Teaching the CISG in Contracts

William S. Dodge

Those of us who teach first-year Contracts have two main responsibilities: to teach our students to think critically about legal rules, specifically the rules of contract law, and to introduce our students to some of the principal issues in contracts and the sources of law that a court will apply in resolving those issues. In discharging the second of these responsibilities, most Contracts professors teach their students not just about the common law of contracts but about Article 2 of the Uniform Commercial Code, which applies to transactions in goods. But most Contracts professors do not teach much, if any, of another body of U.S. contract law—the United Nations Convention on Contracts for the International Sale of Goods, commonly known as the CISG.[1]

The failure to teach the CISG in first-year Contracts is problematic. As a treaty the CISG is federal law, which preempts state common law and the UCC.[2] Whenever a party whose place of business is in the United States contracts for the sale of goods with a party whose place of business is in another country that has joined the CISG, it is the CISG and not the UCC or the common law that governs the formation of their contract and their respective rights and obligations under it. This means that the CISG is potentially applicable to an enormous number of contracts. As of January 1, 2000, fifty-three countries are parties to the CISG, including Canada, Mexico, Germany, France, China, and Singapore.[3] In 1999 U.S. exports of goods to and

William S. Dodge is an associate professor at Hastings College of the Law, University of California. He thanks Ash Bhagwat, Harry Flechtner, John Murray, and Scott Norberg for comments on an earlier draft.

1. United Nations Convention on Contracts for the International Sale of Goods, opened for signature April 11, 1980, S. Treaty Doc. No. 9 (1983), *reprinted in* 19 I.L.M. 671 (1980), *and* 15 U.S.C.A. App. 332–62, & Supp. at 32–49 (West 1998 & Supp. 1999) [hereinafter CISG].

2. See U.S. Const., art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

3. Those 53 countries are Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Burundi, Canada, Chile, China, Croatia, Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Guinea, Hungary, Iraq, Italy, Latvia, Lesotho, Lithuania, Luxembourg, Mexico, Moldova, Mongolia, the Netherlands, New Zealand, Norway, Poland, Romania, Russia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States, Uzbekistan, Yugoslavia, and Zambia. Four more countries—Kyrgyzstan, Mauritania, Peru and Uruguay—

imports of goods from these six countries alone exceeded $814 billion.[4] The lawyers who draft these contracts and litigate disputes arising under them will not necessarily have taken International Business Transactions in law school, which means that if they are not exposed to the CISG in Contracts, they will probably not be exposed to the CISG at all. Thus, by failing to teach the CISG in Contracts, American law schools are producing lawyers who are ill equipped to represent their clients competently.[5]

Incorporating the CISG into first-year Contracts may seem a daunting task. Almost none of the existing casebooks devote much space to the CISG. Many Contracts teachers feel that there is already too much for them to cover in the allotted hours, and some may fear that teaching the CISG will require them to become experts in international law. My purpose in this article is to overcome such inhibitions. First, I hope to convince my fellow Contracts teachers (and perhaps some casebook authors as well) that they have a professional obligation to introduce students to the CISG in first-year Contracts.[6] Second, I will try to make it easier for them to do so by offering suggestions about where to raise the CISG and even a few cases with which to supplement whatever casebook they use.

Teaching the CISG in Contracts *does not* require one to become an expert in international law; it can be taught just like the UCC, as a separate body of contract rules that apply in particular circumstances. Teaching the CISG *does* require some reallocation of class time, but not a great deal. Contracts teachers do not need to turn their students into CISG experts or even to make them as familiar with the CISG as they are with the common law of contracts and the UCC. To discharge their obligations to their students, they need teach only enough of the CISG to ensure that their students know that this body of law exists and when it applies, so that, as lawyers, these students will know when they might need to research a CISG issue further. It does not particularly matter whether one does this by teaching the CISG rules on firm offers or the battle of the forms, the CISG's lack of a statute of frauds and parol evidence rule, the CISG's provisions on remedies (which emphasize specific performance and lack a perfect tender rule), or some combination of these.

joined the CISG in 1999, and it will enter into force with respect to these countries during 2000. See <www.uncitral.org/english/status/status.pdf> (visited May 22, 2000).

Of the top ten U.S. trading partners, only Japan, Korea, Taiwan, and the United Kingdom have not joined the CISG. On the debate in the United Kingdom over whether to join, see Angelo Forte, The United Nations Convention on Contracts for the International Sale of Goods: Reason and Unreason in the United Kingdom, 26 U. Balt. L. Rev. 51 (1997).

4. <www.census.gov/foreign-trade/top/dst/1999/12/balance.html> (visited March 6, 2000).

5. Failing to determine the law that governs a contract (particularly when it is the law of the United States) is probably malpractice. See Ronald A. Brand, Professional Responsibility in a Transnational Transactions Practice, 17 J.L. & Com. 301, 336–37 (1998).

6. I do not think the same obligation exists with respect to another body of "international" contract principles—the UNIDROIT Principles of International Commercial Contracts. These principles are essentially an international Restatement of contract law. They are not designed for adoption by national legislatures and thus are not binding on U.S. courts as the CISG is. See E. Allan Farnsworth, An International Restatement: The UNIDROIT Principles of International Commercial Contracts, 26 U. Balt. L. Rev. 1, 2 (1997) (predicting that the impact of the UNIDROIT Principles will be felt principally in international arbitration).

Finally, time spent on the CISG not only serves to introduce students to an important body of American contract law but also gets them to think critically about legal rules. The CISG shows that the rules of contract law do not have to be identical to those laid down in the *Restatement (Second) of Contracts* and Article 2 of the UCC and provides a number of opportunities to debate which rules are better.

The Problem

American law schools appear to be graduating students who have no familiarity with the CISG and who, as a result, are not properly equipped to serve their clients.

A Cautionary Tale: GPL Treatment v. Louisiana-Pacific

Ignorance of the CISG can be costly. Take as an example the case of *GPL Treatment, Ltd. v. Louisiana-Pacific Corp.*[7] GPL and its two coplaintiffs were Canadian companies engaged in the manufacture and sale of wood shakes and shingles. Plaintiffs alleged that the defendant Louisiana-Pacific, a U.S. company, had agreed orally to buy eighty-eight truckloads of cedar shakes. But Louisiana-Pacific accepted only thirteen truckloads and denied making an agreement for any more. When the plaintiffs sued for their lost profits on the remaining seventy-five truckloads, Louisiana-Pacific raised the UCC statute of frauds as a defense.[8] The plaintiffs in turn argued that the merchant's exception to the UCC statute of frauds applied because they had sent a written confirmation of the agreement for eighty-eight truckloads of cedar shakes to which Louisiana-Pacific had not objected.[9] Louisiana-Pacific responded that, although the plaintiffs' form was captioned "Order Confirmation," it was not actually a confirmation because it required the buyer to sign and return it.

Determining when a writing is "in confirmation" of a contract has troubled the courts,[10] and the Oregon courts in *GPL Treatment* were no exception. The Oregon Court of Appeals affirmed the trial court's ruling that, as a matter of law, plaintiffs' Order Confirmation was a writing in confirmation despite the

7. 894 P.2d 470 (Or. Ct. App. 1995), *aff'd* 914 P.2d 682 (Or. 1996).

8. Uniform Commercial Code § 2-201 [hereinafter UCC], *codified as* Or. Rev. Stat. § 72.2010 (1999).

9. The "merchant's exception" provides: "Between merchants, if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) of this section against such party unless written notice of objection to its contents is given within 10 days after it is received." *Id.* § 2-201(2).

