 INT'L L. 7, 8 (1984)).

25. Richard E. Speidel, *The Impact of Internationalization of Transnational Commercial Law*, 16 NW. J. INT'L. L. & BUS. 165, 166 (1995).

26. CISG, *supra* note 1, art. 1(1).

27. *Id.*

28. *See supra* note 3 (on exclusion of certain sales transactions); *see also*, CISG, *supra* note 1, art. 6 (addressing the ability of contracting individuals to exclude the CISG or to derogate or vary "the effect" of any of its terms).

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

CISG – has now gained worldwide acceptance,"[30] and similarly assert that "the CISG can be regarded superior to choosing any domestic law"[31] when dealing with cross-border transactions, more tempered (and critical) commentators of the CISG exist. One commentator stoically meditated that "uniformity in law is a mixed blessing and not an unqualified good," while proceeding to look at the potential for inefficiency in default rules, divergent approaches to implementation in uniform law, and the novelty uniform law poses – all of which are problems associated with the CISG.[32] Indeed, as Steven Walt noted, "the relatively few disputes in which the CISG has governed are overwhelmingly cases in which the parties were unaware that the CISG even applied to their contract. Only the hapless tend to have their contracts governed by the CISG."[33] And the criticism of substantive elements (or lack thereof) of the CISG by some commentators is a valid one. For example, significant discussion exists as to the CISG's reference in Article 7(1) to "good faith," with commentators on different sides of the argument assessing the scope and relevance of that particular term, and perhaps more troublingly how to apply it uniformly (indeed, there was substantial controversy during the drafting process on how, precisely, to define "good faith").[34] In addition to the CISG's vagueness of terms – it doesn't define "good faith" – the CISG can be defined by the absence of an important element, namely provisions concerning the validity of contracts.

Article 4(a) of the CISG explicitly excludes validity of contracts from the purview of the Convention, stating that "[i]n particular, unless 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."[35] Nevertheless, as some commentators have recognized, the CISG also contains a provision that is in some tension with this absent-provision concerning validity, and on deciding questions within that tension,[36] where, for example, the CISG provides that:

> 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

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30. Schwenzer & Hachem, *supra* note 19, at 457.

31. *Id.*

32. Steven Walt, *Novelty and the Risk of Uniform Sales Law*, 39 VA. J. INT'L L. 671, 672-73 (1999).

33. *Id.* at 688.

34. John Honnold, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, 123-24 (1982).

35. CISG, *supra* note 1, art. 4(a).

36. Patrick C. Leyens, *CISG and Mistake: Uniform Law vs. Domestic Law – The Interpretive Challenge of Mistake and the Validity Loophole*, Oct. 2003, http://cisgw3.law.pace.edu/biblio/levens.html.

> based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.[37]

There is no clear path to what, exactly, "general principles" with respect to the CISG means, and, more importantly, because the CISG by its own terms expressly excludes issues such as validity of contracts, domestic courts will ultimately have to grapple with deciphering the meaning of these vague dictates the CISG provides, with reference to their own bodies of law and understanding of them, in the absence of clear provisions dealing with the validity of contracts.

C. Provisions of the CISG

The CISG is potentially wide ranging in its scope, as it includes all sales of goods transactions when parties are in different States, though it excludes, among other things, consumer transactions, and sales where the predominant purpose of the transaction are services.[38]

1. *Preamble to the CISG*

The internationality of the CISG, and its relevance to the global market and economic cooperation between various states, is evident from the Preamble of the CISG. Chiefly, it notes that "the development of international trade on the basis of equality and mutual benefit"[39] is important for ensuring working relations between the various states. Moreover, the Preamble makes clear that this can be achieved by removing "legal barriers in international trade."[40] Indeed, this effort by the United Nations to facilitate the removal of these barriers to trade, and economic and social development throughout the world, are framed in the context of "the establishment of a New International Economic Order," which crucially links the adoption of a uniform body of laws to regulate trade and its ability to "promote the development of international trade."[41] In doing this, the CISG fundamentally works to achieve parity between various parties to sale of goods transactions in different national jurisdictions, thus allowing benefits to attach to both parties through permitting reliance on a uniform, neutral body of law to govern any agreements between them. Such efforts enhance predictability, reduce transaction costs, and preserve allocation of risks between the parties, allowing greater economic and social development, irrespective of the forum state of the parties.

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37. CISG, *supra* note 1, art. 7(2).
38. Daniel Keating, SALES: A SYSTEMS APPROACH 37-38 (4th ed. 2009).
39. CISG, *supra* note 1, pmbl.
40. *Id.*
41. *Id.*

2. *Part I: Sphere of Application and General Provisions (Arts. 1-13)*

The sphere of the CISG as previously alluded is concerned principally with international sales. Other important provisions included in Part I of the CISG (Arts. 1-13), however, include the CISG's exclusion of contract validity[42] from its purview, exclusion of application to issues of liability "for death or injury caused by any goods to persons,"[43] guidance for decisionmakers' interpretations of the CISG,[44] and the obligation of good faith.[45] These are important for considering the problem of the validity exclusion from the scope of the Convention. Because the CISG excludes consideration of contracts validity from it scope, courts interpreting issues of contracts validity must do so with recourse to the domestic law of their particular jurisdiction. However, this is in tension with Article 7's provisions, which require that "[i]n the interpretation of this Convention, regard is to be had to its international character *and* to the need to promote uniformity in its application."[46] Thus, the possibility for a conflict of interpretation between courts, and between varying degrees of validity protection (e.g. unconscionability) that courts are willing to afford, ultimately creates friction, which destabilizes the purpose of the CISG – harmonization and uniformity in international sales law.[47]

A recent example that highlights this tension is a case in which a New York federal court determined that if additional consideration is required to modify a contract, then it falls within the purview of the CISG's validity exception.[48] As one commentator noted, "This [is] despite Article 29's clear pronouncement that a modification can be made by the 'mere agreement of the parties'"[49] and arguably flies in the face of the commercial spirit of Article 2 of the UNIFORM COMMERCIAL CODE which specifically addresses this issue, and provides (in line with commercial standards of dealing) that consideration is not required to effect a modification of an agreement.[50]

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42. CISG, *supra* note 1, art. 4.
43. CISG, *supra* note 1, art. 5.
44. CISG, *supra* note 1, art. 7(1).
45. *Id*.
46. *Id*. (emphasis added).
47. Larry DiMatteo, et al., INTERNATIONAL SALES LAW: A CRITICAL ANALYSIS OF CISG JURISPRUDENCE 177 (2005) ("As is apparent . . . CISG jurisprudence is mixed regarding the avoidance of homeward trend analysis. There remains, however, troubling evidence of national courts failing to recognize the international character of the CISG.") [hereinafter DiMatteo].
48. Geneva Pharm. Tech. Corp. v. Barr Laboratories, Inc., 201 F. Supp. 2d 236, 283-84 (S.D.N.Y. 2002).
49. DiMatteo, *supra* note 47, at 177.
50. U.C.C. § 2-209(1) (2002) ("An agreement modifying a contract within this Article needs no consideration to be binding").

3. *Part II: Formation of the Contract (Arts. 14-24)*

Part II of the CISG (Arts. 14-24) concerns issues of contract formation. Among them are provisions dealing with offer, acceptance, the moment when acceptance becomes binding, failure to provide a "mirror-image" of the accepted offer, and the like. Notably, "parties grounded in the civil law need not cope with the mysteries of common-law "consideration" that may deny effect to the offer's promise."[51]

4. *Part III: Sale of Goods (Arts. 25-88)*

Generally, Part III of the CISG (Arts. 25-88) deals with the wide range of possible issues that might arise in the contractual configurations between the buyer and seller in a commercial agreement. Among its provisions are those concerning modification, delivery, third party claims, remedies for breach (e.g. avoidance, cancellation, recission), payment, anticipatory breach, damages, and exemptions.

5. *Final Provisions (Arts. 89-101)*

The Final Provisions of the CISG (Arts. 89-101) "are administrative provisions commonly included in United Nations Conventions."[52] However, two important provisions include Article 92 which "permits a Contracting State to declare that it will not be bound by Part II (Formation of Contract) or by Part III (Obligations of the Parties Under a Contract of Sale)."[53] the other important provision is Article 96, which provides that a state may declare that "contracts of sale . . . be concluded in or evidenced by writing."[54] This preserves the Statute of Frauds requirement,[55] found in the laws of the United States. However, the United States has not made an Article 96 declaration, and thus there is no affirmative statute of frauds defense, in the United States, under the CISG.

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51. Honnold, *supra* note 34, at 63.
52. *Id.* at 465.
53. *Id.*
54. CISG, *supra* note 1, art. 96.
55. CISG, *supra* note 1, art. 96; *see also* U.C.C. § 2-201 (2002) (Statute of Frauds requirements for oral agreements); RESTATEMENT (SECOND) OF CONTRACTS §110(1)(e) ("[A] contract that is not to be performed within one year from the making thereof" requires a written memorandum or an applicable exception).

