

University of Florida Levin College of Law  
**UF Law Scholarship Repository**

---

UF Law Faculty Publications

Faculty Scholarship

---

2013

## **CISG as Basis of a Comprehensive International Sales Law**

Larry A. DiMatteo

*University of Florida Levin College of Law*, [dimatteo@ufl.edu](mailto:dimatteo@ufl.edu)

Follow this and additional works at: <https://scholarship.law.ufl.edu/facultypub>



Part of the [International Trade Law Commons](#)

---

### **Recommended Citation**

Larry A. DiMatteo, *CISG as Basis of a Comprehensive International Sales Law*, 58 *Vill. L. Rev.* 691 (2013)

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in UF Law Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact [kaleita@law.ufl.edu](mailto:kaleita@law.ufl.edu).

2013]

CISG AS BASIS OF A COMPREHENSIVE  
INTERNATIONAL SALES LAW

LARRY A. DIMATTEO\*

I. INTRODUCTION

THE articles presented in this symposium range from those that deal with specific issues relating to the Convention on Contracts for the International Sales of Goods (CISG), the CISG as an instrument of domestic law reform, the use of soft law (Unidroit Principles), and the “Swiss Project”<sup>1</sup> that aims at creating a uniform international contract or commercial law. This Article will analyze the idea of developing a more comprehensive international sales law using the CISG as its core, or, alternatively, as a starting point. Such an undertaking is valuable because the non-comprehensiveness of the CISG is universally acknowledged and the likelihood of an international commercial code or contract law is an unlikely proposition in the near future. The CISG’s lack of comprehensiveness remains its major shortcoming. This Article will pursue two lines of research—how best to internally broaden the comprehensiveness of the CISG and, after maximizing its comprehensiveness, how best to resolve the remaining shortcomings in CISG coverage. This Article will examine the idea of “CISG Plus”—the development of a more comprehensive hard-soft international sales law with the CISG at its core.

Part II will examine the shortcomings of the CISG’s scope and coverage. These “gaps” in the CISG’s coverage have been widely researched in the literature. This review will highlight some of the express and implied gaps found in the CISG. The express gaps are those in which the CISG expressly excludes its reach and are often referred to as “external gaps.” Other gaps are found in areas within the intended coverage of the CISG, but the CISG fails to provide specific rules. These gaps are referred to as “internal gaps.” The existence of internal gaps and how they should be solved is an ongoing problem.

The notion of an internal gap is a bit of a misnomer. If the interpreter is able to work within the CISG’s interpretive methodology to fill in the gap, then the gap was truly internal because it was filled through internal methodological means. However, when the gap is unable to be filled

---

\* Huber Hurst Professor of Contract Law & Legal Studies, Warrington College of Business Administration; Affiliate Professor of Law, Levin College of Law, Affiliate Professor, Center for European Studies, University of Florida. J.D. Cornell University; LL.M. Harvard Law School; Ph.D. Monash University (Australia).

1. See UNCITRAL, *Possible Future Work in the Area of International Contract Law: Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law*, UN Doc. A/CN.9/758 (May 8, 2012) [hereinafter UNCITRAL].

by the CISG's interpretive methodology, the last resort of private international law is employed.<sup>2</sup> In this case, the internal gap (within coverage of the CISG) is, in essence, an external gap because recourse is made to sources found in national law to fill in the gap. In a more comprehensive code, the existence of such internal gaps is diminished by the code's comprehensiveness and the interpretive methodologies developed to ensure that the code is indeed comprehensive. Part III will explore theories of interpretation aimed at filling in the gaps found in the CISG. It will look briefly at the works of Karl Llewellyn<sup>3</sup> and Ronald Dworkin<sup>4</sup> to provide a theoretical base for a more aggressive interpretive methodology to extend the coverage of the CISG, or, less dramatically stated, to minimize instances of internally unsolvable gaps that lead to the use of domestic law solutions. Karl Llewellyn, the Reporter of the American Uniform Commercial Code (U.C.C.),<sup>5</sup> worked on the crafting of rules throughout his career.<sup>6</sup> His theory of rules will be examined given the similarities between the U.C.C. and the CISG. Ronald Dworkin's notions of the "integrity of law" and "law as interpretation" also provide a theory of rules that assert that rules are inherently flexible when viewed as part of a greater body of law. His idea of "rule-fit" provides a theoretical construct for dealing with the CISG's internal gaps. Llewellyn and Dworkin's ideas will be utilized in examining where CISG rules end and where a gap begins.

Part IV acknowledges that extending the comprehensiveness of CISG coverage through theories of gap-filling, although useful, can only be modestly successful. In the end, due to the existence of numerous external gaps and the limitations of the language of the CISG in totally eliminating internal gaps, the CISG will always be lacking because it falls short of being a comprehensive international sales law. From the perspective of businesspersons, and their transactional lawyers, efficiency, certainty, and lower transaction costs can best be achieved by the use of a comprehensive composite (hard-soft law) that can be recognized as a single source for all or most issues of international sales law. Part IV examines existing sources of content that can be utilized to craft a more comprehensive law of sales. The use of the Unidroit Principles of International Commercial Contract

---

2. U.N. Comm'n on Int'l Trade Law, United Nations Convention on Contracts for the International Sale of Goods art. 7(2), Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG], available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf> (explaining where gap cannot be filled by general principles it shall be filled "by virtue of the rules of private international law").

3. See Soia Mentschikoff, *Karl N. Llewellyn*, 9 INT'L ENCYCLOPEDIA SOC. SCI. 440 (1968) (providing biographical information and importance in American law); see also Grant Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813 (1962); THE OXFORD GUIDE TO AMERICAN LAW 534-35 (Kermit L. Hall ed., 2002).

4. See THE OXFORD GUIDE TO AMERICAN LAW, *supra* note 3, at 451-52 (discussing biographical information and importance in American law).

5. See William Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1967).

6. See generally KARL N. LLEWELLYN, COMMON LAW TRADITION: DECIDING APPEALS (1960).

Law (Principles)<sup>7</sup> in the interpretation of the CISG has been extensively explored. But, this undertaking will focus on its use as a source for a more comprehensive sales law. The proposed Common European Sales Law (CESL)<sup>8</sup> will also be reviewed as a complimentary source for a broadened CISG. In the end, a consensus over developing a single hard-soft law instrument is the best that can be done, at the present time, to remove law as an obstacle to international trade.

## II. CISG AS CORE: RECOGNIZING ITS SHORTCOMINGS

The argument for retaining the CISG untouched is that it is the product of many years of work that is not likely to be replicated. Under this assumption, this Article will focus on two questions: (1) Is the CISG of sufficient quality to be the center of a broader sales law?; and (2) If so, what is the method by which the CISG can be “expanded” to become a more comprehensive sales law? The first question invites a pragmatic answer—the tremendous amount of scholarship and case law that has evolved relating to the CISG makes it the necessary core of a more comprehensive sales law. The answer to the second question is the undertaking of a hard-soft law project that will provide a single comprehensive legal regiment upon which businesspersons and their lawyers may structure, with greater certainty, their international sales transactions. The second question will be the focus of the later parts of this Article. The first question will be analyzed in the present part. First, an argument will be made that the CISG should be the core of any more comprehensive sales law project. Second, it will review its shortcomings—gaps in coverage. This Part lays the foundation for Parts III and IV’s exploration of methods and theories of interpretation that provide solutions to the problem of filling internal gaps.

### A. *Argument in Favor of CISG as Core*

Before focusing on the shortcomings of the CISG, it is important to recognize the many things the CISG does well. There is much to like about the CISG’s substantive rules. On a whole, the CISG rules provide a fair balance between seller and buyer rights, as well as providing a coherent remedial scheme. The CISG blends the two foundational comparative law methodologies: the “common core” and “better rules” approaches. The common core approach was championed by Rudolf Schlesinger of Cornell University beginning in the 1960s,<sup>9</sup> and more recently by Ole

7. INT’L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2004 (2d ed. 2004) [hereinafter UNIDROIT 2004], available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>.

8. *Proposal for a Regulation of the European Parliament on a Common European Sales Law*, COM (2011) 635 final (Nov. 11, 2011) [hereinafter CESL].

9. See RUDOLF B. SCHLESINGER, *COMPARATIVE LAW: CASES, TEXT, MATERIALS* (1980); UGO MATTEI ET AL., *SCHLESINGER’S COMPARATIVE LAW: CASES, TEXT, MATER-*

Lando<sup>10</sup> in the Principles of European Contract Law.<sup>11</sup> Lando explains that the common core approach is a method to determine a common core among different legal systems.<sup>12</sup> Mauro Bussani and Ugo Mattei have described the aim of the common core approach as a means “to provide with the highest degree of precision a map of the relevant elements of different legal systems.”<sup>13</sup> The fact that the CISG was a product of negotiations of representatives from the common and civil law countries necessarily resulted in the embracing of rules that met the common core criterion.<sup>14</sup> The large amount of similar rules is not surprising given that the basic nature of commercial transactions is consistent across legal systems.

However, there were numerous incidents in which the different legal systems provided conflicting or different rules. In such situations, three alternatives presented themselves: selecting one of the rules, crafting a compromise rule, or abdicating coverage over the subject of the conflicting rules. For purposes of a comprehensive code, the first two alternatives need to be maximized. Failure to select or compromise on rule choice is what leads to external and internal gaps in the law. The quality of a specialized set of rules, such as sales law, is dependent on the quality of its rules and the comprehensiveness of the law taken as a whole. The common core approach is essentially a descriptive enterprise, while the better rules approach is a normative undertaking.

