

CONSTRUING LAWS GOVERNING INTERNATIONAL AND U.S. DOMESTIC CONTRACTS FOR THE SALE OF GOODS: A COMPARATIVE EVALUATION OF THE CISG AND UCC RULES OF INTERPRETATION

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I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (CISG)¹ entered into force in 1986 and applies to transactions between parties with places of business in different contracting states or signatory nations.² For parties with places of business in the United States, the CISG governs relevant transactions formed on or after January 1, 1988. Now, some twenty-four years after the CISG's effective date and over seventy contracting states later,³ the legal community remains challenged by the CISG's provisions and policies. Early on, the practicing bar in the United States ignored or was oblivious to the CISG's applicability⁴ or encouraged domestic clients to opt-out of the CISG's coverage,⁵

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1. United Nations Convention on Contracts for the International Sale of Goods, Mar. 2, 1987, 1489 U.N.T.S. 3 [hereinafter CISG].

2. *See infra* note 183 and accompanying text (discussing the determination of the applicable place of business when a party has places of business in more than one contracting state, one of which is a nation that has ratified or acceded to the CISG).

3. UNCITRAL, Status: 1980 United Nations Convention on Contracts for the International Sale of Goods, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Sept. 23, 2012).

4. Michael Wallace Gordon, *Section III: Part II: Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles as Reflected in One State's (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice, and (3) Judges*, 46 AM. J. COMP. L. SUPP. 361, 371-72 (1998) (revealing general unfamiliarity among faculty, practicing bar, specialty bar, and judiciary with CISG and UNIDROIT contract principles); Sandra Saiegh, *The Business Lawyer's Perspective*, in DRAFTING CONTRACTS UNDER CISG 253, 258 (Harry M. Flechtner et al. eds., 2008) (reporting that a quick review of standard terms available on companies' web sites indicate that opting out of CISG is prevalent);

choosing instead the security of the Uniform Commercial Code (UCC).⁶

In the absence of a contrary agreement, the CISG provides default rules to govern the formation and performance of transactions for the international sale of goods. Unlike the CISG, UCC Article 2 contains a substantial number of mandatory provisions obviating the ability to opt-out of its provisions with the ease accorded by the CISG.⁷ Other than the impact of an Article 96 Reservation by a contracting state, which limits the parties' ability to contract around the writing requirement imposed by the Reservation,⁸ the CISG's applicability is subject to the parties' agreement. This Article will initially discuss the CISG's specific foundational goals and objectives and its interpretative guidelines and policies, and will then address the UCC's interpretative guidelines and the interpretative processes implicated by these guidelines. A comparative evaluation of the processes mandated by the two regimes will conclude the discussion on the interpretative processes. Finally, this Article will discuss the CISG's scope and applicability.

II. THE CISG'S GOALS AND OBJECTIVES

The CISG's stated purpose is "to provide a modern, uniform and fair regime for contracts for the international sale of goods . . . [and] contribute significantly to introducing certainty in commercial exchanges and decreasing transaction costs."⁹ Its objectives are numerous: (1) harmonizing civil and common law jurisprudence to facilitate cross-border commercial transactions;¹⁰ (2) serving as a unifying force in international trade;¹¹ (3) negating the risk of the application of indecipherable foreign law to a transaction after a breach has occurred; (4) minimizing the arduous and unpredictable task of choice of law analysis for courts;¹² and (5) preventing the presumed prejudice to foreign litigants through the application of local law by a forum court. The CISG applies only to commercial transactions in

see generally Sandeep Gopalan, *A Demandeur-Centric Approach to Regime Design in Transnational Commercial Law*, 39 GEO. J. INT'L L. 327, 329 (2007–2008).

5. CISG, *supra* note 1, art. 6 (stating that "[t]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.").

6. Unif. Commercial Code (2007) [hereinafter U.C.C.].

7. *See* Sarah Howard Jenkins, *Contracting Out of Article 2: Minimizing the Obligation of Performance & Liability for Breach*, 40 LOY. L.A. L. REV. 401, 403 n.10 (2006) (discussing the UCC's mandatory provisions, including the Statute of Frauds (U.C.C. § 2-201); Parol Evidence Rule (U.C.C. § 2-202); Unconscionable Contract or Clause (U.C.C. § 2-302); Third Party Beneficiaries of Warranties (U.C.C. § 2-318); Merchant Buyer's Duties (U.C.C. § 2-603); Duty to Mitigate Damages (U.C.C. § 2-715 (2)(a)); Liquidation or Limitation of Damages (U.C.C. § 2-718); Contractual Modification or Limitation of Remedy (U.C.C. § 2-719); Statute of Limitations in Contracts for Sale (U.C.C. § 2-725)).

8. *See generally* CISG, *supra* note 1, arts. 11, 12, 29, 96.

9. UNCITRAL, *supra* note 3.

10. *See generally* Camilla Andersen, *The Global Jurisconsultorium of the CISG Revisited*, 13 VINDOBONA J. INT'L COM. L. & ARB. 43, 45 (2009).

11. UNCITRAL, *supra* note 3.

12. *Id.*

goods¹³—an undefined term with specified exclusions¹⁴—without regard for liability that might accrue from the purchase or use of the goods, such as products liability¹⁵ or property rights in the goods.¹⁶

The CISG's rules of construction are few. Analogous to the role played by UCC Section 1-103,¹⁷ Article 7 directs courts to interpret the CISG: (1) to be consistent with its international character rather than permitting the analysis to be driven by local law and policy;¹⁸ (2) to promote uniformity in its application, thus mandating consideration of opinions of courts and arbitral awards emanating from other contracting states;¹⁹ and (3) to encourage the observance of good faith in international trade.²⁰

A. Interpreted Consistently with its International Character

The CISG directs those charged with interpreting it to glean a meaning consistent with its international character and, thereby, avoid reliance on the “rules

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

14. *Id.* art. 2.

15. *Id.* art. 5.

16. *Id.* art. 4.

17. U.C.C. § 1-103 (1977) (“Construction of [Uniform Commercial Code] to Promote its Purposes and Policies; Applicability of Supplemental Principles of Law: (a) [The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions.”).

18. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 2, 2005, ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] VII ZR 67/04, 2005 (Ger.) (finding that uniformity of application requires that the CISG be interpreted autonomously, without consideration of non-uniform national laws and judicial decisions); Oberster Gerichtshof [OGH] [Supreme Court] Apr. 13, 2000, docket No. 2 Ob 100/00w, ENTSCHIEDUNGEN DES ÖSTERREICHISCHEN OBERSTEN GERICHTSHOFES IN ZIVILSACHEN [SZ] (Austria) (finding that uniformity in application precludes applicability of local conformity laws of buyer's state unless: (1) these laws also exist in the seller's state; (2) the parties agree to follow these laws in the contract; or (3) the buyer notifies the seller of their existence at the time of contract formation, according to CISG art. 35(2)(b)); Oberlandesgericht Frankfurt a.M. [OLG] [High Regional Court of Frankfurt] Apr. 20, 1994, docket No. 13 U 51/93, (Ger.), (finding that uniform application of laws as required by art. 7(1) may involve goods being considered conforming even though the seller does not comply with local laws concerning the merchantability of goods).

19. *See* United Nations Com. on Int'l Trade Law, Case Law on UNCITRAL Texts (CLOUT) 4, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V01/847/23/PDF/V0184723.pdf?OpenElement> (last visited September 23, 2012) (summarizing Tribunale di Pavia Case 380: “Court recognized that foreign decisions, though not binding, should be taken into account by the judge in construing and applying the Convention.”); *see also* Joseph Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Article 7: Convention Interpretation, in* INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CONTRACTS (J. Herbots et al. eds., 2010); JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG 34–35 (2008).

20. *See infra* note 75 and accompanying text for a discussion of good faith in international trade in CISG art. 7(1).

and techniques traditionally followed in interpreting . . . domestic legislation.”²¹ The CISG, as an autonomous body of law, displaces “all the rules” in the ratifying nation state’s “legal system that previous[ly] governed” matters within the scope of the CISG.²² Furthermore, an interpretation of the CISG requires “a liberal and flexible attitude” and consideration of the “underlying purposes and policies”²³ of its individual provisions and the CISG as a whole. No specific domestic law was envisioned when the provisions were agreed to by the delegations.²⁴ Finally, the mere context of drafting—debate and “hard technical negotiations”²⁵ among world-wide delegations—resulted in a neutral, international term rather than one reflective of a particular legal regime.²⁶

For example, the CISG recognizes a goods-oriented remedy called “avoidance.”²⁷ If a seller commits a fundamental breach of the contract,²⁸ then a buyer may, as one of its remedies, declare the contract avoided. Upon avoidance, both parties are released from their contractual obligations;²⁹ the buyer returns the goods—unless they were sold in the ordinary course of business before the nonconformity was discovered³⁰—and the seller must refund the purchase price paid for the goods.³¹ This right of “avoidance” is distinguishable from the common law contract right that arises when a contract is voidable because of the status of one party, such as an infant,³² or conduct by one party is fraudulent³³ or results in the exercise of undue influence.³⁴

This interpretative perspective mandates that legal counsel immerse the judiciary in the mores of international contract law; the discussion and debate surrounding the promulgation of the CISG; its legislative history; case law addressing the 1964 Hague Conventions of the Sale of Goods; and the broad based scholarly commentary assessing the terms of the CISG.³⁵ Although complex given the change in article numbers in subsequent drafts, the legislative history provides

21. C.M. BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW 72-74 (1987); *see also* Franco Ferrari, *Homeward Trend and Lex Forism Despite Uniform Sales Law*, 13 VINDOBONA J. INT'L COM. L. & ARB.15, 19-20 (2009) (arguing that the vague rules of the CISG promote the homeward trend in interpretation of the CISG).

22. BIANCA & BONELL, *supra* note 21, at 93.

23. *Id.* at 72.

24. *See* CISG, *supra* note 1, art. 7.

25. Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW 443, 449 (1989).

26. JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 10-11 (4th ed. 1999).

27. CISG, *supra* note 1, art. 26.

28. *See id.* art. 25 (defining fundamental breach).

29. *Id.* art. 81.

30. *Id.* art. 82.

31. *Id.* art. 81(2) (granting each party the right to claim restitution for goods purchased or delivered).

32. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981).

33. *Id.* § 7.