D. The Absence of Validity Provisions

1. *Avoiding the Unavoidable: Validity, and the* Travaux Préparatoires

As Patrick Leyens notes of the absence of validity provisions within the CISG:

> [T]here was a lack of debate in regard to the meaning of "validity" in CISG [A]rticle 4(a). The delegates did not explore in great detail the difference between issues of validity and contract formation. . . . [T]here is a strong argument that the drafters mainly had in mind mandatory rules that involve an element of public policy.[56]

Although there is some disagreement as to what, exactly, "validity" means in the context of the CISG,[57] it is generally held to include fraud, duress, mistake, unconscionability, etc.[58] Such provisions are important tools in the hands of courts to ensure that gross disparities in bargaining power do not permit more powerful parties from enforcing egregious contractual provisions against weaker, less sophisticated parties. This is especially true in contracts that are so wholly one sided as to "shock the conscience,"[59] and moreover, these important tools provide courts with the means for social regulations and limits to freedom of contract. However, these tools have inherent tensions within themselves: the doctrine of unconscionability, for example, is notoriously difficult to define. As one commentator notes, "Unconscionability remains a difficult concept . . . Common law definitions . . . provide little, if any guidance."[60]

Similarly, the doctrine of duress, while perhaps easier to define in theory – a party is in effect forced, against their will, to enter into an agreement – is in practice a doctrine shrouded in a thicket of

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56. Leyens, *supra* note 36, at 23.

57. Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT'L L. 1, 19-20 (1993).

58. *Id*. at 87.

59. Eyre v. Potter, 56 U.S. 42, 60 (1853).

60. Evelyn L. Brown, *The Uncertainty of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic*, 105 COM. L. J. 287, 291 (2000). *See also* Hepburn & Dundas' Heirs v. Dunlop & Co., 14 U.S. 179 (1816) (noting the Court's equitable power to set aside contracts for reasons of "conscience"). *See also* U.C.C. § 2-302 (2002) (noting rather tautologically that a court may decline to enforce any "unconscionable" provision in an agreement, though failing to define "unconscionable"; thus, "unconscionability" is for a court to find as a matter of law); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (on unconscionability, correlating with the UNIFORM COMMERCIAL CODE, the lack of a definition of "unconscionable," thus making such a finding by the Court a matter of law). *But see* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (noting that a finding of unconscionability requires both procedural and substantive unconscionability. This is in accord with approaches by most courts).

misunderstanding. As Grace Giesel puts it, "The snapshot of the duress doctrine today is bothersome. Over and over again modern day courts struggle with defining the parameters of the doctrine. These courts state illogical or nonsensical tests for application of the doctrine."[61] Giesel concludes this assessment by starkly observing that the lack of definitive standards and tests for applying the doctrine of duress has resulted in "a complete failure of the duress doctrine."[62] Similarly, issues of public policy, fraud, and illegality are those which "Courts have long reserved to themselves,"[63] and the RESTATEMENT (SECOND) OF CONTRACTS articulates this prerogative:

> A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against enforcement of such terms.[64]

Once again, however, this doctrine – while perhaps better defined than unconscionability – is left to the various temperaments of courts to decide when and where they will find illegality, or agreements that are an affront to general concepts of public policy. As the distinguished contract commentators Bruce Frier and James J. White extrapolate: "courts have traditionally extended their reach beyond direct enforcement of statutes, into areas of public policy that judges develop themselves. The doctrines in this area are inevitably contingent on context."[65]

Given that each of these important doctrines lack definitive contours, and are subject to multiple interpretations by domestic jurisdictions within the United States, these problems are only compounded when being interpreted in different countries, with different cultures, and different approaches to the limits to freedom of contract, and the necessity of courts policing contractual agreements. As such, these inconsistencies subject the parties' agreements under the CISG to the real possibility of considerably divergent results, and argue clearly in favor of a uniform rule addressing – not just a vague notion of "validity" – but one which clearly and concisely provides rules, tests, and other methodologies for assessing unconscionability, duress, fraud, illegality, and if, and when, public policy should be used to strike provisions in (or entire) agreements.

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61. Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. VA. L. REV. 443, 446 (2005); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 174 (1981) (provision concerning duress).

62. *Id.*

63. Bruce W. Frier & James J. White, THE MODERN LAW OF CONTRACTS 425 (2d ed. 2008).

64. RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981) (articulating approach to contracts and public policy).

65. Frier & White, *supra* note 63, at 425.

Certainly, the vagaries attached to these equitable doctrines argues in favor of uniform rules governing them, and their inclusion in the CISG, to ensure a more comprehensive, uniform framework, but also warrant serious consideration of whether one can even provide for freedom of contract, and its subsidiary benefits of free trade, market efficiencies, and lowered transaction costs absent their presence. As Giesel notes, "if assent to a bargain is not the product of unfettered choice – if parties to contract do not have the unfettered freedom to choose which bargains are best for them and which are not – the freedom of contract of the individual is less"[66] – though one could go so far as to argue that it is effectively extinguished. While the CISG does not, of course, deny parties' their rights under domestic jurisdictions to seek judgment under these equitable doctrines, its failure to include strong provisions clearly delineating them within its four corners invites mistreatment, underutilization, and inconsistent results.

One commentator noted similarly the consequences of denying full expression of validity concepts within the CISG, opining that:

> The exclusion of validity issues from the Convention's scope significantly limits the development of an international body of case law to guide adjudicators, traders, and their counsel. Art. 4(a) poses a particular danger to the development of a coherent jurisprudence of international trade, because it gives adjudicators wide discretion to determine when to apply domestic law rather than the CISG to contracts for the international sale of goods.[67]

Thus, a decision on whether or not a particular validity issue exists is one that will have to be made autonomously, by the individual court applying the CISG and its own relevant domestic laws, while looking to the international character of the Convention.[68]

In contrast to the successful medieval *lex mercatoria* arrangements of resolving disputes in cross-border transactions, modern approaches to the unification and harmonization of sales law reveal a suspicion of foreign legal systems, and of those jurisdictions' ability to apply neutral bodies of law fairly and uniformly, and the validity exception within the CISG is emblematic of that suspicion.[69] A survey of the *travaux préparatoires* reveals that, in fact, delegates disagreed over the inclusion of, for example, unconscionability, with the delegate from Canada insisting that the doctrine of unconscionability "was out of place in the Convention, which was based

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66. Giesel, *supra* note 61, at 467.

67. Hartnell, *supra* note 57, at 7.

68. Schlechtriem, *supra* note 8, at 65-69.

69. Hartnell, *supra* note 57, at 44-45 ("On balance, then, the drafting history of CISG, article 4(a) demonstrates a clear concern for preserving the applicability of certain domestic laws. Any reading of the validity exception cannot neglect the parochial interests that inspired it.").

squarely on the doctrine of the autonomy of the will of the parties."[70] Contrast that response to the possible inclusion of a clause regarding the doctrine of unconscionability with that of the Italian representative, who declared, "his delegation could not accept the view that the doctrine of unconscionability had no place in the Convention. [And that] he hoped that if differences in the bargaining power of the parties led to abuse, the courts would use [such power] to correct the abuses as far as possible."[71] The Canadian delegate responded, that:

> [H]is delegation was not opposed to a doctrine of unconscionability. They simply felt that the draft Convention conferred no power on the courts to police the fairness of bargains. It was an open question as to whether the same goals could be achieved by impeaching the validity of a contract under the applicable national law.[72]

The tension demarcated here between the Canadian and Italian representatives is a palpable and important one – it highlights the fact that while the CISG allows for "individual autonomy," in that it directs domestic jurisdictions to interpret fundamental matters concerning the law of contracts (arising under the CISG), such as unconscionability, from a domestic perspective. This simultaneously highlights and warrants the problematic conclusion that the CISG is not a comprehensive framework, but more importantly, is *not* a truly international document concerned with internationalizing the law governing the international sale of goods.

Helen Hartnell notes of this, that "Article 4(a) itself presents a paradox. The drafting history demonstrates that this provision fulfills a peculiar role which is fundamentally at odds with the unification goals of the Convention. The purpose of [A]rticle 4(a) is precisely to admit of national divergences regarding sensitive issues."[73] In an effort to avoid potentially controversial issues that might hinge on matters of public policy, the drafters opted for exclusionary language delegating the responsibility of deciding validity of contracts issues to national courts, while tempering that delegation of responsibility with Article 7(2), directing courts applying domestic substantive law outside of the CISG to give effect to the general principles on which the treaty itself is based.[74] This is not helpful to the fundamental tenets that the CISG posits – uniformity and internationalization of the legal regime effectuating sales in cross-border

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70. United Nations, *United Nations Conference on Contracts for the International Sale of Goods, Vienna 10 March – April 11 1980: Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees*, 206 U.N. Doc A/CONF.97/19 (1981).