An evaluation of the CISG, based upon the better rules approach is mixed. When the drafters selected between preexisting common and civil law rules, they generally selected the most efficient rule.<sup>15</sup> The classic example is the choice of rules for the effectiveness of an acceptance between the common law’s “mailbox” or dispatch rule<sup>16</sup> and the civil law’s receipt rule. At the level of general rules, the drafters agreed to adopt the civil law

IALS (7th ed. 2009); Richard M. Buxbaum & Ugo A. Mattei, *Rudolph B. Schlesinger 1909–1996*, 45 AM. J. COMP. L. 1 (1997).

10. Ole Lando, *The Common Core of European Private Law and the Principles of European Contract Law*, 21 HASTINGS INT’L & COMP. L. REV. 809 (1998).

11. See THE COMMISSION ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW (Ole Lando & Hugh Beale eds., 2000).

12. See *supra* note 10, at 809.

13. Mauro Bussani & Ugo Mattei, *The Common Core Approach to European Private Law*, 3 COLUM. J. EUR. L. 339, 347 (1998).

14. See Sara G. Zwart, *The New International Law of Sales: A Marriage Between Socialist, Third World, Common, and Civil Law Principles*, 13 N.C. J. INT’L L. & COM. REG. 109, 109–10 (1988).

15. Larry A. DiMatteo & Daniel T. Ostas, *Comparative Efficiency in International Sales Law*, 26 AM. U. INT’L L. REV. 371 (2011).

16. See I E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.22 (3d ed. 2004) (noting that justifications include offeror authorizing post office as its agent to receive acceptance, dispatching puts it out of the control of the offeree, and it limits offeror’s power to revoke). The mailbox rule is criticized because it places the risk of loss on the receiving party who is in the less favorable position to insure its delivery. See Ian Macneil, *Time of Acceptance: Too Many Problems for a Single Rule*, 112 U. PA. L. REV. 947 (1964).

rule.<sup>17</sup> The civil law's receipt rule was the better rule because the risk of the acceptance being lost in transmission should be placed upon the most efficient insurer, that being the sender. The offeree is in the best position to ensure that its acceptance reaches the offeror. The common law's "mailbox" rule places the offeror in a curious position. The offeror, not receiving any communication from the offeree within a reasonable time period, proceeds to sell the goods to another party. In doing so, the offeror has breached its contract with the original offeree.

Interestingly, the CISG's rule was the product of compromise and not a wholesale adoption of a pure receipt rule. Article 16(1) provides an exception to the receipt rule. The right of the offeror to revoke its offer is frozen if an acceptance has been dispatched prior to the receipt of the revocation by the offeree. Thus, even if the revocation reaches the offeree before the acceptance is received by the offeror, a contract is formed. Under a pure receipt rule, the offer would have terminated upon the receipt of the revocation by the offeree. So under this scenario, a function of the "mailbox rule" is preserved. Although not effective on dispatch, the sending of the acceptance becomes critical to the formation of a contract in that it prevents a revocation of the offer upon receipt of the offeree. The exception to the receipt rule prevents an injustice when an offeree incurs expenses in relying on an offer and the expectations that a proper sending of an acceptance will bind the offeror to a contract. The placing of the burden on the offeror, who creates the expectations of a contract by acceptance, to ensure that its revocation is received prior to the sending of the acceptance is a fair and efficient compromise. This examination of the CISG's acceptance rules is an example of the integrity of the CISG rules as meeting the needs of certainty and fairness.

### B. *CISG Rules and Shortcomings*

Due to divergences between the common and civil law legal traditions, concerns of lesser-developed countries, and the preservation of national sovereignty, compromises were not obtained in a number of areas that would be covered in many national sales law regimes. The result is the limited scope of the CISG (external gaps) and the somewhat uncertainty of scope within the CISG (internal gaps). The CISG's interpretive methodology, as provided in Article 7, seeks to fill in the internal gaps in the CISG.<sup>18</sup> This section explores the non-comprehensiveness of the CISG as it relates to external and internal gaps. It then finishes with the more difficult issue of determining whether a gap is internal or external.

---

17. See CISG, *supra* note 2, art. 18(2) ("[A]n acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror.").

18. See Anthony J. McMahon, Note, *Differentiating Between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining "Governed by" in the Context of Article 7(2)*, 44 COLUM. J. TRANS-NAT'L L. 992, 993 (2006).

1. *External Gaps*

The first approach to the issue of the coverage of a legal instrument is to ask: What does the instrument intend to cover? The answer is provided in Article 4 of the CISG: “This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract.”<sup>19</sup> From this stark statement it can be implied that the scope of the CISG is narrow considering the many areas of sales law, such as pre-contractual and post-contractual liability, defects in consent, and validity of terms, that are outside its coverage. The statement of coverage is also vague and barren of specific content. What is the reach of the “rights and obligations” of the parties? In looking at the CISG rules, “rights and obligations” provides the foundation for a more comprehensive sales law than is indicated in Article 4. For example, the CISG covers formalities;<sup>20</sup> contract formation;<sup>21</sup> performance and breach;<sup>22</sup> conformity of goods;<sup>23</sup> buyer’s duties of inspection;<sup>24</sup> notice of non-conformity;<sup>25</sup> mitigation;<sup>26</sup> passing of risk;<sup>27</sup> remedies<sup>28</sup> and damages;<sup>29</sup> rights to time extensions;<sup>30</sup> buyer’s and seller’s duties of preservation;<sup>31</sup> excuse;<sup>32</sup> and so forth.

The next step in the measurement of comprehensiveness is determining what the CISG expressly excludes. Unfortunately, the extent of subject matter excluded by the CISG is not insubstantial. The CISG does not apply to certain types of goods,<sup>33</sup> mixed transactions where a preponderant part of the contract is not for the sale of goods,<sup>34</sup> security interests in goods,<sup>35</sup> the validity of contracts or contract terms,<sup>36</sup> products liability

---

19. CISG, *supra* note 2, art. 4.

20. *Id.* arts. 11–13 (writing), 29 (modification).

21. *Id.* arts. 14–24.

22. *Id.* arts. 25 (fundamental breach), 47, 48, 63 (time extension), 71–73 (anticipatory breach).

23. *Id.* arts. 35 (conformity of goods), 41–42 (warranty against third-party claims).

24. *Id.* art. 38.

25. *Id.* art. 39.

26. *Id.* art. 77.

27. *Id.* arts. 66–70.

28. *Id.* arts. 46 (buyer’s right to substituted goods), 49, 64 (avoidance) 50 (price reduction remedy), 81–84 (effects of avoidance).

29. *Id.* arts. 74–76, 78 (interest).

30. *Id.* arts. 47, 48, 63.

31. *Id.* arts. 85–88.

32. *Id.* art. 79.

33. *Id.* art. 2 (personal goods, consumer transactions, goods sold by auction, goods sold as collateral, ships, aircraft, and electricity).

34. *Id.* art. 3.

35. *Id.* art. 4(b).

36. *Id.* art. 4(a).

(personal injury),<sup>37</sup> and the remedy of specific performance.<sup>38</sup> The most problematic of the express exclusions of coverage is Article 4's reservation to national law all issues relating to "the validity of the contract or of any of its provisions."<sup>39</sup> In addition, the CISG does not cover the conclusion of the sales contract through an agent, set-off, assignment of rights, limitation periods, and the use of electronic communications.

## 2. *Internal Gaps*

An example of an internal gap is the CISG's failure to allocate the burden of proof between the parties to a contract dispute. In areas where the CISG provides substantive rules, it has been implied that the allocation of the burden of proof is covered in those substantive areas. Thus, the interpreter making the assumption that the burden of proof falls within the scope of the CISG must fill the internal gap by allocating the burden based upon general principles. The courts and scholarly literature have generally held that the burden of proof rests with the party that would benefit from the application of the rule.<sup>40</sup>

Internal gaps may become external gaps if courts cannot imply a rule "in conformity with the general principles"<sup>41</sup> of the CISG. Then recourse must be made to the applicable national law.<sup>42</sup>

The determination of whether a gap is internal or external is difficult because it is beset by competing policy objectives. On the one hand, the more matters are found to be internal, the more the CISG's objective of uniformity is advanced. On the other hand, Member States have an interest in finding certain matters outside the purview of the Convention so that they can apply their own law and give effect to domestic policy choices. This friction emerges from the competing needs of uniformity and flexibility.<sup>43</sup>

The task becomes the filling of internal gaps internally and thus preserving the autonomous nature of CISG interpretations and rule applications. The materials relating to Llewellyn and Dworkin's theories of gap-filling, presented in Part III, aim to show how the conversion of an internal gap to an external can be minimized.

37. *Id.* art. 5.

38. *Id.* art. 28.

39. *Id.* art. 4(a).

40. See, e.g., Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 9, 2002, CIVIL PANEL VIII ZR 304/00 (Ger.), available at <http://cisgw3.law.pace.edu/cases/020109g1.html>; Trib. di Vigevano, 12 luglio 2000, n. 405 (It.), available at <http://cisgw3.law.pace.edu/cases/000712i3.html>.

