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# Do We Need a Global Commercial Code?

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## Introduction

The International Institute for the Unification of Private Law (UNIDROIT) first launched the idea of preparing a code of international trade law. In 1970, the Secretariat of UNIDROIT submitted a note to the newly established United Nations Commission on International Trade Law (UNCITRAL) in justification of such an initiative and indicated some of the salient features of the project.<sup>1</sup> What was proposed was a veritable code in the continental sense. The proposed code included two parts: part one dealing with the law of obligations generally, and part two relating to specific kinds of commercial transactions.<sup>2</sup> However, the “Progressive codification of international trade law” project was never given absolute priority. The “Progressive codification” was hampered by UNIDROIT’s other commitments and limited resources and by continued skepticism as to the project’s feasibility. Years later, the scope of the project was substantially altered and work then focused on the preparation of what is now known as the “Principles of International Commercial Contracts.”<sup>3</sup>

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1. See *Progressive Codification of the Law of International Trade: Note by the Secretariat of the International Institute for the Unification of Private Law (UNIDROIT)*, in UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, YEARBOOK, Volume I: 1968-1970, 285.

2. “The time has come . . . to proceed beyond the stage of partial and fragmentary unification and undertake the systematic codification of at least the basic principles of the law of international trade. This would lay the foundations for any subsequent regulation of the major legal institutions pertaining to this law, including those which have already been unified.” *Progressive Codification, supra* note 1, at 287.

3. For further details on this gradual but fundamental change in perspective, see M. J. BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW 19-21 (2d ed. 1997).

The Secretary of UNCITRAL has recently proposed the "Global Commercial Code,"<sup>4</sup> which is something very different from the original UNIDROIT proposal. Rather, it resumes work on a "world code of international trade law" advocated by Clive M. Schmitthoff some twenty years ago.<sup>5</sup> The "Global Commercial Code" is similar to Schmitthoff's proposal in that it is conceived as an open-ended instrument intended "to weld together . . . into a logical, integrated work," existing and future uniform laws in the field of international trade law.<sup>6</sup>

It is by no means a coincidence that this idea has reemerged. The last two decades have seen the world-wide success of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and also the adoption of additional international uniform laws dealing with topics within specific areas such as transport law, banking law, arbitration, e-commerce, and bankruptcy. The proliferation of specific uniform laws makes the idea of combining these specific pieces into a unified whole more compelling. Since most of the recently adopted instruments have been prepared under the auspices of UNCITRAL,<sup>7</sup> its Secretary has taken the initiative to re-open discussion on the codification of international trade law. The General Assembly of the United Nations gave UNCITRAL the formal mandate "[to] further the progressive harmonization and unification of international trade by: (a) coordinating the work of Organizations active in this field and encouraging cooperation among them."<sup>8</sup>

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4. See G. Herrmann, *Law, International Commerce and the Formulating Agencies—The Future of Harmonisation and Formulating Agencies: The Role of UNCITRAL* (Paper presented at the Schmitthoff Symposium 2000 "Law and Trade in the 21st Century," Centre of Commercial Law Studies, London June 1-3, 2000); G. Herrmann, *Towards a Global Commercial Code for Borderless Commerce: Global Commerce Needs Global Law* (Outline of a paper presented at the 10th Biennial Meeting of the International Academy of Commercial and Consumer Law, Dickinson School of Law of the Pennsylvania State University, August 9-13, 2000).

5. C. M. SCHMITTOFF, *COMMERCIAL LAW IN A CHANGING ECONOMIC CLIMATE* 29-31 (2d ed. 1981).

6. *Id.* at 30.

7. Apart from the CISG, mention may also be made of the Limitation Convention (1974/1980), the Hamburg Rules (1978), the UNCITRAL Model Arbitration Law (1985), the UNCITRAL Bills and Notes Convention (1988), the UN Terminal Operators Convention (1991), the UNCITRAL Credit Transfer Law (1992), the UNCITRAL Model Procurement Law (1994), the UN Guarantee and Stand-by Convention (1995), the UNCITRAL Electronic Commerce Law (1996) and the UNCITRAL Model Insolvency Law (1997).

8. United Nations General Assembly Resolution 2205 (XXI) of December 17, 1966.

Obviously, it is beyond the scope of this comment to address all the questions raised by a far-reaching project like the proposed codification of international trade law. Instead, I will concentrate on two main aspects: one, the kind of code envisaged and two, the relationship between the code and the general contract law.

