

Commercial Common Law, the United Nations Convention on the International Sale of Goods, and the Inertia of Habit

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This Article develops a model of judicial behavior that rests on the idea that a judge's decision is a function of her attitudes and role orientations and these, in turn, are heavily influenced by her law school education. The result is an intellectual stubbornness that may lead judges to reject not only optional innovations that may present themselves, but may also cause them to construe mandatory provisions as if no change had occurred. This model and the Convention on the International Sale of Goods illustrate situations in which the emerging international commercial code may play an important role in the development of domestic law. Although it has been accepted that international instruments have the potential to help shape the law on a domestic level, this phenomenon has only been discussed in the context of legislation. However, these instruments may also exert an influence on the behavior of judges greater than is commonly supposed. For it is surely the case that, in creating a new legal environment for decision making, international instruments are bound to mediate existing intellectual habits and encourage experimentation and growth in cases without an international character. An effort to ensure a clear understanding of this sort would count as one among a wide range of steps to build a framework within which international law can develop without unexpectedly disturbing the domestic legal system.

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Taught law is tough law.¹

Codification, particularly since the formulation of the Uniform Commercial Code (UCC or the Code) and its enactment throughout the United States,² has increasingly become the preferred method of shaping the development of commercial law.³ Aside from the process of periodic adjustments in existing UCC articles to reflect deepgoing changes in society,⁴ there have been several instances where supplementary articles have been enacted as formal amendments to the Code.⁵ For example, computers, reader-sorter machines, image processors, and other technological advances have given rise to new paperless systems of high-value wire credit transfers.⁶ One possible

1. See FREDERIC WILLIAM MAITLAND, *ENGLISH LAW AND THE RENAISSANCE* 25 (1901).

2. After the Code's initial adoption by Pennsylvania in 1953, nationwide enactment was temporarily halted when it was criticized by the New York Law Revision Commission and temporarily rejected by that state. See Walter D. Malcolm, *The Uniform Commercial Code*, in *UNIFORM COMMERCIAL CODE HANDBOOK* 1, 5-6 (American Bar Ass'n 1964). It was not until the 1957 Official Text of the Code was enacted by Massachusetts that its prospects brightened. See *id.* at 7-8. Today the Code, in one form or another, is the law in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.

3. To be sure, this is not an altogether new phenomenon. The Code supplanted uniform acts that were drafted and approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) over the course of half a century, including the Negotiable Instruments Law, the Uniform Sales Act, the Uniform Bills of Lading Act, the Uniform Warehouse Receipts Act, the Uniform Stock Transfer Act, the Uniform Conditional Sales Act, and the Uniform Trust Receipts Act. See U.C.C. general cmt. (1998).

4. Within the past decade, the NCCUSL and the American Law Institute (ALI) have revised articles 3 (1990), 4 (1990), 5 (1995), 6 (1989), 8 (1994), and 9 (1998). See U.C.C. preface (1998). Drafting committees are currently revising articles 1, 2, and 2A. Although the particular impetus for each revision project has been somewhat different, the basic objective has always been to prevent the Code from becoming outdated. For example, since the promulgation of the 1957 Official Text of the Code, article 2 (Sales) has remained virtually unchanged. The same cannot be said, however, of commercial and consumer law generally and the technological environment in which many transactions now take place. Some of the more obvious changes include the common-law development of a theory of strict products liability that overlaps the Code, the enactment of a "hodgepodge of [federal and state] consumer protection legislation," and the growing use of electronic methods of contracting. Edith Resnick Warkentine, *Article 2 Revisions: An Opportunity to Protect Consumers and "Merchant/Consumers" Through Default Provisions*, 30 J. MARSHALL L. REV. 39, 78 (1996). When one also considers the vast number of judicial opinions that have revealed weaknesses in the current statutory structure, it would not be unreasonable to conclude that article 2 may be in need of revision.