71. *Id.*

72. *Id.* at 206-07.

73. Hartnell, *supra* note 57, at 49.

74. *Id*. at 48-49.

transactions. As Hartnell distills it, "While autonomous interpretation of CISG, Article 4(a) appeals to the internationalist spirit, it is fraught with problems."[75]

Eliminating validity provisions from what could be a more comprehensive framework comes at the cost of not only protecting national interests and control over public policy concerns – such as the doctrines of fraud, mistake, unconscionability, reasonable expectations – but also undermines the uniformity and harmonization of the CISG as an important body of neutral law that parties are willing, and able, to rely upon in their transactions, in the face of national forums, preferring their own national law.[76] Still, others contend that the lack of provisions concerning the validity of contracts will not affect, at least to a very great deal, the overall ability of the CISG to be functionally useful, and successful.[77] As well, a number of commentators both on the occasion of the CISG's 25th anniversary, and beyond, seem to suggest that the Convention is doing reasonably well without the validity provision.[78] However, in comments to the 'Bill on the International Sale of Goods' in the Danish Parliament over why Denmark – Norway, Finland, Iceland, and Sweden[79] also included these reservations – had excluded Part II of the CISG concerning the formation of contracts, the Danish Ministry of Justice commented that:

> [T]he Convention does not regulate the validity of contracts, see Article 4(a) of the Convention. Accordingly, the implementation into Danish law of Part II will make the provisions of the Convention applicable to the formation of the contract, whereas the provisions of the Danish Contracts Act will be applicable to the question concerning the validity of the contract; this will result in legal uncertainty as to whether a valid contract has been concluded."[80]

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75. *Id.* at 49.

76. Franco Ferrari, *Homeward Trend and Lex Forism Despite Uniform Sales Law*, 13 VINDOBONA J. INT'L L. & ARB. 15, 40-42 (2009).

77. Hartnell, *supra* note 57, at 87 ("Most of the validity issues excluded from the scope of the Convention – duress, fraud, misrepresentation, mistake, initial impossibility, illegality, and immorality – are issues that do not figure largely in the process of planning contracts for the international sale of goods. Although the exclusion of such issues from the Convention's scope will present uncertainties as to applicable law when a contract dispute does arise, it does not significantly endanger the goal of promoting predictability through unification.").

78. Schwenzer & Hachem, *supra* note 19, at 472 ("A further fundamental criticism relates to the incompleteness of the CISG. . . . Some authors criticize primarily that the meaning of the term validity is unclear, thus leading to an inconsistent application of the Convention, resulting in legal uncertainty. This argument may be easily rejected. The very term 'validity' has to be determined autonomously.").

79. United Nations – Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=X-10&chapter=10&lang=en (last visited Oct. 19, 2009).

80. CISG – Denmark, Dec. 7, 1988, http://www.cisg.dk/eng-intro.htm (last visited Oct. 20, 2009).

The tension between the autonomy of national jurisdictions deciding matters of validity, viewed in comparison with the principles, provisions, and absent provisions of the CISG, make the CISG less predictable – a major negative for commercial dealing – and, also, weaken its strength as a potential source and model for international law and the internationalization of trade.

### 2. *A Suggested Place in the CISG Structure for Validity Provisions*

One proposal, which would be in line with both the international spirit and character of the CISG, would be to delete the current Article 4(a) provision which excludes consideration of the validity of contracts under the CISG, and replace it with a provision that expressly requires (subject to Article 6's permitting exclusion of the CISG, or derogation of its provisions in favor of a particular choice of law), that an interpretation of the CISG due regard is to be given to issues of contract validity. In doing this, the CISG's overall text and context would be preserved – the deletion of the current provision, and the incorporation of a new one would have minimal effect on the already bare convention whose terms are terse, and do not provide, *inter alia*, examples or Official Comments – other than to put courts on notice that interests such as social policy and the public good warrant their attention in scrutinizing the agreements that parties have entered into.

Likewise, this approach would be in line with Article 7(1)'s requirement that "[i]n the interpretation of this Convention, regard is to be had to its international character and the need to promote uniformity."[81] Expressly providing for validity provisions within the specific context of the CISG itself, as well as reference to terms of unconscionability, fraud, duress, illegality, would avert the need to rely on domestic interpretations of these doctrines, and help fulfill the CISG's purpose as an international agreement for securing neutral treatment of commercial contractual arrangements.

## II. THE EFFECT OF THE ABSENCE OF VALIDITY PROVISIONS

### A. Overall Effects from the Lack of a Validity Provision

Validity matters, public policy matters – and both of these concepts matter (or, should matter) in international, cross-border transactions, especially with a treaty that purports to be an internationalization of cross-border trade. The drafters largely left matters of public policy to the particular national jurisdiction where a dispute was brought,[82] and sought to

81. CISG, *supra* note 1, art. 7(1).
82. Hartnell, *supra* note 57, at 93.

exclude validity on the grounds that it introduced issues of morality into legal principles.[83] The drafters of the CISG even had problems with whether to include a principle of good faith in the Convention, something that is utilized by both civil and common law jurisdictions – though in differing ways – in the formation and enforcement of contracts.[84] At the conclusion of tense negotiations the drafters reached the compromise embodied in [A]rticle 7(1), explaining "the need to promote uniformity in its application and the observance of good faith."[85] Despite the inclusion of "observance of good faith" in the CISG, there is still significant disagreement over whether or not the CISG *actually* implies a duty of good faith in commercial transactions, and beyond that, of whether – if there is one – that good faith duty extends to negotiations and contract formation, or only the performance and enforcement of the final agreement.[86] It is surprising that the drafters would be unable to agree on a well-acknowledged historical principle of contract law. Indeed, a survey of THE THEODOSIAN CODE, compiled at the order of the Emperor Theodosius II in 438, reveals that in sales contracts:

> It is not at all fitting that the good faith of sale and purchase should be broken, when no duress was exerted through fraud. For a contract that has been executed without any flaw must not be disturbed by the litigious controversy because of the sole complaint that the price was too cheap.[87]

Courts should be willing and able to address problems concerning contract formation, either through bad faith dealing, duress, fraud, mistake, unconscionability, or the like. And while the CISG does not prohibit courts from doing so, it fails to provide standard international rules within its framework that courts might rely upon in order to ascertain whether or not a contract should be found unenforceable on the basis of problems arising out of validity.

The *lex mercatoria* was premised on a merchant behavior of good faith and fair dealing,[88] and is arguably a basic beginning point for any contract that arises out of a mutual bargain struck between two (or more)

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83. Paul J. Powers, *Defining the Undefinable: Good Faith and the United Nations Convention on the Contracts for the International Sale of Goods*, 18 J.L. & COM. 333, 343 (1999).

84. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement"); *see also* Schlectriem, *supra* note 8, at 74-75; Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964).

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

86. Powers, *supra* note 83, at 345-46.

87. READINGS IN MEDIEVAL HISTORY 1 (Patrick J. Geary ed., 1998).

88. Mather, *supra* note 9, at 179.

consenting individuals (or entities) with the capacity to contract.[89] In relegating validity provisions to domestic jurisdictions, the drafters of the CISG chose to vest international, cross-border transactions posing inherently international questions within the purview of domestic tribunals and courts.[90] In effect, because they were unwilling to address the hard-issues of public policy on an international scale, they effectively created a framework that invites divergent national approaches to what are arguably universal issues concerning contract formation and enforcement.[91] As well, the drafters in pushing to create a sales framework that would be adopted, as opposed to one that was comprehensive, neglected to seize the opportunity to create a document that would be aspirational in its approach to economic and social development. Though the CISG expressly states that "the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,"[92] and "that the adoption of uniform rules which govern contracts for the international sale of goods . . . would contribute to the removal of legal barriers in international trade and promote the development of . . . trade,"[93] they nevertheless excluded important provisions dealing with, *inter alia*, the fairness of bargains and equality of bargaining power.

B. From an International Structural Perspective

This exclusionary approach by the drafters, while making the CISG more palatable for adoption through being pragmatic, is nevertheless disappointing, partly because the CISG has, in fact, served as an important convention for nations with developing economic systems.[94] One commentator noted that:

> [W]ith the end of the cold war and the collapse of the former Soviet Union, the young Eastern European states have also looked to the CISG when formulating their new civil codes. This holds true not only with regard to the Commonwealth of Independent States but also for the Baltic states among which Estonia is the most prominent example.[95]

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89. Powers, *supra* note 83, at 337-38 (noting German requirements of good faith in contract negotiation and performance, and Italian duty of pre-contractual good faith, and requirements of disclosure during negotiations); *but see* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (imposing a duty of good faith in performance and enforcement of contract; and in general American common law).