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

42. See *id.* ("[I]n conformity with the law applicable by virtue of the rules of private international law.")

43. McMahon, *supra* note 18, at 994.



### 3. *Reservations*

Another form of gap found in the CISG is its enunciated reservations. There is a deep literature on the problems of countries opting out of provisions or parts of the CISG. But, reservations are more a problem for harmonization than of comprehensiveness. CISG reservations are found in Articles 92 to 96. They allow contracting states to opt out of a single provision (Article 96's authorization to opt out of the no writing requirement of Article 11) to opting out of entire parts of the CISG (Article 92 allows for opting out of Part II—contract formation—and Part III—sale of goods provisions). The other important reservations allow for a state to opt out of one of the two primary grounds of CISG jurisdiction found in Article 1 (Article 95—application of CISG through operation of international private law) and the ability to opt out in relationship to countries that have closely related domestic laws of sales (Article 94). Although these reservations are detrimental to the overall impact of the CISG,<sup>44</sup> they do not pertain to the coverage of this Article—filling in internal gaps through interpretive methodologies and dealing with external gaps through the development of a comprehensive hard-soft sales law with the CISG at its core.

### 4. *Core-Periphery Analogy*

Whether an internal gap actually exists is a function of the rule itself and the interpreter of the rule. Llewellyn often saw the scope of rules as being more like a field or a zone and not as “a surveyor’s line.”<sup>45</sup> Another metaphor for the reach of the CISG rules would be that rules in general have a core and a periphery. The determination of where the periphery ends is the place where a gap begins. The closer one is to the core, the easier the application; the farther afield one goes from the core, the greater the importance of creativity and context. The most demanding part of applying rules is the ability of the court or arbitral tribunal to craft a rule application (interpretation) at the periphery of a rule that is true to the rule’s core. Another way of looking at some rules is that in easy or clear cases, the rule acts as a fixed, hard rule. In more difficult cases, the rule is more open-ended and the rule application (adjustment) needs to be guided by the core reasons behind the rule. Part III examines where such guidance can be procured within the text of the CISG.

## III. LLEWELLYN’S AND DWORKIN’S THEORIES OF RULES: FILLING IN INTERNAL GAPS

It is important to understand that non-comprehensiveness and the problem of using rules to provide answers to novel fact patterns or real

44. See generally, Laurence R. Helfer, *Response: Not Fully Committed? Reservations, Risk, and Treaty Design*, 31 YALE J. INT’L L. 367 (2006) (discussing problem of reservations in design of treaties).

45. See LLEWELLYN, *supra* note 6, at 183.

world developments are an inherent part of commercial law. This Part will provide some theoretical insights—represented by Karl Llewellyn and Ronald Dworkin’s theories of rules—in which to place the CISG, as a body of rules, into the context of the role and shortcomings of any body of private law rules. Llewellyn’s work is unique in that he was first a rule skeptic, or at least a severe critic of the sales and commercial law rules of the early twentieth century. His rule skepticism and realistic brand of legal philosophy made him the founder of the 1930s legal realist movement.<sup>46</sup> Subsequently, he was given the “keys to the kingdom” as the Chief Reporter of the Uniform Commercial Code Project, and as the drafter of Article I (General Provisions) and Article II (Sale of Goods). It is rare to have a jurisprude and critic of the law of the time to be allowed to apply his ideas to what amounted to America’s largest and most successful uniform law project. Ultimately, this dissonance can be explained by the term of the “later Llewellyn.”<sup>47</sup> The later Llewellyn was merely a critic of the anachronistic rules represented by the Sales Act of 1904, and to a lesser extent, the First Restatement of the Law of Contracts. Llewellyn was a critic of the existing rules, but he believed that the rules could be made to work. This brief analysis of Llewellynian thought will look at the “working rules” of Article II of the U.C.C. as a tool for analyzing the rules of the CISG.

The work of Ronald Dworkin is much more abstract and will be used not so much to analyze CISG rules, but to examine CISG interpretive methodologies. Dworkin’s view of “law as interpretation” is an idealistic view of law where rules can be interpreted to “fit” the law as a whole and, at the same time, provide a correct answer to novel fact patterns or “hard cases.” His theory will be used to gain insight on how internal gaps should be filled in the CISG and ultimately how the CISG can be used as core international sales law and be fitted into a more comprehensive international soft law of sales. Alternatively stated, the theories of rules presented by Llewellyn and Dworkin can be used to fabricate an international soft law that can be used to expand the comprehensiveness of a uniform international sales law with the CISG at its core.

---

46. See Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931); see also WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

47. Llewellyn scholars generally have divided his work between his more radical work of the late 1920s and 1930s (legal realist movement) and the “later Llewellyn”—his more idealistic work, including serving as Reporter for the U.C.C. One scholar refers to Llewellyn’s early work as being authored by a “lucid realist” and his later work by a “mystical idealist.” Takeo Hayakawa, *Karl N. Llewellyn as a Lawman from Japan Sees Him*, 18 RUTGERS L. REV. 717, 733 (1964). Martin Golding asserts that: “I suspect, though, that Llewellyn became friendlier toward rules as time went on; the leading spirit behind the Uniform Commercial Code could hardly be a rule denier.” Martin P. Golding, *Jurisprudence and Legal Philosophy in the Twentieth-Century America—Major Themes and Developments*, 36 J. LEGAL EDUC. 441, 472 (1986).

A. *The CISG and Llewellyn's Theory of Rules*

Karl Llewellyn's quest for a functional sales law was heavily influenced by the civil law, most directly by the German Civil Code.<sup>48</sup> For our purposes, his theory of commercial law was that it needed to be dynamic in nature. This dynamism was to be found in real world commercial practice that would be used to continuously refresh the rules of Article II (U.C.C.). In order to be true to common law legal development the change would be incremental in nature, but it would be in a consistent state of flux so that the U.C.C. would not become a creature of obsolescence. The rule that would make this possible is the "open-textured" rule. The repeated use of the "reasonableness" standard throughout Article II was the means by which real world "law" would be used to refresh its rules.

Refresh, of course, implies change. So, Llewellyn's theory of rules had another feature that allowed the rule to guide its own change or adjustment. The rule confronted with real world change was not to be considered a passive, empty vessel subject to the whim of business practice. The guidance to the rule adjustment would be the reason behind the rule. This is what has been referred to as the "singing rule."<sup>49</sup> Llewellyn's view of the "singing rule"—one that sings with the reason behind the rule—was also an indication of a broader view of how the rules of the U.C.C. should be interpreted and applied:

In drafting the Code, Llewellyn continuously . . . employed policy and purpose as the central device to convey and clarify statutory meaning. As a result, purpose, policy, and reason are major determinants of what the language of the text means . . . . The patent reason principle also assigns a definite role to the courts in interpreting and applying the open-ended principles of the Code.<sup>50</sup>

Each section of the U.C.C. should be read, "in the light of the purpose and policy of the rule or principle in question, as also of the [U.C.C.] as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved."<sup>51</sup>

The important point is that Llewellyn's understanding of the judicial process led him to draft in the language of principle and to

---

48. See Michael Ansaldi, *The German Llewellyn*, 58 BROOK. L. REV. 705 (1992); Shael Herman, *Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code*, 56 TUL. L. REV. 1125 (1982).

49. See Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN ST. L. REV. 397, 479–82 (2004) (discussing relationship between singing rule and contextualism in Llewellynian thought).

50. John L. Gedid, *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 385 (1988).

51. U.C.C. § 1-102 cmt. 1 (2002).

use policy, purpose, and reason to convey meaning. Faced with that statutory architecture, courts should not and probably cannot avoid using policy and purpose in interpreting the Code.<sup>52</sup>

Under his theory, what made rules anachronistic was the form of the rule that is characterized as closed and fixed. This closeness prevented the introduction of contextual information, such as the creation of novel transaction types and leads to the creation of a gap between the law in the books and the law in action. Such rule formulation quickly resulted in the rules no longer being in touch with commercial reality. The solution was the open-ended rule.

However, Llewellyn understood that the constant changing of rules would lead to uncertainty and unpredictability in the law. Such uncertainty is an anathema for business transactions. Thus, the change had to be guided within the law. He saw as the main reason for rules being obsolete, and ultimately irrelevant, is when over time the rule becomes detached from its underlying reason. Fixed, closed rules eventually are applied as a matter of authority or historical accident. The judicial arbiter no longer is informed by the reason behind the rule, but mechanically applies the rule as precedent, despite the rule application leading to an irrational result. But, a different source of detachment of rule from reason can occur from the unfettered influx of new commercial practice resulting in sudden changes to the law. To balance the need for rule flexibility and rule certainty, the changes in the rules have to be anchored in reason.

The court or arbitral panel should first determine the reason for a rule and use that reason to direct a rule change in a predictable fashion. For U.C.C. Article II, the reasons are found in the rules themselves and in the Official Comments to the rules. An example would be Article II, Section 2-206, "Offer and Acceptance." Section 2-206(1)(a) provides the rules for determining a reasonable means of accepting an offer. It states that the acceptance, unless stipulated otherwise by the offer, can be made "by any medium reasonable in the circumstances."<sup>53</sup> This is a quintessential example of the open-textured rule. Section 2-206(1)(b) expands the notion of a reasonable medium of acceptance to include the unilateral contract: an offer for "prompt or current shipment" may be accepted by a return promise or "by the prompt or current shipment" of the goods.<sup>54</sup> The acceptance by performance (sending the goods) is effective upon the sending whether the goods are subsequently deemed to be non-conforming. It further provides that the sending of non-conforming goods will not be construed as an acceptance, but as an accommodation, if "the

---

52. Gedid, *supra* note 50, at 386.

53. U.C.C. § 2-206(1)(a) (2012).

54. *Id.* § 2-206(1)(b).

seller seasonably notifies the buyer that the shipment is offered only as an accommodation.”<sup>55</sup>

Section 2-206 further deals with the issue of acceptance by performance, where prompt or current shipment is not possible.<sup>56</sup> In this case, the beginning of performance is a “reasonable mode of acceptance”<sup>57</sup> and not the actual performance itself. However, if the offeree fails to notify the offeror within a reasonable time of the beginning of performance, then the offeror “may treat the offer as having lapsed before acceptance.”<sup>58</sup>

Thus, the rather short length of Section 2-206 provides numerous rules and questions relating to the proper means of acceptance. It is worth diagramming the section to better understand the rules of acceptance. After providing such a schematic for Section 2-206, the reasons for the framework of rules embedded in this section will be explored. Finally, a comparison to the acceptance rules of CISG will be undertaken.