### I. The Kind of Code Envisaged

Within the discussion of codifying international trade law, it has been suggested that the experience of the United States' Uniform Commercial Code (U.C.C.) represents a particularly significant precedent.<sup>9</sup> Regardless of whether the U.C.C. may or may not be considered a suitable model,<sup>10</sup> the U.C.C. anticipates within a federal system what UNCITRAL intends achieve at the inter-

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9. See Herrmann, *supra* note 4. Herrmann openly speaks of "inspiring aspects of the U.C.C. experience;" see also E. A. Farnsworth, *The Uniform Commercial Code and the Global Unification of International Trade Law*, in INTERNATIONAL ECONOMIC AND TRADE LAW 97 (C. M. Schmittoff & K. R. Simmonds eds. 1976) ("[T]he Code may advance international codification . . . by serving as an example of a successful unification of the laws of many different jurisdictions"); SCHMITTOFF, *supra* note 5, at 30, ("[The] attempt to draft a world code on international trade law . . . is not an idle dream . . . there is the example of the Uniform Commercial Code of the United States. It started as an academic venture but became reality when it was adopted by 49 of the 50 jurisdictions of the United States").

10. There are those who emphatically refer to the U.C.C. as "the most progressive commercial enactment of the Western world . . . [which] has three outstanding merits: it is modern in spirit, pragmatic in treatment and comprehensive." C. M. SCHMITTOFF, *supra* note 5, at 14-15. Others more cautiously speak of "areas [where] the draftsmen of the Code have formulated novel solutions to troublesome problems of international trade in such a form that they can be easily adopted for international use," E.A. Farnsworth, *supra* note 9, at 99, and indicate as examples of provisions which already have been taken as models at the international level § 1-205 on trade usages and § 2-508 on the seller's right to cure, *id.* at 99-100, or § 1-203 on the obligation of good faith, § 2-302 on unconscionable contract terms and § 2-509 on the transfer of risk of loss. J. O. Honnold, *The Influence of the Law of International Trade on the Development and Character of English and American Commercial Law*, in THE SOURCES OF THE LAW OF INTERNATIONAL TRADE 70, 86 (C. M. Schmittoff ed. 1964). Similarly, with respect to Article 9 dealing with security interests, see R. C. C. Cuming, *The Internationalisation of Secured Financing Law: the Spreading Influence of the U.C.C. Concepts, Article 9 and its Progeny*, in MAKING COMMERCIAL LAW: ESSAYS IN HONOUR OF R. M. GOODE 499 (R. Cranston ed. 1997). For examples of provisions of the U.C.C., which even in its home country are controversial and therefore hardly recommendable for imitation at the international level, see J. Gordley, *An American Perspective of the UNIDROIT Principles*, Centro di studi e ricerche di diritto comparato e straniero, Saggi, Conferenze e Seminari, 22 (1996), referring in particular to § 2-201 on the Statute of frauds, *id.* at 14-19, and to § 2-202 on the parol evidence rule, *id.* at 19-24.

national level, namely integrated, uniform rules relating to the most important commercial transactions.<sup>11</sup>

However, as has been rightly observed, “[the U.C.C.] is perhaps as well named as the Holy Roman Empire,” for it is neither “commercial” nor a “code” in the traditional continental sense, nor even strictly speaking, “uniform” throughout the United States.<sup>12</sup> Paradoxically, it is precisely these points that make the U.C.C. so attractive.<sup>13</sup> Therefore, the proposed Global Commercial Code should adopt the same approach with a much broader scope of territorial application.

### A. *Not a “Commercial” Code*

Like the U.C.C., the Global Commercial Code should not be a strict “commercial” code conceived as a special set of rules for merchants distinct from a general “civil” code.<sup>14</sup> One reason is

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11. The current version (2000) of the U.C.C. consists of 10 substantive chapters or “articles” dealing with “Sales” (Article 2), “Leases” (Article 2A), “Negotiable Instruments” (Article 3), “Bank Deposits and Collections” (Article 4), “Funds Transfers (Article 4A), “Letters of Credit” (Article 5), “Bulk Sales” (Article 6), “Warehouse Receipts, Bills of Lading and other Documents of Title” (Article 7), “Investment Securities” (Article 8) and “Secured Transactions; Sales of Accounts and Chattel Paper” (Article 9). Most of these transactions were previously the subject of separate uniform acts, such as the Uniform Sales Act of 1906, the Uniform Negotiable Instruments Law of 1896, the Uniform Stock Transfer Act and the Uniform Bills of Lading Act, both of 1909, the Uniform Warehouse Receipt Act of 1906, the Uniform Conditional Sales Act of 1918 and the Uniform Trust Receipt Act of 1938. It was the recognition that “these acts needed substantial revision to keep them in step with modern commercial practices and to integrate each of them with the others” that prompted the National Conference of Commissioners on Uniform State Laws and the American Law Institute to prepare the U.C.C.. General Comment of the National Conference of Commissioners on Uniform State Laws and the American Law Institute, in UNIFORM COMMERCIAL CODE 17-18 (2000 Edition).

