



## Harmonizing Values, Not Laws: The CISG and the Benefits of a Neo-Realist Perspective

by Peter J. Mazzacano\*

\* Peter J. Mazzacano is a Visiting Professor and the Director of the Legal Process Program at Osgoode Hall Law School, York University, in Toronto, Canada. With Prof. J. Walker, Peter co-coaches the Osgoode Vis Moot Team. He is the Founder and Editor of CISG Canada (<http://www.cisg.ca>), hosted at Osgoode Hall Law School, and Jr. Editor, UNILEX at the International Institute for the Unification of Private Law (UNIDROIT), Rome, Italy (<http://www.unilex.info>).

Nordic Journal of Commercial Law  
issue 2008#1

“Custom, not law, has been the fulcrum of commerce since the origins of exchange”.

Leon Trakman<sup>1</sup>

## I. Introduction

### 1. Legal Realism in the International Context

Legal Realism has been deemed as one of the most important jurisprudential movements in Western society during the twentieth century.<sup>2</sup> This group, which was by no means coherent, flourished particularly in the 1920s and 1930s at Yale and Columbia law schools, originated with such scholars as, Oliver Wendell Holmes, John Chipman, and Karl Llewellyn.<sup>3</sup> Although it has been thought that Realism is “dead”, having been put to rest by H.L.A. Hart’s derisive critique,<sup>4</sup> there has been renewed interest in the subject in recent years.<sup>5</sup> While it is difficult to speak of a single, comprehensive theory belonging to this group, certain unifying themes can be discerned from the writings of the Realists’, particularly those that concern rule-skepticism and the indeterminacy of law.<sup>6</sup> At the risk of simplifying the Legal Realist perspective, the

<sup>1</sup> Leon Trakman, *The Law Merchant: The Evolution of Commercial Law* (Littleton, Colo.: F.B. Rothman, 1983) at 7.

<sup>2</sup> Brian Leiter, “American Legal Realism” University of Texas Law, Public Law Research Paper No. 42 at 1 available at SSRN: <http://ssrn.com/abstract=339562>.

<sup>3</sup> Michael S. Green, “Legal Realism as a Theory of Law” (2004-05) 46 Wm. & Mary L. Rev. 1915 at 1917.

<sup>4</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) at chapter seven.

<sup>5</sup> See e.g. Green, *supra* note 3 at 1918, where he states, “only recently has the study of legal realism become halfway respectable in philosophical circles. A prominent example of the renewed interest in the realists is Brian Leiter’s defense of their theory of adjudication against Hart’s critique”. See also Leiter, *supra* note 2 at 1-2, who states that “one of the important tasks for Realists today is a philosophical reconstruction and defense of [their] views”.

<sup>6</sup> See e.g. *ibid.* at 1919 where Green states: “it is dangerous to speak of a theory held by the realists as a group, even when the group is limited to those most commonly agreed to be realists—Karl Llewellyn, Jerome Frank, Walter Wheeler Cook, Felix Cohen, Hessel Yntema, Herman Oliphant, Max Radin, Leon Green, and Joseph Hutcheson. It is still more dangerous when the theory is in the philosophy of law, given that the realists—Cohen excepted—did not have significant training in philosophy. Nevertheless, realism remains a subject of more than historical interest precisely because unifying themes can be found in the realists’ writings”. See also Brian Bix, *Jurisprudence: Theory and Context*, 3rd ed. (London: Sweet & Maxwell, 2003) at 177, who states, “[a]mong those writers who described themselves (or who were described by others) as “realists”, there was little by way of agreed views, values, subject-matter, or methodology. It has become commonplace to note that it approaches distortion even to refer to ‘the legal realists’, as though it were a coherent movement (one commentator writing recently went so far as to refer to legal realism as a ‘feel’ or ‘mood’). Thus, reference to Realist “theory” in this paper refers more generally to common *themes* shared by members of this group.

conventional view holds that Legal Realism is a theory<sup>7</sup> that law is based, not on formal rules or principles, but instead on judicial decisions that originate from social interests and public policy. In other words, beneath a veneer of scientific and deductive reasoning of “mechanical jurisprudence”<sup>8</sup> are legal rules and concepts—that is, legal doctrine—that are often indeterminate, and these are rarely as neutral as they appear. In the words of Hart, the Realists’ theory of law holds the view that “talk of rules is a myth, cloaking the truth that law consists simply of the decisions of courts and the prediction of them”.<sup>9</sup>

This Realist theory of law is usually analyzed solely within the context of domestic case law and jurisprudence. But how does the Realist theory of law apply in a global setting, that is, within the context of international law? Particularly, would the Realists have us believe that efforts to create uniform national laws through international treaties or conventions are subject to the same degree of uncertainty as domestic rule-making? In other words, can international conventions be as indeterminate as domestic legislation? Considering that the objective of uniform law conventions is to standardize judicial rule-making across jurisdictions appears to directly challenge the Realist notion that such laws are too indeterminate to be a significant influence on, or predictor of, a judges’ decision, how do we explain the development of *functional* uniformity<sup>10</sup> in legal doctrine related to an international convention?

### 1.1 *Legal Realism, the CISG, and the Problem of Formalism*

The open-textured nature of the United Nations *Convention on Contracts for the International Sale of Goods*<sup>11</sup> (“CISG” or “Convention”), combined with its attempt to strike a balance among different legal systems, and a variety of competing national interests, provides a compelling opportunity to examine the Legal Realist<sup>12</sup> theory of law within the context of the attempt to create a uniform sales law. Within this setting, Legal Realism would suggest that beneath the black letter text of the CISG are legal rules, concepts, and reasoning that are indeterminate.<sup>13</sup>

<sup>7</sup> The Legal Realists did not have a uniform or coherent “theory” *per se*, but rather had in common certain “themes”. See Green and Bix, *ibid.*

<sup>8</sup> The term “mechanical jurisprudence” was coined by Roscoe Pound in “The Path of the Law” (1908) 8 Colum. L. Rev. 605 at 614.

<sup>9</sup> Hart, *supra* note 4 at 136.

<sup>10</sup> “Functional uniformity” must be differentiated from “absolute” or “strict uniformity.” It is closer to the concept of “harmonization” in that the goal is to lessen the legal impediments to international trade.

<sup>11</sup> *United Nations Convention on Contracts for the International Sale of Goods*, April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671.

<sup>12</sup> The definition of Legal Realism as used in this paper is broader than this traditional view, and incorporates the notion that as a corollary to indeterminacy and rule-skepticism, the Realists’ are striving for near- perfection with laws, in particular, uniform laws such as the CISG.

<sup>13</sup> See Section 1, below.

More specifically, the Realist perspective would suggest that the Convention is too ambiguous, or is inherently flawed, and is of little practical use as a uniform law in the international realm.<sup>14</sup> This is primarily due to the flaws of Legal Formalism<sup>15</sup> embedded in the CISG. Formalism holds that law is a set of rules and principles independent of other political or social institutions. That is, the law, and judicial decisions, can be deduced from general concepts or rules with no reference to real-world conditions or consequences. Law can be approached as a science, where logically consistent principles and doctrines can be discovered in case law. However, extrapolating from the Realist approach to the Convention suggests that the CISG will ultimately fail to achieve uniformity in international sales law. In this view, uniform judicial rule-making across jurisdictions is too unpredictable to be of practical use.

## 1.2 The CISG and the Neo-Realist Solution

Like frustrated Idealists,<sup>16</sup> the Legal Realists have been searching for the perfect uniform law. This quest is misguided. While it might be possible to conclude that the unification of international commercial law is technically impossible, it is equally unrealistic to expect perfect uniformity and predictability in the application of case law involving the CISG—or for that matter, any other statute. What uniform laws in general, and the CISG in particular, provide for is international acceptance of similar norms, and a common medium for communication—a *lingua franca*.<sup>17</sup> This is a form of international commercial law that is more helpful and predictable than the present set of competing national systems and interests. Thus, what is required is a “Neo-Realist” approach to the CISG. This identifies the values and norms underlying the technical rules of international sale of goods law. From this perspective, the CISG would be an attempt to harmonize not just rules, but more importantly, the values about the conduct of international sales transactions.

This paper will argue that the rule-scepticism embodied in the Realist perspective has missed the point: strict uniformity and predictability in applying the CISG across national boundaries will never be achieved. But perfection was never the goal of the CISG. Rather, the CISG seeks the objective of functional or relative uniformity in both the interpretation and application of the CISG across a common set of commercial norms. In other words, the CISG is an attempt to harmonize not so much the *law* of international sales transactions, but more precisely, the norms and values regarding the conduct of international trade in goods. In this

<sup>14</sup> *Ibid.*

<sup>15</sup> Critics labeled Legal Formalism a “mechanical jurisprudence”. Legal Formalism was espoused by a group of academics, including Christopher Columbus Langdell and Lon Fuller.

<sup>16</sup> The term “frustrated Idealist” is borrowed from Edward J. Bloustein, “Logic and Realism: The Realist As A Frustrated Idealist” (1964-65) 50 Cornell L. Q. 24.

<sup>17</sup> The term *lingua franca* appears to have been coined by John Honnold, in “The Sales Convention in Action—Uniform International Words: Uniform Application?” (1988) 8 J.L. & Com. 207.

way, the CISG is the embodiment and expression of international mercantile customs, or a new *lex mercatoria*.<sup>18</sup> For this reason, Neo-Realism requires an abandonment of the quest for strict uniformity in international sales law. In its place should be a new conception with a focus on the harmonization of values and norms in place of the unfruitful search for a predictable, homogeneous legal text for the international sale of goods.

The first part of this paper will introduce a Realist critique of the CISG. It will survey their attack on the CISG as an incomplete, unpredictable, and systematically imperfect set of rules. The second part of the paper will illustrate how the Realists are misguided by failing to consider the importance of the commercial customs of trade usages, including the development of the *lex mercatoria*, as norms underlying the technical rules of the CISG. In the third section, it will be shown how the CISG incorporates a set of norms for international merchants. It is this system of organized ideological values which provides for a new, Neo-Realist perspective on the CISG. Finally, part four will provide an alternative theoretical framework to the Realist approach to the CISG. It will argue that a Neo-Realist perspective on the Convention is required. Like the *lex mercatoria* and the incorporation of mercantile customs, this alternate approach must focus on the harmonization of norms and values in international commercial transactions, at the expense of a rigid set of rules that strive for predictability and perfection.