### 1. *Section 2-206 Diagram*

Rule 1: Master of Offer, “unless otherwise unambiguously indicated” by offer. (Section 2-206(1)).

Rule 2: Offeree may accept “by any medium reasonable in the circumstances.” (Section 2-206(1)(a)).

Rule 3: Medium of acceptance may be expanded by offeror to include performance. If offer implicitly allows acceptance by performance, then offeree has option to accept by “prompt or current shipment.” (Section 2-206(1)(b)).

Rule 3.1: Prompt or current shipment of either conforming or non-conforming goods is an acceptance. (Section 2-206(1)(b)).

Rule 3.2: Offeree may change acceptance (by sending non-conforming goods) as an accommodation by “seasonably” notifying the offeror. (Section 2-206(1)(b)).

Rule 3.3: If prompt or current shipment is not possible, the beginning of performance (invited in the offer) constitutes acceptance. (Section 2-206(2)).

Exception to Rule 3.3: Offeree must preserve acceptance by beginning performance, by providing notice to offeror within a reasonable time; if not, then the offer shall be treated as lapsed before acceptance. (Section 2-206(2)).

### 2. *Questions Presented by Section 2-206*

What does Section 2-206(1) mean by “unambiguously indicated”?

---

55. *Id.*

56. *Id.* § 2-206(2).

57. *Id.*

58. *Id.*

How does one construe an offer that invites acceptance by any means under Section 2-206(1)(a)?

What is a “reasonable medium” under Section 2-206(1)(a)?

How does one determine if a notification is “seasonable” under Section 2-206(1)(b)?

What is an “accommodation” under Section 2-206(1)(b)?

When is a “beginning of performance” deemed to be a reasonable mode of acceptance under Section 2-206(2)?

What does “beginning of performance” mean as used under Section 2-206(2)?

What is a reasonable time for notice by offeree after beginning performance to prevent a lapse of the offer under Section 2-206(2)?

Given the numerous rules and sub-rules, as well as the questions they present, is Section 2-206 a reasonable approach to determining the effectiveness of the mode of acceptance? Under Llewellyn’s theory of rules, the use of open-textured terms, such as “reasonable” and “seasonably,” allows for the ability to adjust the rule based upon the circumstances, including technological changes relating to the means of acceptance. This is the exact reasoning provided by the Official Comment, which states: “This section is intended to remain flexible and its applicability to be enlarged as new media of communication develop or as the more time-saving present day media come into general use.”<sup>59</sup> The word “enlarged” envisions the rule being adjusted to real world developments. In this case, the notion of a reasonable medium of acceptance will need to change to reflect technological developments in the means of transmission.

Section 2-206 includes an express rule of interpretation that an offer requesting prompt shipment will be construed as inviting an acceptance by performance (prompt shipment). Again, the Official Comment provides the reason behind the incorporation of this rule of interpretation. It states that it is intended to reject “the artificial theory that only a single mode of acceptance [express words of acceptance] is normally envisaged by an offer.”<sup>60</sup> This is a clear recognition of real world practice in which commercial parties are often more concerned with prompt delivery, than binding a contract through an express promise of acceptance.

The meaning of beginning of performance and the importance of notification of beginning of performance are the most confusing of Section 2-206’s rules. On its face, Section 2-206(b) is an extension of prompt or current shipment as a means of acceptance found in Section 2-206(1)(a). One interpretation would be that the beginning of performance that leads to a reasonably prompt shipment creates a binding contract. Alternatively, it can be interpreted that as long as the goods are delivered within a reasonable period of time, then the beginning of performance constitutes an acceptance. But, the Official Comment makes

59. *Id.* § 2-206 cmt. 1.

60. *Id.* cmt. 2.

clear that Section 2-206(2) contains two inseparable requirements—beginning of performance and notification of the beginning of performance.<sup>61</sup> Thus, the beginning of performance can be a reasonable mode of acceptance only if followed by notice to the offeror within a reasonable period of time.

What is the reason for this performance-notice rule? If the offer invites the offeree to begin performance immediately, then the rule allows acceptance by beginning performance as a true reflection of the intent of the offeror. However, the difference between immediate performance (sending the goods) and beginning of performance (manufacturing the goods) needs to be dealt with in any acceptance by performance rule. The problem with the beginning of performance as the means to bind a contract is the lag, sometimes considerable, between the “acceptance” and the actual sending or delivery of the goods. The general rule for offers is that they self-terminate after a reasonable lapse of time.

Thus, hinging acceptance to the beginning of performance brings two policies into conflict—the offeree’s reasonable reliance on the offer’s invitation to begin performance and the offeror’s reliance that the power of another party to bind them to a contract only exists for a reasonable period of time. The solution or compromise is the notice requirement of Section 2-206(2). The beginning of performance is not really an acceptance because it does not bind the offeror to the contract. It really works to convert the offer to a firm offer that is irrevocable from the time of the beginning of performance to the expiration of a reasonable time to give notice of the beginning of performance. It is the sending of the notice of the beginning of performance, in conformity to the mailbox rule that is the acceptance. The question remains of what is a reasonable time for giving the notice of the beginning of performance. It would seem that the best criterion for determining the reasonableness of the notice is found within Section 2-206. In Section 2-206(1)(b), it notes that an offer may invite acceptance by prompt shipment of the goods. The contract is bound upon the shipment of the goods, but the offeror may not know of the acceptance until the goods are actually delivered. From this template, one can argue that the notice of the beginning of performance would be considered reasonable if it is received by the time the goods would have been delivered under the prompt shipment scenario of Section 2-206(1)(b).

The problem with the above rule interpretation is that the paradox of the mailbox or dispatch rule presents an obstacle to such a reasoned solution. If acceptances are good upon dispatch, then a rule that requires the notice of beginning of performance to be received by the offeror by the time goods would have been received under prompt shipment does not “fit” the overall body of offer-acceptance rules, which is required under Dworkin’s theory of rule interpretation. There are a number of possible

---

61. *Id.* cmt. 3.

responses to the issue of reasonable notice. First, Section 2-206(2) is an implicit exception to the mailbox rule. Its exact language is that the offeror must be “notified of acceptance within a reasonable time.” The use of the word “notified” can be construed as meaning “actual” notice that only a receipt rule can give. Second, reasonable time could mean nothing more than a reasonable time that offers of its kind can reasonably be expected to remain open. The unanswered question is whether an invitation to begin performance extends the time for giving reasonable notice beyond what would normally be a reasonable time to accept through a reciprocal promise.

The offeree’s ability to convert an acceptance by performance to an accommodation responds to a number of issues. First, in the haste to respond as directed by the offer, through prompt shipment increases, the likelihood of sending non-conforming goods (defective product or improper packaging) increases. Does the time urgency implied by the offer provide the basis for a reasonable belief in the offeree that speed is more important to the offeror than complete conformity of goods? Section 2-206 provides the offeree the choice of sending non-conforming goods as an acceptance or as an accommodation. In the first instance, the offeree believes that the non-conforming goods will not be rejected by the offeror. If the offeree judges wrongly and the offeror rejects the goods, then the sending of the non-conforming goods serves both to bind the contract and as the basis of a breach of contract. Section 2-206(1)(a) provides an innovative solution to the offeree’s dilemma. The offeree can elect to send the non-conforming goods and give notice that the sending of the goods is not an acceptance of the offer, but that the goods are being sent as an accommodation.<sup>62</sup> Hence, the sending of the non-conforming goods is a counteroffer that the original offeror is free to accept or reject. At the same time, the offeree is able to respond to the prompt shipment request of the offeror without being liable for breach of contract.

Finally, the CISG acceptance rules will be compared to the rules embodied in U.C.C. Section 2-206. CISG Article 18 rejects the common law’s dispatch rule in favor of the receipt rule. It states that an acceptance “becomes effective at the moment the indication of assent reaches the offeror.”<sup>63</sup> As discussed earlier, the CISG’s receipt rule is an example of the drafters’ selection of the more efficient of the two competing rules—dispatch (common law) and receipt (civil law).<sup>64</sup> Like Section 2-206, the acceptance must be received “within a reasonable time.”<sup>65</sup> The reasonableness of the time of acceptance, like under the common law, is a contextual determination. However, the CISG provides a bright line rule not found in the U.C.C.: “An oral offer must be accepted immediately

---

62. *See id.* cmt. 4.

63. CISG, *supra* note 2, art. 18(2).

64. *See supra* notes 15–17 and accompanying text.

