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# Through The Looking-Glass: International Trade in the “Wonderland” of the United Nations Convention on Contracts for the International Sale of Goods

by  
Michael Kabik†

*High hopes and sharp criticism attended the enactment of the United Nations Convention on Contracts for the International Sale of Goods (C.I.S.G.) in the winter of 1988. Designed to promote international trade and harmonize a diverse and often disparate body of international commercial law, the C.I.S.G. drew fire from experts claiming that it would complicate transactions for American businesses accustomed to contracting under the principles of the Uniform Commercial Code (U.C.C.). The author first examines the history and mission of the C.I.S.G. in light of these contentions and concludes that American commercial interests will reap substantial benefits in the form of reduced transactional costs and the circumvention of foreign “mandatory” rules. After comparing and contrasting the major provisions of the C.I.S.G. with the U.C.C., the author applies the Convention rules to some leading domestic contract cases and concludes that the two regimes of law are fundamentally compatible. Finally, the author discusses strategies for achieving uniform interpretation of the C.I.S.G. across a wide range of international forums and closes by predicting that the new rules will both facilitate existing commercial relationships and open new avenues of international trade in the years to come.*

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I.

INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (C.I.S.G.)<sup>1</sup> entered into force on January 1, 1988 and, having been ratified by the United States, is the law governing all aspects of contracts made between commercial parties in the United States and other states that have ratified, accepted, approved, or acceded to the C.I.S.G. Thus, it appears that the players of the international contract game may have been thrown into a whole new world with all new rules . . . or have they? This article will examine whether the C.I.S.G. is in reality a "contract wonderland" or whether it is simply a somewhat distorted reflection of the Uniform Commercial Code (U.C.C.).

A. *The Nature of the Problem*

International trade has been hindered by a myriad of distinct domestic laws governing the sale of goods; the C.I.S.G. arises within this backdrop. Efforts have long been underway to promote international trade by unifying and harmonizing international commercial law.<sup>2</sup> The C.I.S.G. is the latest progression of these endeavors in over sixty years, and it may turn out to be the most successful to date.

Since the United States became a party to the C.I.S.G. in 1988, many substantial benefits have accrued and will continue to accrue to American business interests. First, as a readily available compromise, the C.I.S.G. avoids the potential difficulties of reaching agreement with foreign parties as to the choice of forum or applicable law. Second, the C.I.S.G. permits parties to shape their rights and obligations so as to arrive at results similar to those which could be attained under the U.C.C. without fear of foreign "mandatory" rules. Third, the C.I.S.G. helps to decrease legal costs that might otherwise be incurred by researching numerous foreign laws, since it is easier to research the C.I.S.G. text and legislative history in its official English language text. Finally, the C.I.S.G. reduces problems of proof of foreign law in U.S. courts<sup>3</sup> since the C.I.S.G. is domestic law, and foreign contract law does not govern the contract between parties under the jurisdiction of contracting states (absent an affirmative exclusion or derogation).<sup>4</sup>

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1. United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, U.N. Doc. A/CONF.97/18 Annex 1, *reprinted in* U.N. CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, OFFICIAL RECORDS 176-78, U.N. Doc. A/CONF.97/19, U.N. Sales No. E.81.IV.3 (1981) [hereinafter C.I.S.G.].

2. *See infra* part II.

3. *See* Lyon L. Brinsmade, *American Bar Association Report to the House of Delegates*, 18 INT'L LAW. 39, 40 (1984).

4. *See infra* notes 40-48 and accompanying text.

However, critics of the C.I.S.G. claim that it creates a plethora of problems that will frustrate the goal of unification and harmonization of international commercial law. They suggest that the C.I.S.G.'s "rigid and conceptual approach to codification of international contract rules" will not promote unification, because the C.I.S.G., by creating a separate set of rules governing international transactions apart from those governing domestic transactions, will serve to complicate, rather than simplify, the lives of American businessmen.<sup>5</sup> Critics of the C.I.S.G. also claim that since it is a "consensus document produced by representatives of widely disparate legal, economic and social systems . . . problems of interpretation will abound, and courts sitting in the myriad jurisdictions of the world cannot be expected to achieve uniform interpretation of Convention provisions."<sup>6</sup> Other critics claim that because the C.I.S.G. is a self-executing treaty, it went into effect without mediation of domestic legislation, thereby taking control away from Congress.<sup>7</sup>

### *B. The Importance of the C.I.S.G. and the Resolution of the Problem*

International trade is becoming increasingly important as the world is gearing up to be a truly global economy. Indeed, by some measures, the world economy has already become global. Moreover, with the impending unification of the European Economic Community (EEC) on December 31, 1992,<sup>8</sup> preferential avenues of international trade will be available. When a party in a nonmember state establishes an enterprise in one EEC member state, guaranteed access on preferential member state terms will be available to all EEC member states.<sup>9</sup>

If the C.I.S.G. is to succeed in unifying and harmonizing international trade law, those engaged in international business transactions must embrace it. Yet, this task may be too arduous to realize if the C.I.S.G. is really a beast distinct from the U.C.C. This quandary must be resolved if the C.I.S.G. is to flourish in the contract breeding ground of international trade.

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5. See e.g., Roger Brooks, *Why Congress Should Be Wary Of The U.N. Convention On The International Sale Of Goods*, HERITAGE FOUND. BACKGROUNDER, June 15, 1984, at 2.

6. *Id.*

7. See Elizabeth Hayes Patterson, *United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension Between Compromise and Domination*, 22 STAN. J. INT'L L. 263, 276 (1986); see also *Proposed United Nations Convention on Contracts for the International Sale of Goods: Hearing on Treaty Doc. 98-9 Before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. 36 (1984) (statement of Frank Orban, III, International Counsel, Armstrong World Industries); Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 294 (1984).

8. See *The Single European Act*, Bulletin of The European Communities, Feb. 19, 1986, Supp. 2/86.

9. See Treaty of Rome, Mar. 25, 1957, arts. 30, 52, 58; 298 U.N.T.S. 11.

C. *The C.I.S.G. and its Mission*

The preamble to the C.I.S.G. declares "that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States" and it asserts that "the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade."<sup>10</sup> Thus, the preamble maintains that the C.I.S.G. is the means by which to meet these ends.

The C.I.S.G. governs the formation of international sales contracts and the rights and obligations of the parties to these contracts.<sup>11</sup> However, the scope of the C.I.S.G. is qualified in several important respects. First, it applies only to international transactions.<sup>12</sup> Second, it governs only the commercial sale of goods.<sup>13</sup> Third, it does not apply to specified types of questions.<sup>14</sup> Fourth, exclusion or derogation from it is permitted.<sup>15</sup> Finally, it is to be interpreted uniformly.<sup>16</sup>

1. *International Transactions*

The first qualification states that the C.I.S.G. "applies to contracts [for the] sale of goods between parties whose places of business<sup>17</sup> are in different States . . . [w]hen the States are Contracting States."<sup>18</sup> U.S. courts therefore would apply the C.I.S.G. to a transaction between a seller in Rome and a buyer in New York, since both parties have their places of business in different countries, both of which have become parties to the C.I.S.G. However, since Japan has not become a party to the C.I.S.G., if the seller were in Tokyo rather than in Rome, U.S. courts would not apply the C.I.S.G. and would have to resort to choice of law rules and apply either Japanese law or the U.C.C. Likewise, if the seller were in Los Angeles rather than in Rome or Tokyo, U.S. courts would apply the U.C.C. and not the C.I.S.G.