34. *Id.*

35. *Id.*

access to the U.N. Commission on International Trade Law's (known as UNCITRAL or the Commission) deliberations and its working groups, and access to the purposes and goals sought to be achieved in the CISG, both in general and in specific provisions.³⁶ Case authority developed in resolving disputes subject to the 1964 Hague Conventions—the Uniform Law for the International Sales and the Uniform Law on the Formation of Contracts for the International Sale of Goods—coupled with the Commission's decision to reject, modify, or retain that effect in the CISG, provides guidance on interpreting the CISG.³⁷

Finally, the structure of the Commission and the drafting processes support rejecting a court's interpretative approach based on local law. This conclusion must be followed. Even though similarity exists between language in the official translated versions of the CISG and typical domestic laws, domestic laws' usage must be rejected unless the CISG requires the application of domestic law based on a given provision.³⁸ The General Assembly of the United Nations created the Commission as a representative body of its member states "to promote" the harmonization and unification of the law of international trade in 1966.³⁹ The Commission was comprised of representatives of thirty-six nations who were diverse in both legal and linguistic backgrounds.⁴⁰ The Secretariat, comprised of the U.N. International Trade Law Branch and its Chief, to assist and facilitate the processes of the Commission and its working groups, prepared "studies analyzing the divergences among the existing legal rules; reports on commercial practices to assist [the Commission] in making a choice among alternative solutions to pivotal factual examples; [and] draft statutory texts formulated . . . with clearly labeled alternatives to facilitate debate and decision."⁴¹ The provisions were developed by reaching a consensus that reflected a harmonization of the collective experience and expertise of the Commission.⁴²

To interpret the CISG in a manner consistent with its international character, a court must begin from a perspective based on rejecting domestic policy and goals, embracing the underlying purposes and policies of the CISG, and respecting both the context of the drafting and the legislative history that produced the consensus

36. HONNOLD, *supra* note 26, at 111–12; *see also* John O. Honnold, *UNCITRAL Documents: Research, Sources, Style, Citation*, 27 AM. J. COMP. L. 217, 218–21 (1979).

37. HONNOLD, *supra* note 26, at 111–12.

38. *See, e.g.*, CISG, *supra* note 1, art. 4, 7(2).

39. U.N. Commission on International Trade Law [hereinafter Commission]. *See* G.A. Res. 2205 (XXI) U.N. GAOR, 21st Sess. (Dec. 20, 1965) *available at* <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/005/08/IMG/NR000508.pdf>; *see also* UNCITRAL, Origin, Mandate, and Composition of UNCITRAL, <http://www.uncitral.org/uncitral/en/about/origin.html> (last viewed Sept. 23, 2012).

40. The Commission was composed of delegates from Africa, Asia, Eastern Europe, Latin America, Western Europe, United States, Canada, Australia, and New Zealand. *See* E. Allan Farnsworth, *Developing International Trade Law*, 9 CAL. W. INT'L L.J. 461, 463–66 (1979); *see also* UNCITRAL Origin, *supra* note 39.

41. HONNOLD, *supra* note 26, at 8–9.

42. *Id.*

reached.⁴³ An opinion issued by the Netherlands Arbitration Institute in 2002⁴⁴ employed the foregoing model and recommended tools in determining the scope of a seller's implied obligation of quality imposed by Article 35(2)(a).⁴⁵ Analogous to the implied warranty of merchantability under UCC § 2-314, Article 35(2)(a) imposes an obligation on the seller to deliver goods that are fit for the purposes for which goods of the same description would ordinarily be used.⁴⁶

In the matter before the Netherlands Arbitration Institute, the seller sought damages because the buyer terminated an installment contract for the purchase of petroleum condensate called Rijn Blend, a liquid product derived from the exploration of gas fields.⁴⁷ After successful performance of the contract for five years, the buyer complained that the condensate's mercury content was excessive and refused to take further deliveries. The contract did not contain specifications regarding quality.⁴⁸ The buyer argued that the condensate did not conform to the contract. The Tribunal framed the issue as an asserted failure to satisfy the Article 35(2)(a) obligation.⁴⁹ The Tribunal interpreted the obligation as three potential standards: (1) the merchantable quality standard espoused in English common law: "goods conform if a reasonable buyer would have concluded the contract if he had

43. See BIANCA & BONELL, *supra* note 21, at 72–74.

44. Arbitral Award, Number: 2319, Netherlands Arbitration Institute (Oct. 15, 2002) [hereinafter Arbitral Award, Number: 2319] available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=836&step=FullText> (last visited Sep. 23, 2012.).

45. U.C.C. § 2-314 (1977) states, under the heading "Implied Warranty: Merchantability; Usage of Trade," that "(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. (2) Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and (e) are adequately contained, packaged, and labeled as the agreement may require; and (f) conform to the promise or affirmations of fact made on the container or label if any."

46. See CISG, *supra* note 1, art. 35 ("(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. (2) *Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used; (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment; (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model; (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods. (3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.*") (emphasis added).

47. Arbitral Award, Number: 2319, *supra* note 44, ¶ 39.

48. *Id.* ¶ 44.

49. *Id.* ¶¶ 110–11, 124.

known the quality of the goods without bargaining for a price reduction,”⁵⁰ (2) the average quality standard of the relevant product in the relevant geographical market as reflected in civil, continental European law,⁵¹ or (3) the reasonable expectations of the buyer as suggested by several commentators.⁵² The Tribunal considered the division among: scholarly commentaries; existing CISG case authority; the Canadian delegation’s proposed “average quality” standard that was later withdrawn during the drafting of Article 35; and the policy goal of rejecting, in the first instance, an existing domestic standard for an international one.⁵³ On these grounds, the Tribunal interpreted Article 35(2)(a) to obligate the seller to deliver goods of a reasonable quality,⁵⁴ and held that the delivered goods were not of reasonable quality given the substantial reduction in price received by the seller in its substitute transactions and the long term nature of the agreement.⁵⁵ The pattern of analysis reflected in the interpretation of the Article 35(2)(a) obligation is the model that should be employed to derive a meaning reflective of the CISG’s international character.

B. Interpreted to Promote Uniformity of Application

The resulting promulgation was not an attempt to replicate any existing domestic legal regime but to create an autonomous one by harmonizing disparate approaches to legal problems. The international working groups drafting the provisions of the CISG chose to avoid “abstract, disembodied concepts”⁵⁶ such as the term “property” or “title” and rather sought to use plain language to refer to things and events rather than concepts likely tied to domestic law.⁵⁷ This autonomous legal regime with its own special policies and goals must be applied. Consequently, the Article 7(1) guideline to interpret the CISG to promote uniform application is closely related to the interpretative guideline that “regard is to be had for its international character.”⁵⁸ If the harmonization effort is to be successful, then existing local law as well as the interpretative and construction guidelines and policies of the local law must not impact the interpretation and construction of the uniform text that is created through the harmonization efforts. Rather, the uniform text must preempt and supplant local law to the extent required by the uniform text.⁵⁹

50. *Id.* ¶¶ 68, 88–91.

51. *Id.* ¶¶ 69, 92–100.

52. *Id.* ¶ 71.

53. Arbitral Award, Number: 2319, *supra* note 44, ¶ 118.

54. *Id.*

55. *See id.* ¶¶ 90, 99, 100, 102 (finding the goods were unmerchantable).

56. HONNOLD, *supra* note 26, at § 87(1).

57. *Id.*

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

59. *See generally* Anderson, *supra* note 10. The author selects art. 39’s obligation to provide notice of nonconformity and the variations among opinions as to the length of time that constitutes untimely notice as an example for the need for applied uniformity. This choice is regrettable. The nature or complexity of the goods sold and other factual differences among the

What impact, however, does the mere promulgation of the CISG in six official languages, collectively referred to as “a single original,”⁶⁰ have on its interpretation? The differences inherent in the various languages, such as nuances in meaning, produce “textual non-uniformity.”⁶¹ These six different languages result in diversity in meaning and tone. Therefore, actual uniformity, or textual uniformity, is unlikely. Applied uniformity, which is “uniform understanding and uniform interpretation,” is achievable even without textual uniformity, because “rules or laws labeled ‘uniform’ are not necessarily uniform at all [It is] only where they have been applied cross-jurisdictionally on the intended legal phenomenon and created the intended degree of similarity that the label ‘uniform’ fits.”⁶²

Uniformity in application results when courts of different languages, cultures, and styles apply the same principles or guidelines for interpreting the CISG, and when courts of different languages review and consider authority from other contracting states.⁶³ To ensure applied uniformity, some advocate for the creation of a CISG global jurisconsultorium, “a process of consultation which takes place across borders and legal systems with the aim of producing autonomous and uniform interpretations and applications of a given rule.”⁶⁴ Many courts include in their processes and opinions the review of and reference to existing authority from other states that interpret and apply the CISG provisions.⁶⁵ Some advocate for a more formalized system such as a jurisconsultorium that goes beyond reviewing and considering the opinions of courts of other nations.⁶⁶ This more formalized system involves, first, a scholarly jurisconsultorium with cooperation and consultation between transnational scholars rather than scholarship from and within a single jurisdiction.⁶⁷ Second, it involves a practical jurisconsultorium with transnationally shared case law, to resolve disputes before domestic courts.⁶⁸ The International Sales Convention Advisory Council (CISG-AC) is an example of a scholarly jurisconsultorium.⁶⁹ A private endeavor, the CISG-AC’s stated objective is “promoting a uniform interpretation of the CISG.”⁷⁰ Its members are scholars whose participation is without official ties to any country or “legal culture.”⁷¹ The

cases impact the determination of what is a reasonable time and consequently the variations may be justified.

60. HONNOLD, *supra* note 26, at 11.

61. Andersen, *supra* note 10, at 44 n.8 (citing Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observation on Translations, Reservations and the Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187 (1998)).

62. Andersen, *supra* note 10, at 43.

63. *Id.* at 42–44.

64. *Id.* at 46.

65. *Id.* at 49–52.

66. *Id.* at 46.

67. *Id.*

68. Andersen, *supra* note 10, at 46.

69. See CISG Advisory Council, <http://www.cisgac.com> (last visited Sept. 23, 2012).

70. *Id.*

71. *Id.*

CISG-AC issues opinions upon request or its own initiative.⁷² Less structured endeavors such as the 2004 analytical digest of court and arbitral decisions identifying trends in interpreting the CISG and the 2005 Proceedings of the UNCITRAL-VIAC Joint Conference⁷³ inform the processes for achieving an international and uniform interpretation of the CISG. These efforts effectuate, in part, the goals of a scholarly jurisconsultorium. The increased availability of opinions of contracting states and arbitral awards through UNCITRAL, UNILEX,⁷⁴ and the Pace School of Law facilitate the development of a practical jurisconsultorium. Direct consultation among the courts of contracting states or a system of “certifying” issues was not envisioned. The contracting nation states might have viewed this as an intrusion into state sovereignty.