65. CISG, *supra* note 2, art. 18(2).



unless the circumstances indicate otherwise.”<sup>66</sup> The reasonableness of such a bright-line rule is open to debate. In its favor, it provides a measure of certainty to whether there has been an effective acceptance and whether the offer has lapsed. However, the oral acceptance truncates the courts’ ability to determine the reasonableness of an acceptance that is provided by the open-ended rule of Article 18(2). Thus, the general rule is that the timeliness of an acceptance is determined by the reasonableness standard, while the immediate acceptance rule for oral offers is the exception. But, note that the immediate acceptance rule is conditioned by the subsequent language that the immediate acceptance may not be required if “the circumstances indicate otherwise.”<sup>67</sup> Despite the oral offer exception, the superiority of the receipt rule is preserved.

Article 18(3) is the counterpart of U.C.C.’s Section 2-206<sup>68</sup> rules that allow acceptance by prompt shipment or the beginning of performance. Article 18(3) provides that if provided for in the offer or through practices developed between the parties, then “the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror.”<sup>69</sup> It further states that the acceptance becomes effective “at the moment the act is performed”<sup>70</sup> provided it is performed within a reasonable period of time as determined under Article 18(2). Note, Article 18(3) only deals with the scenario of prompt performance and does not deal with the issue of an offer that invites acceptance by the beginning of performance. The language of Article 18(3) is the language of complete performance—“dispatch of goods or payment of price”—and not the language of the beginning of performance. Therefore, just like Section 2-206(1)(b), Article 18(3) does not require the offeree to give notice. All that is required is that the goods or payment be sent within a reasonable period of time.

Article 18(3) appears to neglect the situation where prompt shipment is not possible, such as in the case where the goods need to be manufactured. Under Article 18(3), the beginning of performance is not recognized as an acceptance. This can easily lead to the injustice in which the offeree begins performance and the offeror revokes the offer before completion of the performance (shipment of the goods). Section 2-206(2) prevents such an injustice by recognizing the beginning of performance as an acceptance as long as the offeree follows up by providing notice of the beginning of performance within a reasonable time. If the story ended here, then the CISG looks to be inferior to the U.C.C. in this area. If the measure is how well sales rules realize the aims of promoting private ordering and preventing contractual injustice, then CISG Article 18 fails on

---

66. *Id.*

67. *Id.*

68. U.C.C. § 2-206(1)(b), (2) (1977).

69. CISG, *supra* note 2, art. 18(3).

70. *Id.*

both accounts. The ability to promptly respond at the offeror's invitation by performance is diminished by Article 18's failure to use the beginning of performance as a benchmark. It would be foolhardy for a party to begin performance without binding the contract with an express acceptance. However, this may be precluded if the offer allows for acceptance only by performance. This retards the free facilitation of contracting. If the offeree goes forward and begins performance without a binding contract it runs the risk of incurring damages if the offeror timely revokes its offer. This is surely a case of contractual injustice.

This exercise of comparing the acceptance rules of the U.C.C. and the CISG shows the difficulty in interpreting and comparing rules in isolation to the overall body of rules. The breadth of the CISG's firm offer rule ameliorates the potential injustice produced by Article 18(3). But, before looking at the CISG's firm offer rule to see how it prevents the inefficiency and injustice of Article 18(3), the firm offer rule of the U.C.C. will first be examined. The firm offer rule of the U.C.C. is an exercise in formality.<sup>71</sup> As such, it is narrow in scope and precludes the use of judicial discretion in crafting a just result. It provides that an offer is only irrevocable for the stated time or a reasonable time, not to exceed three months.<sup>72</sup> Further, the offer must be in writing and signed by the offeror. In contrast, CISG Article 16(2) allows almost any offer to be construed as an irrevocable firm offer in certain circumstances. It states that an offer cannot be revoked "if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer."<sup>73</sup> Thus, the scenario in which an offer invites acceptance by performance and the offeree begins performing would almost always be considered as a firm offer. As long as the offeree performs within a reasonable period of time, then the offer is irrevocable and the contract will be bound at the time of complete performance.

This exercise of finding the reasons for rules within the context of the entire body of law—U.C.C. or CISG—is the central tenet in Dworkin's notion of theory building. In the area of rule application or rule adjustment, Dworkin again requires the application be performed within the context of the entire body of law and not just the rule in isolation. This provides insight into how to properly interpret and apply CISG rules.

The CISG can be linked to Llewellynian thought through its use of open-textured rules. The open-textured rule recognizes that in commercial law the content of a rule is not internally provided by the law, but is provided through induction from real life commercial practice. In contrast, rule application from a Dworkinian approach sees the rule application as internally driven. The need to adjust a rule to a change in commercial practice is guided by an internal, deductive reasoning process

---

71. See U.C.C. § 2-205 (1977).

72. See *id.*

73. CISG, *supra* note 2, art. 16(2)(b).

in which the rule application must fit the body of law in its entirety. Alternatively stated, when a court is presented with two reasonable rule interpretations, it should apply the one that best fits the CISG as a whole. For Llewellyn the fit is guided by the determination of the reasons behind the rule; for Dworkin the fit is determined by the general principles—express or implied—that provide the underlying foundation for the integrity of a given body of law. This principle-led approach to rule application has a close affinity to the CISG’s interpretive methodology found in CISG Article 7.

### B. *CISG and Dworkinian Theory Building*

Ronald Dworkin provided a theory of interpretation that focused on filling in gaps in the law. Llewellyn attempted to do the same thing by contextual interpretation and through open-textured rules. Dworkin starts with the premise that the conceptual or internal part of law can, through deduction from principles, fill in gaps in the law. Both approaches provide a theoretical basis for filling in the gaps found within the CISG.<sup>74</sup>

In Dworkinian terms, the integrity of law provides, if not a right answer, then at least a correct answer, to fact situations that illuminate a gap, previously seen or unseen, in the formal rules of law. The answer to filling in the gap comes from within the “entire” structure of the law.<sup>75</sup> Dworkin’s principle-based approach to interpretation<sup>76</sup> is very much akin to CISG Article 7’s mandate that the CISG is to be interpreted through the “general principles on which it is based.”<sup>77</sup> Although the CISG is not a comprehensive sales law (external gaps), it is meant to provide a comprehensive body of rules in the areas that it does cover—contract formation, rights and obligations of buyers and sellers, and remedies for breach.<sup>78</sup> It is in these areas that a Dworkinian mindset is of value.

In the case of a CISG rule application, the application (interpretation) needs to be done within the entire structure of the CISG. A rule application that appears reasonable within the confines of a single CISG Article may actually be an improper application due to its inability to be harmonized within the CISG as a whole. A certain rule application can only be justified if it provides a proper fit relating to the specific CISG Article or Articles, as well as the CISG as a whole. For example, in applying the CISG’s contract formation Articles, due regard must be given to the interpretive template provided by Articles 7, 8, and 9.

---

74. See DiMatteo, *supra* note 49 (exploring conceptual and contextual aspects of Llewellynian thought relating to interpretation).

75. See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1981); see also RONALD DWOR- KIN, *LAW’S EMPIRE* (1986).

76. See RONALD DWORIN, *A MATTER OF PRINCIPLE* (1985).

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

78. See *id.* art. 4.

Dworkin's theory of law as interpretation sees the idea that an internal gap in the CISG cannot be filled internally as implausible. Dworkin believes that the solution to filling in a gap can always be found by "moving up the pyramid of abstraction or principles."<sup>79</sup> Therefore, any ambiguities or gaps in the CISG is filled by working within the body of rules in which the gap or ambiguity is found, guided by general principles, to find the best possible interpretation that increases the overall integrity and value of the entire body of law: "[A]n interpretation of any body or division of law . . . must show the value of that body of law in political terms by demonstrating the best principle or policy it can be taken to serve."<sup>80</sup>

It is important to note that Dworkin's pyramid of principles sees the recourse to meta-principles as the final step or last resort. Thus, if an ambiguity or gap is found in one of the CISG's formation rules the interpretation process would begin with determining the implied principles or purposes that underlie the specific rule. If that search fails to provide a reasonable solution (rule-adjustment), then the interpreter would look for implied principles that underlie the set of closely aligned rules of which the specific rule is a part. If that fails, then recourse is to the implied rules that underlie the entire area of law, such as Articles 14–24 (formation of contract). Only then is recourse made to the general meta-principles—express or implied—of the entire CISG.

The CISG's express general principles are modest in number—good faith interpretation, international character of the rules, the need to promote uniformity, and international trade usage. The more interesting proposition is how an interpreter finds and recognizes implied general principles. One response is that the interpreter is confined to the express general principles and the implication of general principles is precluded. The alternative approach is that nothing prevents an interpreter in implying other general principles as long as they do not conflict with the express principles.

The second approach is more reasonable due to a number of reasons. First, the express general principles are so broad in scope that they offer the means to imply narrower or ancillary general principles. Second, due to the lack of rule density, additional general principles are needed to fill in the internal gaps and ambiguities found in the CISG. A number of implied principles have been offered by the courts—some have been widely accepted, while others have not been universally accepted. A tentative list of implied principles, default rules, or factors analyses<sup>81</sup> include:

---

79. Larry A. DiMatteo, *A Theory of Interpretation in the Realm of Idealism*, 5 DEPAUL BUS. & COMM. L.J. 17, 43 (2006).

80. DWORKIN, *supra* note 76, at 160.

81. Factors analyses refer to the idea that rules often do not provide a definition or criteria to aid in its application. Over time, the jurisprudence shows that certain factors are recognized as important to the interpretation and application of a given rule.