The C.I.S.G. also "applies to contracts [for the] sale of goods between parties whose places of business are in different States . . . [w]hen the rules of private international law lead to the application of the law of a Contracting

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10. *C.I.S.G.*, *supra* note 1, pmbl.

11. *Id.* art. 4.

12. *Id.* art. 1(1).

13. *Id.* art. 2.

14. *Id.* arts 4(a), 4(b), 5.

15. *Id.* art. 6.

16. *Id.* art. 7(1).

17. Where a party has one or more places of business, for the purpose of Article 1(1), the party's "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." *Id.* art. 10(a).

18. *Id.* art. 1(1)(a).

State.”<sup>19</sup> This situation could arise in two types of circumstances: either when one party to the contract has its place of business in a contracting state, and the other party has its place of business in a non-contracting state<sup>20</sup> or when both parties to the contract have their places of business in different non-contracting states and the dispute is litigated in a third contracting state.<sup>21</sup> However, any state may declare, at the time it becomes a party to the C.I.S.G., that it will not be bound by this provision.<sup>22</sup> The United States has made such a reservation.<sup>23</sup> Where a particular contracting state has not made such a reservation to this provision, the danger exists that the C.I.S.G. could be applicable to a transaction in which one or both of the parties (in one or two non-contracting states) may not have suspected its application. Moreover, it would undoubtedly be difficult for the parties to the contract to ascertain in advance if the C.I.S.G. applies to a particular transaction.<sup>24</sup> It would be equally difficult for a court in a particular jurisdiction to make the same determination with litigation pending.<sup>25</sup>

## 2. *Commercial Sale of Goods*

The second qualification excludes international consumer sales of “goods bought for personal, family or household use.”<sup>26</sup> This covers situations in

19. *Id.* art. 1(1)(b). Note that once any state becomes a party to the C.I.S.G., the C.I.S.G. is the law of that contracting state. However, “the rules of private international law” is a vague and amorphous concept. Does it mean conflict of laws rules, choice of law rules, both, or neither? Although the C.I.S.G. is not clear, “the rules of private international law” will be interpreted by the state in which the parties are litigating. Yet, interpretation in and of itself raises serious problems in as much as article 7 of the C.I.S.G. calls for *uniform interpretation*, a feat which may be impossible given the inherent differences among the world’s legal systems, and thus preclude even the basic interpretation of what a “rule” is, particularly where the effect, operation, and purpose of “rules” are viewed in a disparate manner.

20. Where one party has its place of business in a contracting state and where the other party has its place of business in a non-contracting state, for example, the conflict of laws rules of the state of litigation (either the contracting state, the non-contracting state, or a third state [whether it be a contracting or non-contracting state]) would determine whether the law of a contracting state would apply, and if it does, so too would the C.I.S.G. For an illustrative way in which states may use conflict of laws rules to make such a determination, see, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 10, 186, 187, 188 (1971).

21. Where both states are non-contracting states and the dispute is litigated in a third contracting state, it would be, for example, the conflict of laws rules of the contracting state that would determine whether the law of that contracting state would apply, and if it does, so too would the C.I.S.G. Note, however, where the aforementioned conflict of law rules determine that the law of a non-contracting state applies, the C.I.S.G. will not apply.

22. C.I.S.G., *supra* note 1, art. 95.

23. Reed Kathrein & Daniel Magraw, *The U.N. Convention on Contracts for the International Sale of Goods: An Update*, 23 INT’L LAW. 797, 798 (1989).

24. This would require that parties with places of business in non-contracting states become familiar with the conflict of laws or choice of law rules in each contracting state where they do business or where the dispute may be litigated.

25. Such a determination would require a court to ascertain under its conflict of laws rules whether the C.I.S.G. would be applicable to the contract, even if the laws of the jurisdiction do not include the C.I.S.G. See *supra* notes 20-21.

26. C.I.S.G., *supra* note 1, art. 2(a). This exclusion applies “unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods

which individuals shop on the other side of a nearby international border, shop during trips abroad, or order from foreign mail-order houses.<sup>27</sup>

International consumer transactions were excluded from the C.I.S.G. because of pre-existing domestic legislation and case law that was designed to protect consumers—a concept which carried different meanings in various legal systems.<sup>28</sup> For example, there is a disparate interpretation of “unconscionability” between the common law in which judges have great activist powers and in whose eyes “unconscionability” is defined, and the civil law in which judges are non-activist and try to work within the confines of the code.<sup>29</sup>

3. *Exclusion of Questions of Validity, Property, or Liability Due to Death or Personal Injury*

The third qualification excludes various types of questions. First, the C.I.S.G. “is not concerned with the validity of the contract or any of its provisions or of any usage.”<sup>30</sup> This provision covers instances where, for example, domestic law prohibits the sale of specified products (e.g., contraband, controlled substances),<sup>31</sup> where a person who is induced to enter a contract by fraud is given special rights and remedies under domestic law,<sup>32</sup> a person does not have capacity under domestic law to enter into a contract (e.g., due to insanity, infancy, or other disability),<sup>33</sup> or where issues of agency arise under domestic law.<sup>34</sup> Second, the C.I.S.G. is not concerned with “the effect which the contract may have on property in the goods sold,”<sup>35</sup> such as, whether a sale cuts off outstanding property interests of third parties.<sup>36</sup> Third, the C.I.S.G. “does not apply to the liability of the seller for death or personal injury caused by the goods to any person.”<sup>37</sup> In these aspects of the contract, the C.I.S.G. does not interfere due to their disparate treatment

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were bought for” personal, family, or household use. Also excluded are transactions—even if commercial—“in which the preponderant part of the obligations” of the seller “consists in the supply of labour or other services.” *Id.* art. 3(2).

27. See JOHN HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 85-86 (1987) [hereinafter Honnold].

28. *Id.* at 86.

29. Moreover, there is no unconscionability article in the C.I.S.G. precisely because consumer transactions are excluded from it. Commercial parties are expected to have enough sophistication in the field in which they are dealing so as not to be taken advantage of in an unconscionable manner.

30. *C.I.S.G.*, *supra* note 1, art. 4(a).

31. See HONNOLD, *supra* note 27, at 96.

32. *Id.*

33. *Id.* at 97.

34. *Id.*

35. *C.I.S.G.*, *supra* note 1, art. 4(b).