5. See, e.g., U.C.C. arts. 2A, 4A (1998).

6. See *id.* art. 4A prefatory note.

response to this development might be to leave the task of making “law” to the marketplace, specifically to the financial players that currently rely on this type of payment system, and to a slowly developing common law.⁷ Instead, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) added a new article 4A to the Code in order to respond to uneven or unwelcome common law developments.⁸ The NCCUSL and the ALI believed that courts were uncertain as to whether analogies to other payment mechanisms such as negotiable instruments could be appropriately employed to determine the outcome of a funds transfer case. “The result is a great deal of uncertainty. There is no consensus about the juridical nature of a wire transfer and consequently of the rights and obligations that are created.”⁹

In addition to these efforts to keep the Code responsive to contemporary needs, legislatures have also reacted to change by enacting auxiliary statutes covering only limited subjects that are not consolidated into the Code. In 1996, for example, recognizing that electronic commerce can be improperly impeded by inappropriate law and that the impact of new technologies extends beyond the scope of the Code to other types of transactions, the NCCUSL established the Drafting Committee on Electronic Communications in Contractual Transactions, later renamed the Drafting Committee on the Uniform Electronic Transactions Act (UETA). The original charge to this committee was “to draft such revisions to general contract law as are

The dollar volume of payments made by wire transfer far exceeds the dollar volume of payments made by other means. The volume of payments by wire transfer over the two principal wire payment systems—the Federal Reserve wire transfer network (Fedwire) and the New York Clearing House Interbank Payments Systems (CHIPS)—exceeds one trillion dollars per day.

Id.

7. It has been suggested that “there is no real jurisprudence of wire transfer law.” Raj Bhala, *The Inverted Pyramid of Wire Transfer Law*, 82 Ky. L.J. 347, 349 (1993). If Professor Bhala is correct, might it not be preferable to permit a common-law jurisprudence to develop than to draft a statute before the subject matter has attained a sufficient antecedent conceptual formulation and integration?

8. For example, the article 4A drafting committee took issue with leading cases such as *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 955-59 (7th Cir. 1982), which held that consequential damages could be awarded if a bank, with notice of particular circumstances giving rise to damages, refuses to execute a payment order. The result is a statutory provision that bars consequential damages unless the bank expressly assumes, in writing, such liability. See U.C.C. § 4A-305 cmt. 2 (1998). The first of these “new” articles added to the Code was article 2A. This article governs personal property leases and was initially approved by the NCCUSL and the ALI in 1987. It was subsequently amended in 1990 and is being revised again to bring it into conformity with the revisions to article 2.

9. U.C.C. art. 4A prefatory note (1998).

necessary or desirable to support transaction processes utilizing existing and future electronic or computerized technologies."¹⁰ The committee completed its work in 1999. This project represents another example of codification of a commercial law subject for which no previously developed body of clear concepts exists.¹¹

Looking to international developments, a strong movement has developed during the latter half of the twentieth century favoring the worldwide unification and harmonization of commercial law. There are essentially three principal methods by which this goal is being accomplished. First, a measure of such harmonization can be, and has been, brought about by private endeavor. The latest version of the Uniform Customs and Practices for Documentary Credits (UCP) prepared by the International Chamber of Commerce (ICC) in 1993 is an example of this category.¹² This expression of private commercial norms can become effective as the "law" governing a letter of credit transaction only if viewed as a binding source of trade usage or if "incorporated into the text of the Credit."¹³

10. Memorandum from the Drafting Committee for Electronic Communications in Contractual Transactions, National Conference of Commissioners on Uniform State Laws, to Scope and Program Committee (Jan. 3, 1997) (as approved by the Scope and Program Committee and the Executive Committee of the Conference) (on file with author).