12. J. O. Honnold, *The Influence of the Law of International Trade on the Development and Character of English and American Commercial Law*, in THE SOURCES OF THE LAW OF INTERNATIONAL TRADE 70, 83 (C. M. Schmittoff ed. 1964). For more recent remarks, see A. Rosett, *Improving the Uniform Commercial Code 6-7*, Centro di studi e ricerche di diritto comparato e straniero, Saggi, Conferenze e Seminari, 29 (1997), (“The title Uniform Commercial Code is somewhat misleading”).

13. See, e.g., R. M. Buxbaum, *Is the Uniform Commercial Code a Code?*, in RECHTSREALISMUS, MULTIKULTURELLE GESELLSCHAFT UND HANDELSRECHT 197 (U. Drobnig & M. Rehbinder eds. 1994).

14. Examples of countries that traditionally adopt such a dualistic system by applying special rules to commercial contracts different from the general rules contained in the respective civil codes are France, Germany and Austria, while the monistic approach is followed, for instance, by Switzerland, Italy and more recently by the new Dutch Civil Code. D. TALLON, INTERNATIONAL ENCYCLOPAEDIA OF COMPARATIVE LAW, vol. VIII, chap. 2 10 (1983).

because no such “civil” code exists at the international level. Another, and more important reason, is that the traditional distinction between “civil” and “commercial” parties and transactions has become somewhat outdated and remains under challenge even in those legal systems that still hold to the distinction.<sup>15</sup> Accordingly, a provision of the CISG expressly states that, “[n]either the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.”<sup>16</sup>

The Global Commercial Code should apply to transactions between business people as well as to transactions between individuals acting in their personal capacity. Whether the so-called consumer contracts should be covered remains to be decided. A number of existing uniform law instruments, such as the CISG and the 1988 UNIDROIT Conventions on International Factoring and on International Financial Leasing, expressly exclude consumer contracts from their scope.<sup>17</sup> The U.C.C.’s position is less radical. Under the U.C.C., consumer transactions are in principle, covered, but when appropriate, the Code will not impair the application of special consumer protections that may exist outside the Code.<sup>18</sup> For the Global Commercial Code, the former approach would appear preferable. In any case, the Global Commercial Code should avoid interfering with existing or future domestic rules for the protection of consumers.

### B. *Not a “Code”*

“It is fair to say that the draftsmen of the [U.C.C.] . . . did not want to codify the law, in the continental sense of codification. They wanted to correct some false starts, to point the law in the indicated directions, and to restore the law merchant as an institution for growth only lightly kept in bounds by statute.”<sup>19</sup> In

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15. *Id.* at 82.

16. CISG Article 1(3).

17. See CISG Article 2(a), (“This Convention does not apply to sales . . . of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use”). Article 1(2)(a) of the Factoring Convention and Article 1(4) of the Leasing Convention use similar language, without however including an escape clause.

18. See U.C.C. § 2-102, § 2A-104, § 4A-108 and § 9-103 Official Comment No. 8.

19. H. Kripke, *Principles Underlying the Drafting of the U.C.C.*, in 1962 UNIV. ILL. L. FORUM 322. For more recent commentary see J. F. Dolan, *Fundamentals of*

like fashion, the Global Commercial Code should not be a comprehensive code of general principles and rules capable of providing an answer to all legal controversies that might arise in practice.<sup>20</sup> Rather, the Global Commercial Code should be a compilation of special rules relating to the most important kinds of commercial transactions. Most of these rules already exist in the form of separate international conventions or model laws<sup>21</sup> and others are added for the occasion.<sup>22</sup> Yet, even the existing rules cannot simply be transplanted as such in the new Code. Instead, these rules must be coordinated not only in terms of formal presentation and terminology<sup>23</sup> but also to some extent, in content.<sup>24</sup>

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*the Uniform Commercial Code, in PERSPECTIVES ON COMMERCIAL LAW 3, 24 (A. Mugasha ed. 2000).*

20. As was the case, at least formally, in Article 1 of the 1963 International Trade Code of the former Czechoslovak Socialist Republic ("The purpose of this Act is to adopt a complete set of regulations governing proprietary relations arising in international commercial connections") or of section 3 of the 1976 International Commercial Contract Act of the former German Democratic Republic (according to which in the absence of specific provisions of the Act dealing with the case at hand or with analogous cases "the rule applicable to international commercial contracts is to be ascertained from the principles expressed in this Act.")