36. See HONNOLD, *supra* note 27, at 99.

37. *C.I.S.G.*, *supra* note 1, art. 5.

under various domestic laws.<sup>38</sup> However, the C.I.S.G. is applicable to questions involving the formation of contracts of sale as well as obligations arising from concluded contracts.<sup>39</sup>

#### 4. *Exclusion or Derogation from the C.I.S.G.*

The fourth qualification allows contracting parties either to exclude the application of the C.I.S.G. or to derogate from or vary the effect of any of its provisions.<sup>40</sup> Thus, the C.I.S.G. would not apply to an international commercial transaction if the contracting parties provide otherwise, such as by choosing the domestic law of one state.

The principle of derogating from or varying the effect of the C.I.S.G. applies to the formation of the contract,<sup>41</sup> and supplements the basic principles that the offeror is the master of his offer,<sup>42</sup> and the offeree is the master of his acceptance.<sup>43</sup> Furthermore, the C.I.S.G.'s range of provisions dealing with the obligations of the buyer and seller and the remedies for breach<sup>44</sup> may be reshaped by agreement.<sup>45</sup>

This fourth provision is one of the most important with regard to the C.I.S.G.'s dominant theme of primacy of contract;<sup>46</sup> however, it presents several formidable problems with regard to its implementation and raises a multitude of questions. Out of which transactions can parties opt? To what degree can parties opt out of various parts of a transaction? How do the parties opt out: orally or in writing? Need the opting out be express, or can it be implied? Out of how much of the C.I.S.G. can the parties opt? In interpreting the contract, how do courts determine out of which provisions the parties meant to opt? The drafters of the C.I.S.G. were unable to reach a consensus and left these questions unanswered, and thus the scope of Article 6 and procedure for implementing it remains unclear.<sup>47</sup> Given that different states have different rules in this regard,<sup>48</sup> the safest course of action for parties exercising their rights under Article 6 is to expressly opt out in writing.

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38. See HONNOLD, *supra* note 27, at 96-100.

39. See also E. Allan Farnsworth, *The Vienna Convention: History and Scope*, 18 INT'L LAW. 17, 19 (1984) [hereinafter Farnsworth]; see generally C.I.S.G., *supra* note 1, arts. 14-88.

40. See C.I.S.G., *supra* note 1, art. 6.

41. *Id.* arts. 14-24.

42. *Id.* arts. 14-17.

43. *Id.* art. 18(1).

44. *Id.* arts. 25-88.

45. See HONNOLD, *supra* note 27, at 105.

46. *Id.*

47. See *id.* at 106-09.

48. For example, a contracting state may preserve its domestic laws which require a writing. C.I.S.G., *supra* note 1, arts. 12, 96.



5. *Uniform Interpretation of the C.I.S.G.*

The fifth qualification is that the C.I.S.G. must be interpreted in a uniform fashion among the courts of the contracting states.<sup>49</sup> This is the essential binding that will hold the C.I.S.G. together, thereby promoting international trade among contracting states and encouraging other countries to ratify the C.I.S.G. Yet, uniform interpretation may be impossible given the varied legal, social, and economic systems of the world. The courts in the world's numerous jurisdictions differ over such basic notions as to what law is, how "law" is found, what interpretation is, what is subject to "interpretation", how a statute is interpreted, and even what a court's role is in dealing with this process.

D. *The Roadmap Through Wonderland*

This article is intended to analyze the C.I.S.G. as it applies to commercial contracts made between a U.S. based party and a party in another contracting state. This article attempts to: (1) provide a brief history of the C.I.S.G. and its drafting; (2) discuss the major provisions of the C.I.S.G. and compare them to those of the U.C.C.; (3) apply the C.I.S.G. to some representative domestic U.C.C. contract cases and examine what difference, if any, the C.I.S.G. would have had on their outcome had the contract been between two international parties; (4) determine whether the C.I.S.G. is truly the unification and harmonization of international commercial law and whether it is compatible with our common law tradition; and (5) speculate on some effects that the C.I.S.G. will have on international commercial transactions and the concomitant effects on American attorneys practicing in this field.

II.

THE HISTORY AND DEVELOPMENT OF THE C.I.S.G.

The history of the C.I.S.G. dates back to 1930, when the International Institute for the Unification of Private Law (UNIDROIT)—then under the auspices of the League of Nations—appointed a drafting committee of European scholars to develop a uniform law of international sales.<sup>50</sup> By the outbreak of World War II, the committee had succeeded in preparing a first draft, as well as revising it after taking into account comments which it solicited from the European governments.<sup>51</sup>

In 1951, the government of the Netherlands convened a twenty-one nation conference at The Hague which approved this revised draft and appointed a special commission to continue the work of the original drafting committee.<sup>52</sup> Five years later, the commission released its revised draft and

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49. *Id.* art. 7.

50. Farnsworth, *supra* note 39, at 17.

51. *Id.*

52. *Id.*

again solicited comments from the European governments.<sup>53</sup> In 1964, the government of the Netherlands convened a diplomatic conference at The Hague, at which the Uniform Law on the International Sale of Goods (ULIS)<sup>54</sup> and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC)<sup>55</sup> were approved.

The United States had no role in this process until late 1963 when it joined UNIDROIT.<sup>56</sup> However, American influence was not pervasive enough to produce a final text which justified ratification by the United States.<sup>57</sup> The text was dominated by a European perspective on law relating to the sale of goods because prior to the United States joining, UNIDROIT had been entirely composed of European scholars.<sup>58</sup>

Despite the lack of U.S. ratification, the ULIS was adopted by enough countries to take effect.<sup>59</sup> Yet even before the ULIS was adopted, efforts were already underway under United Nation auspices to produce a revised version of the ULIS that would be more universally acceptable. In 1966, these efforts caused the United Nations General Assembly to establish the United Nations Commission on International Trade Law (UNCITRAL) in which all geographic regions and principal legal systems were represented.<sup>60</sup> UNCITRAL's objective was "the progressive harmonization and unification of the law of international trade" by such means as the preparation of conventions, the construction of model and uniform laws, and the use of standard trade terms<sup>61</sup> "in order to eliminate legal obstacles to international trade and to ensure an orderly development of economic activities on a fair and equal basis."<sup>62</sup> In 1969, UNCITRAL organized a working group on sales to formulate amendments to the ULIS which would render it more amenable to nations of diverse legal, social, and economic systems—particularly to nations outside of the Western European nations which had dominated the drafting of the ULIS.<sup>63</sup>

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53. *Id.*

54. Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107.

55. Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 169.

56. Farnsworth, *supra* note 39, at 17.

57. *Id.*

58. *Id.*

59. The countries that have adopted the ULIS are Belgium, the Federal Republic of Germany, Gambia, Israel, Italy, the Netherlands, San Marino, and the United Kingdom.

60. See Farnsworth, *supra* note 39, at 18. UNCITRAL originally consisted of twenty-nine nations and now consists of thirty-six nations (nine African, nine Western European and others, seven Asian, six Latin American, and five Eastern European). The United States has been a member since UNCITRAL's inception as one of the *others*.

61. *Id.* at 18.

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

63. Farnsworth, *supra* note 39, at 18 (the United States was an active member of this working group since its inception).