C. Interpreted to Encourage Observance of Good Faith in International Trade

The third prong of the interpretative guideline of Article 7(1) directs that interpretation must encourage observance of good faith in international trade.⁷⁵ Before addressing this prong, an assessment of the good faith obligation imposed by U.S. domestic law is warranted and provides a basis for evaluating the mandate of the CISG. UCC Section 1-304⁷⁶ and Restatement (Second) of the Law of Contracts Section 205⁷⁷ both impose an obligation of good faith performance and good faith enforcement of every duty and contract. This good faith obligation of performance and enforcement is implied in every duty and in every contract.⁷⁸

1. Domestic law good faith performance

UCC Article 2 reflects an assumption that parties, as a general rule, invest minimal effort and minimal resources in forming contractual relationships.⁷⁹ The UCC facilitates such conduct by providing gap-fillers to supplement the parties’ bargaining.⁸⁰ This approach to contracting is a by-product of the perceived inefficiency of detailed planning and negotiating.⁸¹ Concomitantly, parties “rely on

72. *Id.*

73. These proceedings were recorded and later published by multiple authors. *Proceedings of the UNCITRAL-VIAC Joint Conference*, 25 J.L. & COM. 1 (2005), available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_VIAC.html.

74. Michael Joachim Bonell is editor-in-chief of this electronic database dedicated to international case law and bibliography on the UNIDROIT Principles of International Commercial Contracts and on the Convention.

75. Andersen, *supra* note 10, at 48–49.

76. U.C.C. § 1-304 (2001) (regarding “[o]bligation of [g]ood [f]aith: *Every contract or duty within [the UCC] imposes an obligation of good faith in its performance and enforcement*”) (emphasis added).

77. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (stating “[d]uty of [g]ood [f]aith and [f]air [d]ealing: *Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.*”) (emphasis added).

78. *Id.*; U.C.C. § 1-304 (2002).

79. *See generally* U.C.C. art. 2 (2001).

80. *See, e.g.*, U.C.C. § 2-204 (2001).

81. Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good*

the good faith of their exchange partners” to perform consistently with reasonable commercial standards.⁸² UCC Section 1-304 of revised Article 1 imposes, as does its predecessor, Section 1-203,⁸³ “an obligation of good faith” in the performance and enforcement of every contract or duty within the UCC’s ambit.⁸⁴ To the extent that a party undertakes obligations of performance as part of the contractual relationship, it must in good faith perform those express obligations undertaken; the terms implied from course of dealing, trade usage, and course of performance; any applicable supplementary gap-filling default rules; and any other statutory duties imposed.⁸⁵ No independent duty of good faith, such as fairness or reasonableness, is implied as a result of Section 1-304.⁸⁶ Rather, UCC Section 1-304 imposes a duty to perform the required obligations consistent with the parties’ reasonable expectations at the time of contracting. The purpose of this duty is to avoid conduct constituting the recapturing of a foregone opportunity or the exercise of a contractual right in a manner that evades the spirit of the transaction.

Although an implied obligation, the parties may not eliminate the duty by agreement.⁸⁷ Both the revised and former Article 1 expressly prohibit disclaiming

Faith, 94 HARV. L. REV. 369, 371 (1980). *See also* Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223, 1267 (1999).

82. Burton, *supra* note 81, at 371.

83. U.C.C. § 1-203 (2000).

84. U.C.C. § 1-304 cmt. 1 (2001). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (restating this general principal as applicable to contracts not within the scope of an article of the UCC); E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 668 (1963) (distinguishing good faith purchase and good faith performance).

85. U.C.C. § 1-304 (2001). *See* *Sons of Thunder, Inc. v. Borden, Inc.*, 690 A.2d 575, 588–89 (N.J. 1997) (supplementing former Article 1’s “honesty in fact” good faith standard with the common law implied covenant of good faith and fair dealing to find that the buyer breached its duty of good faith performance by failing to purchase the agreed-upon quantity of clam meat, in refusing to honor the contract, and in exercising its right to terminate the agreement); *Southface Condominium Owners Ass’n v. Southface Condominium Ass’n*, 733 A.2d 55, 58 (Vt. 1999) (holding that each party to a contract impliedly promises that each will not do anything to undermine or destroy the other’s rights to receive the benefits of the agreement). *But see* *Northview Motors, Inc. v. Chrysler Motors Corp.*, 227 F.3d 78, 91–92 (3d Cir. 2000) (holding that Pennsylvania law would not recognize an independent cause of action for breach of an implied duty of good faith if the allegations of bad faith are identical to another claim for relief). *See generally* Richard E. Speidel, *The “Duty” of Good Faith in Contract Performance and Enforcement*, 46 J. LEGAL EDUC. 537, 544–45 (1996) (positing that a failure to adhere to a developed course of performance constitutes bad faith).

86. Permanent Editorial Board for the Uniform Commercial Code, PEB Commentary on the Uniform Commercial Code, Commentary No. 10—§ 1-203 (1994). *See, e.g.*, *Aisenberg v. Hallmark Mktg. Corp.*, 337 F. Supp. 2d 257, 262 (D. Mass. 2004) (citing § 205 of the Second Restatement of Contracts in a non-goods transaction and holding that the plaintiff must establish that the defendant exercised a contractual right in a manner that evades the spirit of the transaction or denies the plaintiff the benefit of the contract); Harry Flechtner, *Comparing the General Good Faith Provisions of the PECL and the UCC: Appearance and Reality*, 13 PACE INT’L L. REV. 295, 307–11 (2001) (comparing the role of good faith in the UCC with that in the Principles of European Contract Law). *See generally* *Autry Petroleum Co. v. BP Prods. N. Am., Inc.*, 59 U.C.C. REP. SERV. 2d (CBC) 468, 471 (M.D. Ga. 2006) (stating the general rule).

87. U.C.C. § 1-302(b) (2001); *see also* U.C.C. § 1-102(3) (2000).

the obligation to perform or enforce contractual duties in good faith.⁸⁸ The parties may, however, establish standards delineating the conduct or requirements for satisfying the good faith obligation, unless the agreed-upon standard is manifestly unreasonable.⁸⁹ Without an agreed-upon standard established by the parties for determining when the obligation of good faith has been fulfilled, courts should employ the definitional standard imposed by the specific substantive Article that is applicable to the transaction. Revised Article 1 establishes the standard for all Articles except Article 5.⁹⁰ Parties must perform contracts and duties, enforce contract rights honestly, and adhere to reasonable commercial standards of fair dealing when performing or enforcing the contract.⁹¹ This definitional standard of good faith broadens the prior merchant standard of Article 2 by removing the limitation that the commercial standards of fair dealing must only conform to those of the relevant trade.⁹² Developed case law interpreting “fair dealing” in the context of a given trade remains relevant for developing the jurisprudence of the principle even though the revised definition does not limit fair dealing to the trade.⁹³ Now, prevailing community standards of fair dealing as well as the relevant trade should be applicable.

Good faith is defined as honesty in fact and adherence to reasonable commercial standards of fair dealing.⁹⁴ U.S. domestic courts view the honesty in fact prong as one of pure-hearted conduct even if the conduct reflects an empty head or unreasonableness.⁹⁵ It is the second prong, fair dealing, that has proven elusive for courts. The commentary distinguishes fair dealing from ordinary care by describing fair dealing as:

[A] broad term that must be defined in context . . . it is concerned with the fairness of conduct rather than the care with which an act is performed. This is an entirely different concept than whether a party exercised ordinary care in conducting a transaction. Both concepts are to be determined in the light of reasonable commercial standards, but those standards in each case are directed to different aspects of commercial conduct.⁹⁶

88. U.C.C. § 1-302(b) (2001); *see also* U.C.C. § 1-102(3) (2000).

89. *See Jenkins, supra* note 7, at 421–22 nn.128–37.

90. *But see Sons of Thunder*, 690 A.2d at 587 (applying the Article 1 standard and supplementing it with the common law definition of good faith rather than applying the merchant standard of Article 2 for this goods transaction).

91. *See* U.C.C. § 1-304 cmt. 1 (2001).

92. *See* U.C.C. § 2-103(1)(b) (2000).

93. U.C.C. § 1-304 (2001) (lacking any mention of fair dealing within the trade).

94. U.C.C. § 1-201, cmt. 20 (2001) (“The definition of ‘good faith’ in this section merely confirms what has been the case for a number of years as Articles of the UCC have been amended or revised—the obligation of ‘good faith,’ applicable in each Article, is to be interpreted in the context of all Articles except for Article 5 as including both the subjective element of honesty in fact and the objective element of the observance of reasonable commercial standards of fair dealing.”).

95. *Id.*

96. *Id.*

However, courts appear to treat conduct constituting ordinary care⁹⁷ as satisfying the fair dealing requirement.⁹⁸

Fair dealing centers on preventing unfair advantage taking and the unfair disregard for the rights and privileges of another involved in the transaction⁹⁹ or contractual relationship,¹⁰⁰ or the asserting of an unfounded position regarding the performance of a duty or the enforcement of rights.¹⁰¹ “[E]vasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party’s performance” illustrate conduct that the fair dealing prong was designed to discourage.¹⁰²

In *Maine Family Federal Credit Union v. Sun Life Assurance Co. of Canada*,¹⁰³ a depository bank’s failure to place a customary hold on a large check drawn on an out-of-state bank constituted unfair dealing by the bank as to the indorsers who were being defrauded by the bank’s customer.¹⁰⁴ Observe here that although the bank does not owe a non-customer, the indorser, a duty of care, it still must engage in conduct that is fair with respect to all parties to the instrument. Another example of unfair dealing occurs when the debtor places printed satisfaction language on its check stock so that its debts are paid with checks bearing an explicit condition of full satisfaction, regardless of whether a dispute

97. See U.C.C. § 3-103(a)(7) (1990) (“‘Ordinary care’ in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged.”).

98. See, e.g., *Travelers Cas. & Sur. Co. v. Citibank (S. Dakota, N.A., 2007 WL 2875460 (M.D. Fla. 2007)* (holding that adhering to custom or reasonable commercial standards is fair dealing because banks often accept an employer’s checks for employees’ accounts because there are a number of legitimate reasons for employers to pay the credit card debt of its employee; furthermore the discussion suggests that the care taken by the bank was consistent with reasonable commercial standards).

99. See, e.g., *Maine Family Fed. Credit Union v. Sun Life Assur. Co. of Canada*, 727 A.2d 335 (Me. 1999).

100. The meaning of “fair dealing” will depend upon the facts in the particular case. See U.C.C. § 3-311, cmt. 4 (1990). For example, suppose an insurer tenders a check in settlement of a claim for personal injury in an accident clearly covered by the insurance policy. *Id.* The claimant is necessitous and the amount of the check is very small in relation to the extent of the injury and the amount recoverable under the policy. *Id.* If the trier of fact determines that the insurer was taking unfair advantage of the claimant, an accord and satisfaction would not result from payment of the check because of the absence of good faith by the insurer in making the tender. *Id.*

101. *Id.* (“Another example of lack of good faith is found in the practice of some business debtors in routinely printing full satisfaction language on their check stocks so that all or a large part of the debts of the debtor are paid by checks bearing the full satisfaction language, whether or not there is any dispute with the creditor. Under such a practice the claimant cannot be sure whether a tender in full satisfaction is or is not being made. Use of a check on which full satisfaction language was affixed routinely pursuant to such a business practice may prevent an accord and satisfaction on the ground that the check was not tendered in good faith under subsection 3-311, cmt. 4.”).

102. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (1979).

103. 727 A.2d 335 (1999).

104. *Id.*

with the payee-creditor exists or not.¹⁰⁵ The existence of a good faith dispute is a condition precedent to the creation of an accord and satisfaction by tendering a check bearing a statement of satisfaction. Therefore, tendering the check with the preprinted statement of satisfaction is an attempt to gain an advantage in the event of a later developing dispute and is thus unfair. A lender may fail to achieve the status as holder in due course because of its failure to engage in lien searching tailored to discover if its pending transaction with the debtor violated the rights of a senior secured party.¹⁰⁶ Its failure would be inconsistent with reasonable commercial standards of fair dealing.¹⁰⁷

2. Good faith and the CISG

Unlike the forgoing domestic principles, the CISG does not recognize as a general obligation of the parties an implied duty of good faith and fair dealing in the performance and enforcement of contracts.¹⁰⁸ The obligation under various domestic regimes of observing good faith in negotiation, formation, interpretation, and performance by the parties was rejected by the delegations.¹⁰⁹ Article 7 of the CISG imposes a rule of interpretation to guide courts, arbitration panels, and tribunals seeking to “ascertain the meaning and the legal effects to be given”¹¹⁰ to the individual articles of the CISG that the interpretation must encourage the observation of good faith in international trade.

The court or tribunal must consider the impact of the “observance of good faith in international trade”¹¹¹ on the meaning of the provisions. Article 7 has a good faith interpretative goal that is designed to create a body of law that reflects and establishes international behavioral norms for contracting parties in transactions subject to the CISG. Courts giving attention to the observation of good faith in international trade as an interpretative guideline have defined the rights and obligations imposed by the CISG in a manner that minimizes fraudulent conduct,

105. U.C.C. § 3-311, cmt. 4 (1977).

106. *See, e.g.,* Wawal Savings Bank v. Jersey Tractor Trailer Training, Inc. (In re Jersey Tractor Trailer Training, Inc.), 580 F.3d 147, 156–58 (3d Cir. 2009) (finding lender met the good faith requirement for holder in due course because it conducted a series of UCC searches tailored to determine the existence of a senior secured party; court did not discuss whether the failure to include “Inc.” as part of the debtor’s name in those searches constituted a lack of care).

107. *See also* Cugini v. Reynolds Cattle Co., 687 P.2d 962, 968 (Colo. 1984) (addressing the good faith requirement for buyer in the ordinary course of business in the cattle trade; the reasonable commercial standards of fair dealing in the cattle trade required buyer to acquire a brand inspection certificate and to reject an inadequate bill of sale).

108. *See generally* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES § 94 (3d ed. 1999) (discussing that in 1978, the Commission rejected imposition of general duty of good faith); HONNOLD, *supra* note 26, § 94. *But see* Hungarian Chamber of Commerce and Industry Court of Arbitration Nov. 11, 1995, <http://www.unilex.info/case.cfm?id=217> (Hung.) (stating parties have a duty of good faith).

109. BIANCA & BONELL, *supra* note 21, at 70.

110. *Id.* at 71.

111. LOOKOFSKY, *supra* note 19, at 49 (positing that the “distinction between good faith interpretation and good faith performance is proving to be more apparent than real . . .”).

unfair conduct, and deliberate conduct contrary to the essential purposes or terms of the agreement.¹¹² Such conduct has been held to be contrary to good faith in international trade and, thus, does not satisfy the requirements imposed by the Article being addressed.¹¹³ Similarly, courts should not interpret the provisions of the CISG to authorize conduct that would be undesirable in international trade.

Courts have interpreted good faith in international trade to include a duty to cooperate and to provide information, especially if one party seeks to impose on the other party a standard term purportedly included in its offer.¹¹⁴ This duty to cooperate and to provide information requires that the seller disclose standard terms to the buyer rather than merely making standard terms accessible on a website.¹¹⁵ Good faith has been held as the basis for asserting a waiver of rights despite the absence of an express basis for asserting a waiver in the text of the CISG.¹¹⁶ Good faith may require the seller to wait a reasonable time after a payment becomes due before bringing an action to compel the buyer to pay the price pursuant to Article 62.¹¹⁷ A buyer's avoidance of a contract without awaiting the results of the seller's attempts to cure would violate the international principle of good faith.¹¹⁸

Consequently, courts have employed the interpretative guideline of observance of good faith in international trade as a gap-filler giving the courts the opportunity to extend, develop, and mollify or soften the terse provisions of the CISG by imposing a standard of conduct that is consistent with reasonable commercial behavior and to give effect to the rights available in the CISG.¹¹⁹ However, resort must not be made to domestic law, but rather to the general

112. *See* BRI Prod. "Bonaventure" v. Pan African Exp., Cour d'Appel [CA] [regional court of appeal] Grenoble, Feb. 22, 1995, J.D.I. 1995, 632 (Fr.). *See also* Comisión para la Protección del Comercio Exterior de Mexico [COMPROMEX][Commission for Protection of Foreign Commerce of Mexico], Diario Oficial, Enero de 1999, M/115/97, Página 69 (Mex.) *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=374&step=FullText> (discussing the standard of good faith that is common in international trade).

113. *See* BRI Prod. "Bonaventure" v. Pan African Exp., Cour d'Appel [CA] [regional court of appeal] Grenoble, Feb. 22, 1995, J.D.I. 1995, 632 (Fr.).

114. Oberlandesgericht [OLG] [Higher Regional Court] July 24, 2009, OLGZ (Ger.), *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=1472&step=FullText>.

115. *See, e.g., id.*

116. Oberlandesgericht [OLG] [Higher Regional Court] June 25, 1997, BETRIEBS-BERATER 393, 1997 (Ger.) (reversed on other grounds by Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 25, 1998, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1259, 1999 (Ger)).

117. Trib. di Padova, sez. un., 25 febbraio 2004 n. 2, Foro amm. III 2004, 697 (It.) *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=972&step=FullText>.

118. Trib. di Busto Arsizio, 13 dicembre 2001, Foro amm. III 2003, 150 (It.) *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=927&step=FullText> (regarding case where seller argued buyer delayed in giving notice of avoidance, court upheld buyer's giving of notice until seller's attempts to cure failed).

119. *See* PETER SCHLECHTRIEM, UN LAW ON INTERNATIONAL SALES: THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS, 1-9 (Petra Butler trans., 2009) ("the principle of good faith, as embodied in the Convention, concerns only the interpretation of the Convention and not the conduct of the parties in the formation and performance of the contract or the interpretation of their intentions").

conduct and custom of international trade for determining the nature, manner, and scope of good faith.¹²⁰ Unlike the approach employed by civil law jurisdictions, the scope of the CISG bars the use of good faith as an interpretative tool applicable to negotiations that preceded an offer.¹²¹

Good faith interpretation becomes relevant only if the conduct constitutes an offer or the parties have otherwise commenced the process of contract formation.¹²² Unlike civil law that imposes good faith in the context of negotiations, Article 7 should not be interpreted to impose good faith obligations in the pre-formation stage of the parties' relationship. By its terms, Article 7(1) addresses the interpretation of the CISG and its focus as being twofold—formation and the obligations resulting from the contract formed.¹²³

Unlike the interpretation of good faith in the Principles of European Contract Law, good faith as an interpretative tool of the CISG should not be used to override the express terms of the parties' agreement.¹²⁴ Parties are empowered by Article 6 of the CISG to vary or derogate from any or all of its provisions.¹²⁵ This right supports a conclusion that express terms have primacy over a general doctrine of reasonableness or estoppel that might be imposed through an interpretation of the CISG.

Some have argued that the distinction between good faith as an interpretative tool and the implied duty of good faith performance is more “apparent than real.”¹²⁶ When compared with the good faith obligation required by the UCC, the parameters of good faith in the CISG are narrowed to the perspective of the judge or arbitrator as informed by the requirements and needs of international trade. In contrast, however, the requirements imposed on domestic parties by U.S. domestic law are informed by trade and industry custom; local custom; the course of dealings between the parties; common law precedent; and the terms of the parties' agreement.¹²⁷

120. *Id.*

121. See, e.g., John Klein, *Good Faith in International Transactions*, 15 LIVERPOOL L. REV. 115 (1993) (distinguishing the civil law and the common law approaches to good faith, and citing *Société Muroiterie Fraisse v. Micon et Autres*, Cour d'appel de Pau, 14 Janvier 1969, 1969 Dalloz et Sirey 716, which recognized the obligations of rectitude and good faith during negotiations).

122. CISG, *supra* note 1, art. 4 (governing only the formation of the contract of sale and the rights and obligations of seller and buyer arising from such a contract).

123. *Id.*

124. See generally Flechtner, *supra* note 86 (distinguishing the good faith obligation of parties pursuant to the PECL and the UCC and recognizing that the PECL authorizes the imposition of an obligation that exceeds that imposed by the express terms).

125. CISG, *supra* note 1, art. 6 (“The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions”).

126. LOOKOFSKY, *supra* note 19, at 49.

127. Hawkland U.C.C. Series § 1-102:2.

III. UNIFORM COMMERCIAL CODE

A comparative assessment of the principles of interpretation for the UCC and the CISG requires an evaluation of the processes of interpretation that are mandated by the nature and form of the relevant legal regime. The character of the UCC substantially impacts the processes that domestic courts must follow.

A. *The UCC's Character*

In the design of the US system of federal and state governments, private law was left in the domain of state law, and the development of state law governing contracts and commercial law was relegated to judges who created a diverse and varied system of commercial rules and principles among the several states.¹²⁸ Consequently, the laudable commercial goals of predictability and uniformity of results were lacking, frustrating planning and hindering the assessment of risk by commercial parties. These two goals are foundational policies that drive the construction of the UCC.¹²⁹ Although distinguishable from civil codes, the UCC design fits the paradigm of a code that necessitates a methodology of construction that is distinguishable from the processes employed for other statutory enactments. “[J]udges construing [the UCC should] recognize that it is a true code, imposing upon them a methodology aimed at getting a fair degree of certainty and uniformity”¹³⁰

A “code” . . . pre-empts the field and . . . is assumed to carry within it the answers to all possible questions. . . . [W]hen a court comes to a gap or an unforeseen situation, its duty is to find, by extrapolation and analogy, a solution consistent with the policy of the codifying law When a “statute” . . . has been interpreted in a series of judicial opinions . . . the meaning of the statute must now be sought not merely in the statutory text but in the statute plus the cases . . . decided under it. A “code,” on the other hand, remains at all times its own best evidence of what it means: cases decided under it may be interesting, persuasive, cogent, but each new case must be referred for decision to the unfiled code text.¹³¹

The UCC methodology necessitates: (1) the use of analogy rather than “outside” law to fill code gaps; (2) increased reliance on the decisions of other code states; and (3) accordance of less permanent precedential value to one’s own decisions.¹³² Both the revised and former versions of Article 1 mandate the use of code methodology. Official UCC commentary directs that the provisions are to be construed consistently with its purposes and policies¹³³ and that the UCC is to be

128. *Id.* § 1-102:3.