21. See, e.g., *supra* note 7; 1988 UNIDROIT Conventions on International Financial Leasing and on International Factoring.

22. Herrmann, *supra* note 4, mentions, as additional areas of possible coverage, "business organizations, arbitration, transport law, assignment and insolvency." While transport law is an area that should definitely be included in the proposed code, doubts may be raised with respect to the other subjects, either because it would be very difficult to devise internationally uniform rules (business organizations) or because they belong to general contract law (assignment) or are comingled with procedural law aspects (arbitration, insolvency).

23. Just to mention, by way of example, what CISG refers to as "failure to perform" (CISG Art. 25, 49(1)(a)) and "fundamental breach" (CISG Arts. 25, 64(1)(a)), are referred to as "default" (Art. 13(1)) and "substantial default" (Art. 13(2)) in the UNIDROIT Leasing Convention. The right "to avoid" the contract in CISG (Arts. 49 and 64) becomes the right to "terminate" or "rescind" in the UNIDROIT Leasing Convention (Arts. 10(2) and 13). Likewise, although according to some transport law Conventions the carrier loses the benefit of the limits of liability if the damage was caused by its "wilful misconduct or by such default on its part as, in accordance with the law of the court . . . seized of the case, is considered as equivalent to wilful misconduct" (Art. 25 of the 1929 Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air; Art. 29 (1) of the 1956 Convention on the Contract for the International Carriage of Goods by Road (CMR)), in others, the carrier loses the benefit if the damage resulted from its act or omission "done with the intent to cause such . . . damage . . . or recklessly and with knowledge that such . . . damage . . . would probably result" (Art. 25 of the 1929 Warsaw Convention as amended by the 1955 Hague Protocol; Art. 8 of the Hamburg Rules). The UNIDROIT Leasing Convention uses yet another formula and speaks of "intentional or grossly negligent act or omission" of the lessor (Art. 8(3)).

24. Suffice it to mention that revised Articles 24 and 27 of the CISG, dealing

In any case, UNCITRAL should avoid embarking on an overall revision of the existing instruments—there is always the risk of being over-ambitious and ending up with nothing.<sup>25</sup>

### C. Not a “Uniform” Code

The American Law Institute and the National Conference of Commissioners on Uniform State Laws drafted the U.C.C. in the form of a model law. The individual states were free to adopt the model law as stated or with modifications. In fact, many states have adopted variations of the model law, but most of the variations are of little or no significance.<sup>26</sup>

The Global Commercial Code should use the same approach for many reasons. First, sovereign states are less likely to adopt such a far-reaching instrument in its entirety without modification. Second, at the international level, there are marked differences in the legal traditions of the affected nations. In addition, some nations are parties to other regional or universal uniform laws covering the same topics as the Global Commercial Code. These nations may prefer to retain the other uniform laws and exclude the entirety of corresponding chapters of the Global Commercial Code.<sup>27</sup>

UNCITRAL should take the initiative in preparing the Global Commercial Code. UNCITRAL should work in close cooperation with the international organizations and formulating agencies that

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with time and place of receipt and the transmission risk of declarations made by traditional means of communication, would require revision in light of Article 15 of the UNCITRAL Electronic Commerce Law, dealing with time and place of dispatch and receipt of data messages. Likewise, the provisions in the transport law Conventions concerning the issuance of a “document” (Arts. 14-18 of the Hamburg Rules; Art. 4 of the UN Terminal Operators Convention) would have to be adapted to take into account Articles 16-17 of the UNCITRAL Electronic Commerce Law dealing with data messages instead of paper documents.

25. See Rosett, *supra* note 12, at 7 (On the difficulties encountered in the current revision of most of the Articles of the U.C.C., Rosett states, “Perhaps most troubling . . . is the temptation to make the U.C.C. a complete statement of all its complex subject matter . . . To include everything in one code complicates the task impossibly”); see also Dolan, *supra* note 19, at 26-28.