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

91. Lisa M. Ryan, *The Convention on Contracts for the International Sale of Goods: Divergent Interpretations*, 4 TUL. J. INT'L & COMP. L. 99, 100 (1995).

92. CISG, *supra* note 1, pmbl.

93. *Id.*

94. Schwenzer & Hachem, *supra* note 19, at 462-63.

95. *Id.*

Additionally, developing regions such as Africa can look to the CISG for a neutral body of law, which in turn can help facilitate growing businesses that are unable to afford the often-prohibitive counsel costs for researching foreign law, and potentially litigating that foreign law in a foreign forum.[96] Arguably, courts should also be attuned to the potential for unconscionable, fraudulent, and misrepresentative action that might occur in transactions involving actors in developing (or, for that matter, any) economies as they embrace and enter the foray of international commerce. The potential for abuse is arguably also more likely to occur at the hands of economically sophisticated parties, located in jurisdictions that they are familiar with and litigating in forums that they have specified for all disputes (such clauses often appear in contracts of adhesion), that a commercial actor with less sophistication and resources has signed.[97]

This potential for abuse seems particularly acute in commercial transactions involving developing regions such as Africa where:

> [C]ontracts for sale of goods concluded between parties with their place of business, respectively, in a developed and in a developing country, usually do not contain the choice of the domestic law of the latter as applicable law. This may happen for a number of reasons, ranging from difficult access to that law to the balance of contractual power. Hence, the law chosen will be the domestic law of the developed country or the law of a third State, possibly that of the place of arbitration.[98]

The CISG is theoretically designed to bypass these hindrances to commercial transactions in order to secure mutual economic development. Indeed, the CISG's general principles, embodied as a neutral body of law, give small and medium-sized business enterprises a potentially important negotiating tool when interacting with foreign, economically stronger, or both, commercial trading partners, by pointing to a neutral body of law that purports to transcend national ideologies and legal systems, by favoring neither.[99]

### C. From a Human Rights and Development Perspective

The CISG is an international document that reflects international interests, and its existence is concomitant with the purposes of the body –

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96. Luca G. Castellani, *Promoting the Adoption of the United Nations Convention on Contacts for the International Sale of Goods (CISG)*, 13 VINDOBONA J. OF INT'L COM. L. & ARB. 241, 246-47 (2009).

97. Hartnell, *supra* note 57, at 83-92 (noting the difficulties that may arise in assessing the validity of exculpatory clauses under the CISG).

98. Castellani, *supra* note 96, at 246-47.

99. CISG, *supra* note 1, art 1(3) (providing that "Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention").

the United Nations – that provided the forum and source for its creation. As such, the CISG's purpose should not be isolated from the other documents that serve as sources of international understanding and general principles of international law. The Charter of the United Nations provides that among the purposes of the United Nations is, "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion,"[100] and further provides that the United Nations "be a centre for harmonizing the actions of nations in the attainment of these common ends."[101] Similarly, the Universal Declaration of Human Rights provides that:

> Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social, and cultural rights indispensable for his dignity and the free development of his personality.[102]

The Preamble to the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes that "the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights."[103] As well, the Preamble to the International Covenant on Civil and Political Rights (ICCPR) almost identically mirrors that found in the ICESCR.[104]

The point to be made in pointing to these aspirational documents is that while the drafters of the CISG felt moved to exclude validity from the final text of the treaty to avoid controversy,[105] they failed, in doing so, to secure a document that truly reflects the purpose of the foundational documents under whose auspices they labored. Instead of avoiding this important area of the law of contracts, critical to ensuring important goals of

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100. U.N. Charter art. 1, para. 3.

101. *Id*. at art. 1, para. 4.

102. G.A. Res. 217A (III), art. 22, U.N. Doc. A/810 at 71 (Dec. 10, 1948).

103. International Covenant on Economic, Social, and Cultural Rights, pmbl., Oct. 5, 1977, 993 U.N.T.S. 3 [hereinafter ICESCR].

104. International Covenant on Civil and Political Rights, Oct. 5, 1977, 999 U.N.T.S. 171 (comparison reveals inclusion of "civil and political freedom," additional to that of the Preamble to the ICESCR) [hereinafter ICCPR].

105. Jacob S. Ziegel & Claude Samson, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods*, INSTITUTE OF INTERNATIONAL COMMERCIAL LAW – CISG DATABASE, July, 1981, http://www.cisg.law.pace.edu/cisg/wais/db/articles/english2.html (last visited, Oct. 22, 2009) (comment 43 to CISG art. 4, noting that "[t]he exclusion of questions of validity from the reach of CISG is therefore a debilitating if unavoidable weakness").

public policy – economic development, equality of treatment and access, fairness and bargaining parity (to avoid gross disparity between parties of substantially unequal bargaining power) – the CISG drafters should have included provisions dealing specifically with the validity of contracts. In working to draft a treaty that would provide a neutral body of law to promote international economic development, an important international policy goal – as indicated by the United Nations Charter, the Universal Declaration of Human Rights, the ICESCR, and the ICCPR – the drafters would have been formulating a comprehensive document that took into account the public policy goals of fairness and the avoidance of abuse through gross disparity in bargaining power but would also ensure that important regions (such as emerging and developing economies in Eastern Europe and Africa) had these important tools in hand with a neutral body of law, rather than relying upon disparate legal regimes with idiosyncratic methodologies for applying doctrines of validity, to which they could choose to govern their commercial transactions.

Critics, however, would contend – and not unjustly – that merchants are a particular exception to doctrines such as unconscionability and duress, in that there are higher expectations of their sophistication and ability to competitively bargain, which is reflected in their final agreement. Thus, the logic goes, courts ought to respect the express terms of the contract – even in light of clauses, such as forum and arbitration agreements highly favorable to one party – as a basal element of freedom of contract and, therefore, leave them untouched.[106] This highlights a problematic area not just for issues specific to the CISG and the absence of provisions concerning validity, but with contracts law in general – the divorce of nobler, equality-oriented ideals, such as fairness, and the policing of contracts to ensure parity of bargaining, at the expense of leaving the parties with the bargain they agreed to (at the farthest end of the ideological spectrum, no matter how Faustian they might be). Such negative interference in contracts is a philosophy all-too-often promoted by those in favor of overall economic efficiency and the principle of freedom of contract. In the battle – or, rather, guerilla warfare as the *travaux préparatoires* of the Convention shows, between jurisdictions arguing for the power of courts to examine issues of validity of contracts and those asserting that such notions of public policy ought to be excluded from the CISG – the CISG adopted the exclusion approach, embraced the overarching doctrine of freedom of contract, and left the problem of

106. Hartnell, *supra* note 57, at 87 (arguing that in excluding certain validity issues "it [was] recognized that these problems were relatively insignificant in international trade"); *see also* Robert M. Lloyd, *Making Contracts Relevant: Thirteen Lessons for the First-Year Contracts Course*, 36 ARIZ. ST. L.J. 257, 267 (2004) (arguing the unlikelihood, absent exceptional circumstances, that a party will prevail on a claim of unconscionability).

defining "validity" issues, and the relevant approach to them, to individual courts and their particular domestic law.[107] This, in turn, highlights another potential problem arising out of the absence of provisions dealing with validity of contracts, that of divergent approaches to disputes arising under the provisions of the CISG.

D. Commercial Perspectives, and the Problem of the Homeward Tendency

1. *Divergent Approaches to the CISG – the Homeward Trend*

In a case applying the CISG to a dispute, a Federal court noted that while under Article 2 of the UNIFORM COMMERCIAL CODE the:

> [A]ction would be viewed as an acceptance with a proposal for a material modification, [but that] the Uniform Commercial Code, as previously noted does not apply to this case, because the State Department undertook to fix something that was not broken by helping to create the Sale of Goods Convention which varies from the Uniform Commercial Code in many significant ways.[108]

This comment confirms the criticism of some academics that the CISG would succeed, even absent provisions concerning substantive law, like validity, but for the problem of national trends and judicial interests preferring the application of domestic law to the international principles and character of the CISG, in their particular jurisdiction where a complaint is brought.[109]

This is particularly troublesome when looking to resolve issues dealing with validity of contracts under Article 4(a) of the CISG. As Stefan Kröll comments on resolving disputes under Article 4(a), "another problem in analyzing the case law is that where courts do resort to national law, they rarely explain clearly their reason for doing so."[110] Part of this problem is derivative of the relative newness, and lack of utilization of the CISG by contracting parties. As one commentator puts it, "novel default terms typically have a higher variance of possible case outcomes than nonnovel terms. Thus, the drafting attorney will most likely be biased against the use of novel terms."[111] Compounding the problem of the novelty of the CISG, compared to the well established laws of domestic jurisdictions – such as the United States' common law tradition and Article 2 of the UNIFORM

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107. Hartnell, *supra* note 57, at 60-62.