## II. The Legal Realist Critique of the CISG

### 1. The Problematic Quest for Uniformity

#### 1.1 *Outward Uniformity v. Uniform Application*

A broad issue that is often raised in academic commentary on the CISG is whether the Convention's goal of uniformity is achievable. Surrounding this issue there has developed a lively scholarly debate on the relative success, or failure, of the CISG to promote uniformity in international sales law. This debate has frequently been spearheaded by Legal Realists. Generally, this criticism appeared to be particularly strong in the early years of the Convention. For example, long before the CISG became effective, R.J.C. Munday notes, in words that appear to foretell the debate on the quest for uniformity, that "even when outward uniformity [is] achieved [...] uniform application of the agreed rules [is] by no means guaranteed, as in practice different countries almost inevitably [...] put different interpretations upon the same

<sup>18</sup> On the new *lex mercatoria* see Bernardo M. Cremades & Steven L. Plehn, "The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions" (1983-1984) B.U. Int'l L.J. 317; A. Claire Cutler, *Private Power and Global Authority* (Cambridge: Cambridge University Press, 2003); Louise Hertwig Hayes, "A Modern Lex Mercatoria: Political Rhetoric or Substantive Progress?" (1976-1977) 3 Brook. J. Int'l L. 210; Imtaz M. Sattar, "The UNIDROIT Principles of International Commercial Contracts and the Vienna Sales Convention: Competing or Completing 'Lex Mercatoria'?" (1999) 4 Int'l Trade & Bus. L. Ann. 13.

enacted words”.<sup>19</sup> Munday is unconvinced of the ability of the CISG to make a significant impact on uniform international sales law. In this respect, he shares the rule-skepticism of the Realists. As Munday foreshadows, much of the Realist critique of the CISG surrounds the wording within the Convention itself. Words are often ambiguous, and this can sometimes lead to indeterminate results. However, as Duncan Kennedy notes, some indeterminacy is inherent in any system of rules.<sup>20</sup>

Some commentators on the CISG are not Legal Realists *per se*, but rather take a “realistic” approach to the Convention. In this view, because law is a human creation, it is subject to human foibles, frailties, and imperfections. Arthur Rosett takes this approach. He initially views the CISG as a product, not only as a “monumental achievement” for uniform law, but also as a document that makes a positive political statement, benefiting humankind by “giving concrete form to hopes for one peaceful family of nations living under a compatible legal order”.<sup>21</sup> Rosett suggests that the CISG may be a beacon of hope for the unification effort.<sup>22</sup> He tells us that it is the product of more than 50 years of international negotiation, “which has produced a document unanimously approved by delegations representing sixty-two national legal systems”.<sup>23</sup> Since its adoption, the CISG has also received “the approval of groups of lawyers all over the world. Little opposition has arisen to its ratification by the United States, and from all indications the reaction in other nations also has been very positive”.<sup>24</sup>

Rosett’s optimistic words quickly dissipate. Despite the lofty goals of the CISG, “the impressive talent of the drafters, the long period of gestation, and the universal acclaim with which the Convention has been met”, Rosett maintains that the fundamental strategy of attempting to create an exclusive and comprehensive statement of international sales law is poorly conceived. Like the Realist approach to doctrine, his argument is entirely pragmatic: one must uncover the political content behind the text of the convention. As international sales law *harmonization* and international sales law *codification* are not identical, the goal of harmonizing the legal treatment of international sales transactions is not advanced by the adoption of the CISG.<sup>25</sup>

<sup>19</sup> R.J.C. Munday, “The Uniform Interpretation of International Conventions”, (1978) 27 Int’l & Comp. L.Q. 450 at 450.

<sup>20</sup> Duncan Kennedy, “Form and Substance in Private Law Adjudication”, (1976) 89 Harv. L. Rev. 1685 at 1701. Kennedy further notes that the typical historical pattern of legal development involves the growth of indeterminacy in what begins as a determinate body of rules. However, evidence of the convergence of CISG jurisprudence would contradict Kennedy’s assertion.

<sup>21</sup> Arthur Rosett, “Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods” (1984) 45 Ohio St. L.J. 265 at 265-266.

<sup>22</sup> *Ibid.* at 267.

<sup>23</sup> *Ibid.* at 265.

<sup>24</sup> *Ibid.* at 266.

<sup>25</sup> *Ibid.* at 267.

In the fifty year period of negotiations leading to the CISG, Rosett believes that the nature of the problem had changed. In the early years of negotiations, it seemed a worthy idea to promote trade through a unifying codification of national sales laws. During the intervening period economic integration proceeded rapidly and supported a number of important harmonization efforts. These reduced the substantive anomalies that concerned the early proponents of the CISG. The need for a unified doctrinal statement of contract principles, thus, became less important than it appeared at the outset. As Rosett notes, “[t]his diminished urgency is reflected in the slightly outdated character of some of the issues that most concerned the drafters”.<sup>26</sup> For example, the CISG does not deal with many contemporary issues of commercial law that are considered important in the U.S. and abroad. For instance, it does not directly address the issues of product liability that are related to other doctrinal rules announced by the Convention.<sup>27</sup> Rosett’s list of imperfections with the CISG continues. Typifying the Realist perspective, Rosett focuses on the indeterminate legal rules and concepts embodied within the text of the CISG. In conclusion, he believes the Convention provides “no unifying guidance on the host of issues”, and predicts that some of the ambiguous provisions within the CISG will continue to divide scholars, including those academics who participated in the drafting process.<sup>28</sup>

## 1.2 *Uniform Words or a Lingua Franca?*

As John Honnold notes, however, uniform words in themselves will not guarantee uniform results.<sup>29</sup> He additionally concedes that the Legal Realists are “dead right” with their perspective on the quest for uniform laws that are designed to cross national borders.<sup>30</sup> As legal practitioners are required to use unreliable and imperfect tools—words—they will never be able to craft the perfect law, treaty, or convention. He notes that even a simple phrase, such as “Home Sweet Home”, presents the French translator with a challenge.<sup>31</sup> At the international level these difficulties with words are raised to a higher level. For example, common law legal concepts, such as “consideration”, “trust”, and “tort”, are almost impossible to translate in civil law jurisdictions. Honnold is not a critic of the CISG, but he provides a valuable survey of the difficulties and criticisms that are encountered in quests for the international unification of law. Honnold remarks that, like confirmed bachelors or spinsters who have built their lives in search of the perfect spouse, the Legal Realists have been searching for the perfect uniform

<sup>26</sup> *Ibid.* at 302.

<sup>27</sup> *Ibid.* at 303.

<sup>28</sup> *Ibid.*

<sup>29</sup> Honnold, *supra* note 17 at 207.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

law.<sup>32</sup> This is an impossible quest. He states that he could simply conclude “[a]s our sad-faced [R]ealists predicted, international unification is impossible”.<sup>33</sup> Instead, he ends on an optimistic note: “We cannot expect perfect uniformity in applying the [C]onvention—or for that matter, any other statute”.<sup>34</sup> What uniform laws in general, and the CISG in particular, provide for is international acceptance of the same rules—an expression of international mercantile customs and shared values—and a common medium for communication—a *lingua franca*.

### 1.3 The Problem with Open-Textured Wording

Words that are unique to specific jurisdictions are charged with legal meaning. To address this problem the CISG requires the displacement of domestic legal concepts. This explains why the CISG uses generic or neutral words that describe certain events, results, or practices that are typical in an international transaction, and not technically charged legal terms specific to a legal system. This is perhaps why Honnold dubbed the Convention the new *lingua franca*.<sup>35</sup> However, Amy Kastely, in the Realist tradition, is critical of the attempt at a new *lingua franca*, and argues that because of the open-textured wording within the CISG, there is a very real possibility that it will fail. Of course, the Legal Realists were never concerned with the relative success or failure of a convention or piece of legislation. Llewellyn even claimed that the Realists did not have a normative program.<sup>36</sup> The Realist would focus on the open-textured nature of the law to demonstrate how a judge, for example, would be able to justify any result he/she desired in any particular case. In other words, the open-textured nature of the CISG is particularly helpful in allowing a competent adjudicator to make a decision in favour of either side in any given lawsuit.<sup>37</sup>

Utilizing rhetorical analysis on the text of the CISG, Kastely uncovers many of the contextual problems and weaknesses within the Convention. Such an approach is typical of Realist attacks

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.* Emphasis in the original.

<sup>34</sup> *Ibid.* at 212.

<sup>35</sup> *Ibid.*

<sup>36</sup> Allen R. Kamp, “Between-The-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context” (1995-96) 59 Alb. L. Rev. 325 at 327. Kamp is skeptical of Llewellyn’s statement, particularly in light of the fact that many Realists accepted positions under Franklin D. Roosevelt’s administration.

<sup>37</sup> Duncan Kennedy provides an example of how an apparently determinate legal rule can be, in fact, “open-textured” in that it allows a judge to square of a number of factors: “legal directives that looked general and formally realizable were in fact indeterminate. Take, for example, the ‘rule’ that a contract will be rescinded for mutual mistake going to the ‘substance’ or ‘essence’ of the transaction, but not for mistakes as to a ‘mere quality or accident’, even though the quality or accident in question was the whole reason for the transaction. We have come to see legal directives of this kind as invitations to *sub rosa* balancing of the equities. Such covert standards may generate more uncertainty than would a frank avowal that the judge is allocating a loss by reference to an open textured notion of good faith and fair dealing”. Kennedy, *supra* note 20 at 1700.



on Formalism. She states: “[t]o unify the law among nations means to subject people around the world to a single set of rules and principles and to have them understand and conform to these rules and principles as they would to the laws of their own communities”.<sup>38</sup> The problem, as Kasteley understands it, is that while “human communities are natural, organic, or inevitable [...] [t]he community created and promoted by the Convention [...] is thoroughly consensual and artificial”.<sup>39</sup> This artificial community is precarious, and “vulnerable to the whim of human choice and self-interest”.<sup>40</sup> The bonds keeping it together are no stronger than the paper on which the Convention is printed. Kasteley, thus, predicts the failure of the CISG, even though such a concern is not typical of the Legal Realists. She concludes by stating the possibility that it will “only be ratified by a few states or in only a limited part of the world”.<sup>41</sup> Even if the CISG is widely accepted, “it is possible that the system of unified law will be short-lived, with states denouncing the Convention after a trial period, or by domestic courts interpreting the Convention in mechanical or isolated ways”.<sup>42</sup> Realists have often critiqued the “mechanical” jurisprudence and “closed” normative system of Formalism, but Formalism, like the Realist approach, is of little assistance when assessing the relative success of the CISG as a uniform international law. However, while her prediction has not proved true, Kastely is correct to the extent that the CISG, like most—if not all—laws, is not a perfect legal text.

#### 1.4 *Problems of Interpretation*

Interpretational problems will always arise with uniform laws. Realist critics of the CISG have often focused on this problem, without fully acknowledging that national laws also face problems of interpretation. Fortunately, the interpretational challenge was recognized during the drafting of the Convention. As Gyula Eörsi notes, for example, unlike many other conventions, the CISG contains two articles (Arts. 7(1) and 8) specifically devoted to ensuring that the Convention is interpreted in a uniform manner.<sup>43</sup> Article 7 in particular specifically urges tribunals and courts not to make recourse to domestic law unless specifically directed to do so by the CISG itself.

Acknowledging that because language frequently tends to be vague, ambiguous, or provides multiple meanings, Eörsi predicts the problems the CISG might encounter: “It could be argued

<sup>38</sup> Amy H. Kastely, “Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention” (1988) 8 *Nw. J. Int’l L. & Bus.* 574.

<sup>39</sup> *Ibid.* at 588.

<sup>40</sup> *Ibid.* at 589.

<sup>41</sup> *Ibid.* at 621.