- As discussed previously, a widely accepted implied principle is that a party making a claim or who would benefit from a CISG rule application has the burden of proof.<sup>82</sup>
- CISG Article 38(1): inspection “within as short a period as is practicable in the circumstances.” What are the relevant circumstances or factors in determining the reasonable promptness of the inspection? Courts have recognized a matrix of implied factors, including number of items to be examined, type of inspection required, nature or uniqueness of the goods, nature of the packaging, method of delivery, experience of employees receiving goods, if goods are delivered in installments, and the sophistication and location (remoteness, developing country) of the buyer.<sup>83</sup>
- Particularized consent, especially in the area of derogation, may be needed to opt out of the CISG or to derogate from a CISG provision. For example, an Austrian court rejected a derogation from the “no writing” requirement of CISG Article 11; it held that such a derogation required an informed consent from the non-derogating party.<sup>84</sup>
- Implied general principle of the need to give fair notice as a general practice can be implied from the numerous notice provisions found in the CISG.<sup>85</sup>
- Implied duty of cooperation has been derived from CISG Article 80: “A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party’s act or omission.”<sup>86</sup>
- A Helsinki Court of Appeals recognized an implied principle of loyalty: “The so-called principle of loyalty has been widely recognized in scholarly writings. According to this principle, the parties to a contract have to act in favour of the common goal; they have to reasonably consider the interests of the other party.”<sup>87</sup> In that case, the court held that the principle of loyalty required a seller-manufacturer to continue a sales relationship beyond the last formal, dis-

---

82. A highly-regarded Italian case asserted that the “Convention’s general principle on the burden of proof seems to be *ei incumbit probatio qui dicit, non qui negat*: The burden of proof rests upon the one who affirms, not the one who denies.” Trib. di Vigevano, 12 luglio 2000, n. 450, ¶ 23 (It.), available at <http://cisgw3.law.pace.edu/cases/000712i3.html>.

83. See LARRY A. DiMATTEO ET AL., INTERNATIONAL SALES LAW: A CRITICAL ANALYSIS OF CISG JURISPRUDENCE 78–84 (2005).

84. Oberster Gerichtshof [OGH] [Supreme Court] Feb. 6, 1996, docket No. 10 Ob 518/95 (Austria), available at <http://cisgw3.law.pace.edu/cases/960206a3.html>.

85. See CISG, *supra* note 2, arts. 19, 21, 26, 27, 32, 39, 43, 46, 47–49, 63, 65, 67, 71, 72, 88.

86. *Id.* art. 80; see also THOMAS NEUMANN, THE DUTY TO COOPERATE IN INTERNATIONAL SALES: THE SCOPE AND ROLE OF ARTICLE 80 CISG (2012)

87. Helsingin hovioikeus [HO] [Helsinki Court of Appeals], Oct. 26, 2000, docket No. S 00/82, available at <http://cisgw3.law.pace.edu/cases/001026f5.html>.

crete sales contract. It stated, “the operation cannot be based on a risk of an abrupt ending of a contract.”<sup>88</sup> The implied principle here may be extrapolated from a combination of the good faith principle and trade usage.

- An implied general principle can be gleaned from a number of CISG Articles. One such principle is that CISG rules, contracts, and contractual obligations should be interpreted in favor of preserving the contract and the contractual relationship—*favor contractus*. This principle has been derived from CISG Articles 25, 34, 37, 39, 43, 47–49, 63, 64, and 82.<sup>89</sup>

Finally, it should also be noted that Dworkin’s allusion to the “political” refers to the integrity of the law or body of law and not to the external politics of society. Dworkin’s theory of interpretation as it would apply to the CISG partially breaks down because he assumes that the need for rule adjustments to fill in gaps is infrequently presented because of the “density” of law. One of the perceived shortcomings of the CISG is that it lacks density in its coverage creating numerous internal gaps. Nonetheless, Dworkin’s fixation on the use of internally-derived principles offers a similar framework as is found in the principles-driven CISG interpretive methodology of Article 7.

#### IV. FILLING IN GAPS: ROAD TO A COMPREHENSIVE SALES LAW

Part III, examined different theoretical approaches to filling in internal gaps in the CISG. This Part examines the major external gaps in the CISG. It then proposes a modest project to deal with the non-comprehensive nature of the CISG. Developing a “CISG plus” or “Restatement of International Sales Law Project” is the next logical step in developing a more comprehensive, international sales law. This is especially true given the unlikelihood of a formal revision of the CISG or the adoption of a broader international contract or commercial code in the near future. This Part will focus on two soft law projects—the Unidroit Principles of International Commercial Contracts (Principles)<sup>90</sup> and the proposed Common European Sales Law (CESL).<sup>91</sup> The author fully realizes that

---

88. *Id.*

89. André Janssen & Sören Claas Kiene, *The CISG and Its General Principles*, in CISG METHODOLOGY 261, 273–74 (André Janssen & Olaf Meyer eds., 2009).

90. See generally UNIDROIT 2004, *supra* note 7; see also MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (3d ed. 2005).

91. See generally CESL, *supra* note 8; REINER SCHULZE, COMMON EUROPEAN SALES LAW (CESL): COMMENTARY (2012) (providing comprehensive commentary on CISG); REINER SCHULZE & JULES STUYCK, TOWARDS A EUROPEAN CONTRACT LAW (2011) (detailing history and analysis of development of optional (contract law) instrument that eventually became CESL); see also GUIDO ALPA ET AL., THE PROPOSED COMMON EUROPEAN SALES LAW—THE LAWYER’S VIEW (2013) (analyzing positive and negative implications of CESL).

the CESL is being proposed as a European Union regulation and has been more recently reduced in scope, and would be considered a hard law if enacted. But, it is being used here as a proposed law under the assumption that even if it fails to be enacted, the instrument would remain a valuable source of soft law.

### A. *External-Internal Gap Dichotomy*

Part III provided a theoretically based approach to filling in the internal gaps of the CISG. The approaches of two major legal philosophers—Karl Llewellyn and Ronald Dworkin—were briefly reviewed. The purpose of this review was to support the point that when the scope of the CISG's coverage is not at issue, then all attempts at filling in a gap within its scope need to be exhausted to prevent the gap being treated as an external gap requiring resort to private international law rules.<sup>92</sup> Llewellyn's open-textured rules (reasonableness standard) exist throughout the CISG. The main vehicle for filling in gaps when such rules are being applied is through induction from the case facts and commercial practice. In the case of express and implied principles which centers CISG interpretive methodology, Dworkin's theory of interpretation emphasizes the need to work up a pyramid of abstraction to find express or implied principles that through deduction can be employed to fill in any gap in the overall body of rules. Thus, the first directive of this Part is to recognize the importance of aggressively seeking solutions to internal gaps without resorting to private international law.

### B. *CISG and Unidroit Principles*

The rules of the CISG provided the template for correlating rules in the Principles. The temptation is to use the commentary on the Principles in the interpretation of the CISG, especially in areas of internal gaps and ambiguity.<sup>93</sup> But, this would be a misapplication and would contradict the

---

92. Camilla Baasch Andersen appropriately notes the conflation of the terms hard and soft law:

The utility of this classification in modern commercial law is negligible. Not only because these labels belie the political and practical contexts of the instruments so labeled, but because they are not useful in a functional context . . . [R]egardless of the classification of an instrument or non-law standard, if it becomes part of commercial practice, then it is an important part of uniform commercial law.

Camilla Baasch Andersen, *Macro-Systematic Interpretation of Uniform Commercial Law: The Interrelation of the CISG and other Uniform Sources*, in CISG METHODOLOGY 224 (André Janssen & Olaf Meyer eds., 2009)

93. See, e.g., Bojidara Borisova, *Remarks on the Manner in Which the UNIDROIT Principles May Be Used to Interpret or Supplement Article 6 of the CISG*, 9 VINDOBONA J. INT'L COM. L. & ARB. 153 (2005); Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG—Alternatives or Complementary Instruments?*, 26 UNIF. L. REV. 229 (1996); Alejandro M. Garro, *The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG*, 69 TUL. L. REV. 1149 (1995) (noting UNIDROIT princi-

CISG's interpretive methodology that requires autonomous interpretation of CISG provisions. However, the Principles provide a more comprehensive coverage and should be used as a source in the formulation of a comprehensive sales law. In fact the father of the Principles, Michael Joachim Bonell, noted that the adoption of the CISG served as an impetus for the drafting and for the broader coverage of the Principles:

Both the merits and the shortcomings of the CISG prompted the International Institute for the Unification of Private Law (UNIDROIT) to embark upon a project as ambitious as the preparation of the UNIDROIT Principles. In other words, but for the world-wide adoption of an international uniform sales law like the CISG, any attempt at formulating rules for international commercial contracts in general would have been unthinkable. At the same time, it was precisely because the negotiations leading up to the CISG had so amply demonstrated that this Convention was the maximum that could be achieved on the legislative level, that UNIDROIT decided to abandon the idea of a binding instrument and instead proceeded merely to "restate" . . . international contract law and practice.<sup>94</sup>

Professor Gabriel looks at another possibility for developing a more comprehensive international sales law. In his article, *UNIDROIT as a Source for Global Sales Law*,<sup>95</sup> he explores the use of the well-received commercial contract soft law, Principles, as the basis of a comprehensive sales law. This is an attractive idea for a number of reasons. First, as a general contract law and as a soft law, free of political compromises, it is inherently a more comprehensive law. Second, it is a well-established, respected instrument that has been thoroughly researched and vetted. Third, many of its rules track those of the CISG, but are more detailed in nature. The Principles have been used to interpret CISG rules, mostly by arbitral tribunals.<sup>96</sup>

Despite the arguments in favor of using the Principles as the foundation for a comprehensive international sales law, this would be a mistake. The CISG is the better starting point for such a project. First, it is a hard law that has been widely adopted. Second, the depth of CISG case law and breadth of scholarly research on the CISG provides a strong base of knowledge to center any such project. In the words of Michael Joachim Bonell: "Still, on the whole there can be no doubt that the CISG provides a most

---

ples are more suitable to international commercial contract than domestic contract rules).