In 1980, the United Nations held a diplomatic conference in Vienna to revise and approve a final text of the C.I.S.G. After five weeks of intensive effort by the sixty-two countries represented, the C.I.S.G. was approved.<sup>64</sup> Twenty-one countries became signatories to the C.I.S.G. prior to its September 30, 1981 deadline, thereby indicating their intention to give serious consideration to ratifying the document.<sup>65</sup> The C.I.S.G. entered into force on January 1, 1988 having been ratified, approved or acceded to by the requisite ten states.<sup>66</sup>

### III.

#### COMPARING AND CONTRASTING THE MAJOR PROVISIONS OF THE C.I.S.G. AND THE U.C.C.

##### A. General Provisions

##### 1. Course of Dealing and Usage of the Trade

Article 9 of the C.I.S.G. corresponds to section 1-205 of the U.C.C. Both the C.I.S.G. and the U.C.C. are the same in this regard, although the C.I.S.G. sets forth this standard in a more succinct fashion.<sup>67</sup> Under the C.I.S.G., parties are bound by usage to which they have agreed and by practices which they have established among themselves (course of dealing);<sup>68</sup> moreover, parties impliedly make the usage of the trade applicable to their contract.<sup>69</sup> The U.C.C. defines outright the terms "course of dealing"<sup>70</sup> and "usage of the trade,"<sup>71</sup> and states that when they are used, they give particular meaning to, supplement, or qualify the terms of an agreement.<sup>72</sup> The U.C.C. goes further than the C.I.S.G. by setting up a hierarchy of interpretation when the express terms of an agreement conflict with an applicable course of dealing or usage of the trade: express terms of the agreement are

64. *Id.* at 17, 18.

65. *See id.* at 18; *see also C.I.S.G., supra* note 1, art. 91(1).

66. *C.I.S.G., supra* note 1, art. 99(1). As of December 6, 1991, the following 28 States are parties to the C.I.S.G.: Argentina, Australia, Austria, Bulgaria, Byelorussian Soviet Socialist Republic, Chile, Czechoslovakia, Denmark, Egypt, Federal Republic of Germany, Finland, France, Hungary, Iraq, Italy, Lesotho, Mexico, Norway, People's Republic of China, Spain, Sweden, Switzerland, Syrian Arab Republic, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United States, Yugoslavia, and Zambia. The following four States, having acceded to the C.I.S.G., will become parties to it pursuant to article 99(2) on the dates indicated: Canada (May 1, 1992), Guinea (February 1, 1992), the Netherlands (January 1, 1992), and Romania (June 1, 1992). The German Democratic Republic, prior to unification with the Federal Republic of Germany on October 3, 1990, was also a party to the C.I.S.G.. This list of parties to the C.I.S.G., as well as their respective reservations to it, can be updated by contacting either one of the following authorities: (1) Treaty Section, Office of Legal Affairs, United Nations, New York, N.Y. 10017, (212) 963-3918; or (2) Office of Treaty Affairs, U.S. Department of State, Washington, D.C. 20520, (202) 647-1345.

67. *See C.I.S.G., supra* note 1, art. 9.

68. *Id.* art. 9(1).

69. *Id.* art. 9(2).

70. U.C.C. § 1-205(1) (1966).

71. *Id.* § 1-205(2).

72. *Id.* § 1-205(3).

controlling over both course of dealing and usage of the trade, and course of dealing is controlling over usage of the trade.<sup>73</sup>

## 2. *Statute of Frauds*

Article 11 of the C.I.S.G. is the diametrically opposed counterpart to section 2-201 of the U.C.C. While the U.C.C. requires that contracts for the sale of goods (over five hundred dollars) be in writing,<sup>74</sup> the C.I.S.G. does not require a contract for the sale of goods (for any monetary value) to be in writing. Rather, it may be evidenced in any manner, including witnesses.<sup>75</sup>

## B. *Formation of the Contract*

### 1. *Mailbox Rule*

Article 15 of the C.I.S.G. is the diametrically opposed counterpart to the common law mailbox rule. Where the mailbox rule states that an offer is effective when it is dispatched,<sup>76</sup> the C.I.S.G. states that an offer becomes effective when it reaches the offeree.<sup>77</sup>

### 2. *Revocation*

Article 16 of the C.I.S.G. is the counterpart to section 2-205 of the U.C.C. Under the U.C.C., an offer that states that it will be held open is not revocable (absent consideration) during the time stated, or if no time is stated, for a reasonable time not to exceed three months.<sup>78</sup> Similarly, the C.I.S.G. states that an offer cannot be revoked if it indicates that the offer is irrevocable, whether by stating a fixed time for acceptance or otherwise.<sup>79</sup> However, where there is no indication of irrevocability, an offer may be revoked until a contract is concluded if the revocation reaches the offeree before the offeree has dispatched an acceptance.<sup>80</sup>

### 3. *Battle of the Forms*

Article 19 of the C.I.S.G. addresses the "battle of the forms" problem as does section 2-207 of the U.C.C. The classic "battle of the forms" scenario between two merchants is where a reply purports to accept an offer, but in fact differs from it in some aspect, be it material or immaterial. With respect to immaterial additions or differences, the C.I.S.G. is more restrained and does not go as far as the U.C.C. in closing a contract. Under the C.I.S.G., "if

73. *Id.* § 1-205(4).

74. *Id.* § 2-201(1).

75. *C.I.S.G.*, *supra* note 1, art. 11.

76. RESTATEMENT (SECOND) OF CONTRACTS § 63(a) (1979).

77. *C.I.S.G.*, *supra* note 1, art. 15(1).

78. U.C.C. § 2-205 (1966).

79. *C.I.S.G.*, *supra* note 1, art. 16(2)(a).

80. *Id.* art. 16(1).

the offeror, without undue delay, objects" to an additional or different immaterial term, there is no contract.<sup>81</sup> Yet under the U.C.C., additional immaterial terms automatically become part of the contract.<sup>82</sup> Thus, in the case of immaterial differences between an offer and an acceptance, the U.C.C. goes further than the C.I.S.G. and, in effect, "forces through a marriage when the couple is quarreling at the altar,"<sup>83</sup> making section 2-207 the commercial equivalent of a "shotgun wedding."

However, the C.I.S.G. and the U.C.C. treat material differences in terms between an offer and an acceptance similarly. The C.I.S.G. treats material differences as a "rejection of the offer and [as constituting] a counter-offer,"<sup>84</sup> while the U.C.C. treats material differences as "proposals for addition to the contract."<sup>85</sup> In neither case would a merchant be bound to an acceptance containing materially different terms. Both the C.I.S.G. and the U.C.C. provide examples of materially differing terms,<sup>86</sup> yet the C.I.S.G. is more general in its description and thus more beneficial to the seller in this regard.