26. See Rosett, *supra* note 12, at 7 (pointing out that “[a] limited degree of variation has not interfered with essential uniformity”).

27. Thus, with respect to negotiable instruments, countries that have adhered to the 1930/1931 Geneva Uniform Laws for Bills of Exchange, Promissory Notes and Cheques may decide not to adopt the corresponding chapter of the Global Commercial Code based on the UNCITRAL Bills and Notes Convention. Likewise, countries that are parties to the Hague-Visby Rules may decide not to adopt the provisions of the Global Commercial Code on maritime transport based on the Hamburg Rules.

have prepared uniform law instruments that may become part of a Global Commercial Code. The establishment of a "Code Coordination Council," composed of independent experts and functioning as an advisory body, would seem to be particularly appropriate.<sup>28</sup>

#### D. An "International" Code

The Global Commercial Code should definitely depart from the U.C.C. model with respect to its territorial scope. While the U.C.C. governs both domestic transactions and transactions bearing relationships with other states or nations,<sup>29</sup> the scope of the Global Commercial Code should be limited to cross-border transactions. This limited scope, already evident in most of the existing international uniform law instruments in the field of trade law, would be even more appropriate with respect to the Global Commercial Code. To expect nations to agree on and adopt an instrument of this magnitude, which is intended to replace domestic laws in their entirety, would be absolutely unrealistic and politically counterproductive.

Restricting the Global Commercial Code to cross-border transactions is appealing for many reasons. For instance, transactions between parties of different countries create confusion and conflict as to the applicable law governing the transaction. This situation exists in the world of electronic commerce. Although transactions occurring over the Internet may be considered "virtual," in that national boundaries have little or no effect on the transaction, these transactions often involve parties who reside in different countries. Electronic commerce should not be considered completely detached from the territory of individual countries and operating exclusively in a "lawless" Cyberspace.<sup>30</sup>

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28. Again, the Permanent Editorial Board of the U.C.C. may be taken as a viable model.

29. See U.C.C. § 1-105(1) and Official Comment 2.

30. L. EDWARDS & C. WAELDE, *LAW AND THE INTERNET: REGULATING CYBERSPACE* 3, 6 (1997) ("To acknowledge that the enforcement of national law in cyberspace is difficult, perhaps even crippling difficult, is not however the same as saying, as one net commentator recently has [G.P. Barlow], that 'digital technology is . . . erasing the legal jurisdictions of the physical world and replacing them with the unbounded and perhaps permanently lawless seas of Cyberspace' "). See H. Kronke, *Applicable Law in Torts and Contracts in Cyberspace, in INTERNET: WHICH COURT DECIDES? WHICH LAW APPLIES?* 65, 74 (K. Boele-Woelki & C. Kessedjian eds. 1998); see also C. Kessedjian, *Rapport de Synthèse, in INTERNET: WHICH COURT DECIDES? WHICH LAW APPLIES?* 149; P. Mankowski, *Das Internet im Internationalen Vertrags- und Deliktsrecht*, 63 *Rabels Zeitschrift* 203 (1999); J. DING, *E-COMMERCE LAW & PRACTICE* 74 (1999) ("[i]n an electronic environment . . . distance, location and national boundaries are meaningless"

Despite the fact that the legal regimes covering purely domestic contracts vary considerably from country to country, nations are more prepared to grant international contracting parties the widest possible autonomy in regulating their relationships. Nations are generally less determined to impose their own laws to ensure that their own nationals have the same opportunities enjoyed by their foreign competitors. This is generally true for all countries with a planned economy. For obvious reasons, nations cannot impose their own regulations, which are based on a more or less centralized system of production and distribution, on their foreign trade partners. Consequently, these nations have no other choice than to accept the idea of separate legal regimes governing domestic and international transactions.<sup>31</sup> Yet to a certain extent, the remark is equally valid for countries with a market economy. For example, the English and German legislatures have taken a less rigid position on the unfair contract terms in international trade contracts and a more liberal attitude towards “international commercial arbitration.”<sup>32</sup>

A Global Commercial Code could be applied in its entirety to a given transaction or applied chapter by chapter depending on the specific characteristics of the transaction. For instance, a general provision could state that the entire Code applies whenever a single transaction “involves a choice between the laws of different States”<sup>33</sup> or “affects the interests of international trade”<sup>34</sup> or, alternatively, individual chapters could apply based on specific transactional criteria.<sup>35</sup> In either case, a provision should be added

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Ding’s view is that whenever no particular country’s law can be found as the applicable law, courts should apply the UNIDROIT Principles which “are transnational in nature . . . and as such offer the most neutral system of law which parties must have inherently accepted, on the basis of providing business efficacy to their transactions.”)