129. U.C.C. § 1-103(a) (2001) (“[The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions . . . and (3) to make uniform the law among the various jurisdictions”).

130. Hawkland U.C.C. Series § 1-102:9.

131. Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961).

132. See generally Mitchell Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 330 (1951) (addressing analogical development).

133. U.C.C. § 1-103, cmt. 1 (2001).

its “own machinery for expansion of commercial practices.”¹³⁴ Courts must develop and extend the law embodied in the UCC when confronted with unforeseen or new commercial practices rather than amend or repeal the UCC or resort, in the first instance, to extraneous law.¹³⁵ Revised Article 1 reinforces the use of a code methodology by stating a rule of preemption for determining the relationship between other sources of authority, particularly common law and equity, when these principles are inconsistent with the provisions of the UCC or its purposes and policies.¹³⁶ For some, commentary in former Section 1-103 clouded the essential nature of the relationship between the UCC provisions and common law and equity.¹³⁷ This cloud has been removed by the reorganization of Sections 1-102 and 1-103 and the straightforward language of the Official Comments to revised Section 1-103:

Although no change in language occurs, coupling Sections 1-102 and 1-103 by physically combining the contents of both sections “reflect[s] both the concept of supplementation and the concept of preemption.” No longer will Sections 1-102 and 1-103 stand as separate legislative mandates of equal weight and significance, but rather supplementation of the U.C.C. with common law and equitable principles becomes one of several policy goals that must be balanced by the courts.¹³⁸

Supplementation, however, is secondary to code methodology established by the guidelines for interpreting and construing the UCC.¹³⁹

The final characteristics of code methodology, increased reliance on the decisions of other code states and accordance of less permanent precedential value to one’s own decisions,¹⁴⁰ are achieved through the stated construction guideline of “making uniform the law among the various jurisdictions.”¹⁴¹ Code methodology dictates that the UCC is the primary source of authority; the answer is to be found in the UCC, in its purposes and policies, even if analogical development or extension of the provisions is necessitated by an unforeseen circumstance or some innovative practice.¹⁴² Sound case authority from sister jurisdictions is persuasive authority and is preferable to the common law precedent of the adjudicating jurisdiction.¹⁴³

134. *Id.* § 1-102, cmt. 1.

135. *Id.*

136. U.C.C. § 1-103, cmt. 2 (2001).

137. *See id.* § 1-103, cmt. 1; Sarah Howard Jenkins, *Preemption & Supplementation under Revised 1-103: The Role of Common Law & Equity in the New U.C.C.*, 54 S.M.U. L. REV. 495 (2001).

138. Jenkins, *supra* note 137, at 498 (quoting U.C.C. Rev. § 1-103, Reporter’s Notes (2000)).

139. U.C.C. § 1-103(a) (2001).

140. Hawland U.C.C. Series § 1-102:6.

141. U.C.C. § 1-102(2)(c) (2000); U.C.C. § 1-103(a)(3) (2001).

142. Hawland U.C.C. Series § 1-102:2.

143. *See, e.g.*, B & W Glass, Inc. v. Weather Shield Mfg., Inc., 829 P.2d 809 (Wyo. 1992) (following sister jurisdictions’ approach to the promissory estoppel exception to Statute of Frauds); *but see* Empire Gas Corp. v. American Bakeries Co., 840 F.2d 1333 (7th Cir. 1988)

In employing a code methodology, the official comments to former Section 1-102(1) and revised Section 1-103(a) direct the liberal construction and liberal application of the UCC to promote its underlying purposes.¹⁴⁴ Both sections list three identical foundational purposes or policies.¹⁴⁵ However, these are not the sole purposes or policies that impact the court's construction and application, whether that construction is broad or narrow. Rather, courts must consider the purposes and policies of the individual rule and principle under consideration as well as the purposes and policies of the UCC as a whole.¹⁴⁶ The specific purposes and policies of a particular section govern the general purposes and policies of the UCC stated in former Section 1-102 and revised Section 1-103. If, however, specific purposes and policies are absent or cannot be discerned, then the general purposes and policies of the UCC should drive the construction and application of the UCC.¹⁴⁷

B. CISG vs. UCC: Assessing the Differences and Similarities

The UCC is an orderly, authoritative, comprehensive expression of commercial law, addressing the various components of commercial transactions in goods, whether for sale or mere use and possession. It also covers three payment methods for acquiring the goods, securities, or services: a negotiable instrument;¹⁴⁸ a letter of credit;¹⁴⁹ or a wire fund transfer.¹⁵⁰ Article 7 addresses title documents for the carriage, storage, or other bailment of goods, and Article 9 focuses on security agreements' credit enhancement device to protect the creditor's interest in the subject matter—whether the property is goods, instruments, accounts, or other personal property. Article 4 addresses the bank/customer relationship and Article 8 addresses uncertificated investment securities. Finally, the general provisions of Article 1 provide a common language and common frame of reference for all aspects of the commercial transaction that are governed by the UCC. The coordination among the various components of the UCC enhances the provisions of the Sales article, Article 2, which is comparable to the CISG. Article 2 was developed in coordination with Article 7, Documents of Title, and Article 9, Security Agreements. In contrast, the CISG has a single focus, the international sale of goods, and governs only “the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from the contract.”¹⁵¹

(following Illinois common law for determining if the statutory provision term of unreasonably disproportionate applied in decrease cases).

144. U.C.C. § 1-102(1), cmt. 1 (2000); U.C.C. § 1-103(a), cmt. 6 (2001).

145. *Id.*

146. Hawkland U.C.C. Series § 1-102:11.

147. *Id.* (citing *Commercial Credit Equip. Corp. v. Carter*, 516 P.2d 767 (Wash. 1973)) (stating that principal use of collateral determination made on basis of code to simply, clarify, and modernize the law).

148. U.C.C. § 3-102 (1990).

149. *Id.* § 5-103.

150. *Id.* § 4A-102.

151. The CISG states, “This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a)

1. Analogical development of provisions

Both legal regimes provide for gap-filling of its provisions. Both provide for the analogical development of their provisions, the UCC with principles consistent with its purposes and policies.¹⁵² Similarly, the CISG authorizes the resolution of matters that are within the scope of the CISG, but are not settled; “internal gaps”¹⁵³ are to be determined on the basis of its principles. If relevant principles are non-existent, then the matter is to be settled by resorting to the applicable domestic law as determined by principles of private international law.¹⁵⁴ For example, the CISG authorizes the recovery of interest on payments that are in arrears.¹⁵⁵ However, the rate of such interest is not dictated by the CISG and remains unsettled. Analogous to the UCC, the CISG rejects foreign domestic law, in the first instance, as the source of principles or norms for gap-filling.¹⁵⁶ General principles may be gleaned from the threaded policies reflected throughout the provisions of the CISG, such as: the duty to communicate;¹⁵⁷ the protection of reasonable reliance;¹⁵⁸ the duty to mitigate loss;¹⁵⁹ the priority of the parties’ agreement;¹⁶⁰ and the obligation to act reasonably,¹⁶¹ or, as viewed by some, in good faith—the “functional equivalent” of reasonableness.¹⁶²

the validity of the contract or of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold.” CISG, *supra* note 1, art. 4.

152. See U.C.C. § 2-204 (permitting parties to form the barest agreements as long as they establish an intent to be bound and a reasonably certain basis for a remedy exists). See generally U.C.C. art. 4 (providing default rules to fill in the rest of an agreement).

153. UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 132 (Stefan Kröll, Loukas Mistelis, & Pilar Perales Viscasillas eds., 2011).

154. CISG, *supra* note 1, art. 7(2) (stating that in absence of general principles on which the CISG is based, unsettled questions should be settled in conformity with applicable private international law).

155. *Id.* art. 78 (“If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.”).

156. *Id.* art. 7(2) (providing that if the CISG does not expressly settle an issue, the issue should be settled in conformity with the general principles underlying the CISG; then, if there is still no resolution, in conformity with private international law rules).

157. HONNOLD, *supra* note 26, at 144–45 (discussing the obligation to communicate in CISG arts. 19(2), 21(2), 26, 39(1), 48(2), 65, 71(3), 72(2), 79(4), 88(1)).

158. *Id.* at 142–44 (citing CISG arts. 16(2)(b), 29(2), 47).

159. *Id.* at 145 (citing CISG arts. 77, 85).

160. COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 104 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2nd (English) ed. 2005).

161. CISG, *supra* note 1, arts. 8(2), 16(2), 39(1).

162. COMMENTARY ON THE CISG, *supra* note 160, at 104 n.50 (deriving the obligation to act in good faith from provisions requiring that parties act reasonably). See Klein, *supra* note 121, at 124–25 (“[I]mplicit good faith provisions can be grouped according to three primary goals of good faith and fair dealing: 1) to promote full and frank exchange of relevant information; 2) to prevent parties from benefiting from conduct undertaken to frustrate their own contracts; and 3) to salvage agreements wherever possible and minimize damages resulting from failed transactions.”).

In addition to these generally threaded principles, the CISG's rules of interpretation also provide an expression of general principles upon which the CISG is based—its international character, the “need to promote uniformity in its application,” and “the observance of good faith in international trade.”¹⁶³ Indeed, some courts have employed the “observance of good faith” as a tool for imposing an estoppel¹⁶⁴ and a duty to communicate, cooperate, and provide information,¹⁶⁵ thereby extending the obligations and rights under the CISG through the observance of good faith rather than extracting these general principles analogically.