10. Compare Harry Rubin & Sons, Inc. v. Consolidated Pipe Co., 153 A.2d 472 (Pa. 1959), *overruled on other grounds by* AM/PM Franchise Ass'n v. Atlantic Richfield Co., 584 A.2d 915 (Pa. 1990) (letter asking the seller to enter an "order" pursuant to an earlier telephone conversation was a writing "in confirmation") and Bazak Int'l Corp. v. Mast Indus., Inc., 535 N.E.2d 633 (N.Y. 1989) (printed order form stating "[t]his is only an offer" was a writing "in confirmation"), with Great Western Sugar Co. v. Lone Star Donut Co., 567 F. Supp. 340 (N.D. Tex.), *aff'd*, 721 F.2d 510 (5th Cir. 1983) (letter stating it was a "written confirmation" but requiring the other party to sign and return it was not a writing "in confirmation").

sign-and-return clause.[11] This ruling was affirmed by the Oregon Supreme Court, but both the Supreme Court and the Court of Appeals were closely divided. Although ultimately the plaintiffs won their case, doing so required them to prevail on a close question and to win two appeals.

There was an easier way. Because the plaintiffs had their places of business in Canada and the defendant had its in the United States, and because both Canada and the United States have ratified the CISG, the CISG rather than the UCC was applicable to this sale-of-goods transaction. CISG Article 11 states: "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." In other words, the CISG does not have a statute of frauds and would have allowed the plaintiffs to submit their evidence of an oral contract for the sale of cedar shakes to the jury without the need to produce a writing of any sort.[12] Apparently the plaintiffs raised the argument that the CISG rather than the UCC applied, but they raised it so late that the trial judge ruled the argument had been waived.[13] It is likely that the delay in raising the applicability of the CISG was attributable to the unfamiliarity of plaintiffs' counsel with the CISG. The result was that the plaintiffs gave up an argument that was a sure winner and were forced to rely instead on the merchant's exception to the UCC statute of frauds, which presented a much closer question leading to two appeals and presumably costing the plaintiffs a good deal more in attorney's fees.[14]

Ignorance Among Lawyers

The unfamiliarity with the CISG reflected in *GPL Treatment* seems to be widespread. Michael Wallace Gordon recently conducted a survey of lawyers practicing in Florida. He sent a questionnaire to 100 randomly selected members of the Florida Bar's Section on International Law and the twenty-four members of that section's Executive Committee. Most indicated no knowledge of the CISG at all, about 30 percent indicated reasonable knowledge, and only two indicated strong knowledge—and, remember, these were members of the Florida Bar's Section on International Law![15] One can only assume that transactional attorneys and litigators who have no particular interest in international law are even less familiar with the CISG.

11. See *GPL Treatment*, 894 P.2d at 474. The questions whether Louisiana-Pacific received the confirmations, knew their contents, and sent written notice of objection to the plaintiffs were submitted to the jury and decided in favor of GPL. *Id.*

12. See John O. Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention, 3d ed., 125–27 (The Hague, 1999).

13. See *GPL Treatment*, 894 P.2d at 477 n.4 (Leeson, J., dissenting).

14. For another case in which the argument that the CISG applied was raised too late and therefore deemed to have been waived, see Attorneys Trust v. Videotape Computer Products, Inc., No. 95-55410, 1996 WL 473755 (9th Cir. Aug. 20, 1996) (unpublished disposition).

15. 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. 361, 368 (Supp. 1998).

Of course many of these lawyers went through law school before the CISG. But the CISG has been the law of the United States for twelve years now,[16] and a good deal of the ignorance among lawyers must be attributed to their lack of exposure to the CISG in law school.[17] Gordon also surveyed the faculties of Florida law schools and found that little attention was paid to the CISG in contracts and sales courses. One of the principal reasons that the CISG was not taught was its absence from the casebooks being used.[18]

Neglect by Casebooks

If you have looked at the leading casebooks, it should come as no surprise that many lawyers remain ignorant of the CISG. The book that I use to teach Contracts, *Knapp, Crystal & Prince,* devotes approximately two pages out of 1,268 to the CISG.[19] The CISG is reproduced in the accompanying statutory supplement,[20] but this leaves it to the initiative of the instructor to figure out how to incorporate the CISG into the course. Other popular casebooks also neglect the CISG. *Farnsworth & Young* gives the CISG about two pages out of 992.[21] *Fuller & Eisenberg* mentions the CISG in its preface and promises to provide cross-references throughout the book, but apart from a brief note on the genesis and applicability of the CISG, that is all it provides.[22] There is no commentary on how the CISG's provisions differ from the common law or the UCC. *Murphy, Speidel & Ayres* gives the CISG only a footnote,[23] while *Dawson,*

16. It was ratified by the United States on December 11, 1986, and entered into force on January 1, 1988. See 15 U.S.C.A. App. at 332 (1998).

17. Indeed, only three of Gordon's respondents indicated that their familiarity with the CISG came from law school. Gordon, *supra* note 15, at 368 n.27.

18. *Id.* at 364–67.

19. See Charles L. Knapp et al., Problems in Contract Law: Cases and Materials, 4th ed. (Gaithersburg, 1999). The book discusses the CISG for two paragraphs in an introductory note on sources of contract law, see *id.* at 11, notes that under the CISG an offer is not revocable if the offeror has promised to hold it open, see *id.* at 242, asks in one sentence how a battle-of-the-forms hypothetical would be resolved under the CISG, see *id.* at 321, devotes three sentences to the absence of a statute of frauds, see *id.* at 393, 401–02, and another three to the absence of a parol evidence rule, see *id.* at 485–86, and concludes with three paragraphs on remedies at the very end of the book, see *id.* at 1267–68.

20. Charles L. Knapp et al., Rules of Contract Law 107–34 (Gaithersburg, 1999).

21. See E. Allan Farnsworth & William F. Young, Cases and Materials on Contracts, 5th ed. (Westbury, 1995). The book observes that the CISG resolves the battle of the forms differently than the UCC, see *id.* at 236, notes that the CISG abandons the perfect tender rule, see *id.* at 719, discusses a CISG provision that allows a nonbreaching buyer to fix a period of time for the breaching seller to cure, see *id.* at 740, and explores the CISG provision on impossibility, see *id.* at 822–23. The text of the CISG is reproduced in E. Allan Farnsworth & William F. Young, Selections for Contracts 131–55 (New York, 1998) [hereinafter Selections].

22. Lon L. Fuller & Melvin Aron Eisenberg, Basic Contract Law, 6th ed., iii, 137–38 (St. Paul, 1996). The cross-references steer the reader to Steven J. Burton & Melvin A. Eisenberg, Contract Law: Selected Source Materials, 4th ed. (St. Paul, 1998), which (like the *Knapp, Crystal & Prince* and *Farnsworth & Young* statutory supplements) simply reproduces the text of the CISG at 299–323.

23. Edward J. Murphy et al., Studies in Contract Law, 5th ed., 9 n.37 (Westbury, 1997).

Harvey & Henderson does not seem to mention the CISG at all.[24] It goes without saying that none of these books includes a case applying the CISG.[25]

There are some tentative signs that this neglect of the CISG may be starting to change. The most recent editions of both *Rosett & Bussel*[26] and *Murray*[27] include *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.*,[28] a case holding that under the CISG parol evidence may be used to contradict the terms of a written agreement.[29] Two new casebooks for advanced sales courses also devote considerable space to the CISG, but neither of these books is designed to be used in first-year Contracts.[30] In short, the casebooks used by the overwhelming majority of teachers in first-year Contracts courses today give almost no attention to the CISG.

This is unfortunate, because teachers depend on their casebook authors to do the important and difficult work of figuring out what to cover and in what order. The absence of CISG materials from Contracts casebooks makes it more difficult to teach the CISG. I hope that eventually this will change, and that casebook authors will see fit to include more materials (including a case or two) on the CISG. Until this happens, however, Contracts teachers must bear the responsibility for covering the CISG themselves.