11. Another recent effort to statutorily preempt burgeoning case law is the aborted project to draft a new article 2B of the Code. This article would have governed all contracts for the sale, licensing, development, distribution, maintenance, documentation, and support of computer software. Instead of incorporating this uniform law within the Code as originally planned, the NCCUSL recently decided that it would be more appropriate to promulgate the rules for adoption by the states as the Uniform Computer Information Transactions Act (UCITA). For a brief history of article 2B and the reasons why the project was transformed into the UCITA, see Fred H. Miller & Carlyle C. Ring, *Article 2B's New Uniform: A Free-Standing Computer Information Transactions Act*, UCC BULL., June 1999, at 1, 2-4. See also National Conference of Comm'rs on Unif. State Laws, *Committee Drafting New Article 2B of Uniform Commercial Code Makes Major Changes to Protect Consumers and Small Businesses, and to Safeguard Public Interests in Free Speech and Fair Criticism in the Electronic Age* (Nov. 17, 1998) (visited Oct. 11, 1999) <<http://www.2bguide.com/docs/prsr1198.html>> (press release) ("Article 2B can be a strong first step toward a common legal framework for digital information and software licenses."); *infra* text accompanying notes 68-73. Not everyone, however, shares the NCCUSL's optimism. See, e.g., Lawrence Lessig, *Sign It and Weep*, INDUSTRY STANDARD, para. 2 (Nov. 20, 1998) <<http://www.thestandard.com/articles/display/0,1449,2583,00.html>> ("The current draft represents little more than the narrow commercial interests of the major software companies. It's an embarrassment to its sponsors, who ought to dump the draft and leave the topic alone.").

12. See INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 500, ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1993) [hereinafter UCP 500]. This revised a prior version published in 1983. See generally INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 511, DOCUMENTARY CREDITS: UCP 500 AND 400 COMPARED (Charles del Busto ed., 1993).

13. UCP 500, *supra* note 12, art. 1.

The Principles of International Commercial Contracts (UNIDROIT Principles or the Principles), drafted by the International Institute for the Unification of Private Law (UNIDROIT) in 1994, exemplifies the second method.¹⁴ The Principles do not have the binding effect of national legislation or an international convention but rather are the equivalent of an “international restatement” of the law of contracts.¹⁵ In this sense, the Principles become applicable “when the parties have agreed that their contract [shall] be governed by them” and “may be used to interpret or supplement international uniform law instruments.”¹⁶

Finally, cooperative measures on the governmental or legislative level are achieving international harmonization in several important areas of commercial law. This is creating what might be called an international UCC¹⁷ covering such matters as the international sale of goods;¹⁸ international financial leasing;¹⁹ international factoring;²⁰ international bills of exchange and promissory notes;²¹ and international credit transfers, including electronic funds transfers,²²

14. UNIDROIT is an independent intergovernmental organization founded in 1926 and headquartered in Rome. For an overview of UNIDROIT's activities, see Mario Matteucci, *UNIDROIT: The First Fifty Years*, in 1 *NEW DIRECTIONS IN INTERNATIONAL TRADE LAW* xvii, xvii-xviii (1977).

15. See Ole Lando, *European Contract Law*, in *INTERNATIONAL CONTRACTS AND CONFLICTS OF LAWS: A COLLECTION OF ESSAYS* 1, 7-9 (Petar Šarčević ed., 1990) (stating that the goal of the UNIDROIT project is to “provide non-binding proposals for rules” and to “prepare a systematic harmonization of the law of contracts”).

16. INTERNATIONAL INST. FOR THE UNIFICATION OF PRIVATE LAW, *PRINCIPLES OF INT'L COMMERCIAL CONTRACTS* pmbl. (1994), reprinted in 34 *I.L.M.* 1067, 1069 (1995).

17. See Amelia H. Boss & Patricia B. Fry, *Divergent or Parallel Tracks: International and Domestic Codification of Commercial Law*, 47 *BUS. LAW.* 1505, 1506 (1992) (“[A]ctivities are currently under way on the international level leading to the creation of what might be called an ‘International Uniform Commercial Code.’”).

18. See United Nations Convention on Contracts for the International Sale of Goods, opened for signature Apr. 11, 1980, S. TREATY DOC. NO. 98-9 (1984), 1489 *U.N.T.S.* 3 [hereinafter *CISG*].

19. See Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on International Factoring and International Financial Leasing, May 28, 1988, 27 *I.L.M.* 927 (1988).

20. See *id.*

21. See *Convention on International Bills of Exchange and International Promissory Notes*, U.N. Commission on International Trade Law, 6th Comm., 21st Sess., U.N. Doc. A/43/820 (1988), reprinted in 28 *I.L.M.* 170 (1989).