2. Resort to domestic law

Both legal regimes establish a preference for the resolution of unforeseen or unsettled matters through the extension of the purposes, policies, or principles upon which the authority is based.¹⁶⁶ Neither reflects a goal of completely occupying the field of its sphere of the law nor of being an exhaustive statement of the law.¹⁶⁷ Both authorize resorting to domestic or other law.¹⁶⁸

The UCC authorizes the application of principles of common law and equity as supplementary law to commercial transactions unless “the particular provisions” of the UCC, including its purposes and policies, displace them.¹⁶⁹ Any supplementary law, whether common law or equitable principles, is displaced to the extent it is inconsistent with the purposes and policies of both the specific provision of an article or the general, foundational purposes and policies of the UCC.¹⁷⁰ The UCC preempts local common law and equity to the extent that a jurisdiction has developed localized principles that are inconsistent with the UCC's

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

164. Oberlandesgericht Karlsruhe [OLG Karlsruhe] [Regional Court of Appeal] June 25, 1997, 1 U 280/96 (Ger.).

165. Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 31, 2001, VIII ZR 60/01 (Ger.); Oberlandesgericht Celle [OLG Celle] [Regional Court of Appeal] July 24, 2009, 13 W 48/09 (Ger.) (finding that the duty to cooperate and to provide information requires that the seller provide the content of standard terms to the buyer); Landgericht Neubrandenburg [LG Neubrandenburg] [Regional Court] Aug. 3, 2005, 10 O 74/04 (Ger.).

166. U.C.C. § 1-103(a) (2001); CISG, *supra* note 1, art. 7(2).

167. *See* U.C.C. § 1-103(b) (allowing principles from other areas of law to supplement UCC provisions); CISG, *supra* note 1, art. 2 (exempting sales such as goods bought for personal use and stocks from CISG provisions).

168. U.C.C. § 1-103(b); CISG, *supra* note 1, art. 7(2); *see* CISG, *supra* note 1, art. 2.

169. U.C.C. § 1-103 cmt. 2 (“the proper scope of Uniform Commercial Code preemption . . . extends to displacement of other law that is inconsistent with the purposes and policies of the Uniform Commercial Code, as well as with its text.”).

170. *See, e.g.,* Mertz v. Unizan Bank, 416 F.Supp.2d 568 (N.D. Ohio 2006) (stating UCC displaces the common law negligence standard for banks); Poindexter v. Morse Chevrolet, Inc., 270 F.Supp.2d 1286 (D. Kan. 2003) (dismissing the plaintiff's complaint for lack of subject matter jurisdiction; including punitive damages in calculating the amount in controversy was improper; UCC § 1-103 permits the supplementation but not supplanting of UCC § 1-106 that limits compensatory damages); Clancy Systems Intern., Inc. v. Salazar, 177 P.3d 1235 (Colo. 2008) (finding UCC Art. 8 imposes liability on an issuer of securities for unreasonable delay in removing a restrictive legend and displaces common law remedies for the same loss).

provisions, including its purposes and policies.

Unlike the UCC, the CISG relegates specific issues to the applicable domestic law, such as invalidity of the contract because of mistake, fraud, or unconscionability,¹⁷¹ the property interests of third parties in the goods purchased,¹⁷² the availability of specific performance,¹⁷³ the seller's obligation regarding industrial or intellectual property claims of others,¹⁷⁴ or the formalities necessary for the buyer's performance of the obligation to pay the price.¹⁷⁵ These issues are not within the scope of the CISG, and are issues for which harmonization of disparate authority was not sought. Likewise, unsettled issues may be resolved by domestic law if the CISG lacks principles for resolving the unsettled matter. Hypothetically, if neither the threaded policies within the CISG nor the interpretative policies identified in Article 7(1) provide a basis for determining the rate of interest, then a court confronted with the resolution of that issue must then resort to the applicable domestic law of one of the parties selected by the application of the forum's private international law or conflict of law rule.

3. Uniformity of interpretation: The new international common law¹⁷⁶

Both sets of legal rules espouse a policy of uniformity of interpretation.¹⁷⁷ Only the CISG requires uniformity of enactment.¹⁷⁸ The CISG has six official textual languages.¹⁷⁹ Each is considered the functional equivalent of the others.¹⁸⁰ Any lack of uniformity results from nuances inherent in the cultural understanding

171. See CISG, *supra* note 1, art. 4(a) (stating that the CISG does not control a contract's validity, specific provisions' validity, or usage).

172. See *id.* art. 4(b) (declaring that the CISG is not concerned with a contract's effect on the property in the goods sold).

173. *Id.* art. 28.

174. *Id.* arts. 41, 42(1)(a)–(b).

175. *Id.* art. 54.

176. Antonio Boggiano, *The Experience of Latin American States*, in INTERNATIONAL UNIFORM LAW IN PRACTICE: ACTS AND PROCEEDINGS OF THE THIRD CONGRESS ON PRIVATE LAW HELD BY THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW 28, 47 (1987) (“Uniform law requires . . . a new common law . . . [in which] [f]oreign precedents would not be precedents of a *foreign* law, but of *uniform* law.”) (alteration in original), *quoted in* The Queen Mary Case Translation Programme, *available at* <http://www.cisg.law.pace.edu/cisg/text/queenmary.html> (last visited Sept. 10, 2012).

177. See U.C.C. § 1-103(a)(3) (2001) (stating that the UCC should be construed to conform to underlying policies which include the uniformity of law amongst various jurisdictions); CISG, *supra* note 1, art. 7 (instructing CISG interpreters to give regard to the need to promote application uniformity).

178. See CISG, *supra* note 1, pmb1. (declaring that the agreeing parties believe that adopting uniform rules to govern contracts will be mutually beneficial in several different ways).

179. *Texts of the CISG*, CISG DATABASE, <http://www.cisg.law.pace.edu/cisg/text/text.html> (last updated Sept. 28, 2011) (quoting Tristan Laflamme, *The U.N. Convention on the International Sale of Goods (Vienna 1980): Some Significant Changes for the Practitioner* 15 (Mar. 1994) (on file with Institute of International Commercial Law of the Pace University School of Law)).

180. *Id.*

or meaning of the desired equivalent terms used.¹⁸¹ In contrast, each codifying jurisdiction of the UCC has the freedom to alter, delete, or otherwise modify the terms of the promulgated uniform act as part of its enactment process.¹⁸² These non-uniform enactments undermine the goals of uniformity, predictability, and certainty the UCC was designed to ensure.

IV. APPLICABILITY OF THE CISG

The CISG is applicable in three contextual settings. First, the CISG is applicable if both parties have their places of business in different contracting states; fundamentally, the transaction must be an international one.¹⁸³ Article 1(1)(a) obviates the need for the forum court to engage in its conflict of laws analysis to determine the applicable law. If the transaction is an international one, meaning both parties have their places of business in different contracting states, then the CISG applies.¹⁸⁴ An allegation of the applicability of the CISG with the identification of the parties' places of business is a sufficient basis for the court to rule as a matter of law on the applicable law.¹⁸⁵ Forum courts in contracting states have an international law obligation to apply the CISG if it is applicable.¹⁸⁶ This resolution is, however, subject to several declarations by contracting states under Articles 93,¹⁸⁷ 94,¹⁸⁸ and 95.¹⁸⁹ Each of these reservations has the potential to alter the efficacy of Article 1 in producing uniformity and ease of determination of the applicable law.¹⁹⁰ Each relevant reservation must be addressed by the court if one of the parties has its place of business in a reserving state. The possible complication of multiple business locations by one or both of the parties also impacts the applicability of Article 1(1)(a).¹⁹¹ It is the location that has the closest

181. *Id.*

182. UNIFORM COMMERCIAL CODE LOCATOR, <http://www.law.cornell.edu/uniform/ucc.html> (Mar. 15, 2004) (providing the revisions, if any, that each state made during its adoption of each UCC article).

183. Donald J. Lewis, *The U.N. Convention for the International Sale of Goods: Implications for Hong Kong and China*, in *LAW LECTURES FOR PRACTITIONERS* 243, 245 (1988).

184. CISG, *supra* note 1, art. 1(1)(a).

185. *Id.*

186. Vladimir Pavic & Milena Djordjevic, *Application of the CISG before the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce—Looking back at the Latest 100 Cases*, 28 J.L. & COM. 1, 20–21 (2009–2010).

187. CISG, *supra* note 1, art. 93(1) (stating that if a contracting state has more than one territorial unit and each has its own legal system and either system could be applied when dealing with issues with which CISG deals, then the state can set forth a declaration averring to which systems the CISG applies).

188. *Id.* art. 94 (allowing contracting states with similar laws or rules to those set out in CISG to set forth a declaration that CISG rules do not apply to their relation to a similarly situated contracting state or non-contracting state whether the declaration is made unilaterally or in tandem with the other state).

189. *Id.* art. 95 (affording states the opportunity to declare that they will not be bound by CISG art. 1(1)(b)).

190. Rolf Knieper, *Celebrating Success by Accession to CISG*, 25 J.L. & COM. 477, 478–79 (2005–2006) (stating that reservations increase transaction costs).

191. CISG, *supra* note 1, art. 10(1) (defining the place of business, if a party has several

relationship to the contract that is the relevant location for determining the applicability of the CISG.¹⁹²

The second contextual setting triggering the application of the CISG is a transaction between parties when only one of them has its place of business in a contracting state. In such scenarios, CISG provisions apply only if the forum court's private international law rules and its conflict of law principles directs the application of the contracting state's law.¹⁹³ For example: a buyer with its place of business in the United Kingdom enters a contract for the purchase of goods with a seller from Germany. Although Germany is a contracting state to the CISG, the United Kingdom is not a contracting state.¹⁹⁴ Both Germany and the United Kingdom are Member States of the European Union.¹⁹⁵ Consequently, Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on Law Applicable to Contractual Obligations (Rome I)¹⁹⁶ governs the determination of the applicable law by forum courts in Member States. Accordingly, in litigation between a U.K. buyer and a German seller occurring in either state, CISG provisions are applied only if German law is applicable.¹⁹⁷ Applying the provisions of the Regulation, if the parties have not agreed upon the applicable law, then the law of the seller's habitual residence provides the applicable law.¹⁹⁸ For a corporation or other business form, the habitual residence is defined as the place of central administration—in the hypothetical situation presented here, Germany.¹⁹⁹ Consequently, the CISG is applicable to the transaction.

Assume, however, that the transaction is between a buyer from the United Kingdom and a seller from the United States. In ratifying the CISG, the United States made an Article 95 Reservation. A contracting state may, at the time it deposits its instruments of ratification, accession, or approval, declare that it will

locations, as that place which has the closest relationship to the contract and its performance determined by what was contemplated by the parties at contracting).

192. See *infra* notes 193–202 and accompanying text for a discussion of the impact of multiple business locations.

193. CISG, *supra* note 1, art. 1(1)(b).

194. UNCITRAL, *supra* note 3.

195. European Union, *Countries*, http://europa.eu/about-eu/countries/index_en.htm (last visited October 3, 2012).

196. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 117) 6 [hereinafter Regulation].

197. CISG, *supra* note 1, art. 1(1)(b).

198. Regulation, *supra* note 196, art. 4(1). (“1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 [carriage of goods] to 8 [employment contracts], the law governing the contract shall be determined as follows: (a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence . . .”).