24. John P. Dawson et al., Contracts, 7th ed. (New York, 1998).

25. This neglect of the CISG cannot be attributed to any ignorance on the part of the authors. Allan Farnsworth certainly knows the CISG—he was a member of the U.S. delegation to the Vienna Diplomatic Conference that drafted it. See E. Allan Farnsworth, The American Provenance of the UNIDROIT Principles, 72 Tul. L. Rev. 1985, 1985 (1998). Richard Speidel has written about the CISG's utility as a model for redrafting Article 2 of the UCC. See Richard E. Speidel, The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods, 16 Nw. J. Int'l L. & Bus. 165 (1995). The omission of the CISG seems instead to reflect a conscious choice.

26. See Arthur Rosett & Daniel J. Bussel, Contract Law and Its Application, 6th ed., 564–71 (New York, 1999). In addition to the parol evidence case, *Rosett & Bussel* raises the CISG in connection with contract modification, see *id.* at 491, the statute of frauds, see *id.* at 536, firm offers, see *id.* at 593, the battle of the forms, see *id.* at 618, the mailbox rule, see *id.* at 636–37, and impossibility, see *id.* at 716.

27. See John Edward Murray, Jr., Contracts: Cases and Materials, 5th ed., 451–58 (New York, 2000). Murray's casebook also discusses the applicability of the CISG, see *id.* at 10, 403–10, as well as its provisions on offer and acceptance, see *id.* at 53, 110, the mailbox rule, see *id.* at 116, firm offers, see *id.* at 142, the battle of the forms, see *id.* at 224, modification, see *id.* at 312, the statute of frauds, see *id.* at 408, and remedies, see *id.* at 854–57. In addition, Murray's hornbook contains one of the best summaries of the CISG that I have seen. See John Edward Murray, Jr., Murray on Contracts, 3d ed., §§ 150–54, at 871–903 (Charlottesville, 1990) [hereinafter Murray on Contracts].

28. 144 F.3d 1384, 1391 (11th Cir. 1998).

29. *Calamari, Perillo & Bender* also excerpts one footnote from *MCC-Marble*. See John D. Calamari et al., Cases and Problems on Contracts, 3d ed., 17–18 (St. Paul, 2000). Ironically, this footnote is a strong statement of the objective theory of contracts, which did not apply in *MCC-Marble* because the plaintiff had introduced evidence that the defendant knew his subjective intent, and the footnote makes no mention of the CISG.

30. See John A. Spanogle & Peter Winship, International Sales Law: A Problem-Oriented Coursebook (St. Paul, 2000); John E. Murray, Jr. & Harry M. Flechtner, Sales, Leases and Electronic Commerce: Problems and Materials on National and International Transactions (St. Paul, 2000).

Incorporating the CISG in Contracts

In this part I make several suggestions about how to incorporate the CISG into a first-year Contracts class. With several of the issues discussed below, there are no U.S. cases applying the CISG rules, so one must simply teach from the text of the CISG itself,[31] comparing it to the relevant common law or UCC rules and perhaps asking the students to determine how a common law or UCC case that is in their book would have been decided under the CISG. There are, however, three U.S. decisions (which I discuss below) that do provide good vehicles for learning the CISG rules on the battle of the forms, the admissibility of parol evidence, and CISG remedies. I strongly recommend teaching at least one of these cases, because nothing drives home the point that the CISG is U.S. law, binding on U.S. courts, like seeing a U.S. court apply that law to resolve an actual dispute. I have identified a variety of CISG provisions that might be taught in first-year Contracts to provide a range of options, and I have tried to indicate some of the interesting issues that I think these provisions raise.

When the CISG Applies

The CISG applies to contracts for the sale of goods between parties whose places of business are in different countries when both those countries have joined the CISG.[32] In theory the CISG applies even when both countries have not joined the CISG if conflict-of-laws rules lead to the application of the law of a country that has. But the United States has entered a reservation to this latter provision, which means that in practice a U.S. firm is likely to find itself governed by the CISG only when the other party's place of business is in another CISG country.[33] As a treaty the CISG is federal law, and under the Supremacy Clause it displaces any inconsistent provisions of state law, including inconsistent provisions of the UCC.

There are a number of important exclusions from the CISG. Sales of consumer goods are not covered, for example.[34] The CISG also deals only with contract formation and the rights and obligations of the parties. It is expressly not concerned with questions of validity, which means that domestic law continues to govern such issues as incapacity, fraud, duress, mistake, and unconscionability.[35]

31. There are at least three statutory supplements that reproduce the CISG along with various provisions of the *Restatement (Second) of Contracts* and UCC. See Knapp et al., *supra* note 20, at 107–34; Burton & Eisenberg, *supra* note 22, at 299–323; Farnsworth & Young, Selections, *supra* note 21, at 131–55. Alternatively, one can simply reproduce the text of the CISG.

32. CISG Art. 1(1)(a). If a party has more than one place of business, the place of business with the closest relationship to the contract is used. *Id.* Art. 10(a). If a party has no place of business, its habitual residence is used. *Id.* Art. 10(b). There is no requirement that the goods cross a national border, although that will frequently be the case.

33. Such reservations are permitted under Article 95 of the CISG.

34. The phrase used in the CISG is "goods bought for personal, family or household use." CISG Art. 2(a). Also excluded are sales of goods by auction; on execution or otherwise by authority of law; of securities; of ships and aircraft; and of electricity.

35. See generally Helen Elizabeth Hartnell, Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods, 18 Yale J. Int'l L. 1, 62–87 (1993).

Most important, Article 6 allows the parties to exclude application of the CISG or to vary its provisions, and it appears that most parties who are aware of the CISG (at least in the United States) do try to opt out of it.[36] Such attempts, however, may not always be successful. Suppose, for example, that a U.S. buyer tries to exclude application of the CISG with a choice-of-law clause providing that the UCC as adopted in New York shall govern and that the CISG shall not.[37] If the seller in another CISG country simply signs and returns the contract, the choice-of-law clause will be effective and the CISG will be excluded. But suppose that the seller acknowledges the buyer's offer by returning its own form and that the seller's form contains a different choice-of-law clause. A court would then be faced with a battle of the forms and would have to determine whether a contract had been concluded, what the terms of any such contract were, and (more specifically) whether either choice-of-law clause was part of the contract. Obviously the court cannot rely on either party's choice-of-law clause to decide these questions; it must turn to the law that would apply in the absence of these clauses—the CISG.[38]

I teach the applicability of the CISG at the same time that I teach the applicability of the UCC. I make sure the students understand that if a U.S. party enters a contract with a party from another CISG country, the CISG will likely apply. I also make sure they understand that just as the UCC displaces inconsistent rules of state common law, so the CISG (as federal law) displaces inconsistent provisions of the UCC. This also allows me to emphasize the point that, except for the CISG, contract law is *state* law. With respect to Article 6's opt-out provision, I point out that the UCC contains a similar provision, which generally allows the parties to vary the provisions of the UCC.[39] These opt-outs can serve as the basis for a discussion of party autonomy as one of the guiding principles of contract law.

Contract Formation

There are at least three issues of contract formation that lend themselves to incorporation of the CISG: firm offers, the mailbox rule, and the battle of the forms. So far there are no U.S. cases dealing with firm offers or the mailbox rule under the CISG, so one must simply teach from the text of the Conven-

36. See Steven Walt, Novelty and the Risks of Uniform Sales Law, 39 Va. J. Int'l L. 671, 687–88 (1999).

37. A choice-of-law clause intended to exclude application of the CISG should expressly exclude the CISG. A clause that simply provides for the application of New York law will not necessarily do the trick, since under the Supremacy Clause the CISG is the law of New York. See E. Allan Farnsworth, Review of Standard Forms or Terms Under the Vienna Convention, 21 Cornell Int'l L.J. 439, 442 (1988). The German Federal Supreme Court has held that an agreement to apply "German law" does not exclude the CISG because the CISG is part of German law. Benetton II, BGH, NJW 1997, 3309, English translation at <www.cisg.law.pace.edu/cisg/wais/db/cases2/970723g2.html#ta> (visited May 22, 2000).