### C. Breach of the Contract

#### 1. Threshold of Breach

The concept of breach differs slightly between the U.C.C. and Article 25 of the C.I.S.G. In order for there to be a breach under the U.C.C., a failure to render or offer performance must be *material*.<sup>87</sup>

In determining whether a failure to render or offer performance is material, the following circumstances are significant: the extent to which the injured party will be deprived of the benefit which he reasonably expected; the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; the extent to which the party failing to perform or to offer to perform will suffer forfeiture; the likelihood that the party failing to perform or to offer to perform will cure his failure, taking into account all of the circumstances including any reasonable assurances; [and] the extent to which the behavior of the other party failing to perform or to offer to perform comports with standards of good faith and fair dealing.<sup>88</sup>

A breach under the C.I.S.G., however, must rise to a slightly more serious level—that of a *fundamental* breach.<sup>89</sup> A fundamental breach is one which results in such "detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in

81. *Id.* art. 19(2).

82. U.C.C. § 2-207(2)(b) (1966). Different immaterial terms, however, do not become part of the contract. *See, e.g.,* Reaction Molding Technologies, Inc. v. General Elec. Co., 588 F. Supp. 1280, 1289 (E.D. Pa. 1984).

83. John Honnold, *The New Uniform Law for International Sales and the UCC: A Comparison*, 18 INT'L LAW. 21, 26 (1984).

84. C.I.S.G., *supra* note 1, art. 19(1).

85. U.C.C. § 2-207(2) (1966).

86. *See id.* § 2-207 comment 4; *see also* C.I.S.G., *supra* note 1, art. 19(3).

87. RESTATEMENT (SECOND) OF CONTRACTS § 241 (1979).

88. *Id.*

89. C.I.S.G., *supra* note 1, art. 25.

breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."<sup>90</sup>

## 2. *Modification and Termination*

Article 29 is the C.I.S.G. counterpart of U.C.C. section 2-209(1), (2), (3). Under U.C.C. section 2-209(1), (2), (3), an "agreement modifying a contract . . . needs no consideration to be binding";<sup>91</sup> however, a signed agreement which excludes modification or rescission (termination) of a contract except in writing cannot otherwise be modified or rescinded.<sup>92</sup> In any case, the requirements of section 2-201 (the Statute of Frauds) must be satisfied if the modified contract falls within its provisions.<sup>93</sup>

The C.I.S.G. treats modification and termination in a fashion similar to the U.C.C. Under the C.I.S.G., a contract may be modified or terminated by the mere agreement of the parties.<sup>94</sup> However, the C.I.S.G. prohibits modification or termination by agreement of a written contract containing a provision requiring such modification or termination by agreement to be in writing.<sup>95</sup>

## 3. *Warranties of Merchantability and Fitness for a Particular Purpose*

Article 35 of the C.I.S.G. is the counterpart of sections 2-314, 2-315, and 2-316 of the U.C.C. U.C.C. section 2-314 contains an implied warranty of merchantability.<sup>96</sup> This section defines merchantable goods as those able to pass without objection in the trade under the contract description;<sup>97</sup> in the case of fungible goods, of fair average quality within the description;<sup>98</sup> fit for ordinary purposes for which the goods are used;<sup>99</sup> able to run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved;<sup>100</sup> adequately contained, packaged, and labeled as the agreement may require;<sup>101</sup> and able to conform to the promises or affirmations of fact made on the container or label if any.<sup>102</sup> Implied warranties may also arise from course of dealing or usage of the trade.<sup>103</sup>

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90. *Id.*

91. U.C.C. § 2-209(1) (1966).

92. *Id.* § 2-209(2).

93. *Id.* § 2-209(3).

94. *C.I.S.G.*, *supra* note 1, art. 29(1).

95. *Id.* art. 29(2).

96. U.C.C. § 2-314(1) (1966).

97. *Id.* § 2-314(2)(a).

98. *Id.* § 2-314(2)(b).

99. *Id.* § 2-314(2)(c).

100. *Id.* § 2-314(2)(d).

101. *Id.* § 2-314(2)(e).

102. *Id.* § 2-314(2)(f).

103. *Id.* § 2-314(3).

U.C.C. section 2-315 creates an implied warranty of fitness for a particular purpose. This warranty applies if the seller, at the time of contracting, has reason to know any particular purpose for which the goods are required, and has reason to know that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods.<sup>104</sup>

U.C.C. section 2-316 allows the parties to exclude or modify the implied warranty of merchantability in writing.<sup>105</sup> These exclusions or modifications can also be established by course of dealing, course of performance, or usage of the trade.<sup>106</sup>

Article 35 of the C.I.S.G. combines the warranties contained in U.C.C. sections 2-314 and 2-315 in a more specific fashion. Under the C.I.S.G., merchantable goods are defined as those "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."<sup>107</sup> Goods are not in conformity with the contract unless they

are fit for the purposes for which goods of the same description would ordinarily be used;<sup>108</sup> 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;<sup>109</sup> possess the qualities of goods which the seller has held out to the buyer as a sample or model;<sup>110</sup> [or] 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.<sup>111</sup>

In contrast to the U.C.C., under the C.I.S.G. "the seller is not liable . . . for any [such] lack of the 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."<sup>112</sup> Moreover, the implied warranties of merchantability cannot be avoided as is permitted under U.C.C. section 2-316 unless "at the time of the conclusion of the contract the buyer knew or could not have been unaware of [a] lack of conformity [of the goods]."<sup>113</sup>

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104. *Id.* § 2-315.

105. *Id.* § 2-316(2).

106. *Id.* § 2-316(3)(c).

107. *C.I.S.G.*, *supra* note 1, art. 35(1).

108. *Id.* art. 35(2)(a).

109. *Id.* art. 35(2)(b).

110. *Id.* art. 35(2)(c).

111. *Id.* art. 35(2)(d).

112. *Id.* art. 35(3).

113. *Id.*

## IV.

APPLICATION OF THE C.I.S.G. TO SOME DEFINITIVE  
CONTRACT CASES: AN EXERCISE IN  
"RE-ANALYZATION"

Given the aforementioned differences between the U.C.C. and the C.I.S.G., to what extent will the C.I.S.G. affect contracts for the international sale of goods in the real world? Are the differences between the U.C.C. and the C.I.S.G. merely superficial, or do they fundamentally change the principles that lie at the heart of the U.C.C.? In order to consider the extent to which the C.I.S.G. may change the rules of the contract game in the international arena, the C.I.S.G. has been applied to some representative contract cases decided under individual state's equivalents of the U.C.C.<sup>114</sup> This analysis assumes that the parties to the contract have their places of business in differing contracting states.

A. *Statute of Frauds*

In *Futch v. James River-Norwalk, Inc.*,<sup>115</sup> the plaintiff, a wood dealer, and the defendant, a paper mill, entered into an oral contract under which the plaintiff would supply one half of the defendant's timber requirements. Thereafter, the plaintiff received weekly orders from the defendant over a period of the next twenty months. When the defendant ceased ordering its timber from the plaintiff, the plaintiff sued the defendant seeking damages for breach of the oral contract for the supply of wood.<sup>116</sup>

The court held that since the contract for the sale of timber was governed under section 2-201(1) of the U.C.C., to be enforceable it must be evidenced by a writing. Thus, since the contract was oral, it was not enforceable.<sup>117</sup>

Under Article 11 of the C.I.S.G., this transaction would have had the opposite result since contracts for the sale of goods "need not be concluded in or evidenced by writing."<sup>118</sup> Rather, the C.I.S.G. allows the contract to be "proved by any means."<sup>119</sup> Sufficient means existed in this case to prove the existence of a contract since the parties were witnesses to it, and it was performed for a period of twenty months.