199. *Id.* art. 19: Habitual residence 1 (stating that “for the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration”).

not be bound by Article 1(1)(b).²⁰⁰ In a dispute between the parties with litigation occurring in the United Kingdom, for example, in the absence of an agreement on choice of law, the law of the seller's place of business, a state in the United States, is the applicable law because the United Kingdom is a European Union Member State subject to the Regulation.²⁰¹ The United States made an Article 95 Reservation so that in litigation between parties with places of business in the United States and a non-contracting state, Article 1(1)(b) is inapplicable, the United States is treated as a non-contracting state, and the UCC is applicable to the transaction:

The United States . . . stated that ratification subject to the Article 95 reservation was contemplated. This position, recommended by the American Bar Association, will promote maximum clarity in the rules governing the applicability of the Convention. The rules of private international law, on which applicability under subparagraph (1)(b) depends, are subject to uncertainty and international disharmony

A further reason for excluding applicability based on subparagraph (1)(b) is that this provision would displace our own domestic law more frequently than foreign law. By its terms, subparagraph (1)(b) would be relevant only in sales between parties in the United States (a Contracting State) and a non-Contracting State. (Transactions that run between the United States and another Contracting State are subject to the Convention by virtue of subparagraph (1)(a).) Under subparagraph (1)(b), when private international law points to the law of a foreign non-Contracting State the Convention will not displace that foreign law, since subparagraph (1)(b) makes the Convention applicable only when "the rules of private international law lead to the application of the law of a Contracting State." Consequently, when those rules point to United States law, subparagraph (1)(b) would normally operate to displace United States law (the Uniform Commercial Code) and would not displace the law of foreign non-Contracting States.

If United States law were seriously unsuited to international transactions, there might be an advantage in displacing our law in favor of the uniform international rules provided by the Convention. However, the sales law provided by the Uniform Commercial Code is relatively modern and includes provisions that address the special problems that arise in international trade.²⁰²

Finally, although not addressed by the terms of Article 1, the CISG is applicable in yet another context. If neither of the parties have their places of business in a contracting state but the application of the forum court's private international law rules points to the application of the law of a contracting state as the place with

200. See United Nations Convention on Contracts for the International Sale of Goods, Message from the President of the United States, Appendix B, Proposed United States Declaration under Article 95 Excluding Applicability of the Convention Based on Article 1(1)(B) (Sept. 21, 1983), <http://www.cisg.law.pace.edu/cisg/biblio/reagan.html>.

201. Regulation, *supra* note 196, art. 4(1)(a).

202. Message from the President of the United States, Appendix B, *supra* note 200.

legislative jurisdiction, then the CISG is applicable.²⁰³ Legislative jurisdiction is the authority or power of a state to apply its law to a dispute.²⁰⁴

Consider the following facts: a buyer from the United Kingdom and a seller from the United States meet in Austria and negotiate a contract for the sale of goods. The buyer makes an offer to purchase goods and the seller accepts. The buyer takes delivery in Austria. Later, a dispute arises between the parties, and the buyer sues the seller in the United States in State X, a state that adheres to the First Restatement of Conflict of Laws that provides that the law of the place of the performance of a contract governs questions of breach.²⁰⁵ The buyer alleges that a contract was formed in Austria and that Austrian law applies. The buyer's place of business is in a non-contracting state—the United Kingdom—and the United States has made an Article 95 Reservation and, therefore, is treated as a non-contracting state. Pursuant to the Restatement, the law of the place of the making of the contract governs the validity of the contract, Austria,²⁰⁶ and the law of the place of performance, Austria, governs issues of performance.²⁰⁷ Austria is a contracting state to the CISG.²⁰⁸ The CISG provides that in a transaction between parties when neither party is a contracting state, the law applicable as a result of the application of private international law rules governs the transaction.²⁰⁹ Here, it is the law of Austria. Austria is a contracting state and consequently, the CISG is applicable. The relevant language of Article 1(1)(b) states: “when the rules of private international law lead to the application of the law of a Contracting State” the CISG is applicable.²¹⁰

A. *Reservation 93: The Federal State Clause*

Intriguing questions regarding the applicability of the CISG arose after June

203. See *infra* notes 204–10 and accompanying text for discussion on the applicability of CISG if the application of the forum court's private international law rules points to the law of a contracting state as the place with legislative jurisdiction if neither of the parties have their place in a contracting state.

204. Willis L. M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1608 (1978); see also *Alabama G.S.R. Co. v. Carroll*, 11 So. 803, 806–07 (Ala. 1892).

205. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 358 (1934) (“The duty for the performance of which a party to a contract is bound will be discharged by compliance with the law of the place of performance of the promise with respect to: (a) the manner of performance; (b) the time and locality of performance; (c) the person or persons by whom or to whom performance shall be made or rendered; (d) the sufficiency of performance; (e) excuse for non-performance.”).

206. See *id.* (the reference to the law of Austria would be to its internal law that would not include its private international law principles, the Conflict of Laws rules. The First Restatement of the Law of Conflict of Laws limited Revoir, the reference to the whole law of a jurisdiction to several discrete issues, none of which are relevant here.); see Regulation, art. 20 (stating that the Regulation rejects the applicability of Revoir).

207. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 358 (1934).

208. UNCITRAL, *supra* note 3.

209. CISG, *supra* note 1, art. 1(1)(b).

210. *Id.*

30, 1997, when the United Kingdom transferred sovereignty over Hong Kong to the People's Republic of China in fulfillment of the December 19, 1984 treaty between China and the United Kingdom.²¹¹ Similarly, sovereignty over Macao, a territory which had been administered by Portugal since 1979, was restored to China in 1999.²¹² China ratified the CISG in 1986, eleven years before the restoration of these territories to China. Neither of the former sovereigns, the United Kingdom or Portugal, nor these territories, Hong Kong or Macao, were contracting states under the CISG. In 2001, Hong Kong merchandise trade with the United States alone exceeded \$409 billion.²¹³ Of concern is the effect of China's ratification of the CISG in 1986 on these territories after their restoration to China. Article 93 of the CISG, the Federal State Clause, included in the CISG at the request of Australia and Canada, provides that a contracting state with differing legal systems on issues within the CISG's scope may declare the extent to which the CISG is applicable to its divergent territories at the time of its signature, ratification, acceptance, approval, or accession. Although Canada originally made an Article 93 declaration regarding the scope of applicability of the CISG, it now extends to all territories in Canada.²¹⁴

Some have argued that the right to extend or limit the CISG's applicability must be based on a "constitutionally" recognized limitation rooted in a difference in the legal systems that exists at the time the nation becomes a contracting state.²¹⁵ One leading commentator suggests that the requirement of "constitutional" limitation is supported by the purpose and legislative history of the provision.²¹⁶

This interpretation is supported by both purpose and legislative history of the provision, which was intended to enable a State to accede to the CISG with respect to individual units, even if it is unable to do so for all of its territorial divisions as it lacks sufficient competence over the legal matters governed by the CISG.²¹⁷

211. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong [Hong Kong (Special Administrative Region of China)], U.K.-China, Dec. 19, 1984, available at <http://www.unhcr.org/refworld/docid/3ae6b525c.html>.

212. Ulrich G. Schroeter, *The Status of Hong Kong and Macao Under the United Nations Convention on Contracts for the International Sale of Goods*, 16 PACE INT'L L. REV. 307, 312, 314 (2004).

213. *Id.* at 308.

214. UNCITRAL, *supra* note 3. Upon accession, Canada declared that, in accordance with article 93 of the Convention, the Convention would extend to Alberta; British Columbia; Manitoba; New Brunswick; Newfoundland and Labrador; Nova Scotia; Ontario; Prince Edward Island; and the Northwest Territories. In addition, Canada declared that, in accordance with article 95 of the Convention, with respect to British Columbia, it will not be bound by Article 1(b) of the Convention. In a notification received on July 31, 1992, Canada withdrew that declaration. In a declaration received on Apr. 9, 1992, Canada extended the application of the Convention to Quebec and Saskatchewan. In a notification received on June 29, 1992, Canada extended the application of the Convention to the Yukon Territory. In a notification received on June 18, 2003, Canada extended the application of the Convention to the Territory of Nunavut.

215. *See* Schroeter, *supra* note 212, at 321.

216. *Id.*

217. *Id.*

This standard obviates the fragmentation of accession by States that have sufficient competency over all its territorial possessions.

Contrary to the foregoing position taken by some, the more accurate question is whether the contracting state lacked the competency to extend the applicability of the CISG to a subject territory at the time of the contracting state's signature, ratification, acceptance, approval, or accession. The issue should be one of competency to act for the territory at the relevant time with the emphasis on substance rather than formality.²¹⁸ At its ratification of the CISG, China lacked the competency to act for either Macao or Hong Kong. The concern regarding fragmentation of accession does not arise if the contracting state lacks competency to act for a subsequently acquired or redefined territory. Moreover, such an interpretation of Article 93 is consistent with the mandate of Article 7 to give regard to the CISG's international character. In this age of realignment of people and groups and redefinition of geographical and political boundaries, the need for flexibility in interpretation of Article 93 exists. A rigid rule that limits the applicability of Article 93 to territories not within the contracting states' *constitutional* competency at the time of its ratification unduly restricts the CISG's policy objectives of harmonizing civil and common law jurisprudence to facilitate cross-border commercial transactions and serving as a unifying force in international trade.

Hong Kong lacks the status of a "state" in international law²¹⁹ and could not accede to the CISG should it or China desire an extension. An inflexible reading of Article 93 promulgated by commentators insists either that: (1) the CISG requires "independence of the 'territorial unit' based on the state's constitution"²²⁰ or, alternatively, (2) that the extension or limitation must occur at the time of accession restricting the ability of the State with the authority and power to extend or to limit the applicability of the CISG when that State desires either uniformity in the law of the State or the lack thereof.

In spite of varying perspectives on the CISG's applicability, Article 93(4) resolves the risk of any confusion as to the extent of the territorial applicability of the CISG by allocating it to the contracting state. Without a non-unitary declaration, Hong Kong and Macao are deemed covered by the Chinese ratification.²²¹ Furthermore, only a choice of law clause designating the domestic law of Hong Kong as the applicable law should result in the application of Hong Kong Sales Law when the CISG would be otherwise applicable.²²² Finally, China's

218. See HONNOLD, *supra* note 26, at 67 (discussing how substance rather than label is to be decisive).

219. See Schroeter, *supra* note 212, at 317.

220. *Id.* at 321.

221. CISG, *supra* note 1, art. 93(4) ("If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.").

222. Cour de cassation [Cass.][Supreme Court for Judicial Matters] 1e civ., Apr. 2, 2008, Bull. Civ. I, No. 04-17726 (Fr.); *Innotex Precision Ltd. v. Horei Image Prods.*, 679 F. Supp. 2d 1356, 1359 (N.D. Ga. 2009).