108. Filanto, S.p.A. v. Chilewich Intern. Corp., 789 F. Supp 1229, 1238 (S.D.N.Y. 1992).

109. Larry A. DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT'L L. & BUS. 299, 437-40 (2004) [hereinafter DiMatteo et al.].

110. Stefan Kröll, *Selected Problems Concerning the CISG's Scope of Application*, 25 J.L. & COM. 39, 40 (2006); *see also* DiMatteo et al., *supra* note 109, at 304-05.

111. Walt, *supra* note 32, at 685.

COMMERCIAL CODE – is the fact that there is no international adjudicatory body for disputes arising under the provisions of the CISG.[112] Disputes, rather, must be channeled through domestic courts and tribunals, who may have little to no familiarity with the CISG, and who may prefer the comfort of their own domestic laws. However, Steven Walt contends that might not be such a terrible outcome, given that "the CISG contains no definitions and leaves crucial default terms unspecified."[113] Walt also maintains, "given that learning externalities are produced by using novel terms, a "homeward trend" is not such a bad thing. Interpreting the terms of the uniform law in the same way as under national law enhances predictability."[114] Other commentators suggest, however, that divergent approaches to the CISG may be decreasing, noting, "there are signs that courts are taking their role in applying CISG interpretive methodology more seriously. The result has produced a coalescing of different interpretations through the formation of more specific default rules and the recognition of factors to be used in applying CISG articles."[115]

However, such absences and the possibility for divergent application of the CISG by different domestic jurisdictions is evident in inconsistent interpretations by domestic tribunals. Such inconsistencies are the death-knell for would-be commercial actors who might choose to be bound by the CISG. An example of such a divergent approach – with a relevant provision present in the CISG itself – was seen in two cases involving the parol evidence rule. In one case, a federal appellate court held that the parol evidence rule applied to a dispute under the CISG.[116] As one commentator noted:

> The U.S. Court of Appeals for the Fifth Circuit held that the parol evidence rule applied to cases of written contracts within the scope of the CISG because of its nature as a rule of procedure and not of substantive law. This is an example of judicial parochialism. The court failed to use CISG interpretive methodology.[117]

In contrast, another court "rejected the homeward trend temptation and correctly held the admissibility of parol evidence was a rule of substantive law and within the scope of the CISG. In addition, the court appropriately cited scholarly writings and foreign case law to buttress its holding."[118] Such divergent approaches, within the courts of one state party – the United

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112. Schwenzer & Hachem, *supra* note 19, at 468 (noting that the lack of a common supreme court for uniform interpretation might be seen as a "severe deficit").

113. Walt, *supra* note 32, at 700.

114. *Id.*

115. DiMatteo et al., *supra* note 109, at 440.

116. Beijing Metals & Minerals v. Am. Bus. Ctr., Inc., 993 F.2d 1178, 1183 (5th Cir. 1993).

117. DiMatteo, *supra* note 47, at 174-75.

118. DiMatteo, *supra* note 47, at 175.

States, in this instance – illustrate the dangers from a commercial perspective of the inadequacies of provisions present in the CISG. Moreover, these two divergent approaches highlight the dangers present in the CISG when clear directives to courts are absent, in this case that the parol evidence rule does not apply to cases that will be governed by the CISG (although that should be evident from Article 11's dictate – which doesn't use the term 'parol evidence', but nevertheless directs that a contract need not be evidenced in writing).

Even so, the more time that courts spend looking to domestic law to resolve matters of international dispute, the less time they are spending on the substantive law that they should be, in this case the CISG. The exclusion of validity issues from the CISG is not a positive mark, despite the attempts that some commentators have made to suggest that the CISG's provision embodied in [A]rticle 7(2) enables resolution of such issues by way of its dictate to settle disputes "in conformity with the general principles on which it is based." This does not, however resolve the problem. In compelling courts to look to "general principles," or, in the final instance "in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law,"[119] the drafters are inviting courts to make determinations not only as to what constitutes validity, but to do so with regard to ethereal, undefined general principles of international law.[120]

2. *The Duality of Success: Harmonization and Uniformity*

This is problematic in two major respects, the first being that the CISG is an effort to unify international law.[121] In many regards this effort has been successful.[122] The CISG has succeeded, if numbers are anything to suggest – it has been ratified by over 70 countries, and 2010 will see the entry of Albania and Armenia[123] – in unifying a disparate assortment of countries beneath the umbrella of a single document that applies as a default set of rules and terms in the absence of a specific clause excluding application of the CISG by parties to a cross-border, commercial transaction

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

120. Ryan, *supra* note 91, at 117-18.

121. CISG, *supra* note 1, pmbl.

122. Schwenzer & Hachem, *supra* note 19, at 478 (arguing that "[a]ll in all the story of the CISG has been one of worldwide success. Criticism that has been put forward can largely be either rejected as unfounded to begin with or met by a correct interpretation of the Convention").

123. *See* UNCITRAL – Status of CISG, *supra* note 6.

whose principal places of business are located in two contracting States.[124] This is incredibly significant. Merely saying that the "laws of the state of North Dakota" or the "laws of Mexico" will govern a particular commercial transaction in the sale of goods, potentially, may not be sufficient to exclude application of the CISG, because the CISG is both a part of the laws of the state of North Dakota, and of the country of Mexico.[125]

Thus, the potential scope of application of the CISG is tremendous, and as shown by the increased participation of states acceding to the CISG, as evidenced above, will only continue to grow. As it does however, issues of validity, disagreements as to whether the CISG implies good faith – and if it does, to what extent – will continue to demand that parties resort to domestic courts to litigate these questions.[126] Absent the occasional parochial decision by a jurisdiction that refuses to even look to foreign jurisprudence to see how a particular question under the CISG *might* be resolved, courts are generally improving their knowledge of the CISG.[127] As one commentator notes, "a new generation of lawyers is already waiting at the doorstep to take over business – a generation trained in the CISG and mindful of its advantages as well as a generation full of curiosity about the world beyond national law."[128] The CISG went into effect in the United States on Jan. 1, 1988, now over twenty years ago, and jurists, law instructors, and business entrepreneurs are still forming a new understanding of the CISG, creating a discourse amongst themselves as to its nature. These individuals will, theoretically, possess a greater level of familiarity and comfort with the international principles of the CISG than their predecessors.

Nevertheless, as one commentator has put it:

> The biggest obstacle, however, is that in most cases no detailed reasoning is given why certain issues fall within or outside the scope of application of the CISG. The courts usually limit themselves to mere statements that the CISG does or does not regulate a certain matter without any further argument. Furthermore, broad statements based on national concepts of legal instruments may often not be precise, since certain issues under a national concept may be governed by the CISG while others are not.[129]

The problem of omitting certain provisions from the CISG that the drafters thought might be cured through delegation of validity issues to the autonomous decision making of domestic jurisdictions – at least in their

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124. Allison E. Butler, *The International Contract: Knowing When, Why, and How to "Opt Out" of the United Nations Convention for the International Sale of Goods*, 76-May FLA. B.J. 24, 28-30 (2002).

125. *Id.*

126. Powers, *supra* note 83, at 352-53.

127. DiMatteo et al., *supra* note 109, at 440.

128. Schwenzer & Hachem, *supra* note 19, at 478.

129. Kröll, *supra* note 110, at 56-57.

haste to adopt the CISG and avoid controversy that might delay or prohibit its passage – has not occurred. This especially seems to be the case when one takes into account Article 7(2)'s instruction to look to general principles before resorting to private international law.[130] While credit is due to the courts that have struggled with the novelty of issues falling under the CISG, it is debatable as to whether such divergent results are truly within collective notions of fairness and justice, to say nothing of the cost, previously alluded to, of having foreign actors litigate in unfamiliar forums, with unfamiliar bodies of law, before arbiters with an unfamiliar sense of the CISG and how it integrates fully within their own domestic legal system. Contract law is premised on certain fundamentals, among them the allocation of risk, and predictability.[131] If parties are unable to rely upon predictable results, or at least to expect them, then the question of harmonization of the CISG comes into play.

While the CISG has arguably attained unification, at least on the face of the Convention, it has not fared as well with harmonization, which requires disparate courts in disparate jurisdictions to come to a consensus as to the general principles on which the CISG is based.[132] As one commentator notes, "the open-ended nature of the CISG default rules has expectedly produced divergent interpretations. The interpretations that are a product of reasoned analysis within the framework of the CISG's interpretive methodology will hopefully be given persuasive effect."[133] These problems with harmonization might be best categorized as problems with the Other.[134] We instinctively avoid what we don't fully understand, and the CISG is one of those documents. As Michael Kabik avers, "[t]he C.I.S.G. appears to have succeeded in unifying the law of international sales, but whether there will be harmonization depends entirely on whether the courts of the various states which have become parties to the C.I.S.G. are able to interpret it in a uniform fashion in accordance with Article 7."[135]

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

131. Frier & White, *supra* note 63, at 27-30 (noting, *inter alia*, that "we plan further into the future, using contract in order to allay many of the future's uncertainties"); *see also* Maren Heidemann, METHODOLOGY OF UNIFORM CONTRACT LAW: THE UNIDROIT PRINCIPLES IN INTERNATIONAL LEGAL DOCTRINE AND PRACTICE 40-42 (2007).