38. Michael P. Van Alstine, Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law, 37 Va. J. Int'l L. 1, 11–12 (1996). The district court faced an analogous question involving an arbitration clause rather than a choice-of-law clause in Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229 (S.D.N.Y. 1992). For further discussion of *Filanto*, see below.

39. UCC § 1-102(3).

tion. There is a battle-of-the-forms case applying the CISG, however, which I have assigned and taught for several years.

Firm Offers

Under the common law, an offer is freely revocable, even if the offeror has promised to hold it open, unless that promise is supported by consideration or reliance. The UCC, of course, changes this rule, allowing a merchant to make an irrevocable offer—a "firm offer"—without the need for consideration. But the UCC's firm-offer rule contains a number of restrictions: the offeror must be a merchant; the offer must be in a signed writing; the offer must contain an "assurance that it will be held open"; and the period of irrevocability may not exceed three months.[40]

CISG Article 16 allows an offeror to make a firm offer without these limitations:

> (1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.
>
> (2) However, an offer cannot be revoked:
>
> (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
>
> (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

As one can see, Article 16 does not require that the offeror be a merchant[41] or that the offer be in a signed writing, and there is no limit on the period of irrevocability. Article 16 does not even require an express assurance that the offer will be held open. It requires only that the offer "indicate that it is irrevocable" and it makes clear that an offer may do this "by stating a fixed time for acceptance." If an offer simply stated that it would expire after thirty days, the UCC would not treat the offer as "firm" and would allow the offeror to revoke before the thirty days were up. The CISG, on the other hand, would treat the offer as being irrevocable during the thirty-day period.[42] Article 16(2)(b), like *Restatement (Second)* § 87(2), provides for an offer to become irrevocable because of the offeree's reliance.[43]

Article 16 reflects a compromise between the civil law tradition, which presumes that offers are irrevocable, and the common law tradition, which presumes the opposite. Article 16(1) provides that offers are revocable, as under the common law, but Article 16(2) creates broad exceptions that will lead many offers to be irrevocable in practice. A Contracts teacher can make

40. UCC § 2-205.

41. But one should recall that Article 2's exclusion of consumer goods from the scope of the CISG means that most contracts to which the CISG applies will be between merchants.

42. See Murray on Contracts, *supra* note 27, § 152, at 880.

43. Article 16(2)(b), unlike *Restatement (Second) of Contracts* § 87(2) (1981), does not require that the offeree's reliance be "substantial," and the commentary suggests that investigation of an offer may be sufficient to make it irrevocable under the CISG but not under the *Restatement (Second)*. See Murray on Contracts, *supra* note 27, § 152, at 880.

good use of Article 16 in at least three ways. First, it can be used to question the common law rule that offers are freely revocable. Second, it can be used to question the rather substantial limitations that the UCC puts on its firm-offer rule. Finally, using the example of an offer that states a fixed time for acceptance but does not assure the offeror that it will be held open, one can examine how different legal rules may work differently on the same language, with the UCC holding that such an offer is revocable and the CISG that it is not.

The Mailbox Rule

Under the common law, acceptances are effective upon dispatch, even if they never reach the offeror. This rule performs two functions: it protects the offeree against the possibility of revocation once the acceptance is dispatched, and it places the risk of a lost communication on the offeror. In contrast to the common law mailbox rule, Article 18(2) of the CISG adopts a receipt rule: "An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror." But this provision must be read in conjunction with Article 16(1), which says that "an offer may be revoked if the revocation reaches the offeree *before he has dispatched an acceptance*" (emphasis added). In other words, once the offeree has dispatched an acceptance, the offeror may no longer revoke, but if the acceptance is lost in the mail there is no contract. So the CISG and the common law both protect the offeree against the possibility of revocation once the acceptance is dispatched, but the CISG places the risk of a lost communication on the offeree rather than the offeror.

I use the CISG in this context to distinguish the two different functions that the common law mailbox rule plays by showing that we can still protect the offeree against revocation without making the offeror suffer if the acceptance is lost. I think there is a good case to be made that the CISG's rule is an improvement over the common law, because it places the risk of a lost communication on the party who is in the best position to prevent that loss by choosing a more reliable means of communication.[44] This is one way of introducing students to the idea that a risk should typically be placed on the party best able to prevent the loss or to insure against it—an idea one encounters in other areas of contract law like mistake and impossibility.[45]

44. Of course the offeree's freedom to choose the means of communication is limited to some extent under the common law rule by the fact that the offer may specify the means of communication and that, if no means is specified, the means of communication must still be reasonable. Nevertheless, an offeree will frequently be in a position to choose among two or more reasonable means of communicating an acceptance. Putting the risk of a lost communication on the offeree gives her an incentive to choose the most reliable one. See Honnold, *supra* note 12, at 188.

    On the other hand, the CISG's rules on acceptance and revocation may become problematic when combined with another CISG rule allowing an acceptance to be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective. As John Murray has pointed out, the combined effect of these rules may be to allow the offeree to speculate at the expense of the offeror. Murray on Contracts, *supra* note 27, § 152, at 882.

45. See generally Richard A. Posner & Andrew M. Rosenfield, Impossibility and Related Doctrines in Contract Law: An Economic Analysis, 6 J. Legal Stud. 83 (1977).

The Battle of the Forms

Teaching the CISG in the contexts of firm offers and the mailbox rule can be fun, but the CISG rules that I enjoy teaching the most are those that relate to the battle of the forms.[46] Moreover, there is an interesting case that one can use to illustrate the operation of these rules.

Under the common law's mirror-image rule, an acceptance that added to or changed the terms of the offer was deemed to be a rejection and a counteroffer. In practice this resulted in a last-shot rule, with each new form constituting a counteroffer until the last one was accepted by conduct. The UCC, of course, changed this rule, providing that "[a] definite and seasonable expression of acceptance . . . operates as an acceptance even though it states terms additional to or different from those offered . . . ."[47] The additional terms in the acceptance may become part of the contract if expressly accepted by the offeror or (so long as both parties are merchants) automatically so long as the offer does not expressly limit acceptance to the terms of the offer, the additional terms do not materially alter the contract, and the offeror does not object to the additional terms.[48] Finally, if the parties act as though there is a contract although their writings fail to establish one (for example, because the acceptance was expressly conditional on the offeror's assent to the additional or different terms), the UCC employs a strikeout rule so that the terms of the contract are those on which the parties' writings agree, supplemented by the UCC's gap fillers.[49]

The CISG, by contrast, adopts what is essentially a mirror-image rule.[50] Article 19(1) provides: "A reply to an offer which purports to be an acceptance

46. For further discussion of the battle of the forms under the CISG, see Maria del Pilar Perales Viscasillas, "Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles, 10 Pace Int'l L. Rev. 97 (1998); Van Alstine, *supra* note 38; Henry D. Gabriel, The Battle of the Forms: A Comparison of the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code, 49 Bus. Law. 1053 (1994); John E. Murray, Jr., An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods, 8 J.L. & Com. 11 (1988).

47. UCC § 2-207(1). Such an expression of acceptance does not operate as an acceptance if it is "expressly made conditional on [the offeror's] assent to the additional or different terms." *Id.*

48. UCC § 2-207(2). What to do with "different" terms, which are not mentioned in the text of § 2-207(2), has divided the courts. The majority rule is that conflicting terms cancel each other out and are replaced by the UCC's gap fillers. The leading minority view does not allow different terms to become part of the contract automatically, since they are not mentioned in § 2-207(2). And California treats different terms like additional terms, allowing them to become part of the contract automatically unless the offer expressly limits acceptance to the terms of the offer, the different terms materially alter the contract, or the offeror objects. For a review of the cases, see Northrop Corp. v. Litronic Indus., 29 F.3d 1173, 1178–79 (7th Cir. 1994).