<sup>42</sup> *Ibid.*

<sup>43</sup> Gyula Eörsi, “General Provisions”, in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, Galston & Smit eds., 1984, 2-1 available at <http://cisgw3.law.pace.edu/cisg/biblio/eorsi1.html>.

that the [interpretive] provisions of Article 7(1) [of the CISG] are but pious wishes: the paragraph is necessarily vague and therefore open to surprising results”.<sup>44</sup> Eörsi was likely ahead of her time in predicting that the interpretive articles within the CISG would play an important role in its ultimate success, particularly with regard to the unification of international sales law. She states: “the elements of regard to the international character of the Convention and uniformity in its application were well chosen. The first, as we have seen, was devised to check the homeward trend, and the second is an admonition to follow precedents on the international plane”.<sup>45</sup>

### III. The Lex Mercatoria and the Evolution of Commercial Norms, Trade Usages, and Customs

#### 1. The Legal Realist and Folkways

Karl Llewellyn and his contemporaries, collectively referred to as Legal Realists, were a decentralized group of reformist academics who were generally influenced by the social sciences, particularly anthropology and economics.<sup>46</sup> The connection between the Realist’s and anthropology is particularly interesting. Many of the Realists sought to apply it to the study of law.<sup>47</sup> More specifically, the Realists wanted to study the law objectively, in the same manner that an anthropologist might study the activities of a tribe. This approach is based on the assumption that modern society functions in similar ways as traditional societies. While this simplification is questionable, the Realists have astutely contemplated the parallel characteristics between the practices of tribes and the trade practices of commercial merchants. Llewellyn, for example, felt that even the modern merchant followed a cohesive body of traditions and trade practices in the same manner that tribes would follow certain folkways.<sup>48</sup> In this respect, the Realists have correctly identified the importance of mercantile customs in contemporary commerce. However, their fixation on the indeterminate nature of the law has blinded the Realists from seeing the relative success that certain uniform laws, such as the CISG, have enjoyed.

To understand the importance of the norms and values in international commerce—as opposed to a rigid legal code—the evolution of the function and customs of trade usages and practices, within the context of the CISG, must be considered. This development illustrates the

<sup>44</sup> *Ibid.* at 2-5.

<sup>45</sup> *Ibid.* at 2-5.

<sup>46</sup> Kamp, *supra* note 36 at 327.

<sup>47</sup> *Ibid.* at 354.

<sup>48</sup> *Ibid.* at 355.

importance of a contextual interpretative approach in commercial relationships, which are frequently employed by international merchants. That Llewellyn and his contemporaries showed interest in the “folkways” of commercial merchants is particularly interesting, considering that later Realists would reject an interpretative and contextual approach to the trade customs and rules embodied in the modern *lex mercatoria*,<sup>49</sup> the CISG. The focus on trade usages and practices demonstrates how these values have superseded the strict legal provisions of a uniform law convention. The history of these commercial norms can be traced back to the ancient *lex mercatoria* and beyond.<sup>50</sup>

### 1.1 The Medieval *Lex Mercatoria*

The term *lex mercatoria*, which is literally translated into the English language as “law merchant”, or “mercantile law”, has been described as “a uniform system of law to regulate international commercial transactions, avoiding the vagaries of differing national systems”.<sup>51</sup> At the core of the *lex mercatoria* are commercial customs, which materialize in the form of trade usages and practices. As Julian Lew notes, “[t]his system of law [the *lex mercatoria*] comprises the rules which have been developed to regulate and facilitate international trade relations and the customs and practices which have attained universal (or at least very extensive) recognition in international trade”.<sup>52</sup>

Thus, the quest for predictability and uniformity in the rules of international trade is not a modern phenomenon. Indeed, it is argued that the roots of the CISG can be traced back more than 800 years to the beginning of the eleventh century when medieval Europe experienced a commercial resurgence that required a need for a special law to govern its commercial activities.<sup>53</sup> The earliest known version, entitled *Lex Mercatoria*, has been dated *circa* 1280.<sup>54</sup> This legal code is inextricably tied to the marketplace, as the first sentence in the treatise notes: “Mercantile law is thought to come from the market, and thus we first need to know where

<sup>49</sup> On the new or modern *lex mercatoria*, see note 18, *supra*.

<sup>50</sup> The *lex mercatoria* is also known as the Law Merchant. In fact, the Latin and English terms are often used interchangeably.

<sup>51</sup> Alan Redfern & Martin Hunter, *Law & Practice of International Commercial Arbitration*, 2<sup>nd</sup> ed., (London: Sweet & Maxwell, 1991) at 117.

<sup>52</sup> Julian D.M. Lew, *Applicable Law in International Commercial Arbitration* (Dobbs Ferry, N.Y.: Oceana Publications, 1978) at 436.

<sup>53</sup> See Errol P. Mendes, “The U.N. Sales Convention & U.S.-Canada Transactions; Enticing the World’s Largest Trading Bloc to Do Business Under a Global Sales Law” (1988) 8 J.L. & Com. 109 available at <http://cisgw3.law.pace.edu/cisg/biblio/mendes.html>.

<sup>54</sup> Mary Elizabeth Basile *et al.*, eds. & trans., *Lex Mercatoria and Legal Pluralism: A Late Thirteenth Century Treatise and its Afterlife* (Cambridge: The Ames Foundation, 1998) at 107. This treatise, written in Latin, formed part of a collection of material compiled by William de Colford, the recorder of Bristol in the 1340s. It is sometimes also referred to as *The Little Red Book of Bristol*.

markets are held from which such laws derive”.<sup>55</sup> However, it is not made explicit in the English medieval record until the fifteenth century that the *lex mercatoria* is considered to be positive law in the international community. A 1473 case involving the seizure of goods from a foreign merchant records the notion that the *lex mercatoria* is transnational in its application.<sup>56</sup> The Chancellor of the Star Chamber asserted that foreign merchants must not be judged according to English law, but rather according to “the law of nature which by some is called the law merchant, which is law universal throughout the world”.<sup>57</sup>

Gerard Malynes, writing in 1622, traces the existence of uniform merchant customs back to ancient Greek and biblical times, “[s]o that it plainly appeareth, that the Law Merchant, may well be as ancient as any humane Law, and more ancient than any written Law”.<sup>58</sup> Its precursor may have also been the Sea Law of Rhodes<sup>59</sup> from ancient Greece, and the Roman *ius gentium*, which was the body of law that governed trade between foreigners and Roman citizens.<sup>60</sup> However, during Malynes’ time, the *lex mercatoria* had gained such a foothold in the commercial routes of Europe and the Mediterranean that he could declare, “[f]or albeit that the government of the said kingdoms and common-weales doth differ one from another: 1 In the making of lawes and ordinances for their owne government [...] yet the *Law-Merchant* hath always bene found *semper eadem*, that is, constant and permanent without abrogation, according to her most auncient customes, concurring with the law of nations in all countries”.<sup>61</sup> Indeed, one of Malynes’ themes throughout his work is that ancient customs grew into a unique body of transnational law, and this law deals most effectively with merchants’ disputes.

## 1.2 The Development of Merchant Customs

With the Middle Ages came the rise of independent city-states, flourishing seaports, town markets, and boroughs which led to the flow of goods across new national borders.<sup>62</sup> The merchants not only brought goods across borders, they also transported their unique customs

<sup>55</sup> *Ibid.* at Ch. 1, p. 1.

<sup>56</sup> *Ibid.* at 128.

<sup>57</sup> *Ibid.* at 128-129. The case is *Anon. v. Sheriff of London (The Carrier’s Case)*, YB Eas. 13 Edw. 4, fol. 9, pl. 5, in *Exchequer Chamber Cases*, 2:32.

<sup>58</sup> Gerard Malynes, *The Merchant’s Almanac of 1622 or Lex Mercatoria, the Ancient Law-Merchant* (Metheglin Press ed., 1996) (1622). Malynes provides numerous references to ancient commercial laws and customs as being uniform among all trading states, from the time of Solon in ancient Greece to the publication of his *Lex Mercatoria*. He also refers to the trade endeavors of Jacob, Joseph, and Moses, as well as Minos, Lycurgus, Phalcas, and others.

<sup>59</sup> Cutler, *supra* note 18 at 113.

<sup>60</sup> Ana Mercedes Lopez Rodriguez, *Lex Mercatoria*, RETTID (2002) 46 available at <http://www.rettid.dk/artikler/20020046.pdf#search='lex%20mercatoria>.

<sup>61</sup> Malynes, *supra* note 58 at 5 (grammar, spelling, and italics in the original).

<sup>62</sup> Mendes, *supra* note 53.

and practices into foreign markets. The impetus to create or crystallize rules for merchants came from a “desire to overcome the fragmentary and obsolete rules of feudal and Roman law”, which were unsuited to the needs of international commerce.<sup>63</sup> Thus, trading centers began to “reduce local practices into regulatory codes” and the laws of particular towns eventually “grew into dominant codes of custom” with an international flavor.<sup>64</sup> Stimulated by the maritime trade of burgeoning seaport towns throughout Europe, the *lex mercatoria* soon acquired its “cosmopolitan character and reflected [a retreat] from local law to a universal system of law” that transcended sovereigns and national boundaries.<sup>65</sup> The end result was a new legal order, free from burdensome local laws and local legislators.<sup>66</sup> In other words, the *lex mercatoria* became not only an autonomous body of commercial law, but also the embodiment of commercial practices as reflected in merchant customs.

A unique feature of the *lex mercatoria* was that it incorporated the customs of commerce, trade fairs, markets, and maritime customs relating to trade into a single law.<sup>67</sup> It also had additional features, some of which were not unlike the principles adopted by its modern incarnation, the CISG: it was a transnational law; cross-border disputes could be administered by the market tribunals of various trade centers, rather than by professional judges and state courts; justice was quick and informal; and the law stressed equity and fairness, hence, decisions were made on the basis of *ex aequo et bono*.<sup>68</sup> These features speak in favour of the importance of norms and values regarding merchant conduct in trade, and override the importance of adherence to a rigid code of law to govern international sales transactions. This point appears to be lost on the Legal Realists.

### 1.3 The Nationalization of the Lex Mercatoria

The *lex mercatoria* governed international commerce for an extremely long period, until the early seventeenth century. At this point the autonomous mercantile courts began to decline in relative importance and the *lex mercatoria* began to merge with common law.<sup>69</sup> The reason for this wane is attributed to the rising influence of nationalism and the quest for state sovereignty.<sup>70</sup> The pace accelerated under the influence of Sir Edward Coke, who initiated a comprehensive common law

<sup>63</sup> Rodriguez, *supra* note 60.

<sup>64</sup> Gesa Baron, *Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?* at <http://www.cisg.law.pace.edu/cisg/biblio/baron.html>.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> Louise Hertwig Hayes, “A Modern Lex Mercatoria: Political Rhetoric or Substantive Progress?” (1976-1977) 3 *Brook. J. Int’l L.* 210 at 212-214.

<sup>68</sup> Baron, *supra* note 64.

<sup>69</sup> *Ibid.*

<sup>70</sup> See e.g. Rodriguez, *supra* note 60 at 46-47.

for England and the British Empire.<sup>71</sup> “During this period, the common law courts were given the power to override any decision[s] in the mercantile courts”.<sup>72</sup> Thus, in the case of a dispute, merchants would initiate an action with the common law courts and bypass the mercantile courts altogether. Eventually, the mercantile courts became superfluous and fell into disuse. Those that remained were eventually abolished by national laws.<sup>73</sup>

“The customs and usages of the merchants, while still relevant, were deemed not binding in the common law courts”.<sup>74</sup> Instead, “they were treated as ordinary questions of fact, which had to be proved [in each] case to the satisfaction of twelve [civilian] jurors”.<sup>75</sup> With the blending of the *lex mercatoria* with the peculiarities of national law, the former began to lose much of its uniform and cosmopolitan character. It likely would have faded into oblivion had it not been recognized in the mid-eighteenth century by Lord Mansfield, the Chief Justice of the King’s Bench. In the famous case of *Pillans v. Mierop*,<sup>76</sup> Mansfield held that the rules of the *lex mercatoria* were questions of law to be decided by the courts, not issues of fact to be proved by the disputing parties.<sup>77</sup> With this ruling, the *lex mercatoria* became “an integral part of the common law”.<sup>78</sup>

The nationalization of mercantile law, including international sales law, occurred in the nineteenth century. During this period, states began to codify commercial common law rules into national legislation. They decided to take full control over international trade and developed new laws to regulate all aspects of economic relations between commercial parties.<sup>79</sup> Furthermore, disputes between domestic and foreign parties were to be resolved in state courts by referring to private international law.<sup>80</sup> The emergence of these national laws, and the exclusive state court jurisdiction over commercial disputes, marked the demise of the ancient *lex mercatoria*. By the end of this era, it had dissolved into an array of domestic legal regimes. With nationalization and codification, a universal, developing, cosmopolitan, commercial law ceased to exist.<sup>81</sup>

<sup>71</sup> Mendes, *supra* note 53.