132. Kabik, *supra* note 23, at 429.

133. DiMatteo et al., *supra* note 109, at 431.

134. The Other is a specific reference to the philosophy of G.W.F. Hegel, and is typically understood to mean a fear of that which is not the same as we are, and that we ultimately seek to destroy. Here I mean to use the term to explain the psychological tendency domestic jurisdictions have to return to their own national bodies of law, rather than to embrace foreign (literally and figuratively) concepts of law and methodologies for approaching the adjudication of international disputes. *See also*, Andrew Hass, HEGEL AND THE PROBLEM OF MULTIPLICITY 231 (2000) ("Hegel writes: 'the other is multiple [entangled and existent] consciousness' – and this is what we fear").

135. Kabik, *supra* note 23, at 429.

Depending on the critique of CISG decisions you read, you'll find support on either side – that there is concurrent harmonization of applying CISG jurisprudence to disputes within its provisions across disparate jurisdictions, or that there continues to be significant and unavoidable trends towards national bodies of law.[136] Kabik further notes that:

> [I]ronically, for the same reason that the CISG has succeeded in unifying international sales law, it may never succeed in attaining the uniform interpretation needed for it to prevail. These legal, social, and economic differences may be too formidable to overcome, and in fact may be the death of the C.I.S.G., inasmuch as the courts in the myriad jurisdictions of the world have different conceptions of such basic notions as what "law" is, how "law" is found, what "interpretation" is, what is subject to "interpretation," how a statute is interpreted, and what a court's role is in dealing with this process.[137]

The death of the CISG will probably not occur, given the increasing number of parties to the Convention,[138] but that does not excuse or diminish the importance of the validity debate, or the need to produce a more effective Convention to resolve problems generated by the current edition's validity-provision absence. Such an endeavor seems preferable to mere reliance on disparate courts throughout the world attempting to discern general principles from the terse provisions of the CISG.

However, before the CISG can be truly effective in unifying international law, it must also harmonize that law. Uniform law, in and of itself, does not create harmonization, but instead requires a degree of guidance and specificity to achieve its uniform implementation.[139] While a CISG jurisprudence is possible, indeed, one may already, arguably, even be forming in the absence of hard-guidelines from the drafters as to issues concerning validity, that is not necessarily the best approach.[140] Issues concerning predictability and allocation of risk, among other issues, continue to be the focal point of commercial agreements, and the CISG in its present state does not adequately address this. More importantly, simply arguing, academically, that a CISG jurisprudence exists does not, in fact, make it so. The decisions of foreign courts, unless being applied within the

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136. *See* DiMatteo et al., *supra* note 109, 307-08 (arguing that CISG has been successful regarding harmonization); *but see* Kabik, *supra* note 23, at 429 (suggesting that the CISG "may never succeed in attaining the uniform interpretation needed for it to prevail").

137. Kabik, *supra* note 23, at 429.

138. *Id.*

139. Walt, *supra* note 32, at 701-02 (noting that "uniformity is not a self-applying notion, and ignoring domestic law makes it more unlikely that parties will select the CISG's terms").

140. *Cf.* James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales*, 32 CORNELL INT'L L. J. 273, 276 (1999) (proposing a better approach in order to realize harmonization).

same nation of origin, have little authority, except to potentially persuade a court to adopt its approach or rationale to a particular question under the CISG.[141]

Too often in the rush to declare that a jurisprudence that fills-gaps or omissions exists, commentators miss the point – that the plain language of the treaty should be the first place that any court, or lawyer, or party to a contract governed by the CISG looks to resolve an issue within the CISG's purview, and that if that treaty is drafted with sufficient fullness, that recourse to disparate foreign jurisdictions, or difficult to ascertain principles of law, and other similarly searching inquiries, will be rendered unnecessary. Courts applying novel issues under the CISG should be – and in many cases are – looking very hard at how to apply the CISG, and are looking to foreign jurisdictions to attain to a body of jurisprudence that creates predictability and uniformity,[142] thus harmonizing the CISG. And, indeed, the Vienna Convention on the Law of Treaties requires under the principle of *pacta sunt servanda* that parties perform the terms of a treaty in good faith, thus giving full realization to the terms of the treaty.[143] However, in lieu of the CISG's inherent vagueness and exclusion of validity issues from its provisions, multiple interpretations, by courts that vary in multiple ways, would, in most cases, probably satisfy the implied principle of good faith in performance of treaty obligations.

E. Contract Theory and Practice: Problems with the CISG

Basic problems of contract law arise under the CISG in connection with the absence of provisions dealing with validity. Among them is loss of predictability, and loss of the allocation of risk specifically designed and put into the agreement by the parties. These are foundational issues of commercial contracts,[144] and put any practitioner of law on notice that before putting his client under the umbrella of the CISG, with its various absent-provisions, and unknown judicial outcome, that the interests of the client would probably be better served by choosing a body of law amenable, and predictable, to both parties.[145] In most cases that would probably resolve the issue, and no further problem would arise, however, it fails to give effect to the CISG, both by the party seeking to avoid it, given its

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141. Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales Law*, 25 INT'L REV. L. & ECON. 446, 479-80 (2005).

142. DiMatteo et al., *supra* note 109, at 429-30.

143. Vienna Convention on the Law of Treaties art. 26, Apr. 24, 1970, 1155 U.N.T.S. 331 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

144. Frier & White, *supra* note 63, at 688-89 (discussing contractual allocation of risk).

145. Butler, *supra* note 124, at 26.

unpredictability and incompleteness, and by depriving the CISG of its usefulness to international commercial actors, whose States are party to the CISG, and for whose benefit the treaty was enacted in the first place.

From a practical standpoint, the hopes and dreams of the drafters of the CISG in creating what they think is a uniform body of law that will be utilized universally are irrelevant to the practitioner of law who needs to advise his or her client about choice of law, and are irrelevant as well to the business actor who, at the end of the day, wants to have the transaction consummated with little-to-no barriers to the successful performance of the agreement.[146] And in fact, the novelty and unpredictability of the CISG are major detriments to its use, and so should be avoided, and in many cases is probably being avoided, by parties in cross-border transactions. This debate is perhaps most central to the practice of law, and to the adoption of the CISG, and its subsequent use by international actors in cross-border transactions. [147] As such it warrants attention to the issues that such actors are concerned with, namely preserving the agreement that they enter (or think they enter) into with another actor, from a foreign jurisdiction.

1. *Destabilizing the Relations Between the Parties*

The overarching detriment of the CISG's lack of provisions concerning validity is that it impinges upon the stability of contractual relations between parties. These disruptions come in two forms, which this examination will categorize as: A) surface disruptions, and B) subsurface disruptions, and affect the parties in different and distinct ways. In "surface" disruptions, the parties are aware of the CISG and its provisions, as well as its silence as to certain fundamental issues in contracts law, thus creating the risk that in event of dispute, the outcome will be uncertain. As one pair of commentators has noted, in the case of sophisticated parties "one might argue that the CISG, in fact, expands the choices available to commercial parties choosing amongst competing commercial law regimes."[148] Thus, the CISG could be a potential bargaining tool in the parties' negotiations, irrespective of its failure to address particular issues.[149] In utilizing a neutral body of law, the parties might choose to risk a potentially adverse judgment later for the present ability to choose from

146. Gillette & Scott, *supra* note 141, at 485.

147. *See* Walt, *supra* note 32, at 687-88.