49. UCC § 2-207(3).

50. The mirror-image rule is found in both the common and civil law traditions. Britain and France still adhere to it, even with respect to contracts for the sale of goods. Germany, by contrast, has adopted a solution very similar to that of UCC 2-207(3). See Arthur Taylor von Mehren, The "Battle of the Forms": A Comparative View, 38 Am. J. Comp. L. 265, 269, 294–98 (1990).

but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer." Article 19(2) attempts to soften this rule a little by providing that if the additional or different terms are not material *and* the offeror does not object to them, then the purported acceptance is an acceptance and the additional or different terms become part of the contract. But Article 19(3) defines materiality so broadly that it is hard to imagine a change that the CISG would not consider material.[51] This means that, in almost every case, an acceptance that varies the terms of the offer will be a counteroffer which will be accepted by the other party's conduct.[52]

To teach the CISG's rules for the battle of the forms, I use *Filanto, S.p.A. v. Chilewich International Corp.*,[53] which applied those rules to determine whether an arbitration clause was part of a contract. One of the things that make *Filanto* an interesting case, however, is that the district court misapplied the CISG's rules in order to make the case come out the way the court thought it would under the UCC. Although the result in the case is (as I shall explain) defensible on other grounds, its application of the CISG is wrong, and this requires the instructor to be willing to teach against the case.

The defendant Chilewich International, a New York export-import company, had entered a contract through its U.K. agent to supply footwear to Raznoexport, a buyer in the Soviet Union. Chilewich's contract with Raznoexport, which the court referred to as the "Russian Contract," included an arbitration clause requiring that all disputes be submitted to arbitration before the U.S.S.R. Chamber of Commerce and Industry. To fulfil its obligations under the Russian Contract, Chilewich entered a series of contracts with the plaintiff Filanto, an Italian footwear manufacturer. Chilewich's previous orders had attempted to incorporate by reference the terms of the Russian Contract, including the arbitration clause, into its contracts with Filanto, but Filanto had attempted to exclude all the terms of the Russian Contract except those related to packing, shipment, and delivery.

On March 13, 1990, Chilewich sent Filanto a Memorandum Agreement ordering 250,000 pairs of boots to be shipped in two installments. The Memorandum Agreement again attempted to incorporate by reference the terms of the Russian Contract, including the arbitration clause. On May 7, 1990, Chilewich opened a letter of credit in favor of Filanto. On August 7, 1990, Filanto returned a signed copy of the Memorandum Agreement, but with a

51. It reads: "Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially."

52. CISG Article 18(1) provides for acceptance by conduct: "A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance."

53. 789 F. Supp. 1229 (S.D.N.Y. 1992). I have edited the case for classroom use, omitting most of the court's discussion of the treaty and statutory framework for arbitration and its discussion of remedies. I would be happy to send this edited version to anyone who would like it.

For a detailed analysis of the *Filanto* decision, see Ronald A. Brand & Harry M. Flechtner, Arbitration and Contract Formation in International Trade: First Interpretations of the UN Sales Convention, 12 J.L. & Com. 239 (1993).

cover letter that purported to exclude all terms of the Russian Contract except those related to packing, shipment, and delivery. Chilewich took delivery of the first shipment of 100,000 pairs of boots on September 15, 1990, but accepted only 60,000 of the remaining 150,000 pairs of boots in January 1991. Filanto brought suit in U.S. district court for breach of contract, and Chilewich moved to dismiss based on the arbitration clause.

In order to determine whether the arbitration clause was part of the contract, the district court applied the CISG, which both the United States and Italy had ratified. The court noted that CISG Article 19 had rejected the UCC's solution to the battle of the forms and had reverted to a mirror-image rule. The court also correctly noted that the exception for nonmaterial terms would not apply because arbitration clauses are considered material under the CISG.[54] One would have guessed, therefore, that the district court would have found Filanto's reply of August 7, 1990, to be a counteroffer, which Chilewich accepted by conduct when it took delivery of the first shipment of boots in September 1990, and that the resulting contract did not include the arbitration clause. But the court sided with Chilewich and dismissed the case. It held that Filanto accepted the terms of the March 13, 1990, Memorandum Agreement by failing to object to them in a timely fashion.[55] The problem with this reasoning is that the CISG explicitly states that "[s]ilence or inactivity does not in itself amount to acceptance."[56] To get around this, the district court referred to the parties' prior course of dealing, which the court reasoned had established an obligation on Filanto's part to alert Chilewich quickly to any objections it might have.[57] It is true that on at least one prior occasion Filanto had objected to incorporation of the Russian Contract's terms within a month.[58] But that is all the more reason that Chilewich should not have been surprised when Filanto objected to these terms on August 7, 1990. The more reasonable interpretation of the parties' course of dealing was not that Filanto's silence constituted an acceptance of the terms of the Russian Contract, which would have been a change in its position, but rather that Filanto continued to object to those terms.

I suspect that the district court was trying to reach the same result it thought the UCC would. At one point, the court expresses some hostility towards the CISG, saying that "the State Department undertook to fix something that was not broken by helping to create the Sale of Goods Convention which varies from the Uniform Commercial Code in many significant ways."[59] But although

54. See *Filanto*, 789 F. Supp. at 1237–38.

55. See *id.* at 1240.

56. CISG Art. 18(1). Cf. Restatement (Second) of Contracts § 69 (1981).

57. *Filanto*, 789 F. Supp. at 1240. CISG Article 8(3) instructs courts to look to trade usage, course of dealing, and course of performance in interpreting the parties' statements and conduct.

58. *Filanto*, 789 F. Supp. at 1231.

59. *Id.* at 1238. It is not clear, however, that the arbitration clause should have been part of the contract even if UCC § 2-207 were applied. Under § 2-207(1), Filanto's reply of August 7 would be an acceptance rather than a counteroffer, but the express exclusion of the arbitration clause would be a "different term." As noted above, the courts are divided on how to treat different terms, and I have not been able to determine which rule New York courts

the court's battle-of-the-forms analysis goes astray, the result it reaches is defensible on two other possible grounds. First, shortly after Filanto sued Chilewich for breach of contract, Chilewich's agent complained that some of the boots were defective. In response to this complaint, Filanto relied on a provision of the Russian Contract that it had purported to exclude. The district court viewed this reliance as "an admission in law by Filanto" that it was bound by the terms of the Russian Contract,[60] and it is at least evidence of the parties' course of performance which may be used to determine the intents of the parties under CISG Article 8(3).[61] The second (and more doubtful) ground on which the result in *Filanto* may be justifiable is that arbitration clauses are different—specifically, that under the *Prima Paint* doctrine a court should not entertain arguments about the existence or validity of the contract as a whole, but should limit itself to determining whether the arbitration clause is valid.[62] As the district court recognized, however, it is sometimes necessary for a court to consider issues related to the formation of the contract in order to determine whether the parties have agreed to arbitrate, and *Filanto* would appear to be just such a case.[63]

If you do not feel compelled to teach only from cases that get the law right, *Filanto* provides an excellent vehicle for covering the battle of the forms under the CISG. It is a challenging case for students, but certainly within their abilities, and it can be fun to watch them realize how badly the court mixed up its application of the CISG rules.

would follow. If New York followed the majority strikeout rule, the arbitration clause and the exclusion of the arbitration clause would cancel each other out, and since the UCC's gap fillers do not provide for arbitration, no arbitration clause would be part of the contract. If New York followed either of the minority rules, on the other hand, Filanto's exclusion of the arbitration clause would be ineffective because it materially altered the contract or simply because it was a "different term" which cannot become part of the contract without Chilewich's assent. See *supra* note 48.

60. *Filanto*, 789 F. Supp. at 1233.