<sup>72</sup> *Ibid.*

<sup>73</sup> See *ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Pillans v. Mierop*, 3 Burr. 1663, 97 E.R. 1035 (1765).

<sup>77</sup> Baron, *supra* note 64.

<sup>78</sup> *Ibid.*

<sup>79</sup> Imtyaz M. Sattar, “The UNIDROIT Principles of International Commercial Contracts and the Vienna Sales Convention: Competing or Completing ‘Lex Mercatoria?’”, (1999) 4 Int’l Trade & Bus. L. Ann. 13 at 14.

<sup>80</sup> Friedrich K. Juenger, “The Lex Mercatoria and Private International Law”, (2000) 60 La. L. Rev. 1133 at 1136.

<sup>81</sup> Baron, *supra* note 64.

#### 1.4 *Disenchantment with National Commercial Laws*

But by the 1900s, there were already signs that the international trade community felt unduly restricted by the array of national legal systems governing their cross-border transactions. As W. Mitchell remarks, “whenever the private law is splintered into many jurisdictional fragments, the need for uniformity shows up most strongly in the field of commercial law”.<sup>82</sup> The complexity of the rules of private international law, and the obsolete character of domestic laws, failed to satisfy the business community’s need for simplicity and predictability in cross-border trade. In particular, conflict of law rules often produced results that appeared arbitrary and impractical. It also became recognized that national laws were primarily enacted to govern domestic transactions and often failed to address the unique requirements of international transactions.<sup>83</sup> The end result was the impairment of global trade. As Lord Justice Kennedy wrote in 1909:

The certainty of enormous gain to civilised [sic] mankind from the unification of law needs no exposition. Conceive the security and the peace of mind of the shipowner [sic], the banker, or the merchant who knows that in regard to his transactions in a foreign country the law of contract, of moveable property, and of civil wrongs is practically identical with that of his own country.<sup>84</sup>

States soon became aware of the negative impact on international commerce by a world divided into so many legal systems. Non-governmental institutions, such as the International Chamber of Commerce (“ICC”) and its International Court of Arbitration were established to address some of the flaws inherent in the national regulation of global commerce.<sup>85</sup> In 1926, the International Institute for the Unification of Private Law (“UNIDROIT”), an independent intergovernmental organization, was also founded as an auxiliary organ of the League of Nations. Its objective was to find methods for modernizing and harmonizing private international law between states or groups of states.<sup>86</sup> Following the demise of the League, UNIDROIT was re-established in 1940 and continues to work towards preparation of modern, harmonized uniform rules of private law.<sup>87</sup>

<sup>82</sup> Mendes, *supra* note 53, citing W. Mitchell, *Essay on the Early History of the Law Merchant* (1st ed. 1969) at 90.

<sup>83</sup> See e.g. Rodriguez, *supra* note 60 at 51.

<sup>84</sup> Lord Justice Kennedy, “The Unification of Law”, (1909) 10 J. Soc’y of Comp. Legis. 21, 214-15 reprinted in Kastely, *supra* note 38.

<sup>85</sup> International Chamber of Commerce, Merchants of Peace, The ICC Story available at <http://www.iccwbo.org/id6167/index.html>.

<sup>86</sup> International Institute for the Unification of Private Law (UNIDROIT), About UNIDROIT, <http://www.unidroit.org/english/presentation/main.htm>.

<sup>87</sup> *See ibid.*

### 1.5 The Rise of the New *Lex Mercatoria*

The establishment of the ICC and UNIDROIT reflected the renewed interest in—and rediscovery of—the historical, cosmopolitan character of commercial law and the desire on the part of the business community to free itself from the restrictions of national law.<sup>88</sup> States began to address this dissatisfaction by introducing international conventions and model laws in the effort to harmonize private international law across borders.<sup>89</sup> Considering the various economic, social, political, and legal systems of numerous participating states, the process was—and continues to be—difficult and time-consuming. However, considerable progress has been made, especially in the fields of arbitration, factoring, leasing, letters of credit, sale of goods, and contracts. In the 1960s, academics also began to question the effectiveness of national law in international transactions, and they also noted the revitalization of the *lex mercatoria*.<sup>90</sup>

As Ana Rodriguez notes, “[j]ust as the medieval merchants overcame feudal law, present time traders were adopting alternative solutions to avoid the application of national law to their transactions”.<sup>91</sup> With the use of standardized contract clauses, self-governing contracts, trade term usages, and recourse to international commercial arbitration, merchants began to introduce their own regulatory regime, which operated autonomously, as an addendum of national law.<sup>92</sup> Indeed, some academics have suggested that the new law merchant is simply denationalized law.<sup>93</sup> This development has since become known as the new *lex mercatoria*.<sup>94</sup> It is within the context of this dissatisfaction with national legal regimes, and the renaissance of the *lex mercatoria*, that the CISG came into being.<sup>95</sup>

<sup>88</sup> Mendes, *supra* note 53.

<sup>89</sup> See *ibid.*

<sup>90</sup> Rodriguez, *supra* note 60 at 47.

<sup>91</sup> *Ibid.*

<sup>92</sup> See *ibid.*

<sup>93</sup> See e.g. Barton S. Selden, “*Lex Mercatoria* in European and U.S. Trade Practice: Time to Take a Closer Look” (1995) 2 Ann. Surv. Int’l & Comp. L. 111. Barton provides an interesting contemporary example of denationalized (or internationalized) law. He notes a remarkable clause in the agreement to construct the English Channel Tunnel between Eurotunnel (the owner and operator) and Transmanche Link (the group of English and French construction companies). The clause provides that the agreement shall “be governed by and interpreted in accordance with the principles common to both English law and French law, and in the absence of such common principles by such general principles of international trade law as have been applied by national and international tribunals”. Selden, *ibid.* at 116.

<sup>94</sup> On the new *lex mercatoria* see note 18, *supra*.

<sup>95</sup> John Felemegas, “The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation”, (2001-2002) Pace Rev. of CISG 115, 130-140. See also Bernardo M. Cremades & Steven L. Plehn, “The New *Lex Mercatoria* and the Harmonization of the Laws of International Commercial Transactions” (1983-1984) B.U. Int’l L.J. 317 at 319-323.



Berthold Goldman in the 1960s, and Lord Mustill in the 1980s, spearheaded the modern revitalization of the *lex mercatoria*.<sup>96</sup> This movement ultimately led to the creation of the CISG and related uniform conventions, such as the *UNCITRAL Model Law on International Commercial Arbitration*,<sup>97</sup> and the *UNIDROIT Principles of International Commercial Contracts*,<sup>98</sup> to name a few. Lord Mustill analyzed the principles of the *lex mercatoria* and defined this body of law and custom as follows:

In the first place, the *lex mercatoria* is ‘anational.’ This concept has two facets. First, the rules governing an international commercial contract are not, at least in the absence of an express choice of law, directly derived from any one national body of substantive law. Second, the rules of the *lex mercatoria* have a normative value which is independent of any one legal system. The *lex mercatoria* constitutes an autonomous legal order.<sup>99</sup>

The *lex mercatoria* is, thus, a set of principles and norms from which merchants, courts, and arbitral panels can seek guidance to settle disputes. A difficult issue, however, is to determine which principles constitute the *lex mercatoria*. This imperfection allows the Realist to charge that the *lex mercatoria*—and by implication, its modern incarnation, the CISG—is a vague set of rules, or perhaps a “non-subject”.<sup>100</sup> Even Lord Mustill had to consider the usefulness of the *lex mercatoria* and ask “whether it can and does exist as a viable system”.<sup>101</sup>

<sup>96</sup> Andrew Tweeddale & Keren Tweeddale, *Arbitration of Commercial Disputes* (Oxford: Oxford University Press, 2005) at 194. The sources referred to in Tweeddale & Tweeddale include: Bertold Goldman, “La Compagnie de Suez, societe internationale” (4 October 1956) *Le Monde* at 3; *Frontieres du droit et lex mercatoria* (1964) *Archives de philosophie du Droit* at 177; *La lex mercatoria dans les contrats et l’arbitrage internationaux: realite et perspectives* (Clunet, 1979) at 475. Lord Mustill, “The New Lex Mercatoria: The First Twenty-five years” (1987) in *Liber Amicorum for Lord Wilberforce*.

<sup>97</sup> *UNCITRAL Model Law on International Commercial Arbitration*, United National Commission on International Trade Law (“UNCITRAL”), (United Nations document A/40/17, Annex I, 21 June 1985).

<sup>98</sup> International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts 2004*, (Rome: International Institute for the Unification of Private Law (“UNIDROIT”) 83<sup>rd</sup> session, 2004). Note that the Preamble states: These Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.

<sup>99</sup> Lord Mustill, quoted in Tweeddale & Tweeddale, *supra* note 96 at 194.

<sup>100</sup> *Ibid.* at 194-195.

<sup>101</sup> *Ibid.* at 195.

## 2. The Indeterminacy of Customs-Based Law

### 2.1 *The Legal Realist Critique of the New and Medieval Lex Mercatoria*

A main point that the Realist charge is that the *lex mercatoria* is not a “law”, or it is, at most, “soft law”, that is, it is a guide that sets a standard of conduct, but it is not legally binding. This criticism has similarly been made of the CISG.<sup>102</sup> However, courts and arbitral panels have used soft law rules as evidence of international customary law in order to oust national laws.<sup>103</sup> Realists’ may argue that the *lex mercatoria* lacks both a methodological base, and a legal system supporting it, and is dependent on national legal systems to work efficiently. Moreover, it does not have any state authority from which it can derive its binding force. As such, it is typically argued, it cannot govern a contract, because a contract concluded between private parties must be based on the municipal law of some state. Law is made exclusively by nation-states. Hence, a contract intended to be subject to the *lex mercatoria* would be a stateless contract, one floating in a legal vacuum. A state-free contract, thus, presents a logical impossibility, and is an intellectual solecism. Furthermore, trade practices, usages, and customs of international trade only acquire the character of law to the extent that they are incorporated into national legal systems, either expressly or impliedly.