148. Gillette & Scott, *supra* note 141, at 482.

149. Butler, *supra* note 124, at 26 (noting that "[i]t should also be pointed out to the client that the convention is often viewed by foreign entities as a neutral body of law. Therefore, inclusion of the convention might be the factor that brings closure to negotiations").

different legal systems. This, however, is unlikely.[150] Parties with a minimum level of sophistication, and certainly those with counsel will probably choose a particular body of domestic law, precisely because of its predictability. Consequently, should there be objections between two parties, for example, between a party in an American jurisdiction, Wisconsin, and another party in Germany, they might both agree to settle on New York law, because they have some sociological familiarity with that geographic unit and its body of law, and both feel as though it can operate as a neutral forum. Thus, the value of the CISG on the "surface" as a neutral body of law is probably of little real use to commercial interests, who "value clarity and predictability, which they can achieve in their contracts by carefully drafted combinations of bright-line rules coupled with broader standards."[151]

More problematic of the CISG are its "subsurface" disruptions, so-called because they can have significant effects on parties' commercial agreements. These sorts of disruptions occur when there has allegedly (or in fact) been a breach, and a party seeks enforcement of some right under the agreement in a particular forum. If the parties to a sale of goods transaction in jurisdictions party to the CISG have been silent as to choice of law, or have insufficiently excluded the CISG as the governing body of law for their transaction, then the CISG will apply. Because issues concerning validity are specifically excluded from the CISG, they will be dealt with by choice of law rules for the particular forum in which the litigation will take place.[152] While complex choice of law issues are not dealt with here, it is nevertheless important to note issues arising regarding choice of law, because the CISG does not address validity disputes. Thus, even if a party chose to have their transaction governed by the CISG, and a dispute arose under the validity exclusion, they would still be forced to litigate in a particular national forum, under that forum's choice of law rules, with respect to disputes arising under the validity exception of the CISG, thus using that forum's domestic law to supplement the omissions of the CISG.[153]

In either case, the CISG also presents problems on the "surface" of the contractual relations, in that its use as a bargaining tool is undermined by its lack of provisions concerning validity, and in the situation of parties actually choosing the CISG as their body of law to govern their transaction presents even greater risks of instability to their contractual relations, given that disputes concerning validity will potentially be governed in accordance with that jurisdiction's choice of law schema, which might, depending on

150. Gillette & Scott, *supra* note 141, at 482.
151. *Id.* at 484.
152. Mather, *supra* note 9, at 156.
153. *Id.* at 161-64.

the parties, also need to be litigated further. In either situation, the CISG does not provide any greater stability to contractual relations than ordinary negotiations concerning what law will, in the event of a dispute, govern and construe a particular contract. Moreover, this lack of stability is even greater in the event of a dispute when the parties have been silent as to law, and the CISG governs by its default terms. This in turn will generate greater transaction costs for the particular agreement. Thus, the CISG in many ways fails to provide an effective and cost-alternative approach to international sales than had arguably previously existed in its absence.[154]

2. *Negating the Allocation of Risks*

With instability within the contract itself comes the potential for destabilizing the allocation of risk between the parties. On this issue it is especially important to note that between commercial actors, allocating risk in a particular way is a significant focus of the contract negotiations.[155] Under the framework of the CISG, not only will Article 4 disputes potentially subject the parties to an allocation of risks other than they had intended, but in general, given the CISG's relative newness, and applying it in various national jurisdictions in the event of dispute, comes with the possibility of disparate results, because of judicial idiosyncrasy, choice of law (for a dispute not specifically resolvable within the Convention), and forum shopping. On this, Franco Ferrari emphatically and resolutely posits that "even where a contract meets all (substantive and international) requirements of a specific uniform substantive law convention and the issue to be dealt with falls under the scope of that convention, forum shopping cannot be avoided."[156]

Forum shopping can be problematic for an array of reasons, but in consideration of the issues noted previously concerning developing economies such as Africa and Eastern Europe, forum shopping can be especially problematic. It can mean litigating in an unknown (foreign) forum, with an unknown body of law, and in the case of a major corporation, or other economically powerful and sophisticated entity, the potential of litigating in forums inconvenient and hostile to the non-national litigating in the host forum.[157] Absent an international adjudicatory body to deal with disputes under the auspices of the CISG, parties are left to sort out

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154. Gillette & Scott, *supra* note 141, at 482 (concerning the various transaction costs of default rules, and those bargained for).

155. Tina L. Stark, NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE 247 (2002).

156. Franco Ferrari, *International Sales Law and the Inevitability of Forum Shopping*, 8 VINDOBONA J. INT'L COM. L. & ARB. 1, 16 (2004).

157. *Id.* at 19-22.

the choice of forum (if they have such bargaining power to do so), and in any event all of this will prove especially costly, most notably for the party in the weaker financial position. And while particular forums might, potentially, be more willing to protect their own interests and the interests of their home-litigants, more costly will be the effort that must be exerted by the party litigating in the foreign forum.[158] As well, because the CISG is still in its legal-adolescence, there is risk that courts might reach unpredictable results as to a particular issue arising under the CISG, especially in the case of validity, which is excluded by the terms of the CISG, and thus left to the individual court to define and decide.

3. *Extinguishing the Predictability of Contract*

Arguably the greatest foundation of contracts law, and one of its major purposes for being an area of law, is the desire to preserve predictability in outcome.[159] The CISG does not preserve this principle for issues concerning validity in several important ways. The clearest reason is that the CISG does not provide for disputes arising as issues of validity, and thus, the individual who relies on a body of systemic law to enforce his promise might, potentially, be deprived of that predictable body of law because the CISG expressly excludes issues of validity from its confines. As well, because of choice of law – and what might be negatively described as forum shopping – parties to a commercial agreement under the CISG might be forced to litigate in unfamiliar territory at great cost and expense. Finally, though the CISG is a unified body of law, in that it is in force in a variety of jurisdictions, full harmonization, as previously noted, has not been fully achieved, thus subjecting the litigants to potentially inconsistent results.

Nevertheless, there are, however, some commentators who maintain that CISG jurisprudence has reached a level sufficient to eradicate much of this fear.[160] However, given the incompleteness of the CISG, the uncertainty of its jurisprudence from both an international and domestic perspective, and the fundamental importance of predictability to commercial contractual relations, the CISG will not be the choice of law for most cross-border transactions.

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158. Camilla Baasch Andersen, *The Uniform International Sales Law and the Global Jurisconsultorium*, 24 J.L. & COM. 159, 162 (2005).

159. Frier & White, *supra* note 63, at 27-30.

160. Peter Schlechtriem, *Keynote Address: Pace University School of Law Conference on the United Nations Convention on Contracts for the International Sale of Goods (CISG): Of Words and Issues – Finding a Common Language for Common Issues*, *in Review of the Convention on Contracts for the International Sale of Goods (CISG)* 79, 84-89 (PACE INT'L L. REV., eds., 2005).

## III. SOLUTIONS

Some predict that the CISG will eventually become decreasingly utilized, and eventually fade into obscurity as a costly impediment, in favor of alternative, more cost-effective, business friendly models of international trade law.[161] This is perhaps an overstatement, given that States continue to become signatories to the CISG, and the history of States' desiring a uniform regime of trade law. Nevertheless, impediments to harmonization, the incompleteness of the CISG as a body of law on important questions such as validity, and the lack of a central adjudicatory body capable of producing binding, internationalized decisions, argue in favor of the contention that the CISG may, in fact, become increasingly irrelevant, unless changes are made.

### A. Hybridized Solution

Such changes can in fact be beneficial, not only for making the CISG a more cost-effective model that individual commercial actors in cross-border transactions will utilize, but might, in fact, want to utilize. Such changes to the CISG should include, *inter alia*, a protocol defining validity. This is important not only for making the CISG more comprehensive, thus diminishing reliance on potentially disharmonizing, disparate decisions in a myriad of jurisdictions, and instead refocuses courts hearing disputes on the CISG itself. This is fundamental to getting parties to see the CISG as a body of law that is sufficiently comprehensive that they can rely upon the CISG to resolve their disputes, and that in the event of such disputes can point the court hearing the arguments to the plain language of a comprehensive CISG. This reduces reliance on national laws, potentially lessens the impact of forum shopping, and allows commercial actors to reduce costly legal research to issues pertaining solely to the CISG, rather than unfamiliar domestic laws. As well, in drafting a protocol to the CISG regarding validity issues, the drafters should expressly provide a non-exhaustive list of issues that constitute "validity" issues to allow the CISG to move towards greater unification of international law *and* harmonization of it by giving judicial arbiters the tools and understanding necessary to render decisions solely within the four corners of the CISG. Indeed, in becoming a more comprehensive code, the CISG is not only providing commercial actors with greater certainty in their contractual relations, but in fact is furthering the goals of public policy.

As noted previously, some developing economies, such as Africa and Eastern Europe turn to the CISG for instructive guidance on drafting their

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161. Gillette and Scott, *supra* note 141, at 485.

own commercial codes,[162] and a revised CISG might also become another tool by which enterprising entrepreneurs in geographical regions with less developed economic and rule of law structures can enter into the morass of international commerce with potentially increased equality under a neutral body of international law. As well, in defining issues of validity, which include matters of public policy (e.g. unconscionability, duress, fraud, mistake, etc.), the drafters must endeavor to take firm, principled stands on internationalizing public policy. In other words, the drafters must not waffle with the difficult issues – as they arguably did in the drafting of the CISG on issues concerning validity[163] – preferring passage of the CISG, to wrestling with difficult questions that might have slowed, hindered, or even precluded the passing of the CISG. Implementing a protocol that specifically includes validity issues, such as unconscionability or duress, means that courts will have greater authority – and potentially look to the international character of public policy demands (if included in the CISG) – in rendering decisions that do, in fact, ensure that those in developing economies (or any economies) who are not as sophisticated, or positioned with inferior bargaining power, are not taken advantage through gross-disparities in bargaining position. History is riddled with examples of superior actors exploiting those in more vulnerable positions; the CISG can be a tool in the hands of courts to ensure that such gross exploits do not occur, in line with international policy.