61. CISG Art. 8(3) provides: "In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties." See also Filanto, 789 F. Supp. at 1240 (treating Filanto's reliance on the Russian Contract as evidence of the parties' course of performance).

62. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967); see also Filanto, 789 F. Supp. at 1239 (discussing *Prima Paint*).

63. The district court gave two other grounds for its decision, neither of which withstands scrutiny. First, it reasoned that by suing for breach of contract, Filanto recognized the contract's existence. See *id.* at 1240: "Filanto finds itself in an awkward position: it has sued on a contract whose terms it must now question . . . ." But this begs the question. Filanto did not question the existence of the contract, just its terms, which Filanto contended were those of its August 7, 1990, counteroffer that Chilewich had accepted in September when it took delivery of the first shipment of boots. Second, the court reasoned that Filanto assented to the terms of the March 13 Memorandum Agreement by signing and returning it in spite of the cover letter that purported to exclude most of the Russian Contract's terms. See *id.* But the court's reasoning here is contradicted by CISG Article 19(1), which plainly states: "A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer."

Writings

Two other important issues on which the CISG differs from the common law and the UCC concern the need for and the effect of reducing a contract to writing, for the CISG has neither a statute of frauds nor a parol evidence rule.

Statute of Frauds

Both the common law and the UCC require that certain contracts be in writing in order to be enforceable. CISG Article 11, by contrast, provides: "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." Other provisions of the CISG, however, allow a country to opt out of Article 11 and apply its domestic legislation requiring a writing whenever one of the parties to the contract has its place of business in such a country. The United States has not opted out of Article 11, which means that contracts between U.S. and foreign parties will not be subject to the statute of frauds unless the non-U.S. party has its place of business in a country that has opted out of Article 11.[64] As the earlier discussion of *GPL Treatment* indicates, the CISG's lack of a statute of frauds can make a big difference in litigation.

I use the absence of a statute of frauds in the CISG chiefly to question whether it should be retained in the UCC for sale-of-goods transactions. I point out that the UCC included a statute of frauds chiefly because Karl Llewellyn was enamored of it,[65] that England has abolished the statute of frauds for all but land and guarantee contracts,[66] and that the revisers of Article 2 seriously considered dropping the statute of frauds entirely.[67]

Parol Evidence Rule

Although the CISG does not require the parties to put their contract in writing, they will frequently choose to do so anyway, and so a court may have to decide whether to allow one of the parties to argue that their actual agreement differed from the written terms. Under the parol evidence rule found in both the common law and the UCC, the parties may not contradict the terms of a final written agreement with evidence of prior or contemporaneous negotiations or agreements. CISG Article 8(3), by contrast, directs a court interpreting a contract to give "due consideration . . . to all relevant circumstances of the case including the negotiations, any practices which the parties

64. As of January 1, 2000, the following countries have opted out of Article 11: Argentina, Belarus, Chile, China, Estonia, Hungary, Latvia, Lithuania, Russia, and Ukraine. See <www.uncitral.org/english/status/status.pdf> (visited May 22, 2000).

65. See Karl N. Llewellyn, What Price Contract?—An Essay in Perspective, 40 Yale L.J. 704, 747 (1931).

66. Law Reform (Enforcement of Contracts) Act, 1954, 2 & 3 Eliz. 2, ch. 34.

67. See generally American Law Institute & National Conference of Commissioners on Uniform State Laws, Revision of Uniform Commercial Code Article 2—Sales, Annual Meeting Draft § 2-201(a) (July 12–19, 1996); American Law Institute & National Conference of Commissioners on Uniform State Laws, Revision of Uniform Commercial Code Article 2—Sales, Discussion Draft § 2-201, Note 1 (May 1, 1998). Both are available at <www.law.upenn.edu/bll/ulc/ulc_frame.htm> (visited March 6, 2000).

have established between themselves, usages and any subsequent conduct of the parties." In other words, the CISG lacks a parol evidence rule and allows a court interpreting a written contract to consider not just trade usage, course of dealing, and course of performance, but even the parties' prior negotiations.

The Eleventh Circuit's recent decision in *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.*[68] provides a good vehicle for teaching the CISG's approach to extrinsic evidence. MCC was a Florida tile retailer, and D'Agostino an Italian tile manufacturer. At a trade fair in Bologna MCC's president negotiated an agreement to buy ceramic tiles with D'Agostino's commercial director through a translator. The terms of the parties' oral agreement were recorded on one of D'Agostino's standard order forms, which MCC's president signed; it contained a number of boilerplate terms in Italian. The parties subsequently entered a requirements contract for tile, pursuant to which MCC submitted more orders on D'Agostino's standard order forms. According to MCC, however, the quality of the tile it received was lower than the quality for which it had contracted, and MCC reduced its payment because of the nonconformity.[69] When D'Agostino responded by failing to fill MCC's subsequent orders, MCC sued for breach of the requirements contract, and D'Agostino counterclaimed for the amounts it had not been paid.

D'Agostino relied on two of the boilerplate terms on its standard order form. The first term required that complaints about defects be made in writing within ten days after the goods had been received, which MCC had not done and which D'Agostino argued deprived MCC of the right to reduce payment for alleged defects. The second term gave D'Agostino the right to suspend or cancel any pending contracts in the event of nonpayment. MCC countered with an affidavit from its president that he had not intended to be bound by these terms and affidavits from D'Agostino's commercial director and the translator confirming that the parties had not intended to be bound by the boilerplate on D'Agostino's order forms. The magistrate judge and district court granted summary judgment to D'Agostino on the basis of the written terms, but the Eleventh Circuit reversed.

The Court of Appeals began its analysis with a discussion of the role that subjective intent plays in interpreting a contract under the CISG. Article 8(1) says that "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." But Article 8(2) continues: "If the

68. 144 F.3d 1384 (11th Cir. 1998).

69. CISG Article 50 allows a buyer to do this: "If the goods do not conform with the contract . . . , the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time." The reduction permitted under Article 50 is analogous to the measure of damages under UCC § 2-714(2) for nonconforming goods. But the buyer of nonconforming goods under the CISG does not have the right to reject them unless the nonconformity amounts to a "fundamental breach" of the contract, a sharp contrast with the UCC's "perfect tender" rule. See UCC § 2-601.

preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances." Although the court characterized the CISG's approach as "[c]ontrary to what is familiar practice in United States courts,"[70] the CISG's approach is, in fact, barely distinguishable from the modified objective theory of contract interpretation that one finds in the *Restatement (Second)*.[71] In most cases, CISG Article 8(2)'s reasonable-person standard applies, and it is only in those rare cases where one party "knew or could not have been unaware" of the other's subjective intent that this subjective intent controls under Article 8(1).[72] The *Restatement (Second)* similarly provides that one party's subjective intent governs where the other party knew of that subjective intent.[73] The court left no doubt that under a reasonable-person standard the signature of MCC's president would have manifested assent to D'Agostino's boilerplate terms even though those terms were in Italian.[74] But the affidavits of D'Agostino's commercial director and translator confirmed that D'Agostino knew that MCC's president intended not to be bound by the boilerplate on D'Agostino's form.

This brought the court to the question whether this evidence of prior negotiations could be used to contradict the terms of the written agreement—in short, whether the CISG contains a parol evidence rule like the common law and the UCC. Although U.S. courts always apply their own rules of procedure and evidence, the court noted helpfully that the parol evidence rule is not really a rule of evidence but a substantive rule of law.[75] The court read CISG Article 8(3)[76] as rejecting the parol evidence rule, an interpretation that it noted was in accord with almost all the academic commentary on the question.[77] Despite its holding, the court expressed some discomfort with

70. *MCC-Marble*, 144 F.3d at 1387.