Perhaps most importantly, implicit in the Realist perspective is the notion that the *lex mercatoria*, as an autonomous body of law, is incomplete, vague, and somewhat incoherent. In other words, it is indeterminate. They attempt to uncover what constitutes this alleged body of law, or try to locate where it can be found. The general principles, rules which are reflected in the law of all trading nations and which are said to constitute the core of the *lex mercatoria*, are to be distilled by means of a comparative analysis of representative national laws. However, uncovering rules and principles that are common to most nations is a daunting task. Considering the diversity of national legal systems and the vast number of states, there are only very few principles that are truly common to a representative number of legal systems. While this is not a concern of the Realists, it is important to note that “common principles” are often too general and too broad to solve any but the simplest problem, let alone a complex commercial dispute. The often cited principles of, for example, good faith or *pacta sunt servanda*, are as such abstract principles. They gain meaning only through the supplementary rules, court decisions, and the enforcement mechanisms in the various national legal systems. However, the Realist sees these interpretive devices as leading to doctrinal inconsistency. As Clare Dalton notes, “doctrinal inconsistency necessarily undermines the force of any conventional legal

<sup>102</sup> For an example of the use of CISG as “soft law”, see Larry A. DiMatteo, “Resolving International Contract Disputes” (1998) 53 *Disp. Resol. J.* 75, at 79. DiMatteo states: “The CISG, along with the UNIDROIT Principles, provide arbitrators a suitable framework for deciding international contract disputes by the application of the general principles that underlie [these] documents”. See also e.g. Rosett, *supra* note 21 and Kastley, *supra* note 38.

<sup>103</sup> Larry A. DiMatteo, “Contract Talk: Reviewing the Historical and Practical Significance of the Principles of European Contract Law” (2002) 43 *Harv. Int’l L.J.* 569 at 571.

argument, and [...] opposing arguments can be made with equal force [...] [L]egal argumentation disguises its own inherent indeterminacy [...] [L]egal doctrine is unable to provide determinate answers to particular disputes”.<sup>104</sup> Dalton’s focus on doctrinal inconsistency, and by extension, the indeterminacy of law, is misplaced. While she was addressing issues in contracts, and not the *lex mercatoria* or the CISG, Dalton fails to appreciate that an international commercial code can provide for the acceptance of similar norms, and a common medium for communication—a *lingua franca*.

## 2.2 Undermining the Legal Realist Critique

The *lex mercatoria* evolved independently of local political authorities or institutions. It comprised a deterritorialized legal order, “that did not derive its normative claims from treaties amongst sovereign states”.<sup>105</sup> As a private commercial order, it existed outside the local political economy. This gave rise to a dualistic system of governance in commerce: laws and regulations for local commerce and the *lex mercatoria* for transnational commerce. It was essentially a self-regulatory merchant community in the creation of laws, and in dispute resolution.<sup>106</sup> This community also created property rights and entitlements that were entirely inconsistent with traditional medieval concepts of property.<sup>107</sup> The conception of equity in merchant courts also differed considerably from the canonical view of equity.<sup>108</sup> Although there existed normative and institutional pluralism in medieval society, including canon law, feudal law, manorial law, urban law, and local merchant law, local authorities were unable to enforce the *lex mercatoria*, and deferred to merchant courts.<sup>109</sup>

The *lex mercatoria*, as an autonomous body of law, evolved contrary to the jurisprudence of positivism. Positivism is based on the theory that all law is derived from the will of sovereign states, and that international law is derived from the combined wills of many sovereign states. Hence, legislation is seen as the heart of law, and, contrarily, the Realist would tend to downplay the importance of the role of commercial customs, norms and values as guiding behaviour. As Ole Lando states, “the binding force of the *lex mercatoria* does not depend on the fact that it is made and promulgated by State authorities but that it is recognized as an autonomous norm system by the business community and by State authorities”.<sup>110</sup> As such, the *lex mercatoria*, as a code of legal-commercial norms is different to the traditional concept of

<sup>104</sup> Clare Dalton, “An Essay in the Deconstruction of Contract Doctrine” (1985) 94 Yale L. J. 997 at 1007.

<sup>105</sup> Boaventura de Sousa Santos, quoted in Cutler, *supra* note 18 at 109.

<sup>106</sup> Cutler, *supra* note 18 at 110.

<sup>107</sup> *Ibid.* at 111.

<sup>108</sup> *Ibid.* at 116-117.

<sup>109</sup> *Ibid.* at 109.

<sup>110</sup> Ole Lando, “The Lex Mercatoria and International Commercial Arbitration” (1985) 34 I.C.L.Q. 747 at 754.

“law” as the law to be found in legal texts, codes, and case law. It is, moreover, an evolving, “living law” which is the product of the adaptability and inventiveness of commercial merchants and which, therefore, concentrates on those legal norms that can be enforced in practice.

The principles of the *lex mercatoria* are embodied not only in the CISG, but elsewhere as well. Indeed, in recent years the *lex mercatoria* has developed into a substantial code. For example, lists of the constituent elements of the *lex mercatoria* have been compiled.<sup>111</sup> While by no means definitive, the lists include: public international law; uniform laws; the general principles of law; the rules of international organizations; customs, practices, and usages; and the reporting of arbitral awards.<sup>112</sup> Furthermore, the Transnational Law Database lists over eighty principles which constitute the *lex mercatoria*.<sup>113</sup> This database is regularly updated with new principles and case awards. In commercial practice, the *lex mercatoria* has been applied by parties to assist in the resolution of disputes, including the Iran-United States Claims Tribunal.<sup>114</sup> Most modern arbitration legislation will also permit parties to choose an applicable law, even if this law is not a national law *per se*, but rather the *lex mercatoria*.<sup>115</sup> Thus, the Realist criticism that the *lex mercatoria*, and its related conventions, such as the CISG, are too indeterminate to provide a comprehensive set of rules that can guide merchant behavior, and help to resolve disputes, is undermined.

## IV. The Embedded Norms of the CISG and the Neo-Realist Approach

### 1. The Incorporation of Norms

#### 1.1 The “General Provisions” of the CISG

One of the most interesting features of the CISG is how it incorporates a set of norms for international merchants. It does this through the incorporation of certain principles, which evolved from the *lex mercatoria*. In particular, the CISG organizes ideological values by giving legal sanction and effect to commercial usages, practices, and customs. In this way, the CISG can be viewed as more of an attempt to harmonize international commercial values, than as a model of unified black letter law. For example, it provides for the inclusion of “general

<sup>111</sup> Lando, *ibid.* at 749-751. Lando lists the following elements that comprise the law merchant: 1) public international law; 2) uniform laws; 3) general principles of law; 5) rules of international organizations; 6) customs and usages; 7) standard form contracts; and, 8) the reporting of arbitral awards.

<sup>112</sup> See e.g. *ibid.* and Tweeddale & Tweeddale, *supra* note 96 at 195.

<sup>113</sup> Center for Transnational Law (CENTRAL), University of Cologne, Germany, Transnational Law Database at <http://www.tldb.net>.

<sup>114</sup> Tweeddale & Tweeddale, *supra* note 96 at 196.

<sup>115</sup> *Ibid.*

provisions”,<sup>116</sup> which are a means for avoiding repetitions in the text of the law. They govern a broad field, and as a body of rules they are heterogeneous—or indeterminate, in the language of the Realists. They serve many purposes, and govern the interpretation of the CISG. General provisions also deal with closing gaps in the law, and provide rules for the interpretation of the statements and conduct of the parties to a contract, that is, the commercial understandings between parties. However, it is the indeterminate nature of these “gaps” in the form of general provisions that provide the Realists with the fuel to critique the CISG as a body of law. The Realist would reject the legal rule involved in filling gaps in the CISG through the use of the Convention’s general provisions, as this simply provides an example of the law’s inability to provide reasons for obedience.

## 1.2 *Rules of Interpretation*

The failure of the Realist to consider the importance of an open-textured, interpretative approach to the CISG is where they go wrong. Article 7 establishes the main interpretive rules, or the normative framework, for the Convention. In this regard, Article 7 states that “[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade”.<sup>117</sup> This requires courts to avoid recourse to domestic legal concepts, unless they have no other option. To this end, Article 7(1) emphasizes the importance of having due regard for the Convention’s international character, as well as for the need to promote uniformity across all signatory states. Strict uniformity, while not a direct concern of the Realist, is not possible. From a slightly different perspective, Article 7 also contributes significantly to the harmonization of values. Reliance on domestic law would likely lead to different, contradictory, and confusing rules, ultimately defeating the purpose of the CISG. As a result, the functional uniformity at the heart of the CISG requires that legal practitioners, tribunals, and courts look to standards of international practice (i.e. international commercial customs) in an interpretation or a determination of provisions of the Convention.

As C.K. Allen notes, “[t]he operation of statute is not automatic, and can never be so. Like all legal rules, it has to take effect through the interpretation of the courts”.<sup>118</sup> This is where the Realists direct their attack. Instead of considering that the embedded norms within the CISG might guide doctrine (and thus, behavior), the Realist would instead note that any body of legal doctrine allows a judge to justify any result desired in any particular case. Indeterminacy involves revealing that a seemingly determinate legal rule is in fact “open textured” in that it allows a judge to perform a makeshift balancing of a number of factors. Legal doctrine is

<sup>116</sup> See Eorsi, *supra* note 43.

<sup>117</sup> CISG, *supra* note 11 at Art. 7(1).

<sup>118</sup> C.K. Allen, *Law in the Making*, 6th ed., (1958) at 466 quoted in Eorsi, *supra* note 43 at 2-13.

deemed indeterminate because any legal rule can be opposed by a counterrule. Because the rule and the counterrule support opposing results, the authoritative legal materials, taken as a whole, fail to provide determinate outcomes in any given case. Duncan Kennedy provides an example in contract law:

In [certain] situations, a “rule” that appears to dispose cleanly of a fact situation is nullified by a counterrule whose scope of application seems to be almost identical. Agreements that gratuitously increase the obligations of one contractual partner are unenforceable for want of consideration. But, such agreements may be binding if the judge can find an implied rescission of the old contract and the formation of a new one incorporating the unilaterally onerous terms. The realists taught us to see this arrangement as a smokescreen hiding the skillful judge's decision as to duress in the process of renegotiation, and as a source of confusion and bad law when skill was lacking.<sup>119</sup>

In the common and civil law systems there are various methods of statutory interpretation which provides for unpredictable legal outcomes. This helps to explain why the Realists are skeptical of legal rules as determinants of legal decisions. However, the Realist preoccupation with rules has blinded them of common norms embedded within doctrine. These norms help in the establishment of a certain degree of consistency in judicial rulemaking. For example, the Swiss Code of Obligations provides that interpretation should be based on the common intent of the parties without regard to vague expressions and terms.<sup>120</sup> Such an approach speaks to an embedded norm. However, in the example involving the Swiss Code, the Realists would typically focus their criticism on the rule, and not the norm, that is, the focus would be on the vague expressions and terms instead of on the degree of consistency in the application of the common intent of the parties. Similarly, the German BGB contains a provision on the interpretation of a declaration of intent in general, and another specifically on the interpretation of contracts; the first requires that the true intent, and not the literal meaning of the wording, should be taken into consideration, and the second provides that a contract must be construed in conformity with *Treu und Glauben*.<sup>121</sup> Again, the attention is on the norms embedded in rules. Finally, the Hungarian Civil Code provides that a contractual declaration shall be construed in the way the other party must have meant, in accordance with the generally accepted meaning of the wording employed, having regard to the presumed intent of the party making the statement, and to the circumstances of the case.<sup>122</sup>

There is also the debate between broad or restrictive interpretation. The Realist might argue that either approach still focuses on a closed system of rules, and that any judicial decision

<sup>119</sup> Kennedy, *supra* note 20 at 1700.