31. See, e.g., Article 38 of the new Chinese Contract Law of 1999 on contracts imposed by State mandatory plans as compared to Article 126 on the principle of party autonomy in the context of truly international commercial contracts.

32. See BONELL *supra* note 3, at 49-50 for further reference.

33. For this language, see Article 1 of the 1980 EEC Convention on the Law applicable to Contractual Obligations, and Article 1 of the 1986 Hague Convention on the Law applicable to Contracts for the International Sale of Goods (where, however, the such a conflict of laws situation may not arise solely from a stipulation by the parties as to the applicable law, even if accompanied by a choice of court of arbitration).

34. See Article 1492 (as amended by Decree no. 81-500 of May 12, 1981) of the French Code of Civil Procedure, according to which “[e]st international l’arbitrage qui met en cause des intérêts du commerce international”).

35. For example, in sales and leasing contracts the fact that the parties have their places of business in different States (Art. 1(1) CISG; Art. 3(1) Leasing

stating that the Global Commercial Code, either in its entirety or by individual chapters, will not apply whenever the international character (however it is defined) of the transaction was not apparent to the parties involved.<sup>36</sup>

In addition, the scope of the Global Commercial Code should not prevent individual states from applying the Code, either in its entirety or by chapters, to purely domestic transactions. On the other hand, parties to international transactions should be free to exclude the application of the code in its entirety. The remaining issue is whether the parties should be permitted to make a purely negative choice, by deciding that they do not want the Global Commercial Code to apply, or whether they should be required to make a positive choice, by excluding the application of the Global Commercial Code only on condition that they indicate the domestic law applicable in its place.<sup>37</sup>

## II. The Relationship Between the Global Commercial Code and the General Contract Law

Subsections (1) and (2) of § 1-102 of the U.C.C. provide that “[t]his Act shall be liberally construed and applied to promote its underlying purposes and policies,” one of which is “to make uniform the law among the various jurisdictions.” The Official Comments further stress that “[t]he text of each section should be read in the light of the purpose and policy of the rule or principle in question and also of the Act as a whole.” Section 1-103 of the U.C.C. states that “[u]nless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its

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Convention); for factoring contracts the fact that the receivables assigned result from an international sales contract (Art. 2(1) Factoring Convention); for contracts for the carriage of goods by sea the fact that the port of loading, the port of discharge and the place of issuance of the bill of lading are located in at least two different States (Art. 2(1) Hamburg Rules); for independent guarantees and stand-by letters of credit the fact that the guarantor/issuer, the beneficiary, the principal/applicant, the instructing party and the confirmer are situated in at least two different States (Article 4 UN Guarantee and Stand-by Convention).

36. See, e.g., Article 1(2) CISG.

37. While the first approach is taken in most of the existing international uniform law instruments (such as Article 6 CISG, Article 5(1) UNIDROIT Leasing Convention, Article 3 UNIDROIT Factoring Convention), the latter approach is that taken by the U.C.C. (§ 1-105). On the advantages and disadvantages of the two approaches, see M. J. Bonnell, *Uniform Law and Party Autonomy: What is Wrong with the Current Approach?* in INTERNATIONAL UNIFORM LAW IN PRACTICE 433, Acts and Proceedings of the 3rd Congress of the International Institute for the Unification of Private Law (Rome, September 7-10, 1987) (1988).

provisions.” In other words, while the U.C.C. is the primary source of law in areas it governs, it is “open-ended towards general principles of contract law.”<sup>38</sup> Therefore, with respect to matters the U.C.C. does not regulate, it relies on the body of uncodified principles of common law and equity as a supplementary source.<sup>39</sup>

The Global Commercial Code should contain a similar provision, which would be interpreted as taking into account its international origin and the need to promote uniform application. As a model, Article 7(1) of the CISG states, “[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.”<sup>40</sup> Similar to the U.C.C., the Global Commercial Code should use general principles underlying the Code to fill the internal gaps arising from questions relating to the Code but not expressly settled by it. An example is found in Article 7(2) of the CISG, which states that “[q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based.”<sup>41</sup>

A further issue is how the Global Commercial Code should deal with internal gaps that cannot be filled on the basis of general principles underlying the Code and also with external gaps, described as matters falling outside the scope of the Code. One possibility would be to resort to the general contract law of the individual States, as does the U.C.C. and most other existing international uniform laws.<sup>42</sup> This approach has both advantages

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38. Buxbaum, *supra* note 13, at 219.