71. Restatement (Second) of Contracts §§ 20 & 201 (1981).

72. See Murray on Contracts, *supra* note 27, § 152, at 888–89.

73. Restatement (Second) of Contracts § 20(2)(a) (1981); see also *id.* § 201(2)(a).

74. "MCC makes much of the fact that the written order form is entirely in Italian .... We find it nothing short of astounding that an individual, purportedly experienced in commercial matters, would sign a contract in a foreign language and expect not to be bound simply because he could not comprehend its terms. We find nothing in the CISG that might counsel this type of reckless behavior and nothing that signals any retreat from the proposition that parties who sign contracts will be bound by them regardless of whether they have read them or understand them." *MCC-Marble*, 144 F.3d at 1387 n.9.

75. See *id.* at 1388–89. In a footnote, the court illustrated the distinction, observing that although CISG Article 11 allows the parties to prove a contract "by any means, including witnesses," "a party seeking to prove a contract in such a manner in federal court could not do so in a way that violated the rule against hearsay." *MCC-Marble*, 144 F.3d at 1389 n.13.

76. It provides: "In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to *all relevant circumstances* of the case *including the negotiations*, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties" (emphasis added).

77. *MCC Marble*, 144 F.3d at 1389–90. The court noted that another court had stated that the parol evidence rule applied under the CISG, see Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., Inc., 993 F.2d 1178, 1183 n.9 (5th Cir. 1993), but the court found that decision unpersuasive. *MCC-Marble*, 144 F.3d at 1390.

allowing oral evidence to undercut the reliability of a written document, and its discussion can be used to raise or revisit the question of what weight should be given to the written agreement as opposed to other evidence of the parties' agreement.[78]

Another interesting question is what effect a standard merger clause should have under the CISG. *MCC-Marble* suggests in dictum that the parties to a contract could create a private parol evidence rule by inserting a merger clause in their contract, but it is not clear that this is so.[79] A merger clause works under the common law and UCC because it states that the writing is a completely integrated agreement,[80] and the parol evidence rule states that such an agreement should not be contradicted by extrinsic evidence.[81] Under the CISG, by contrast, there is no parol evidence rule for a merger clause to invoke, and Article 8(3) states that a court should give "due consideration . . . to all relevant circumstances of the case including the negotiations," without any apparent exception for agreements that state they are complete and final.[82] As noted above, CISG Article 6 allows the parties to derogate from (almost) any provision of the CISG, but such derogation may have to be express rather than implied, and it is not clear that a standard merger clause would do the trick.[83]

In short, the CISG departs substantially from the common law and the UCC on the need for and the effect of a writing. Not only are these differences potentially significant to practicing lawyers, they allow Contracts teachers a wonderful opportunity to question the ways in which writings have traditionally been treated in American law.

Remedies

One could write an entire article about remedies under the CISG, and indeed others have done so.[84] The remedial scheme of the CISG differs in important ways from those of the common law and the UCC, and at least three of these differences may be worth covering in a first-year Contracts course. First, specific performance is more easily available under the CISG. Second,

78. *MCC-Marble*, 144 F.3d at 1391. It should be noted that the text of CISG Article 8(3) allows a court to give greater weight to the writing because it calls on courts to give evidence of the parties' negotiations only "due consideration," leaving it to the court to decide what consideration is due. This same language would allow a court to give relatively less weight to boilerplate terms in a writing than to dickered terms.

79. *MCC-Marble*, 144 F.3d at 1391 & n.19.

80. Even a merger clause, however, is not dispositive as to whether an agreement is completely integrated. See Restatement (Second) of Contracts § 216 cmt. *e* (1981).

81. *Id.* § 215; UCC § 2-202.

82. Of course, a merger clause might mean that less consideration of extrinsic evidence was "due," but that might depend on whether both parties wanted the clause included or whether it was boilerplate in one of the parties' forms.

83. See Murray on Contracts, *supra* note 27, § 152, at 890–91.

84. See, e.g., Harry M. Flechtner, Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C., 8 J.L. & Com. 53 (1988); Eric C. Schneider, Measuring Damages Under the CISG, 9 Pace Int'l L. Rev. 223 (1997); Steven Walt, For Specific Performance Under the United Nations Sales Convention, 26 Tex. Int'l L.J. 211 (1991).

the CISG lacks a perfect tender rule. And finally, the measure of expectation damages is different.

Specific Performance

At common law, specific performance is available only if damages would be an inadequate remedy, and the UCC also reflects this limitation. The CISG by contrast allows both the buyer and the seller to elect specific performance rather than damages.[85] But this specific performance remedy is subject to a substantial limitation contained in Article 28, which provides that "a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention." Although this provision would not require a U.S. court to deny specific performance unless the goods at issue were unique, it would allow the court to do so without violating the CISG.

One can use the CISG's provisions on specific performance to question the common law and UCC limitations on this remedy. A number of scholars have argued that American law should make specific performance more readily available.[86] The CISG is an example of a system of contract law that actually does so.[87]

Absence of a Perfect Tender Rule

Under the common law doctrine of substantial performance, one party's obligations under a contract are not affected by the other party's breach of its obligations unless the second party's breach is material.[88] Under the UCC's perfect tender rule, by contrast, a buyer may reject a delivery of goods if they "fail in any respect to conform to the contract."[89] The UCC's adoption of a perfect tender rule was simply a continuation of the different treatment the common law had given to contracts for the sale of goods, which Karl Llewellyn unsuccessfully proposed replacing with a substantial performance rule.[90] When

85. See CISG Art. 46(1) ("The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement."); *id.* Art. 62 ("The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement."). Article 46(2), however, allows a buyer to "require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract."

86. See, e.g., Alan Schwartz, The Case for Specific Performance, 89 Yale L.J. 271 (1979); Thomas S. Ulen, The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies, 83 Mich. L. Rev. 341 (1984).

87. Of course, civil law countries also more routinely make specific performance available for breach of contract, see Rudolph B. Schlesinger et al., Comparative Law: Cases—Text—Materials, 5th ed., 663–84 (Mineola, 1988), and this aspect of the CISG is really just a reflection of the civil law tradition.

88. See Restatement (Second) of Contracts § 237 (1981). A nonmaterial breach may, however, give rise to a claim for damages.

89. UCC § 2-601. But the seller typically has the right to cure any nonconformity. See *id.* § 2-508. Moreover, once a buyer has accepted the goods, he may revoke his acceptance only if the "non-conformity substantially impairs its value to him." *Id.* § 2-608.

90. See Zipporah Batshaw Wiseman, The Limits of Vision: Karl Llewellyn and the Merchant Rules, 100 Harv. L. Rev. 465, 509–12 (1987).

I ask students to explain why there should be a different rule for goods, someone invariably hits upon the idea that there is less risk that a breaching seller of goods will suffer a forfeiture from the buyer's rejection since the seller can typically recover the goods and sell them to another buyer.[91] On the other hand, as Llewellyn pointed out, a perfect tender rule creates possibilities for opportunistic behavior by buyers who may seize on insignificant defects as an excuse for rejecting goods whose market value has declined.[92]

In contrast to the UCC, the CISG does not allow one party to declare a contract avoided unless the other party's failure to perform its obligations amounts to a "fundamental breach."[93] A breach is considered fundamental "if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract,"[94] a standard that appears almost indistinguishable from the common law notion of material breach.[95] I use the CISG here to show that a perfect tender rule is not inevitable for the sale of goods and that reasonable minds can differ as to its utility.[96]

Damages

Ever since *Hadley v. Baxendale*, the common law has limited expectation damages with a principle of foreseeability. *Hadley* expressed these damages as those that "may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."[97] The *Restatement (Second)* changes the phrasing somewhat but continues to focus on those damages one could foresee as "probable,"[98] and the UCC appears to be in accord.[99]

91. For a fuller explanation of this argument, see William H. Lawrence, Appropriate Standards for a Buyer's Refusal to Keep Goods Tendered by a Seller, 35 Wm. & Mary L. Rev. 1635, 1639–40 (1994).