94. Michael Joachim Bonell, *The CISG, European Contract Law, and the Development of a World Contract Law*, 56 AM. J. COMP. L. 1, 16 (2008).

95. See generally, Henry Deeb Gabriel, *UNIDROIT as a Source for Global Sales Law*, 58 VILL. L. REV. 661 (2013).

96. See Jan Ramberg, *Creativity of Arbitrators in the Context of UNIDROIT Principles of International Commercial Contracts*, 3 UNIF. L. REV. 651 (1998).



valuable and fairly innovative normative regime for international sales contracts.”<sup>97</sup> Nonetheless, it is true that the drafting of the Principles was unrestrained by the need for political compromise, as characterized the CISG project. As a result, the Principles project was able to cover areas not broached by the drafters of the CISG. The Principles cover such areas as authority of agents, validity, third party rights, hardship, set-off (counter-claims), assignment of rights, transfer of obligations, and assignment of contracts and limitation periods.<sup>98</sup> In the end, the portions of the Principles not covered in the CISG should be mined in the fabrication of a comprehensive sales law document.

### C. *CISG and CESL*

The proposed Common European Sales Law (CESL) presents a number of issues that will be briefly discussed here. First, how will such an E.U. Regulation interrelate with the CISG which is the law of twenty-three of twenty-seven E.U. countries?<sup>99</sup> Second, how do interpreters deal with the dilemma posed by parallel laws having numerous similar or identical rules? The first issue questions the usefulness of the CESL in relationship to the role currently played by the CISG. The answer to this question is multifaceted. If the CESL was purely a sales law, then the CESL would be merely redundant and be more problematic than useful due to the interpretive issue presented by the second question. The only purpose a narrowly focused E.U. sales law would serve is to bring the four outlying E.U. countries, which are not contracting states to the CISG, into a uniform sales law regime with the other E.U. countries. A simpler solution would be for the four countries to adopt the CISG, which would unify inter-E.U. sales law.

However, the CESL title is a bit of a misnomer because it covers much more ground than a sales law-only proposal. It is this broader scope that makes the CESL unique. The CESL provides general contract law provisions that could be used as a basis of further harmonization efforts for other types of contracts. The most interesting part of the CESL is its specialized bodies of rules for the supply of digital content and service related to the sale of goods. Thus, the greater comprehensiveness of the CESL makes it more attractive than the CISG, at least in these areas. For purposes of this Article, the CESL provides a source for building a soft law periphery to the CISG core.

The CISG and CESL have been seen as potential competitors. If the CESL becomes E.U. law, then parties opting into the CESL would implicitly be opting out of the CISG, even when both parties are from CISG countries. This is not, itself, a problem for the parties are free to opt in or

---

97. Bonell, *supra* note 94, at 4.

98. See BONELL, *supra* note 90, at 305–08.

99. The four current E.U. countries that have failed to adopt the CISG are Ireland, Malta, Portugal, and the United Kingdom.

opt out of most commercial laws, domestic or international. The problem results from the fact that many of the CESL rules, especially in the area of contract formation and rights and obligations of the parties, are duplicative of CISG rules. This becomes a problem if those similar provisions are interpreted differently in the applications of the CISG and the CESL. The result would be complexity and chaos, as a party using the CESL within Europe and the CISG internationally would be confronted with different meanings for identical terms and rules.

Professor Ulrich Magnus sees the creation of such divergent meanings as a real possibility. The reason is that the CISG employs an international interpretative methodology and European law follows distinctively European-based interpretive methodologies.<sup>100</sup> In addition, both the CISG and the CESL require autonomous interpretations of their provisions.<sup>101</sup> Nonetheless, Magnus rightly asserts that where the CISG and CESL have parallel provisions, the pre-existing meanings found in the in-depth CISG case law and scholarly literature should be applied to the CESL. This type of “inter-conventional interpretation” is necessary to keep order in European and international sales law. If the CESL passes into law, it is best for the legal and business communities’ interests that the CISG and CESL work as complimentary instruments. However, they would likely devolve into competition if parallel provisions were interpreted differently under the two instruments. This would be a disaster for national courts in the countries having both the CISG and the CESL as the law of the land.

For the current undertaking, the use of the CESL as soft law is valuable because it covers areas, such as the supply of digital content<sup>102</sup> and trade-related services<sup>103</sup> that can be used to fill in the gaps found in the CISG. Interestingly, it is plausible that the supply of digital content and trade-related services may be either an internal or an external gap in the CISG. CISG Article 3 states that the CISG does not apply to “contracts” where the “preponderant part” of a party’s obligations are the supply of labor or services.<sup>104</sup> Notice that the provision simply refers to contracts and not to contracts for the sale of goods. So, there is a plausible argu-

---

100. For a discussion of the differences between European interpretive and CISG-international style interpretive methodologies, see Ulrich Magnus, *Interpretation and Gap-filling in the CISG and in the CESL*, 11 J. INT’L TRADE L. & POL’Y 266, 272–77 (2012).

101. The mandate of autonomous interpretation is implied from CISG Article 7(1), which directs the interpreter to pay due regard to the “international character” and the need to “promote uniformity in its application” when interpreting CISG provisions. CESL Article 4(1) expressly states that the CESL “is to be interpreted autonomously.”

102. See CESL, *supra* note 8, pt. IV: Obligations and remedies of the parties to a sales contract.

103. See *id.* pt. V: Obligations and remedies of the parties to a related service contract.

104. CISG, *supra* note 2, art. 3(2).

ment that the CISG covers trade-related services, as long as they are not a preponderant part of the contract. However, it is more difficult to argue that the CISG would cover the supply of digital content. The CISG would cover such contracts if the digital content is determined to be a “good” and the transaction involves a “sale.” Most often such transactions involve licensing of the right to use digital content. It would be implausible to argue that the CISG covers such decidedly non-sale transactions. Nonetheless, whether covered under the CISG or not, the CESL provides a dense body of detailed rules in these areas that can be used directly or by analogy in developing a more comprehensive instrument.

In addition, the CESL covers other areas not covered by the express rules under the CISG, such as standard form contracting,<sup>105</sup> conflicting standard terms,<sup>106</sup> duty to disclose (pre-contractual information),<sup>107</sup> defects in consent,<sup>108</sup> unfair terms,<sup>109</sup> rate of interest,<sup>110</sup> prescription periods,<sup>111</sup> and the excuse of hardship.<sup>112</sup>

#### D. *Other Sources*

There are other conventions that can be used in constructing a composite international sales law doctrine, including the 1974 U.N. Convention on the Limitation Period in the International Sale of Goods as amended by the 1980 Protocol, the 1983 Geneva Convention on Agency in the International Sale of Goods, the 2001 U.N. Convention on Assignment of Receivables in International Trade, and the 2005 U.N. Convention on the Use of Electronic Communications in International Contracts. Finally, a number of Civil Codes have gone through modern revisions, such as the German Civil Code (*Bürgerliches Gesetzbuch* or “*B.G.B.*”) and the Dutch Civil Code (*Burgerlijk Wetboek* or “*B.W.*”), and should be reviewed as a source for a comprehensive international sales document. These laws, as well as the International Chamber of Commerce’s model agreements, such as its Model Sales Contract, may provide a menu of alternative rules that commercial parties can choose from in negotiating and drafting their contracts.

Resorting to well-respected national commercial or contract laws will be necessary in some areas where national laws vary widely. This would be

---

105. See CESL, *supra* note 8, arts. 7, 62, 70.

106. See *id.* art. 39.

107. See *id.* art. 23.

108. See *id.* arts. 48–57.

109. See *id.* arts. 9–81, 86, 170.

110. See *id.* art. 168.

111. See *id.* pt. VIII: Prescription.

112. See *id.* art. 89 (covering “excessively onerous” and “duty to enter into negotiations”).

in the areas of defects in consent,<sup>113</sup> validity,<sup>114</sup> and agency contracts.<sup>115</sup> In these areas, it is best to provide a number of options that the parties may select. Use of national laws, international soft laws, and trade practice materials should be reviewed in crafting optional rules that parties may select under the principle of freedom of contract.

### E. *Comprehensive International Sales Law Project*

#### 1. *Fusion of Hard and Soft Laws*

A comprehensive sales law, as proposed here, would be a combination hard-soft law instrument. This Section will provide a brief analysis of the nature and characteristics of hard and soft laws. First, the hardness of hard laws varies across legal subject matters, with the broad range of public law (constitutional, criminal, tax, and so forth), regulatory, and consumer protection laws as very hard laws. Contract and sales law, anchored in the principle of freedom of contract, are inherently “soft” hard laws. Despite the existence of mandatory rules, the overwhelming bodies of such laws are made up of default rules that the parties can expressly or implicitly opt out of. On the other end of the spectrum, soft law is viewed as completely voluntary in nature. Parties may choose to utilize soft laws or courts and arbitral panels may use them to guide or support their decisions. However, there are some soft laws that are so universally accepted that they take on a hard law edge. The International Chamber of Commerce’s Incoterms (trade terms) and Uniform Customs and Practices for Documentary Credit Transactions (rules for international letters of credit) manuals are examples of such “hard” soft laws.