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114. Article 2 of the U.C.C. has been adopted in 49 states (all states except Louisiana), the District of Columbia, and the Virgin Islands.

115. 722 F. Supp. 1395 (S.D. Miss. 1989).

116. *Id.* at 1397.

117. *Id.* at 1462.

118. *C.I.S.G.*, *supra* note 1, art. 11.

119. *Id.*



### B. Battle of the Forms: Additional Material Terms

In *Dale R. Horning Co. v. Falconer Glass Industries, Inc.*,<sup>120</sup> the defendant verbally agreed to sell a shipment of glass to the plaintiff for use in a construction project. Their conversation did not touch on issues of limiting remedies or disclaiming implied warranties. The next day, the defendant sent a standard form to plaintiff confirming the verbal agreement of the previous day. The reverse side of the form contained "terms and conditions of sale" purporting to: (1) govern the buyer's acceptance of the form,<sup>121</sup> (2) disclaim warranties of the product's merchantability,<sup>122</sup> (3) limit the buyer's remedies,<sup>123</sup> and (4) govern the selection of forum for any actions brought under the contract.<sup>124</sup>

Thereafter, the defendant delivered the shipment of glass, however, it was defective and was not fully corrected for five months. The plaintiff sued the defendant, alleging that the defendant breached its contract and was liable for consequential damages. The court held that under section 2-207(2)(b) of the U.C.C., the acceptance criteria including the disclaimer of implied warranties of merchantability, the exclusion of liability for consequential damages, and the selection of forum terms and conditions in the defendant's confirmation form, materially altered the pre-existing oral contract and thus were not a part of it.<sup>125</sup>

Under Article 19 of the C.I.S.G., the transaction would have had the same result since material differences in an acceptance do not become a part of the contract. Thus, treatment of additional material terms in an acceptance is the same under both the U.C.C. and the C.I.S.G.

### C. Battle of the Forms: Additional Immaterial Terms

In *St. Charles Cable TV, Inc. v. Eagle Comtronics, Inc.*,<sup>126</sup> the plaintiff ordered four thousand addressable descramblers needed to set up its cable television system, pursuant to oral negotiations. Thereafter, and on each subsequent order, the defendant sent "sales order acknowledgement forms" to the plaintiff. The bottom of each sales order read "Subject to the Terms and Conditions on Reverse Side." These terms and conditions purported to: (1) limit the manufacturer's warranty,<sup>127</sup> (2) limit the notice period for reporting

120. 710 F. Supp. 693 (S.D. Ind. 1989).

121. *Id.* at 698 n.5 (the clause stated that the additional terms in the confirmation of the oral contract would be binding on the buyer if he failed to object within three days).

122. *Id.* at 696.

123. *Id.* (the clause stated that the buyer's exclusive and sole remedy would be to secure replacement of the non-conforming material, and that the seller would not in any event be liable for consequential damages).

124. *Id.* (the clause forced the buyer to bring any actions under the contract in a New York court).

125. *Id.* at 698-701.

126. 687 F. Supp. 820 (S.D.N.Y. 1988).

127. *Id.* at 824 (the clause stated that the defendant "warrants the goods to be free from defects in material and workmanship under normal use and service for a period of ninety days

defects,<sup>128</sup> and (3) assign liability for freight, legal, and interest charges to the buyer.<sup>129</sup>

The defendant began delivery of the descramblers the following month. Over the following five months, the plaintiff found the descramblers defective in various manners.<sup>130</sup> Each time the descramblers were either replaced or repaired. Thereafter the plaintiff brought an action against the defendant for, *inter alia*, breach of warranty.

The court held under section 2-207(2) of the U.C.C., that since the plaintiff did not limit acceptance to the terms of the offer or object to the additional terms before or within a reasonable time of their receipt, the terms would become a part of the contract unless they materially altered it.<sup>131</sup> Since the defendant's limited warranty in the "terms and conditions" disclaimer on the "sales order acknowledgement form" did not materially alter the contract discussed by the parties during oral negotiations, it was thus a part of the contract.<sup>132</sup> The court also held that the interest provision contained in the terms and conditions did not materially alter the contract because no "surprise or hardship" would result from charging interest on an unpaid bill, and thus was a part of the contract.<sup>133</sup> With regard to the freight charge provision, the court held that since freight charges were generally paid by the buyer, this provision did not materially alter the contract and was thus included in it.<sup>134</sup>

Under Article 19 of the C.I.S.G., the transaction would have had a disparate result had the plaintiff objected to the immaterial differences without undue delay.<sup>135</sup> In such a case, these terms, although immaterial, would not

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from delivery; that the buyer's remedy under [seller's] warranty is limited to repair or exchange of defective goods; [and] that all other warranties are excluded").

128. *Id.* (the clause stated that the buyer must provide notice of defects within fifteen days of delivery).

129. *Id.* at 824 (the clause held the buyer responsible for freight charges, legal costs, and any interest arising from any contract dispute).

130. *Id.* at 824-25 (shortly after the defendant began delivery, the plaintiff noticed that the descramblers caused minor interference on one of their 33 channels. The defendant fixed the devices, but three months later the plaintiff discovered that the descramblers were vulnerable to a method of tampering in which subscribers could descramble all scrambled channels and thereby steal additional channels without paying for them. Five months after initial delivery, plaintiff made additional complaints about the descramblers' performance).

131. *Id.* at 827.

132. Furthermore, indirect evidence indicated that the parties based their agreement on the defendant's warranty term. *Id.*

133. See U.C.C. § 2-207 cmt. 4 (1966).

134. 687 F. Supp. at 827 (however, the court held that the defendant's indemnity, attorney fees, and notice provisions materially altered the contract because of the surprise and hardship that they would place upon the plaintiff, and that the notice provision providing that claims made after fifteen days would be waived also materially altered the contract because it conflicted with the one and one-half year warranty provision agreed to by the parties).

Under Article 19 of the C.I.S.G., the result would have been the same with regard to the material differences in the acceptance—they would not have been included in the contract, as illustrated in *Dale R. Horning Co.*, 710 F. Supp. at 693.

135. *C.I.S.G.*, *supra* note 1, art. 19(2).

have been included in the contract. Thus, as demonstrated previously, the C.I.S.G. is more lenient with regard to tying the hands of the offeror where an offeree's acceptance varies in ways which are immaterial yet significant in the eyes of the offeror.