92. See Karl N. Llewellyn, On Warranty of Quality, and Society: II, 37 Colum. L. Rev. 341, 378, 389 (1937). Of course a substantial performance rule creates possibilities for opportunistic behavior by sellers who may ship nonconforming goods in the expectation that buyers may be unwilling or unable to litigate.

93. CISG Art. 49(1)(a) (seller's breach); *id.* Art. 64(1)(a) (buyer's breach). The CISG allows one method for the nonbreaching party to avoid the contract in the absence of a fundamental breach. Under the so-called *Nachfrist* procedure (borrowed from German law), the nonbreaching party may fix an additional, reasonable period of time for the breaching party to perform its obligations. *Id.* Arts. 47 & 63. If the breaching party fails to perform or declares he will not perform within that period of time, the nonbreaching party may declare the contract avoided. *Id.* Arts. 49(1)(b) & 64(1)(b).

94. CISG Art. 25.

95. See Murray on Contracts, *supra* note 27, § 153, at 897–98.

96. It is also interesting to note that John Honnold, one of the chief architects of the CISG, is also a longstanding opponent of the UCC's perfect tender rule. See John Honnold, Buyer's Right of Rejection: A Study in the Impact of Codification upon a Commercial Problem, 97 U. Pa. L. Rev. 457, 479–80 (1949).

97. 156 Eng. Rep. 145, 151 (Ex. 1854).

98. "Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made." Restatement (Second) of Contracts § 351(1) (1981).

99. UCC § 2-715(2)(a) states that "consequential damages resulting from the seller's breach include . . . any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be

The CISG's foreseeability limitation is even less strict: "Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract . . . as a *possible* consequence of the breach of contract."[100] This means that the breaching party ought to be liable for a greater range of consequential damages under the CISG (those that were foreseeable as a "possible" consequence of the breach) than under the common law or UCC (only those that were foreseeable as a "probable" consequence of the breach).[101] Indeed, one commentator has cautioned, "U.S. judges should try to divorce themselves from the influence of *Hadley* as much as possible; its rules are not the same as those under the consequential damages article of the C.I.S.G."[102]

But this is easier said than done, and the Second Circuit's recent decision in *Delchi Carrier S.p.A. v. Rotorex Corp.*[103] illustrates the point and provides an opportunity to review some of remedies issues discussed above. The defendant Rotorex, a New York corporation, had agreed to supply air conditioner compressors to the plaintiff Delchi, an Italian firm, in three shipments. While the second shipment was en route, Delchi discovered that the first shipment did not conform to the sample model and contract specifications because these compressors consumed too much power and did not have enough cooling capacity. Delchi asked Rotorex to supply new compressors conforming to the sample and specifications; when Rotorex refused, Delchi cancelled the contract and sought another source. Delchi subsequently sued Rotorex for breach of contract, seeking incidental and consequential damages.

The first issue the case raises is whether Delchi was entitled to require Rotorex to deliver substitute goods and entitled to cancel the contract when Rotorex refused to do so. Although the CISG generally allows for specific performance, it provides that a buyer may require delivery of substitute goods "only if the lack of conformity constitutes a fundamental breach."[104] Moreover, the breach must be "fundamental" for the buyer to reject the goods and cancel the contract.[105] After noting these points and quoting Article 25's definition of "fundamental breach," the court of appeals affirmed the district

prevented by cover or otherwise . . . ." Although this language omits the word "probable," White and Summers explain that this provision does not supply a complete definition of consequential damages and must be read against the background of *Hadley*. James J. White & Robert S. Summers, Uniform Commercial Code, 4th ed., v. 1, § 10-4, at 573–74 (St. Paul, 1995). Even more specifically, they state that "'the test is one of reasonable foreseeability of probable consequences.'" *Id.* § 10-4, at 569 (quoting Gerwin v. Southeastern Cal. Ass'n of Seventh Day Adventists, 92 Cal. Rptr. 111, 118 (Cal. Ct. App. 1971)); *accord* Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280, 285–86 (Iowa 1979); R. I. Lampus Co. v. Neville Cement Products Corp., 378 A.2d 288, 291 (Pa. 1977).

100. CISG Art. 74 (emphasis added).

101. This difference is noted by Arthur G. Murphey, Jr., Consequential Damages in Contracts for the International Sale of Goods and the Legacy of *Hadley*, 23 Geo. Wash J. Int'l L. & Econ. 415, 439–40 (1989).

102. *Id.* at 417.

103. 71 F.3d 1024 (2d Cir. 1995).

104. CISG Art. 46(2).

105. CISG Art. 49(1)(a).

court's conclusion that Rotorex's breach was fundamental "[b]ecause the cooling power and energy consumption of an air conditioner compressor are important determinants of the product's value."[106] Although the court's discussion is not extensive, it does provide an opportunity to discuss or review the CISG's lack of a perfect tender rule.

Next, the court of appeals turned to the question of damages, quoting Article 74 in full, including the words "as a possible consequence of the breach of contract." But the court then equated this provision with the rule of *Hadley v. Baxendale*, and concluded that under the CISG consequential damages are subject "to the familiar limitation that the breach party must have foreseen, or should have foreseen, the loss as a *probable* consequence."[107] In other words, the court of appeals, apparently inadvertently, replaced the CISG's limitation on consequential damages with the *Hadley* rule that it was more familiar with.[108] In *Delchi Carrier*, the court's error appears to have made no difference, for the court found that Delchi's lost profits and other consequential damages were recoverable even under the *Hadley* rule,[109] but in a case involving more unusual consequential damages the difference in formulation could make a difference in the amount of recovery.[110]

The court of appeals also allowed Delchi to recover the costs of storing and returning the defective compressors as incidental damages, relying on UCC § 2-715(1).[111] Unlike the UCC, however, CISG Article 74 makes no express mention of incidental damages. This raises the question whether incidental damages are properly recoverable under Article 74 as loss "suffered by the other party as a consequence of the breach." Several commentators have suggested that they are,[112] but surely the issue cannot be adequately resolved simply by invoking the UCC. At the start of its analysis, the court of appeals observed that "[c]aselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code ('UCC'), may . . . inform a court where the language of the relevant CISG provisions tracks that of the UCC."[113] Unfortunately, the court seemed to forget its own qualification, and applied UCC principles even where the language of the CISG was different.

106. *Delchi Carrier*, 71 F.3d at 1029. The court's opinion also contains a brief discussion of the CISG provision on warranties. See *id.* at 1028.

107. *Id.* at 1029–30 (emphasis added).

108. See V. Susanne Cook, The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity, 16 J.L. & Com. 257, 260 (1997).

109. *Delchi Carrier*, 71 F.3d at 1029–31.

110. Indeed, *Hadley* itself is an example of a case in which the difference in formulation would matter. In *Hadley*, the court held that the lost profits of a mill were not a "probable" result of the defendant's delay in carrying a broken shaft for repairs. Hadley v. Baxendale, 156 Eng. Rep. 145, 151 (1854). But it would be difficult to say that these lost profits were not a "possible" result of the delay, and so the plaintiff in *Hadley* would likely have recovered his lost profits under the CISG's formulation for consequential damages.

111. See *id.* at 1030 & n.2.

112. See Schneider, *supra* note 84, at 226; Murphey, *supra* note 101, at 459.

113. *Delchi Carrier*, 71 F.3d at 1028.

* * * * *

I have made the case for teaching the CISG in Contracts largely on the grounds that teachers have an obligation to their students (and to those students' future clients) to familarize them with this body of contract law, which is the law of the United States and is applicable to contracts worth hundreds of billions of dollars each year. But I hope that I have not obscured my feeling that teaching the CISG is fun, both for the instructor and for the students. That is because the CISG is different from both the common law and the UCC, and those differences provide wonderful opportunities to question the rules of contract law that we have grown so used to.