Article 95 reservation is effective for parties that have places of business in Hong Kong and Macao. Neither Hong Kong nor Macao has a right to express an independent declaration because neither is a “state” in the international arena; therefore, the declarations of the state, China, are effective and bind its territorial units.

B. Reservation 94: Same or Closely Related Law

Two or more contracting states with the same or closely related legal rules may jointly or in reciprocal unilateral declarations provide that the CISG does not apply to the sale or the formation of contracts between parties which have places of business within these contracting states.²²³ Similarly, a contracting state may declare that the CISG is inapplicable in transactions with parties that have their places of business in non-contracting states with the same or closely related legal rules on matters within the scope of the CISG.²²⁴

Denmark, Finland, Norway, and Sweden declared, in accordance with Article 92(1), that they would not be bound by Part II of the CISG contract formation principles.²²⁵ These four nations are considered non-contracting states on matters within the formation principles, Articles 14 through 24,²²⁶ but as contracting states as to the balance of the CISG unless the transactions are between parties with their places of business in Denmark, Finland, Iceland, Norway, or Sweden.²²⁷ Each of these states also declared pursuant to Article 94(1) and (2) that the CISG would not apply to contracts of sale if the parties have their places of business in Denmark, Finland, Iceland, Norway, or Sweden. Iceland subsequently conformed its ratification to that of Denmark, Finland, Norway, and Sweden with similar declarations.²²⁸ Contracts between parties with their places of business in these contracting states are not subject to the CISG. Private international law rules determine which of these closely related laws applies. In contracts between parties with their places of business in these Nordic states and other contracting states, for the purposes of provisions other than Articles 14 through 24, these Nordic states are contracting states.

C. Reservation 95: Article 1(1)(b) Exclusion

Article 95 permits a contracting state to declare that it will not be bound by Article 1(1)(b), a secondary basis for the application of the CISG to contracts for goods if the parties have their places of business in different nations. If the forum court’s application of its private international law rules and its conflict of laws principles points to the application of the law of a contracting state, then the CISG applies even though neither of the parties have their place of business in a contracting state. If, however, one of the parties’ places of business is in a

223. CISG, *supra* note 1, art. 94(1).

224. *Id.* art. 94(2).

225. *See* UNCITRAL, *supra* note 3.

226. *Id.*; *see generally* Flechtner, *supra* note 86.

227. *See* UNCITRAL, *supra* note 3.

228. *See* Flechtner, *supra* note 86.

contracting state that has made an Article 95 Reservation, then the nation is treated as a non-contracting state when its citizens are contracting parties with those who have their businesses in non-contracting states.²²⁹ Seven nations—the United States; Slovakia; Singapore; Saint Vincent and the Grenadines; Czech Republic; China, and Armenia—have made an Article 95 Reservation.²³⁰ Of the seven, four are substantial producers of cross-border trade. The Article 95 Reservation provides an opportunity for the domestic law of these nations to be applied.

D. Multiple Places of Business Impact the Applicability of the CISG

The existence of multiple places of business is an additional factor that may impact the applicability of the CISG. Article 10 provides a default rule for determining the relevant location of a party's businesses for the purposes of the CISG if a party has multiple locations.²³¹ "Place of business" is pertinent for several key provisions of the CISG.²³² The parties, by employing Article 6 that gives them the right to derogate or vary any provision of the CISG, may designate the applicable location or the desired effect if either or both have multiple locations. If the parties fail to do so, then Article 10 provides a test for resolving the issue. Article 10 directs that the place of business with the closest relationship to the contract and its performance is the relevant place of business for the purposes of the CISG, including determining the applicability of the CISG. Circumstances known or contemplated by the parties "at any time before or at the conclusion of the contract"²³³ are relevant for identifying the location.

Article 10 is problematic. First, it imposes the resolution of a factual determination and, thereby, the burden of proving that a proffered location is a place of business, "[a] place where the business is actually and chiefly run, which requires stability as well as a certain independent sphere of authority"²³⁴ and that

229. Message from the President of the United States, Appendix B, *supra* note 200.

230. See UNCITRAL, *supra* note 3 (listing those States that have declared they would not be bound by paragraph 1(b) or article 1).

231. CISG, *supra* note 1, art. 10 states that:

For the purposes of this Convention: (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

232. CISG, *supra* note 1, arts. 12 & 96 (stating the effect of an Article 96 Reservation imposing a writing requirement); *id.* art. 20(2) (calculating the timeliness of an acceptance); *id.* art. 24 (determining when an acceptance "reaches" the offeror); *id.* art. 31(c) (ascertaining the place of delivery); *id.* art. 42(2) (determining the seller's obligation to deliver goods free from any right or claim of a third party based on industrial property or other intellectual property, unless the parties contemplate that the goods will be resold or used in another state); *id.* art. 57(1)(a) (defining the place of the buyer's performance of the obligation to make payment); *id.* art. 69(2) (determining the shifting of the risk of loss); *id.* art. 93 (stating effect of CISG when it extends to some but not all of the territories of a contracting state).

233. *Id.* art. 10.

234. Oberlandesgericht Stuttgart [OLGZ] [Provincial Court of Appeal] Feb. 28, 2000, Zivilsenat at 5, 2000. No. 5 U 118/99 (Ger.) (regarding a German seller delivering flooring to

the proffered place of business has the “closest connection.”²³⁵ Had the CISG rather established a fixed, easily ascertainable standard such as the place of business that concluded the contract²³⁶ or a party’s principal place of business, a litigation point would have been eliminated and the cost of resolving disputes minimized.

Second, standing alone in Article 6, the use of the phrase “at the conclusion of the contract” appears to refer to two different points in time. Does “at the conclusion of the contract” mean the point of contract formation when the acceptance is effective or does it refer to the point in time when performance of the contract is completed? If the latter is intended, then a broad swath of time exists for considering what was “known or contemplated” by the parties. Fortunately, the phrase “at the conclusion of the contract” reappears throughout the CISG and refers to that point in time when the contract is formed.²³⁷ Circumstances known or contemplated by the parties *ex ante* but not *ex post* are relevant.²³⁸

Although the CISG states a preference for the subjective intent of a party, a party’s subjective understanding of the existence of the other’s place of business is only relevant if the other person knew or could not have been unaware of that subjective understanding.²³⁹ Consequently, a party’s subjective intent regarding its understanding of either its location with the closest connection or the other party’s relevant location is likely to be irrelevant. Circumstances such as the visits to or inspection of facilities; the working location of those officers or employees who are conducting the negotiations or with whom the contract is concluded;²⁴⁰ the business location, not including temporary lodgings such as hotels or suites²⁴¹ used during the negotiations; the language used by the parties in the contract or other transactional documents,²⁴² the place from which transactional documents are generated,²⁴³ and the aggregation of transactional activity in one locale²⁴⁴ are

Spanish buyer).

235. *Id.*

236. COMMENTARY ON THE CISG, *supra* note 160, art. 10 ¶4, 156 n.12c (stating that the location of the place of business that concluded the contract is the preference of scholarly commentary).

237. *See, e.g.*, CISG, *supra* note 1, arts. 1(2), 2(a), 31(b), 31(c), 33(c), 35(2)(b), 35(3), 38(3), 42(1), 42(1)(a), 42(2)(a), 55, 57(2), 68, 71(1), 73(3), 74, 79(1).

238. COMMENTARY ON THE CISG, *supra* note 160, art. 10 ¶4, 157.

239. CISG, *supra* note 1, art. 8(1) (stating that “For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.”).

240. Bezirksgericht der Saane [District Court] Feb. 20, 1997, No. T.171/95, *available at* <http://cisgw3.law.pace.edu/cases/970220s1.html> (Switz.) (regarding case where Austrian buyer concluded contract with Swiss branch of Liechtenstein company, Swiss location, a contracting state, had closest connection to the contract rather than Liechtenstein, a non-contracting state).

241. HONNOLD, *supra* note 26, at 31–34.

242. Rechtbank van Koophandel [Kh] [commerce tribunal] Hasselt, Feb. 2, 1999, Case No. A.R. 1079/99 (Belg.) (determining that U.S. buyer’s place of business with the closest connection was the Belgian location, Dutch-speaking Flanders, because seller’s invoice was in Dutch).

243. Cour d’Appel [CA] [regional court of appeal] Colmar, Oct. 24, 2000, *S.a.r.l. Pelliculest, S.A. Rhin et Moseille v. Morton International GmbH, Société Zurich Assurances S.A.*

relevant factors for determining which of several locations has the closest relationship to the contract and its performance.

The scant case authority applying Article 10 suggests that the language of the contract and the geographic location of the transactional acts, whether manufacturing the goods, producing the contract documents, or initiating the transaction, are primary facts for determining the closest relation.²⁴⁵ If, however, transactional activity occurs at more than one location of a party, then the language of the contract will likely determine the place with the closest relationship.

V. CONCLUSION

For the global entrepreneur, the CISG offers an autonomous set of legal rules without bias towards any legal regime and the opportunity to assess and fix his or her risk assumption when contracting with businesses located within contracting states without offending local sensibilities or imposing “foreign” principles on the counterparty. The CISG’s provisions are different from the UCC’s in subtle ways that may prove deceptive given the language’s similarity to the language of U.S. domestic law. The Model Rules of Professional Conduct mandate that lawyers understand and appreciate the differences between the CISG and the UCC.²⁴⁶ Without doing so, an attorney cannot fulfill his or her role as advisor.²⁴⁷ An attorney must understand the legal effects, benefits, and risks of the applicable legal regimes. The place to commence that journey is with Article 7 and its principles of interpretation.

available at <http://cisgw3.law.pace.edu/cases/001024f1.html#cd> (finding that even if the orders had been received by a French agent of the German seller, the confirmations of the delivery orders, the issuance of the invoices, and the delivery of the goods were from the seller’s German place of business, which had the closest relation to the contract with a French buyer).

244. *Asante Tech., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1144 (N.D. Cal. 2001) (involving U.S. buyer who purchased computer parts from Canadian seller, had offices in the U.S., and used U.S. distributor who was not seller’s agent, manufactured and shipped the goods from Canada and made representations that were allegedly breached in Canada, Canada had the closest connection); *Vision Sys., Inc. v. EMC Corporation*, 19 Mass.L.Rptr. 139 (Sup. Ct. Mass. 2005). (involving U.S. buyer’s initial contact with Australian seller was with employee of seller’s U.S. subsidiary, employee remained seller’s principal contact with buyer, all price quotations to buyer were provided by U.S. subsidiary, all sales to buyer were F.O.B. Massachusetts, and buyer submitted all orders to seller’s U.S. office).

245. *Vision Sys., Inc.*, 19 Mass.L.Rptr. at 139.

246. *See, e.g.*, MODEL RULES PROF’L CONDUCT § 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

247. *Id.* § 2.1 (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”).