39. See generally UNIFORM COMMERCIAL CODE, REVISED ARTICLE 1, General Provisions 2 (ALI Members Consultative Group Draft February 2000) (“The Uniform Commercial Code is not intended to be a comprehensive Code in the civil law tradition. Rather it was drafted against the backdrop of existing bodies of law, including the common law and equity, and relies on those bodies of law to supplement its provisions in many important ways. At the same time, the [U.C.C.] is the primary source of commercial law in areas that it governs.”).

40. For similar provisions see, e.g., Article 6(1) UNIDROIT Leasing Convention; Article 4(1) UNIDROIT Factoring Convention; Article 4 of the UNCITRAL Bills and Notes Convention; Article 14 of the UN Terminal Operators Convention; Article 5 of the UN Guarantee and Stand-by Convention; Article 8 of the UNCITRAL Model Insolvency Law.

41. For similar provisions see, e.g., Article 6(2), first part, UNIDROIT Leasing Convention; Article 4(2), first part, UNIDROIT Factoring Convention.

42. Thus, Article 7(2), second part, expressly states that questions concerning matters governed by CISG but which are not expressly settled in it are to be settled, in the absence of general principles underlying CISG, “in conformity with the law applicable by virtue of the rules of private international law,” while with respect to matters falling outside the scope of CISG, recourse to the applicable domestic law is generally taken for granted. For further references see, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS

and disadvantages. The advantage is that there are solutions to most issues since only domestic laws provide a complete system of formally binding principles and rules in the field of contract law. However, one disadvantage is determining which of the conflicting domestic laws applies in each case. Another and more important disadvantage is that the differences in content between the various domestic contract laws in sovereign States are far more marked than those between the state laws in the United States. Consequently, the solutions may well vary considerably depending on which domestic law is applicable in a given case. Varied solutions seriously jeopardize the ultimate goal of the Global Commercial Code—uniformity.

Another possibility would be to seek recourse by “internationally accepted principles of contract law” as the supplementary source of law of the Global Commercial Code. The obvious advantage is to obtain a maximum degree of uniformity, by avoiding the application of principles and rules of domestic law to transactions otherwise governed by the Global Commercial Code. However, the notion of “internationally accepted principles of contract law” is rather vague. Decisions would emerge on an *ad hoc* basis with the potential for unpredictable and arbitrary results.<sup>43</sup> This disadvantage could easily be overcome if the Code specifically referred to the UNIDROIT Principles of International Commercial Contracts.

The UNIDROIT Principles are specially tailored to the needs of international commercial transactions.<sup>44</sup> These principles, for the most part, reflect concepts found in many, if not all legal systems. These Principles cover important issues that are normally neglected in international uniform law instruments, such as contract formation, validity, interpretation, performance, non-performance and remedies.<sup>45</sup> Additional chapters under preparation cover agency, assignment, limitation of actions, set-off, third party rights and waiver.<sup>46</sup> In its entirety, these Principles represent a comprehensive system of general contract law, which is particularly

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43, 6 (P. Schlechtriem ed., 2d ed. 1998).

43. See Bonell, *supra* note 3, at 207.

44. See UNIDROIT—International Institute for the Unification of Private Law, Principles of International Commercial Contracts (1994), available at <http://www.unidroit.org/english/principles/contents.htm>.

45. *Id.*

46. In 1997, a new Working Group was established for the preparation of Part II of the UNIDROIT Principles, and it has met three times so far in plenary session (1998, 1999 and 2000) with an expected completion date in 2003.

suites to serve as the supplemental body of law for the Global Commercial Code.