Soft law can be best understood “as a continuum, or spectrum, running between fully binding treaties and fully political positions.”<sup>116</sup> Guzman and Meyer note that there are so many types of soft law that it is best to think of soft law as a variety of categories. They argue that, despite many types of soft laws, soft law comes in two general forms—agreements

---

113. Negotiations over providing rules on mistake were scuttled because of the variety of rules on the subject found in various domestic laws. See *Report of the Secretary-General: Formation and Validity of Contracts for the International Sale of Goods*, 8 U.N.Y.B. Comm’n Int’l Trade, A/CN.9/128, annex 11 (1977), available at <http://www.uncitral.org/pdf/english/yearbooks/yb-1977-e/vol8-p90-109-e.pdf>.

114. See *Rep. of the Working Group*, 9 U.N.Y.B. Comm’n Int’l Trade, A/CN.9/142, ¶¶ 48–69 (1978), reprinted in [1978] IX Y.B. UNCITRAL 61, 65–66, available at [http://www.uncitral.org/pdf/english/yearbooks/yb-1978-e/yb\\_1978\\_e.pdf](http://www.uncitral.org/pdf/english/yearbooks/yb-1978-e/yb_1978_e.pdf) (noting decision to exclude specific rules on validity).

115. Similarly, efforts to address issues related to agency were not successful. See *Rep. of the Working Group*, 6 U.N.Y.B. Comm’n Int’l Trade, A/CN.9/100, ¶ 47, reprinted in [1975] VI Y.B. UNCITRAL 49, 53, available at [http://www.uncitral.org/pdf/english/yearbooks/yb-1975-e/yb\\_1975\\_e.pdf](http://www.uncitral.org/pdf/english/yearbooks/yb-1975-e/yb_1975_e.pdf).

116. Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 173 (2010). Prosper Weil once stated that soft law obligations “are neither ‘soft law’ nor ‘hard law’: they are simply not law at all.” Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 414 n.7 (1983).

and “international common law.”<sup>117</sup> Ultimately, Guzman and Meyer offer a very interesting definition of soft law “as those nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct.”<sup>118</sup> This definition can act as the mantra for a comprehensive hard-soft international sales law project.

## 2. *Determining Comprehensiveness*

Exactly what constitutes a comprehensive international sales law? The answer is that it reaches the many issues that are found in a comprehensive national sales law, as well as the terms found in international sales contracts. The totality of sales law in a given national legal system is generally found in a number of statutory instruments and case decisions. In the U.S., at the minimum it would include Article II of the U.C.C., common law of contracts, and various statutory interventions, such as terminations of franchises, usury, form of warranties, and so forth.

The proposed Swiss Law Project provides a non-exhaustive list of contract law subjects including:

[F]reedom of contract, freedom of form; formation of contract, among others: offer, acceptance, modification, discharge by assent, standard terms, battle of forms, electronic contracting; agency, among others: authority, disclosed/undisclosed agency, liability of the agent; validity, among others: mistake, fraud, duress, gross disparity, unfair terms, illegality; construction of contract, among others: interpretation, supplementation, practices and usages; conditions; third party rights; performance of contract, among others: time, place, currency, costs; remedies for breach of contract, among others: right to withhold performance, specific performance, avoidance, damages, exemptions; consequences of unwinding; set-off; assignment and delegation, among others: assignment of rights, delegation of performance of duty, transfer of contracts; limitation; joint and several obligors and obligees.<sup>119</sup>

This would be a good place to start, but should also include negotiations and pre-contractual instruments, interest damages, consignment, retention of title, warranties and disclaimer of warranties, and post-contractual obligations. However, for a functioning and practical instrument of sales law, it is necessary to avoid too broad of a scope. The project should focus only on international commercial sales transactions, such as is the case with the CISG and Unidroit Principles. This will help maintain a level of simplicity that the inclusion of consumer transactions would

117. See Guzman & Meyer, *supra* note 116, at 173–74.

118. *Id.* at 174.

119. See UNCITRAL, *supra* note 1, at 4.

complicate. Second, any such document should maintain the private nature of contract law. The infrequency of mandatory rules found in the CISG should be retained, but the rest of the document should be subservient to the principle of private autonomy.

### 3. *Approaches to Developing a Comprehensive International Sales Law*

There are a number of options or methodologies that can be employed in developing a comprehensive sales law: (1) the restatement approach, (2) the compendium approach, and (3) the combined approach. The “restatement” approach would work off a template, consisting of four parts: (1) Statement of rule or definition (2) Comments (3) Illustrations, and (4) Notes. The restatement approach is both descriptive and prescriptive in nature. It provides the rule and its meaning based upon the review of the jurisprudence. It notes whether there is a consensus in the case law on a particular meaning. If not, it elucidates the majority and minority views or the multiple minority views. It then takes a position on the best of the existing rules. The choice of a best rule helps simplify chaotic bodies of rule interpretations that are often in conflict. The prescriptive dimension of restatement approach is also forward-looking by suggesting what the law “should” be by anticipating future developments.

The compendium approach would entail the sketching of an outline of all possible issues, rules, or terms relating to international sales transactions. It would provide the relevant CISG provision with commentary. If there are no such provisions, then the document would suggest a provision. The sources for the “gap-fillers” could be both hard and soft laws—CESL, Unidroit Principles, U.C.C., B.G.B., and commercial practice or customary international law. This format would likely not entail the providing of a best rule or a model provision, but would supply alternative provisions that reflect the characteristics of different contracting parties and the context of their transactions. The compendium approach is purely a descriptive enterprise, while the restatement approach possesses an important normative element. Ultimately, the two approaches may work out to be the same depending on how they are implemented. The best method would be to start with the compendium approach for sketching out a framework, but use the restatement format for determining content. This combined approach is likely to be more helpful to the practitioner. It starts under the presumption that the CISG is a good foundation for an international sales law, but offers complimentary materials and approaches to make the CISG more comprehensive and useful.

Both the compendium and restatement approaches could follow a rule-exception format. Instead of listing a menu of rule and term options, each rule could be immediately followed by an exception. The earlier coverage of the CISG acceptance rule (Article 18) was an example of a rule-exception approach. However, in the interest of certainty, the non-CISG provisions of a comprehensive sales law should require the contracting

parties to expressly choose between the rule and its exception. If not, a rule followed by an overly broad exception essentially leaves “the question open as to which of the two alternatives will ultimately prevail” in a contract dispute.<sup>120</sup> This approach as a vehicle of compromise is preferable to the use of ambiguous language that masks the failure to reach a consensus view.

#### 4. *Restatement First of International Sales Law*

Given the previous section, the restatement approach would play the dominant role in drafting a comprehensive sales law. The CISG is viewed as the core document because it has been widely adopted, but the fact remains that transactional lawyers often opt out. So, any restatement project using the CISG as its core should ask how could it be made better and more comprehensive?

The restatement approach makes it relatively easy to interweave the CISG with soft law sources. The final product would be viewed as a soft law instrument, the impact of which can be judged by its use in practice and citations from courts. The most ambitious expectation is that it would be viewed as a “manual” that is recognized as customary international law. Henry Deeb Gabriel’s statement on soft law offers encouragement:

[P]rinciples and restatements, have been widely used by courts and arbitrations as a basis for forging new legal rules as well as interpreting existing ones. In the common law world, particularly the United States, courts have long relied upon the various Restatements of the Law produced by the American Law Institute as a source of law. Moreover, arbitration tribunals, which are generally not bound by domestic choice of law restrictions, often adopt legal rules, such as the UNIDROIT Principles of International Commercial Law, because of the presumed neutrality of the rules.<sup>121</sup>

A comprehensive international sales law project recognizes that the CISG lacks the comprehensiveness found in domestic sales laws or codes. Because of the shortcomings of the CISG and the inspirational quest for a broader international code, a more robust use of the CISG as the beginning and not the end of the “uniform sales law project” has been neglected. This Article tries to move the focus on expanding the CISG from both the theoretical and practical levels to make a comprehensive sales law. The goal of such a project is not to reform or amend the CISG, because that is politically impractical. Its purpose is to use the CISG as a core

120. Bonell, *supra* note 94, at 3–4.

121. Henry Deeb Gabriel, *Universalism and Tradition: The Use of Non-Binding Principles in International Commercial Law*, in *LIBER MEMORIALIS PETAR ŠARČEVIĆ: UNIVERSALISM, TRADITION AND THE INDIVIDUAL* 471, 479 (Vesna Tomljenovi et al. eds., 2006).

and base document and develop a widely accepted body of customary international law to overcome its limited scope. The CISG, as the only uniform law that we have to work with for the foreseeable future, can be made better by analyzing and applying by analogy other laws including, domestic and international hard and soft laws.

## V. CONCLUSION

This Article travels through the levels of doctrinal analysis of the Convention on Contracts for the International Sales of Goods (CISG), as well as documenting its limited scope and its other shortcomings. The middle part of the Article moves to the level of theory by examining the theories of interpretation advanced by Karl Llewellyn and Ronald Dworkin. These theories are mined for insights on how best to close the internal gaps of the CISG. The third part of the Article proposes a new project—the development of a hard-soft law document that provides a single place for parties, lawyers, judges, and arbitrators to go for a comprehensive international sales law.<sup>122</sup>

---

122. A team of scholars, led by Ulrich Magnus, Reiner Schulze, André Jansen, and Larry A. DiMatteo, will convene a meeting (September 27–28, 2013) of a group of scholars to plan the undertaking of the project described in this Article.