#### *D. Modification and Termination*

In *Marlowe v. Argentine Naval Commission*,<sup>136</sup> the parties signed a written contract which provided that the plaintiff would arrange for the defendant to buy two airplanes from a Panamanian corporation.<sup>137</sup> However, problems arose in the defendant's obligation to successfully open a letter of credit in favor of the seller, which resulted in a period of delay.<sup>138</sup>

In the meantime, the plaintiff made a failed attempt to deliver the aircraft on November 19, 1982.<sup>139</sup> Tentative delivery dates were rescheduled on four occasions, each of which were postponed because the plaintiff failed to obtain authorization to sell the airplanes. On December 30, 1982, the defendant sent the plaintiff a telex stating that the contract would expire the next day.<sup>140</sup> The defendant finally cancelled the contract on January 6, 1983. The plaintiff rejected this cancellation, however, but never delivered any aircraft. Thereafter, the plaintiff brought suit for breach of contract.

The plaintiff's cause of action alleged that the parties orally modified their contract to extend the permissible delivery date to January 31, 1983 and claimed that the agreement was confirmed in writing by the documents extending the letters of credit. The court held: (1) that under U.C.C. section 2-209(2) the oral agreement did not modify the contract because the contract only permitted modification by written agreement, and (2) that neither the defendant's letters to the bank extending the expiration date on the letter of

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136. 808 F.2d 120 (D.C. Cir. 1986).

137. *Id.* at 122 (the contract was executed in Washington D.C. and specified that its terms were to be governed by the laws of the District of Columbia, and that any modifications to the contract could only be executed by written agreement. The contract further required that the defendant open a letter of credit in favor of the Panamanian corporation that would be confirmed by the Banco Nacional de Panama. No time limit was specified by the contract within which the letter of credit was required to be opened or confirmed. Additionally, the contract required that the Panamanian corporation deliver the aircraft no later than thirty days after the contract was signed by both parties and the letter of credit was opened by the defendant. ["Delivery" of the aircraft consisted of the transfer of good and marketable legal title to two airplanes in an "air-worthy" condition, with the defendant being given an opportunity to inspect the aircraft before granting its final acceptance]).

138. *Id.* at 121 (the letters of credit were opened for the defendant on October 18, 1982 and were due to expire on November 30, 1982; however, they were not confirmed before expiration, partly because the defendant had failed to designate an authorized representative to carry out its side of the transaction, therefore, the expiration date of the letters of credit was extended until January 31, 1983. Thereafter the defendant designated its authorized representative, and the letters of credit were confirmed on December 1, 1982).

139. *Id.* at 122 (the attempt failed for several reasons: (1) the ground inspection of the aircraft was not yet complete, (2) the plaintiff could not produce documentation of title, and (3) the plaintiff could not warrant that the aircraft would be delivered in an airworthy condition).

140. *Id.* (however, the plaintiff denied receiving such a telex).

credit nor the defendant's internal memorandum authorizing this extension purported to modify the contract.<sup>141</sup>

Under Article 29 of the C.I.S.G., the transaction would have had the same result since "a contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not otherwise be modified or terminated by agreement."<sup>142</sup> Thus, both the U.C.C. and the C.I.S.G. are similar in their approaches to modification of contracts containing clauses which prohibit such modification without the agreement of the parties.

### *E. Implied Warranties of Merchantability & Fitness for a Particular Purpose*

In *Blommer Chocolate Co. v. Bongards Creameries, Inc.*,<sup>143</sup> the plaintiff contracted to purchase whey to be used as an ingredient in its chocolate coatings.<sup>144</sup> In ordering the dry whey powder, the plaintiff stressed that the whey powder supplied had to be free of salmonella. The purchase order specified that the whey powder would be "extra grade,"<sup>145</sup> "guaranteed salmonella negative," and "tested salmonella negative before shipment" to the plaintiff.<sup>146</sup>

The defendant, the manufacturer, began shipping the whey powder directly to the plaintiff. Pursuant to testing by the plaintiff's consultant, salmonella was found in several products at the plaintiff's plant. Almost simultaneously, one of the plaintiff's customers found salmonella in a recently delivered shipment of the plaintiff's chocolate compound. After further tests of the plaintiff's finished products, it was determined that only those products which contained the defendant manufacturer's whey were contaminated. As a result of this contamination, the plaintiff was forced to recall its chocolate coating, decontaminate its processing facilities, and assist several of its customers who were forced to decontaminate their facilities. Several hundred thousand pounds of the plaintiff's chocolate products were contaminated by the salmonella bacteria. The plaintiff concluded that the defendant's whey had been contaminated,<sup>147</sup> and brought suit for breach of

141. *Id.* at 123.

142. *C.I.S.G.*, *supra* note 1, art. 29(2).

143. 635 F. Supp. 919 (N.D. Ill. 1986); *see also* *Blommer Chocolate Co. v. Bongards Creameries, Inc.*, 635 F. Supp. 911 (N.D. Ill. 1985).

144. *Id.* at 922 (the whey was purchased from the defendant/third party plaintiff, a food broker, who had ordered the whey from the third party defendant, a dairy broker, who in turn arranged for the manufacture of the dry whey powder by defendant, a manufacturer).

145. *Id.* ("extra grade" whey denotes "the highest quality of whey that is salmonella-free and fit for human consumption").

146. *Id.*

147. *Id.* at 915 (through serological testing, it was determined that the strain of salmonella found in the plaintiff's chocolate was *salmonella cubana*, one of approximately 1,500 distinct strains. The same strain was also found in an unopened bag of whey at the plaintiff's plant, and also in whey tailings [residue in the processing machinery] at the defendant manufacturer's plant).

implied warranty of merchantability and breach of implied warranty of fitness for a particular purpose.

The court held that under U.C.C. section 2-314, the presence of the salmonella in a food product destined for human consumption ordinarily breaches the implied warranty of merchantability because such food products cannot "pass without objection in the trade under the contract description."<sup>148</sup> Moreover, under U.C.C. section 2-315, the implied warranty for fitness for a particular purpose was breached; this warranty is implied whenever the seller had "reason to know any particular purpose for which the goods are required."<sup>149</sup> The third party defendant dairy broker either knew or should have known that the extra grade whey sent was to be a component in a chocolate product which was intended for human consumption, and that whey containing salmonella was not fit for human consumption.<sup>150</sup>

Under Article 35 of the C.I.S.G., this suit would have had an identical result, with regard to both the implied warranty of merchantability and the implied warranty of fitness for a particular purpose, since the whey was not "of the quality . . . and description required by the contract,"<sup>151</sup> "fit for the purposes for which [whey] of the same description would ordinarily be used,"<sup>152</sup> nor "fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract."<sup>153</sup> Thus, both the U.C.C. and the C.I.S.G. treat breaches of implied warranties of merchantability and fitness for a particular purpose in a similar fashion.