<sup>120</sup> Eorsi, *supra* note 43 at 2-13.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

following thereafter is a (flawed) form of deduction. Generally, common law traditions are rooted in the style in which statutes are drafted to favour narrow interpretation, and the civil law systems, with their systematic codes, favour broad interpretation.<sup>123</sup> In any event, as C. K. Allen notes, the “greatest inconsistency is between ‘broad’ and ‘narrow’ interpretation”.<sup>124</sup> This may be true but there is also much truth in the arguments of Lazlo Réczei who believes that the policy of the CISG is to extend its sphere of application to approach universality. This suggests the acceptance and embracement of a common set of values across national borders. Certainly it follows from Article 7 that the CISG must be interpreted extensively in order to encompass doubtful issues under the Convention, and offset the homeward trend, which only leads to divergent, and non-uniform interpretations of the Convention. However, perfection in the interpretation of the CISG was never its goal. Flawlessness or judicial predictability in any legal instrument will never be achieved.

The CISG incorporates a practical approach that is simultaneously interpretative and normative. Article 8(3) of the CISG states, for example, that “[i]n determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties”.<sup>125</sup> This provision uses trade usages as a factor for interpreting the will of the parties as it lends an interpretative value to the usages. In fact, modern interpretation, particularly in the field of contracts, is inclined to rely on such devices as the commercial practices established between the parties, the preliminary negotiations, trade usages, prior and subsequent conduct, as noted in Article 8(3). The policy rationale for this approach is to assure legal security and commercial predictability in both domestic and international trade, but by default this approach recognizes the existence of an inherent set of common values.

### 1.3 Trade Usages, the Hierarchy of Norms and the CISG

Other important provisions in the CISG concerning trade usages are those embodied in Article 9. It states that “[t]he parties are bound by any usage to which they have agreed and by any practices they have established between themselves” and that “[t]he parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage [...] which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned”.<sup>126</sup> In this way, Article 9 grants normative value to trade usages.

<sup>123</sup> According to Eorsi, *ibid.*

<sup>124</sup> C.K. Allen, at 509 quoted in Eorsi, *ibid.* at 2-14.

<sup>125</sup> CISG, *supra* note 11 at Art. 8(3).

<sup>126</sup> *Ibid.* at Art. 9(1) and 9(2) respectively.

Article 9 also reconciles two competing theories regarding trade usages. The first is the subjective theory, according to which usages can only be applicable if parties have agreed to them. The usages are seen as part of the contract and usages unknown to either party can never, according to this theory, be applicable. In contrast is the objective theory, based on the notion that usages are applicable if they represent a legal norm and have a normative power. The application of usages in an agreement is independent of the intention of the parties. It “comes from the binding force of the usage itself” and implies that “[e]ven usages unknown to both parties can be applicable to an agreement in this theory”.<sup>127</sup> Both theories, and their reconciliation, are reflected in Article 9 of the CISG.

The reconciliation of the subjective and objective theories can be determined in the hierarchy of norms.<sup>128</sup> This is crucial, as it suggests that the norms embedded in the CISG are paramount, especially relative to any strict reading of the text. The Convention does not expressly state that in case of a conflict between usages and the provisions of the Convention the former will prevail. This does not mean that under the CISG the usages may apply only to the extent that they do not conflict with any of the Convention’s provisions. According to the prevailing view within UNCITRAL,<sup>129</sup> and during the negotiations and drafting of the CISG at the Vienna Conference,<sup>130</sup> such an express statement was simply considered to be unnecessary as the precedence of the usages applicable under Article 9(1) and (2) automatically follows from Article 6, which embodies the principle of the parties’ autonomy.<sup>131</sup>

Case law supports the recognition of the norms embodied in the CISG through the concept of trade usages. Thus, the usages of trade should prevail over the textual provisions of the Convention, independently of whether they bind the parties pursuant to Article 9(1) or Article 9(2). For example, according to the Austrian Oberster Gerichtshof, “[t]hus adopted, agreed usages, established practices and widely known and regularly observed usages prevail over other deviant CISG provisions”.<sup>132</sup> In an earlier decision, regarding the employment of trades, the Court stated that “Austrian usages, if applicable, would prevail over the provisions of the

<sup>127</sup> Patrick X. Bout, “Trade Usages: Article 9 of the Convention on Contracts for the International Sale of Goods” (1988) available at <http://www.cisg.law.pace.edu/cisg/biblio/bout.html>. Also quoted in Chalarambos Pamboukis, “The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods” (2006) 25 J.L. & Com. 107 at 109.

<sup>128</sup> Pamboukis, *ibid.* at 109.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.* CISG Article 6 states: “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions”.

<sup>132</sup> CLOUT Case No. 425 [Oberster Gerichtshof, Austria, 21 Mar. 2000] available at <http://cisgw3.law.pace.edu/cases/000321a3.html>.



CISG”.<sup>133</sup> Another example can be found in a ruling by a German Court, which “observed that the provisions contained in the Articles 38 and 39 [of the CISG] can be derogated [...] through a usage, [even though] in the case at hand, [the Court] excluded such a possibility”.<sup>134</sup> Moreover, according to the National Commercial Court of First Instance in Argentina, “‘international trade usages’ are assigned by [the] CISG itself a hierarchical position higher than the very same CISG provisions”.<sup>135</sup>

The hierarchical rank of the applicable rules of law to a contract that falls within the scope of the CISG has been analyzed by Chalarambos Pamboukis.<sup>136</sup> His analysis is also supported by Patrick X. Bout.<sup>137</sup> Pamboukis states these rules can be placed in the following order of importance:

- a) The mandatory provisions of the applicable national law.
- b) The trade usages that the parties have impliedly made applicable to their contract (Article 9(2)).
- c) The trade usages to which the parties have explicitly or implicitly agreed or the practices they have established between themselves (Article 9(1)).
- d) The provisions of the Convention.
- e) The general principles underlying the Convention (Article 7(1)).
- f) The law applicable by virtue of the rules of private international law of the forum state (Article 7(2)).<sup>138</sup>

This hierarchy demonstrates the influence of trade usages, which are an integral part of the norms embedded in the CISG, on the drafters of the Convention. Trade usages are not only capable of both filling in the gaps in a contract and interpreting its terms, they also constitute

<sup>133</sup> CLOUT Case No. 240 [Oberster Gerichtshof, Austria, 15 Oct. 1998] available at <http://cisgw3.law.pace.edu/cases/981015a3.html>.

<sup>134</sup> CLOUT Case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 Jan. 1993] available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=180&step=Abstract>.

<sup>135</sup> Juzgado Nacional de Primera Instancia en lo Comercial, Argentina, 6 Oct. 1994 (*Bermatex v. Valentin Rius*) available at < <http://cisgw3.law.pace.edu/cases/941006a1.html> >.

<sup>136</sup> Pamboukis, *supra* note 127 at 110.

<sup>137</sup> Bout, *supra* note 127 at I states: “Usages applicable to a case take precedence over contradictory articles in the CISG. This precedence is mainly based on the autonomy of the parties in article 6 CISG. Usages that, based on article 9 CISG, are applicable to an agreement, are also part of that agreement. By virtue of article 6 CISG, parties are free to opt out of the CISG or to fit it to their individual needs. A contradictory usage can in that sense be seen as an adaptation of the CISG, agreed between the parties. An otherwise applicable usage can, however, be excluded from an agreement, due to its conflict with a national validity rule”.

<sup>138</sup> Pamboukis, *supra* note 127 at 110.

the core of the *lex mercatoria*.<sup>139</sup> Both trade usages and the will of the parties prevail over national law with the exception of the mandatory provisions. In other words, the CISG's value system is of overriding importance. Consequently, international trade practice led to the creation of a Convention that sets as its primary goal to regulate practice by assigning normative value to trade usages. In the process, strict interpretations and the narrow confines of doctrine are relegated to a subordinate role.

The Convention provides the foundation for the legal effect of usages, by giving them a status superior to the Convention rules itself. Usages will, thus, prevail over other articles of the CISG either by virtue of the will of the parties (Article 9(1)) or objectively (Article 9(2)). On the contrary, and in light of the complex character of international transactions, the Convention did not intend to provide, or even to incite, a codification of trade usages and it does not contain a definition of usages or practices. This deliberate omission provides much fodder for the Realists.

Finally, the CISG incorporates a variety of contextual legal standards that depends on *ex post* substantive interpretation of their open-textured content. These include not only the general principles of Article 7(1) and the trade usage provisions of Article 9, but also provisions that prescribe a reasonableness test for all interpretative questions;<sup>140</sup> that allow contractual liability to be imposed without any formal writing requirement;<sup>141</sup> that direct tribunals to interpret the entire Convention in light of unspecified standards of good faith in international trade;<sup>142</sup> and, that direct tribunals to consider all relevant evidence in interpreting the parties' intentions and expectations, including even communications that would be barred as parol evidence under common law systems.<sup>143</sup> In short, these provisions constitute part of the mercantile value system. And it is this system of values which provides for a new, Neo-Realist perspective on the CISG.

<sup>139</sup> *Ibid.* at 105.

<sup>140</sup> CISG, *supra* note 11 at Article 8(2).

<sup>141</sup> *Ibid.* at Article 8(3).

<sup>142</sup> *Ibid.* at Article 7(1).

<sup>143</sup> *Ibid.* at Article 11.

## V. The Contributions of the Legal Realists, the CISG, and the Harmonization of Values

### 1. The Benefits of the Legal Realist Perspective

#### 1.1 Challenging Orthodoxy

The need for a Neo-Realist perspective on the CISG does not discard all of the teachings of the Realists movement. The Realist school has had a positive impact on jurisprudence, legal theory, and legal institutions. In the words of Joseph William Singer, “[l]egal realism has fundamentally altered our conceptions of legal reasoning and the relationship between law and society”.<sup>144</sup> This is the message that the Critical Legal Studies movement inherited, as Singer suggests: “All major current schools of thought are, in significant ways, products of legal realism. To some extent, we are all realists now”.<sup>145</sup> Morton J. Horwitz adds to this praise, and notes that “the most important legacy of Realism” is its “challenge to the orthodox claim that legal thought was separate and autonomous from moral and political discourse”.<sup>146</sup> The Realist attack on deductive legal reasoning constituted the Realists’ most “original and lasting contributions to legal thought”.<sup>147</sup> But if we are all Realists now, why is their message still controversial? Perhaps in their vigour, the Realists’, to use the words of Edward Bloustein, simply “overshot their mark”, that is, they destroyed one dogma, but then substituted another in its place.<sup>148</sup>

### 2. Neo-Realism: Focusing on the Harmonization of Commercial Norms

Realism is concerned with the logical deductions behind the façade of the law. Thus, Neo-Realism should be viewed more as a variation of the Realist approach in that it attempts to identify the values and norms that underlie the technical rules of laws, such as the *lex mercatoria* and the CISG. From this perspective, a Neo-Realistic approach to the CISG is more of an attempt to harmonize not so much the law of the Convention across national borders, but rather calls for a new focus on the harmonization of commercial values and norms in place of the unfruitful search for a perfectly predictable, transnational, uniform law. Such an approach would also acknowledge the importance of international commercial norms, that is, the new *lex mercatoria*. Its recent re-emergence may be due to certain similarities of today’s commercial environment to that of medieval Europe. Both periods can be characterized by a geographically

<sup>144</sup> Joseph William Singer, “Legal Realism Now” (1988) 78 Cal. L. Rev. 465.

<sup>145</sup> *Ibid.* at 467.

<sup>146</sup> Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992) at 193.

<sup>147</sup> *Ibid.* at 199.

<sup>148</sup> Bloustein, *supra* note 16 at 24.

mobile commercial class operating across national borders, where local laws rarely agreed. Yet, despite wide differences among national legal systems, there exists a high degree of uniformity in norms and contract practices for the international sale of goods.