Indeed, this position – which may send some contracts lawyers into a fierce gnashing of teeth – is hardly revolutionary. As mentioned previously, the United Nations Charter, the Universal Declaration of Human Rights, the ICESCR, and ICCPR – among others – all include clauses relating to international cooperation in matters of economic and social development,[164] and the CISG is hardly an exception. The Preamble of the CISG explicitly states that "the development of international trade on the basis of *equality* and *mutual benefit* is an important element in promoting friendly relations among States."[165] Issues concerning public policy, unconscionability, duress, fraud, mistake, reasonable expectations, illegality, and the like, are doctrines concerned with, *inter alia*, equality, and societal benefit. The CISG should include provisions dealing with them, and arguably the CISG's failure to include them, its overall incompleteness (e.g. an absence

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162. Schwenzer & Hachem, *supra* note 19, at 462-63; *see also* Castellani, *supra* note 96, at 247-48.

163. Hartnell, *supra* note 57, at 27-28 (noting the historical struggle of the delegates – through various documents, including the Uniform Law on International Sales [a forerunner to the CISG] as they grappled with similar issues such as validity).

164. U.N. Charter, *supra* note 100; *see also*, G.A. Res., *supra* note 102; ICESCR, *supra* note 103; ICCPR, *supra* note 104.

165. CISG, *supra* note 1, pmbl. (emphasis added).

of provisions pertaining to validity of contracts), its reliance on domestic forums to resolve, autonomously, issues of validity, is not only a weakness,[166] but verges on frustrating the overall object and purpose of the treaty, which includes in its Preamble "the removal of legal barriers in international trade and promot[ing] the development of international trade."[167]

To correct this omission, and work towards making the CISG more comprehensive and able to achieve its international goals of uniformity, and harmonization, a sample validity provision for the CISG could read:

> Article 4
>
> This Convention governs 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 concerned with:
>
> (a) the validity of the contract, specifically, but not limited to, concerns arising from unconscionable terms, or an unconscionable agreement; duress; illegality; mistake; or fraud;
>
> (b) with respect to the above, consideration should be given to the public policies underlying the CISG, with reference to its international character, and other international instruments promulgated under the auspices of the United Nations, including, but not limited to, the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights;
>
> (c) and that a finding by a competent court that one, or more, of the validity provisions in 4(a) are present, that on the court's own initiative it may render the contract unenforceable, strike the offending provision(s), narrowly construe the agreement or provision(s) of the agreement, or rewrite the offending provision(s) so as to remove the effect of the offending provision(s).

This provision takes into account the relative international instruments that ought to inform the drafting of both the CISG and a validity provision to be incorporated into it, and make clear that consideration must be paid to issues of public policy by tribunals adjudicating matters under the CISG, and expressly provides provisions to inform that finding – traditional equitable doctrines such as unconscionability, duress, illegality, etc. In doing this, the provision makes clear that courts should be on notice that public policy *is* an issue that informs the CISG and validity findings under its auspices, and that moreover there are relevant tools to be applied, in the form of various equitable doctrines, as well as reference to relevant international instruments to be used in obtaining a sense of the international character, history, and spirit that informs the CISG and its workings.

In providing a clear framework in a revised Article 4, as suggested above, courts adjudicating disputes within the confines of the CISG will be

166. Ziegel & Samson, *supra* note 105.
167. CISG, *supra* note 1, pmbl.

strictly informed that they should think of validity issues from an "international perspective." In doing this, the international spirit of the CISG is preserved, but more importantly, greater predictability, uniformity of application (and, hopefully, final judgment), and comprehensiveness will be achieved, all of which are positive for commercial actors seeking a neutral body of law, while achieving greater efficiency in contracting and lowered transactional costs.

### B. The Creation of an International Arbitral Body

The creation of an international adjudicatory body would also greatly assist implementation and use of the CISG. Such a body composed of international judges, charged with the international implementation of the CISG, could render binding decisions on disputes arising under the CISG. This would not only create a relevant body of binding CISG jurisprudence that this tribunal could look to for guidance in the event of disputes, it would also be one which commercial actors utilizing the CISG as their body of law to govern their agreements could look to, thus creating overall harmonization of CISG jurisprudence.

The creation of an international adjudicatory body could be an optional choice for parties contemplating use of the CISG. In other words, if parties choose to use the CISG as their body of law, and choose to be bound by the decision of a CISG-Arbitration Court, then they theoretically would receive a decision rendered by an international body, interpreting an international document, in line with general principles of international law, thus avoiding the possible taint of domestic forums and the increased costs associated with litigating in those forums. Even if parties choose not to be bound by an international CISG-Arbitration Court, they can still point the national court in which they are appearing to the CISG-Arbitration Court's body of jurisprudence, thus permitting national courts to rely on, or be persuaded by, an international body of arbiters whose sole duty is to interpret the CISG, rather than playing a game of darts in choosing and applying the decisions of foreign jurisdictions. Finally, even if parties are silent as to their choice of law, and are thus bound by the CISG's default terms, they can still rely on an international CISG-Arbitration Court to adjudicate their disputes arising under the CISG, and thus avoid costly conflict of laws problems, and foreign forums with national tendencies.

## CONCLUSION: TOWARDS THE 21ST CENTURY

In remarking on the innovations that have occurred in containerization for ocean-going transportation of commercial goods, a commentator noted

that "today, it is cheaper to ship a bottle of wine from Australia to Hamburg than to bring it from Hamburg to Munich."[168] The global economy is growing, and with it the potential for economic development in countries sorely in need of it, and also the possibility of greater economic and social inequalities.[169] The economic future of the world is dependent upon greater cooperation in reducing barriers between nations – such as costly legal barriers (noted in the CISG's Preamble)[170] – and in providing tools for entrepreneurs in disparate regions of the globe to facilitate international commerce. The CISG can be an important part of this process. Its default terms already apply to all sales agreements within its substantial scope, unless parties explicitly exclude its application. But it is an incomplete document, and it does not address important legal issues, such as those involving validity. Moreover it does not take into account the problems of national jurisdictions, with a predilection for national law, charged with applying an international document in accordance with general international principles of law.[171] This does not have to be the case.

As global economic development continues, the need for international agreements, and international bodies that implement them will be required to promote, ensure, and improve the judicial mechanisms of enforcement for the economy and efficiency of commercial transactions, that reduce legal barriers, while preserving parties' risk allocation and predictability – and this will only become more apparent with the passage of time. Concomitant with this, however, will be the need for the drafters to have serious, controversial conversations (and disagreements) over issues concerning public policy (addressing doctrines like unconscionability, fraud, duress and mistake), and to debate fiercely the principle of freedom of contract, and the limits to freedom of contract. As Herbert Kronke put it:

> As always, charting the way forward is, more than anything else, a matter of identifying and agreeing on priorities. Beyond the CISG, and the UNIDROIT Principles of International Commercial Contracts and other instruments on specific transactions, lies work, method and critical evaluation of strategy. And what lies beyond that remains to be discussed by the next generation of practitioners, scholars and civil servants.[172]

The drafters will hopefully, as the genesis for this discussion, look to the past (to assess its victories, and its failures) in order to see the way to the

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168. Schwenzer & Hachem, *supra* note 19, at 461; *see also* Hasnain Kazim, Die Welt past ein Schiff, DER SPIEGEL, Feb. 21, 2007, http://www.spiegel.de/wirtschaft/0,1518, 466836,00.html (last visited Oct. 22, 2009).

169. Andrés Solimano, SOCIAL INEQUALITY: VALUES, GROWTH, AND THE STATE 6 (1998) (noting the connection between economic development and social inequality).

170. CISG, *supra* note 1, pmbl.

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

172. Herbert Kronke, *The UN Sales Convention, The UNIDROIT Contract Principles and the Way Beyond*, 25 J.L. & COM. 451, 464-65 (2005).

future. As Bob Dylan's lyrics – written in a period marked by radical movements and changes in the governing social structure – remind us, "[As] the present now / Will later be past / The order is Rapidly fadin' / And the first one now will later be last / For the times they are a-changin'."[173] Only by addressing the crucial needs of others – among them the particular current and future needs of developing economies, and the social inequalities that all-too-often linger in the backdrop of economic discussion – will true success be obtained. As the impetus to these changes the drafters need only look, as a point of origin, to the documents of the United Nations – its charter, the Universal Declaration of Human Rights, and other international treaties, to find the inspiration and calling for the next bold steps in the historical search for workable principles of law that complete, unify, and harmonize the CISG, that it might serve the demands and hopes of new generations, and their needs of tomorrow.

173. BOB DYLAN, *The Times They Are A-Changin'*, *on* THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964).