#### F. Exclusion of Implied Warranties

In *Sobiech v. International Staple and Machine Co.*,<sup>154</sup> the plaintiff was engaged in the business of growing, packaging, and shipping vegetables, including onions. The defendant was a distributor of vegetable packaging equipment and materials and had supplied the plaintiff with machines known as "weigh packers" that weighed onions on a mechanical scale and automatically packaged them. After the plaintiff learned that electronic scales which weighed onions more accurately had come onto the market, it inquired whether the defendant could provide them to replace the mechanical scales in the weigh packers. The defendant informed the plaintiff that a conversion was possible, although it did not know whether such a conversion had ever been attached to the type of weigh packers used by the plaintiff. Thereafter, the plaintiff went ahead with the conversion on one of its weigh packers on a trial basis so that it could evaluate the performance of the conversion

148. U.C.C. § 2-314(2)(a) (1966); *id.* at 925.

149. *Id.* § 2-315.

150. 635 F. Supp. at 929-30.

151. C.I.S.G., *supra* note 1, art. 35(1).

152. *Id.* art. 35(2)(a).

153. *Id.* art. 35(2)(b).

154. 867 F.2d 778 (2d Cir. 1989).

machine before deciding to purchase it. At the time, the defendant advised the plaintiff that the machine was new and experimental.<sup>155</sup>

The plaintiff experienced numerous problems with the conversion machine but nevertheless decided to purchase it as well as a new weigh packer with electronic scales identical to those of the conversion machine. The difficulties that the plaintiff subsequently experienced were the same as had occurred during the trial period use of the conversion machine. Despite these problems, the plaintiff continued to use both the new weigh packer and the conversion machine for at least three years. In response to the plaintiff's complaints, the defendant offered to take back the machines and to sell the plaintiff new models at cost, yet the plaintiff rejected this offer and never requested that the defendant take back the machines. Thereafter, the plaintiff brought suit alleging breach of implied warranty.<sup>156</sup>

The court held that no implied warranties existed.<sup>157</sup> The plaintiff had actual knowledge, based on extensive personal experience, of the machines' defects at the time he purchased them, thus negating the existence of any implied warranty under U.C.C. section 2-316(3)(b).<sup>158</sup>

Under Article 35 of the C.I.S.G., any implied warranties would have also been excluded from the transaction because the plaintiff "at the time of the conclusion of the contract knew . . . of [the] lack of conformity" of the machines which he purchased.<sup>159</sup> Thus, implied warranties of merchantability are negated under both the U.C.C. and the C.I.S.G. if a buyer has actually examined the goods or knew that they did not conform.

## V.

### CONCLUSION

#### A. *Compatibility with the U.C.C.*

As demonstrated above, the C.I.S.G. and the U.C.C. are generally consistent. Although they do not treat all issues identically, "the two laws are sufficiently compatible to support claims of overall consistency."<sup>160</sup> Many of the C.I.S.G.'s provisions are similar in approach and content to those of the U.C.C. In fact, the C.I.S.G. resembles the U.C.C. "more than the law of any other country."<sup>161</sup> Thus, the C.I.S.G. is, for the most part, truly a mirror

155. *Id.* at 779.

156. *Id.* at 779-80.

157. *Id.* at 782.

158. *Id.* at 782-83.

159. *C.I.S.G.*, *supra* note 1, art. 35(3).

160. Patterson, *supra* note 7, at 275; *see also* President's Message to Congress Transmitting the United Nations Convention on Contracts for the International Sale of Goods, 19 WEEKLY COMPILATION PRESIDENTIAL DOCUMENTS 1-43 (Sept. 21, 1983).

161. *Proposed United Nations Convention on Contracts for the International Sale of Goods: Hearing on Treaty Doc. 98-9 Before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. 2 (1984) (statement of Peter H. Pfund, Assistant Legal Advisor for Private International Law, U.S. Department of State).

image of the U.C.C., albeit somewhat distorted. The xenophobic fears of some parties, that the C.I.S.G. would be the beginning of the end of our common law tradition, have been proven ill-founded in light of the substantial similarities between the C.I.S.G. and the U.C.C. Accordingly, the fear that the C.I.S.G. would "complicate the lives of businessmen rather than make them more simple or harmonious"<sup>162</sup> has proven erroneous.

### *B. Unification and Harmonization*

The C.I.S.G. is the result of genuine cooperation and concession by sixty-two states working under the auspices of UNCITRAL. It is a consensus which represents the varied legal, social, and economic systems of the world. In that sense it has already surpassed the ULIS and the ULFC. The C.I.S.G. appears to have succeeded in unifying the law of international sales, but whether there will be harmonization depends entirely on whether the courts of the various states which have become parties to the C.I.S.G. are able to interpret it in a uniform fashion in accordance with Article 7. Ironically, for the same reason that the C.I.S.G. has succeeded in unifying international sales law, it may never succeed in attaining the uniform interpretation needed for it to prevail. These legal, social, and economic differences may be too formidable to overcome,<sup>163</sup> and in fact may be the death of the C.I.S.G., inasmuch as the courts in the myriad jurisdictions of the world have different conceptions of such basic notions as what "law" is, how "law" is found, what "interpretation" is, what is subject to "interpretation," how a statute is interpreted, and what a court's role is in dealing with this process.

However, the death of the C.I.S.G. is by no means certain, nor for that matter, even likely, given the ardent desire of the parties and signatories to the C.I.S.G. to create a unified law of international sales. "If courts keep in mind the international character of the C.I.S.G., if they refer to its legislative history and ensure that decisions are consistent with the intent of the drafters, and if they give appropriate weight to decisions rendered in other countries, then they will minimize the occurrence of divergent interpretations and promote the goal of [international] unification."<sup>164</sup>

Clearly the C.I.S.G. succeeds in unifying the international law of sales, and given uniform interpretation, will succeed in harmonization of this law.

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162. Brooks, *supra* note 5, at 2.

163. For example, simply examine the legal disparities between the common and civil law. The common law is oriented to the contracting parties and their intent (as evidenced in their agreement). Under the common law, parties are free to do almost anything they want as long as it is not illegal, as the common law courts will enforce almost anything that the contracting parties agree to. There exists very little in the way of rules or regulations that restrict how parties may agree to contract. In contrast, the civil law presents a very different emphasis. In the civil code, there exist a interminable list of detailed rules, many of which are obligatory and cannot be contracted out of, and some of which are not applicable only if they are expressly waived. This basic framework cannot be waived and the intent of the parties is not as relevant as under the common law.

164. Patterson, *supra* note 7, at 283.

The potential for a truly global unification though lies only in the wider ratification, acceptance, approval, or accession to the C.I.S.G. by the majority of the world's nations. Given that thirty-two countries have already or shortly will become parties to C.I.S.G.,<sup>165</sup> and that many more are considering becoming parties, it seems highly probable that other states will become parties to it in order to facilitate and stimulate international trade across their borders—the major outgrowth of unification.

*C. The Future of the C.I.S.G.*

In the years to come the C.I.S.G. will have the substantial effect of increasing international trade between parties in states which have adopted it, due to the breakdown in the disparities between domestic laws of sales. Not only will the C.I.S.G. facilitate existing international trade, but it will stimulate new avenues of trade as well, especially for those who have been deterred from engaging in the field. American attorneys would be wise to become conversant with the C.I.S.G., as it has become the rules by which the international contract game will be played in the years to come.

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165. See *supra* note 66.