### 2.1 *Transplanting Law or Commercial Norms?*

The notion that laws can be successfully transplanted (i.e. harmonized or unified), that is, promulgated and interpreted in various national jurisdictions, has been a matter for debate for centuries. This debate continues today regarding the relative success or failure to implement uniform laws across nations.<sup>149</sup> One of the earliest examinations of this question was undertaken by Montesquieu in his 1748 publication of *The Spirit of the Laws*.<sup>150</sup> Montesquieu, for example, discussed the transferability of the law at great length, and identified such indigenous characteristics as climate, terrain, population and religion as keys to determining governmental structures, and to understanding the diverse practices of nations in matters of public and private law.<sup>151</sup> On the specific question of the transferability of law, Montesquieu states, “[a]s the civil laws depend on the political institutions, because they are made for the same society, whenever there is a design of adopting the civil law of another nation, it would be proper to examine beforehand whether they have both the same institutions and the same political law”.<sup>152</sup> To Montesquieu, differences in the political and social makeup between nations impede the successful transplantation of laws.

Montesquieu’s observations regarding the transferability of law have been debated more recently. Unfortunately, this debate has failed to consider the role of the *lex mercatoria* as a set of norms, and as a commercial law that transcends national boundaries. In any event, this debate provides the necessary theoretical context for the application of a Neo-Realist approach to the attempt to create uniform law, such as the CISG. It is significant that much of this debate focuses on the *law*, rather than the *norms* that lie beneath the law, as is evident in the *lex mercatoria* and CISG. Otto Kahn-Freund, for example, relies on Montesquieu to support his own proposition that law is so inextricably linked to its environment that it can rarely change its habitat.<sup>153</sup> Where the “habitant” of the law is transnational is not considered. His central thesis is that while it may be more than two hundred years since Montesquieu’s work, the

<sup>149</sup> See e.g. James E. Bailey, “Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales” (1999) 32 Cornell Int’l L.J. 273; Philip Hackney, “Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?” 61 La. L. Rev. (2001) 473; Paul B. Stephan, “The Futility of Unification and Harmonization in International Commercial Law” (1999) 39 Va. J. Int’l L. 743; Steven Walt, “Novelty and the Risks of Uniform Sales Law” (1999) 39 Va. J. Int’l L. 671.

<sup>150</sup> Baron de Montesquieu, *The Spirit of the Laws*, trans. by Thomas Nugent (New York: Hafner Publishing Co., 1959).

<sup>151</sup> *Ibid.* at vol. II, 42-43.

<sup>152</sup> *Ibid.* at vol. II, 163.

<sup>153</sup> Otto Kahn-Freund, “On Uses and Misuses of Comparative Law” (1973) 37 Mod. L. Rev. 1.

geographic, economic, and social differences between nations may have narrowed, but the political differences have greatly expanded.<sup>154</sup> Kahn-Freund's statement may be less persuasive today, as it was written during the Cold War. The geo-political structure of the world has since changed with the collapse of the Soviet Union and the fall of communism, and the arrival of the Asian economic tigers. The important point, however, is that religious, social, political, and economic differences between nations can provide barriers to the transferability of law. The implication for the CISG is that uniform law stands little chance of successful transplantation from one nation to another, even though it is not a "national" law *per se*. However, the growth of globalization in the last few decades, which has tended to blunt national differences, favours unification efforts, and the development of the new *lex mercatoria*.

In response to Kahn-Freund, Alan Watson does not dispute that law is deeply embedded in its political context. But where law is autonomous, that is, free from the confines of national political institutions, is not addressed. He argues that both Montesquieu and Kahn-Freund, like true Realists', underestimate the degree of successful transplantation of legal ideas that has taken place not only historically, but also in the modern era.<sup>155</sup> Watson states that successful borrowing can be accomplished from very different legal systems, even without systematic knowledge of the law or the political structure of the donor state or legal system.<sup>156</sup> He concludes by stating that "[w]hat the law reformer should be after in looking at foreign systems was an *idea* which could be transformed into part of the law of his country".<sup>157</sup> This close link between *ideas* and *norms* has not been lost on the drafter's of the CISG. Watson continues this line of thinking in a later article, and points to the lengthy history of legal transplantation from Roman times to the present.<sup>158</sup> In doing so, he challenges Kahn-Freund's link between law and social structures:

To a large extent law possesses a life and vitality of its own; that is, no extremely close, natural or inevitable relationship exists between law, legal structures, institutions and rules on the one hand and the needs and desires and political economy of the ruling elite or of the members of the particular society on the other hand. If there was such a close relationship, legal rules, institutions and structures would transplant only with great difficulty, and their power of survival would be severely limited. Changes in societal structure would always entail changes in the law.<sup>159</sup>

<sup>154</sup> *Ibid.* at 8.

<sup>155</sup> Alan Watson, "Legal Transplants and Law Reform" (1976) 92 Law Q. Rev. 79.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.* Emphasis added.

<sup>158</sup> Watson, "Comparative Law and Legal Change" (1978) 37 Cambridge L.J. 313.

<sup>159</sup> *Ibid.* at 314-315.

Bernard Grossfeld has analyzed the transferability of law based on the same factors and national endowments noted by Montesquieu.<sup>160</sup> He argues that “[t]he culture and law of a country are as dependent on its geography as is its very terrain”.<sup>161</sup> Accordingly, Grossfeld rejects the notion that ideas are universal, or are capable of easy transplantation and reception across national boundaries. Such a view fails to explain the success, longevity, and re-emergence of the *lex mercatoria*. Grossfeld’s position also contrasts with the words of Lord Mansfield, who expressed the view more than 250 years ago that “mercantile law [...] is the same all over the world. For from the same premises, the sound conclusions of reason and justice must universally be the same”.<sup>162</sup> Other scholars have focused on the transformative power of legal transplants.<sup>163</sup> They echo the teachings of Montesquieu, Kahn-Freund, and Grossfeld by suggesting the lack of success with the transferability of law.<sup>164</sup>

Similarly, according to Anthony D’Amato, modern legal theory, borrowing heavily from literary criticism, puts forward the proposition that law cannot be easily transferred.<sup>165</sup> This suggests that legal texts are not authoritative statements of either the author’s intent or the objective, plain meaning. There is little in any text that can effectively convey the author’s intent or any stable meaning to the reader. Instead, the focus shifts to the reader’s construction of the text based on the reader’s life experience, social setting, and value system. Black letter law and doctrine would rarely, if ever, transfer to another setting with its exact message intact. The implications for the CISG are clear: the transfer or harmonization of international commercial law does not necessarily offer any realistic prospect for the desired outcomes, assuming that strict uniformity of the CISG is its primary goal. As the Realists’ tend to focus on strict uniformity, instead of the relative uniformity of commercial norms, the law that is transferred upon each nation’s ratification of the CISG is not likely to be identical in every signatory state.

## 2.2 Convergence or Divergence?

Not surprisingly, according to a recent study, the divergent interpretations of the CISG remain a problem with most signatory states.<sup>166</sup> Some of the problem is due to the ambiguous and open-textured language incorporated in the CISG. Oftentimes, a high level of abstraction and

<sup>160</sup> Bernard Grossfeld, “Geography and Law” (1984) 82 Mich. L. Rev. 1510.

<sup>161</sup> *Ibid.* at 1511.

<sup>162</sup> *Pelly v. Royal Exch. Assurance Co.*, 97 E.R. 342, 346 (1757).

<sup>163</sup> See e.g. Anthony Allott, “The Unification of Laws in Africa” (1968) 16 Am. J. Comp. L. 51 and John H. Beckstrom, “Transplantation of Legal Systems: An Early Report on Reception of Western Laws in Ethiopia” (1973) 21 Am. J. Comp. L. 557.

<sup>164</sup> *Ibid.*

<sup>165</sup> Anthony D’Amato, “Aspects of Deconstruction: The Failure of the Word ‘Bird’” (1990) 84 Nw. U. L. Rev. 536.

<sup>166</sup> Larry A. DiMatteo *et al.*, “The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence” (2004) 34 Nw. J. Int’l L. & Bus. J. 299 at 447.

the use of neutral language were necessary in order to accommodate the diverse political considerations during the drafting of the Convention.<sup>167</sup> While this created a law that is formally and linguistically uniform in numerous jurisdictions, subsequent litigation creates many opportunities for divergent interpretations of the Convention's provisions.<sup>168</sup> Perhaps for this reason, DiMatteo *et al.*, in their fifteen year review of CISG jurisprudence, found that “[a]t one extreme, some courts have largely ignored the CISG’s mandate that interpretations are to be formulated with an eye toward the international character of the transaction and the need for uniformity of application”.<sup>169</sup> At the other extreme are courts that have made a concerted effort to apply the above mandates of the CISG and to attempt to seek out the common values within the CISG, which provides for functional uniformity.<sup>170</sup> One example of many is the U.S. Court of Appeals for the Eleventh Circuit in *MCC-Marble Ceramic Center v. Ceramica Nuova D’Agostino* where the court cites foreign jurisprudence on the CISG, and refers to academic commentary.<sup>171</sup> The court then notes:

[T]he CISG was to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes [...] Courts applying the CISG cannot, therefore, upset the parties’ reliance on the Convention by substituting familiar principles of domestic law.<sup>172</sup>

Not surprisingly, as DiMatteo notes, the vast majority of CISG cases fall somewhere in the middle, between the two extremes of recognition and insensitivity to the interpretive requirements of the Convention.<sup>173</sup> DiMatteo concludes on a positive note by acknowledging that there are signs that courts are making a greater effort in applying the CISG’s interpretive methodology in a more uniform manner.<sup>174</sup> At the very least, this development illustrates the fundamental difficulties that nations face when trying to implement uniform international law. Indeed, as Leonardo Graffi states, “diverging interpretations by national courts is a problem of all international uniform laws”.<sup>175</sup>

<sup>167</sup> Clayton P. Gillette & Robert E. Scott, “The Political Economy of International Sales Law”, N.Y.U. L. & Eco. Research Paper Series, Working Paper No. 05-02, 2005 available at <http://ssrn.com/abstract=709242>.

<sup>168</sup> *Ibid.* Gillette and Scott proceed to predict the demise of the CISG because of its failure to supply a truly uniform interpretive language to resolve all contractual problems.

<sup>169</sup> DiMatteo *et al.*, *supra* note 166 at 440.

<sup>170</sup> On “functional uniformity” see note 10, *supra*.

<sup>171</sup> *MCC-Marble Ceramic Center v. Ceramica Nuova D’Agostino*, 144 F.3d 1384 (11th Cir. 1998).

<sup>172</sup> *Ibid.* at 1391.

<sup>173</sup> DiMatteo *et al.*, *supra* note 166 at 440.

<sup>174</sup> *Ibid.*

<sup>175</sup> Leonardo Graffi, “Case Law on the Concept of ‘Fundamental Breach’ in the Vienna Sales Convention”, (2003) 3 Int’l Bus. L.J. 338 at 338.