Nonetheless, the UNIDROIT Principles lack any binding force. These Principles were prepared by a private group of experts acting under the auspices of an intergovernmental organization, UNIDROIT, with no legislative power. Despite the fact that these Principles are nonbonding, they have gained worldwide recognition in academic circles and in practice, in only six years.<sup>47</sup> In fact, a number of countries all over the world have used the UNIDROIT Principles as a model for their law reform projects.<sup>48</sup> Moreover, parties have increasingly chosen these Principles to govern their contracts, even in the absence of an express reference to them within the contract, as an expression of “general principles of law,” the *lex mercatoria*.<sup>49</sup> This approach has also been confirmed implicitly by a federal court in the United States.<sup>50</sup>

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47. This was amply confirmed on the occasion of the XVth International Congress of Comparative Law held in Bristol in 1998 where the UNIDROIT Principles were the subject of a special session. See A NEW APPROACH TO INTERNATIONAL COMMERCIAL CONTRACTS: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (M. J. Bonell ed. 1999) (containing the National Reports of G.A. Moens (Australia), M. Fontaine (Belgium), H. Danhan (China), J. Lookofsky (Denmark), B. Fauvarque-Cosson (France), J. Basedow (Germany), B. Izadi (Iran), A.M. Rabello (Israel), G. Alpa (Italy), R. Yamashita (Japan), H. Veytia Palomino (Mexico), F. de Ly (Netherlands), F. Sabourin (Quebec), P.M. Cosmovici and R. Munteanu (Romania), C. Hultmark (Sweden), F. Werro and E.M. Belser (Switzerland), M. Furmston (United Kingdom), A. Rosett and M.W. Gordon (United States of America) and Lê Net (Vietnam), together with the General Report by M.J. Bonell). An exhaustive bibliography on the UNIDROIT Principles is available at <http://www.unidroit.org/english/principles/pr-bib.htm>.

48. For further information, see M. J. Bonell, *The UNIDROIT Principles of International Commercial Contracts: Nature, Purposes and First Experiences in Practice*, in TRANSNATIONAL LAW IN COMMERCIAL LEGAL PRACTICE 7, 24-25 (Center for Transnational Law ed. 1999), available at <http://www.unidroit.org/english/principles/pr-exper.htm>.

49. For an analysis of the most significant decisions see M. J. Bonell, *The UNIDROIT Principles and Transnational Law*, in UNIFORM LAW REVIEW 2000-199, available at <http://www.unidroit.org/english/publications/review/articles/2000-2.htm>. For a collection of decisions and arbitral awards referring in one way or another to the UNIDROIT Principles, see UNILEX II—INTERNATIONAL CASE LAW AND BIBLIOGRAPHY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (Transnational Publishers, 2000).

50. See *The Ministry of Defence and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 29 F. Supp. 2d 1168 (S.D. Cal. 1998) (upholding the ICC Award No. 7365 of May 5, 1997, in which the Arbitral Tribunal held that since the parties have agreed on the application of general principles of international law and trade usages, it should be guided by the UNIDROIT Principles as to the contents of such rules); see also M. J. Bonell, *UNIDROIT Principles: A Significant Recognition by a United States District Court*, in: UNIFORM LAW REVIEW 2000, 651.

## Conclusions

Three years ago, the Dutch Ministry of Justice invited eminent scholars and practitioners from all over Europe to meet in The Hague to discuss the advisability and feasibility of preparing a European Civil Code. On that occasion, Ole Lando recalled the controversy between the German jurists Thibaut and Savigny, which occurred at the beginning of the nineteenth century. Lando recognized that even today there are those who, like Thibaut, strongly advocate the idea of the codification of private law in Europe, and those who, like Savigny, object that such an ambitious project is questionable from a political point of view.<sup>51</sup> As far as the proposed European Civil Code is concerned, I was then rather on Savigny's side.<sup>52</sup> My position with respect to the Global Commercial Code project is quite different. While this may appear to be a contradiction, it is not. What is envisioned at the international level is not a comprehensive code intended to replace the existing national civil codes. Instead, the proposed Code will be an integrated body of rules relating to the most important commercial transactions, leaving the general contract law to be supplemented by other more flexible instruments such as the UNIDROIT Principles of International Commercial Contracts.

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51. See Ole Lando, *Why Codify the European Law of Contract?*, in 5 EUROPEAN REVIEW OF PRIVATE LAW 525 (1997).

52. M. J. BONELL, THE NEED AND POSSIBILITIES OF A CODIFIED EUROPEAN CONTRACT LAW 505. Since the reservations I expressed on that occasion were exclusively of a political nature, obviously they have nothing to do with the outstanding work on the preparation of the envisaged European Civil Code which is currently being carried out by a team of eminent scholars from all over Europe led by Professor Christian von Bar. For an account of the latest results of the Group's work as well as of the first positive reactions on the part of the European Parliament and the Commission, see Christian von Bar, *The Study Group on a European Code*, in TIDSKRIFT UTGIVEN AV JURIDISKA FÖRENINGEN I FINLAND 323 (2000).