## VI. Conclusion

However, considering the divergent interpretations of the CISG, there appears to be little chance of successfully transplanting or harmonizing the CISG in the signatory states, which number over sixty—at least not if the goal is to achieve strict uniformity and doctrinal perfection. Thus, what is needed is a Neo-Realist approach to the transplantation or harmonization of international commercial law. This recognizes both the unique social construction and embedded norms present in the CISG. As values converge, statements of the norms to be honoured may be more useful than the enunciation of a rigid rule or doctrine. Neo-Realism in this context would look behind the formal text of the rules within the CISG. In the past, this focus has been on the unrealistic, technical sphere of law. Divergence in law will never be eliminated, but it can be narrowed. The Neo-Realist would, instead, examine harmonization of the CISG within the context of the value- and norm-sensitive aspects of lawmaking, which is particularly important when attempting to harmonize law across national borders. Successful transference or harmonization ultimately hinges on values, norms and behaviour, not legal rules and texts.

## References

### *Conventions, Treaties, and Model Laws*

- UNCITRAL Model Law on International Commercial Arbitration*, United National Commission on International Trade Law (United Nations document A/40/17, Annex I, 21 June 1985).
- UNIDROIT Principles of International Commercial Contracts 2004*, (Rome: International Institute for the Unification of Private Law, 83<sup>rd</sup> session, 2004).
- United Nations Convention on Contracts for the International Sale of Goods*, April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671.

### *Cases*

- Anon. v. Sheriff of London* (The Carrier's Case), YB Eas. 13 Edw. 4, fol. 9, pl. 5, in *Exchequer Chamber Cases*, 2:32 (1473) (U.K.).
- CLOUT Case No. 240 [Oberster Gerichtshof, Austria, 15 Oct. 1998] available at <http://cisgw3.law.pace.edu/cases/981015a3.html>.
- CLOUT Case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 Jan. 1993] available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=180&step=Abstract>.
- CLOUT Case No. 425 [Oberster Gerichtshof, Austria, 21 Mar. 2000] available at <http://cisgw3.law.pace.edu/cases/000321a3.html>.
- Juzgado Nacional de Primera Instancia en lo Comercial, Argentina, 6 Oct. 1994 (*Bermatex v. Valentin Rius*) available at < <http://cisgw3.law.pace.edu/cases/941006a1.html> >.
- MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino*, 144 F.3d 1384 (11th Cir. 1998) (U.S.).
- Pelly v. Royal Exch. Assurance Co.*, 97 E.R. 342 (1757) (U.K.).
- Pillans v. Mierop*, 3 Burr. 1663, 97 E.R. 1035 (1765) (U.K.).



## Secondary Sources

- ALLOTT, Anthony. "The Unification of Laws in Africa" (1968) 16 Am. J. Comp. L. 51.
- BAILEY, James E. "Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales" (1999) 32 Cornell Int'l L.J. 273.
- BARON, Gesa. *Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?* at <http://www.cisg.law.pace.edu/cisg/biblio/baron.html>.
- BASILE, Mary Elizabeth et al., eds. & trans. *Lex Mercatoria and Legal Pluralism: A Late Thirteenth Century Treatise and its Afterlife* (Cambridge: The Ames Foundation, 1998).
- BECKSTROM, John H. "Transplantation of Legal Systems: An Early Report on Reception of Western Laws in Ethiopia" (1973) 21 Am. J. Comp. L. 557.
- BIX, Brian. *Jurisprudence: Theory and Context*, 3rd ed. (London: Sweet & Maxwell, 2003).
- BLOUSTEIN, Edward J. "Logic and Legal Realism: The Realist as a Frustrated Idealist" (1964-65) 50 Cornell L.Q. 24.
- BURRUS, Bernie R. "American Legal Realism" (1962) 8 Howard L.J. 36.
- COOK, V. Susane. "The UN Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity" (1997) 16 J.L. & Com. 257.
- CREMADES, Bernardo M. & Plehn, Steven L. "The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions" (1983-1984) B.U. Int'l L.J. 317.
- CUTLER, A. Claire. *Private Power and Global Authority* (Cambridge: Cambridge University Press, 2003).
- DALTON, Clare. "An Essay in the Deconstruction of Contract Doctrine" (1985) 94 Yale L. J. 997.
- D'AMATO, Anthony. "Aspects of Deconstruction: The Failure of the Word 'Bird'" (1990) 84 Nw. U. L. Rev. 536.
- DIMATTEO, Larry A. "Contract Talk: Reviewing the Historical and Practical Significance of the Principles of European Contract Law", (2002) 43 Harv. Int'l L.J. 569.
- DIMATTEO, Larry A. "Resolving International Contract Disputes" (1998) 53 Disp. Resol. J. 75.
- DIMATTEO, Larry A. et al. "The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence" (2004) 34 Nw. J. Int'l L. & Bus. J. 299.
- EÖRSI, Gyula. "General Provisions", in Nima M. Galston & Hans Smit, eds., *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, (Huntington, NY: Juris Publishing, 1984) 2-1.
- FERRARI, Franco. "CISG Case Law: A New Challenge for Interpreters?" (1999) 17 J. L. & Com. 245.
- FERRARI, Franco. "Uniform Interpretation of the 1980 Uniform Sales Law" (1994) 24 Ga.J. Int'l & Comp. L. 183.
- FELEMEGAS, John. "The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation", (2001-2002) Pace Rev. of CISG 115.
- GEBAUER, Martin. "Uniform Law, General Principles and Autonomous Interpretation" (2000) 4 Unif. L. Rev. 683.
- GILLETTE, Clayton P. & Scott, Robert E. "The Political Economy of International Sales Law," (2005) NYU Law and Economics Research Paper No. 05-02 at SSRN: <http://ssrn.com/abstract=709242>.
- GILMORE, Grant. "Legal Realism: Its Causes and Cure" (1960-61) 70 Yale L.J. 1037.
- GRAFFI, Leonardo. "Case Law on the Concept of 'Fundamental Breach' in the Vienna Sales Convention", (2003) 3 Int'l Bus. L.J. 338.
- GREEN, Michael S. "Legal Realism as a Theory of Law" (2004-05) 46 Wm. & Mary L. Rev. 1915.
- GREEN, Michael S. "Legal Realism, Lex Fori, and the Choice-of-Law Revolution" (1994-95) 104 Yale L.J. 967.
- GROSSFELD, Bernard. "Geography and Law" (1984) 82 Mich. L. Rev. 1510.
- HACKNEY, Philip. "Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?" 61 La. L. Rev. (2001) 473.
- HART, H.L.A. *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994).
- HAYES, Louise Hertwig. "A Modern Lex Mercatoria: Political Rhetoric or Substantive Progress?" (1976-1977) 3 Brook. J. Int'l L. 210.
- HONNOLD, John. "The Sales Convention in Action—Uniform International Words: Uniform Application?" (1988) 8 J.L. & Com. 207.
- HORWITZ, Morton J. *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992).
- INTERNATIONAL CHAMBER OF COMMERCE. *Merchants of Peace, The ICC Story* available at <http://www.iccwbo.org/id6167/index.html>.
- INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW. *About UNIDROIT* available at <http://www.unidroit.org/english/presentation/main.htm>.

- INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, *UNIDROIT Principles of International Commercial Contracts 2004*, (Rome: International Institute for the Unification of Private Law, 83<sup>rd</sup> session, 2004).
- JUENGER, Friedrich K. "The Lex Mercatoria and Private International Law", (2000) 60 La. L. Rev. 1133
- KAHN-FREUND, Otto. "On Uses and Misuses of Comparative Law" (1973) 37 Mod. L. Rev. 1.
- KAMP, Allen R. "Between-The-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context" (1995-96) 59 Alb. L. Rev. 325.
- KASTELY, Amy H. "Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention" (1988) 8 Nw. J. Int'l L. & Bus. 574.
- KILIAN, Monica. "CISG and the Problems with Common Law Jurisdictions" (2001) 10 J. Transnat'l L. & Pol'y 217.
- MONTESQUIEU, Baron de. *The Spirit of the Laws*, trans. by Thomas Nugent (New York: Hafner Publishing Co., 1959).
- LANDO, Ole. "The Lex Mercatoria and International Commercial Arbitration" (1985) 34 I.C.L.Q. 747.
- LEW, Julian D.M. *Applicable Law in International Commercial Arbitration* (Dobbs Ferry, N.Y.: Oceana Publications, 1978).
- LEITER, Brian R. "American Legal Realism" University of Texas Law, Public Law Research Paper No. 42 available at SSRN: <http://ssrn.com/abstract=339562>.
- MACAULAY, Stewart. "Contracts, New Legal Realism, and Improving the Navigation of *The Yellow Submarine*" (2005-06) 80 Tul. L. Rev. 1161.
- MALYNES, Gerard. *The Merchant's Almanac of 1622 or Lex Mercatoria, the Ancient Law-Merchant* (Metheglin Press ed., 1996) (1622).
- MENDES, Errol P. "The U.N. Sales Convention & U.S.-Canada Transactions; Enticing the World's Largest Trading Bloc to Do Business Under a Global Sales Law" (1988) 8 J.L. & Com. 109 available at <http://cisgw3.law.pace.edu/cisg/biblio/mendes.html>.
- MUNDAY, R.J.C. "The Uniform Interpretation of International Conventions", (1978) 27 Int'l & Comp. L.Q. 450.
- POUND, Roscoe. "The Path of the Law" (1908) 8 Colum. L. Rev. 605.
- REDFERN, Alan & Hunter, Martin. *Law & Practice of International Commercial Arbitration*, 2<sup>nd</sup> ed., (London: Sweet & Maxwell, 1991).
- RODRIGUEZ, Ana Mercedes Lopez. Lex Mercatoria, RETTID (2002) 46 available at <http://www.rettid.dk/artikler/20020046.pdf#search='lex%20mercatoria>.
- PAMBOUKIS, Chalarambos. "The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods" (2006) 25 J.L. & Com. 107.
- ROSETT, Arthur. "Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods" (1984) 45 Ohio St. L.J. 265.
- SATTAR, Imtyaz M. "The UNIDROIT Principles of International Commercial Contracts and the Vienna Sales Convention: Competing or Completing 'Lex Mercatoria'?", (1999) 4 Int'l Trade & Bus. L. Ann. 13.
- SELDEN, Barton S. "Lex Mercatoria in European and U.S. Trade Practice: Time to Take a Closer Look" (1995) 2 Ann. Surv. Int'l & Comp. L. 111.
- SINGER, Joseph William. "Legal Realism Now" (1988) 78 Cal. L. Rev. 465.
- STEPHAN, Paul B. "The Futility of Unification and Harmonization in International Commercial Law" (1998-1999) 39 Va.J. Int'l L. 743.
- TRAKMAN, Leon E. *The Law Merchant: The Evolution of Commercial Law* (Littleton, CO.: F.B. Rothman, 1983).
- TWEEDDALE, Andrew & Tweeddale, Keren. *Arbitration of Commercial Disputes* (Oxford: Oxford University Press, 2005).
- VAN ALSTINE, Michael P. "Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law" (1996) 37 Va.J. Int'l L. 1.
- WALLER, Spencer Weber. "Neo-Realism and the International Harmonization of Law: Lessons from Antitrust" (1993-94) 42 U. Kan. L. Rev. 557.
- WALT, Steven. "Novelty and the Risks of Uniform Sales Law" (1999) 39 Va. J. Int'l L. 671.
- WARDHAUGH, Bruce. "From Natural Law to Legal Realism: Legal Philosophy, Legal Theory, and the Development of American Conflict of Laws Since 1830" (1989) 41 Me. L. Rev. 307.
- WATSON, Alan. "Comparative Law and Legal Change" (1978) 37 Cambridge L.J. 313.
- WATSON, Alan. "Legal Transplants and Law Reform" (1976) 92 Law Q. Rev. 79.