22. See *Report of the United Nations Commission on International Trade Law on the Work of its Twenty-Fifth Session, 4-22 May 1992*, U.N. GAOR, 47th Sess., Supp. No. 17, Annex I, U.N. Doc. A/47/17 (1992), reprinted in 32 *I.L.M.* 587 (1993).

independent bank guarantees, and letters of credit.²³ Regional efforts to unify commercial law are also becoming commonplace.²⁴

What should the Code drafters do about this international commercial lawmaking activity? Although one of the principal underlying purposes and policies of the Code is "to make uniform the law among the various jurisdictions,"²⁵ national uniformity of commercial law should be viewed in relation to the ultimate goal of international harmonization of conflicting laws. Such harmonization would help surmount what has been defined as the "anarchy" upon which international relationships are based.²⁶ In other words, one of the greatest impediments to worldwide trade is the impact of a myriad of distinct domestic laws. Indeed, commentators have suggested that the sponsors of the Code pay attention to the international ramifications of the Code and the need for uniformity between domestic and international law.²⁷ On the other hand, it must be recognized that the attainment of national uniformity, by itself, will make commercial law more easily accessible and may facilitate future attempts at harmonization by the various international law making bodies.²⁸

Concern and debate over the extent to which commercial law on one level (international or domestic) should be taken into account in revisions of the law on the other level have, to date, been limited to the various "legislative" drafting projects that were recently completed or are presently under way.²⁹ This conversation misleads us to think that

23. See *Report of the United Nations Commission on International Trade Law on the Work of Its Twenty-Eighth Session, 4-26 May 1995*, U.N. GAOR, 50th Sess., Supp. No. 17, Annex 1, U.N. Doc. A/50/17 (1995).

24. See, e.g., Harold S. Burman, *International Conflict of Laws, the 1994 Inter-American Convention on the Law Applicable to International Contracts, and Trends for the 1990s*, 28 VAND. J. TRANSNAT'L L. 367, 386 (1995).

25. U.C.C. § 1-102(2)(c) (1998).

26. See RENÉ DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 9 (2d ed. 1978).

27. See, e.g., Boss & Fry, *supra* note 17, at 1506-07; James E. Byrne, *Fundamental Issues in the Unification and Harmonization of Letter of Credit Law*, 37 LOY. L. REV. 1, 1-6 (1991); Peter Winship, *Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 LOY. L. REV. 43, 43-45 (1991).

28. For example, it has been suggested that in the area of secured financing "the impact of United States developments on the international level should be significant." Amelia H. Boss, *Electronic Commerce and the Symbiotic Relationship Between International and Domestic Law Reform*, 72 TUL. L. REV. 1931, 1942 (1998).

29. See, e.g., Henry D. Gabriel, *The Inapplicability of the United Nations Convention on the International Sale of Goods as a Model for the Revision of Article Two of the Uniform Commercial Code*, 72 TUL. L. REV. 1995 (1998); 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); Peter Winship, *The National*

drafting convergence is the only issue of true importance. There is little dispute that the quickest and most efficient route to unification and harmonization is for drafting committees to coordinate international and domestic law; it simply cannot make sense in today's global economic environment to allow important legal outcomes to turn on national legislation so diverse that intelligent business planning becomes impossible.

Neglected by writers, however, is another source of law in the United States—common law—that has the potential to assist the harmonization effort and which itself might be strengthened and improved by drawing upon the emerging law of international commercial transactions. In the current age of codification, commercial common law has become only a small part of the sprawling, complex body of commercial law, but it is an important part, both practically and conceptually. Practically, common law rules are important because, unless displaced by the Code, they supplement its provisions.³⁰ Conceptually, the common law, to the extent it is reflective of the *lex mercatoria*, takes us close to the heart of what the Code is all about, and this in turn invites us to examine basic models of contract and property obligations.³¹

This Article examines the United Nations Convention on Contracts for the International Sale of Goods (CISG or the Convention), which is arguably the greatest legislative achievement aimed at harmonizing the international law of sales, from the perspective of common-law decision making and attempts to discover what implications, if any, the Convention might have on fundamental questions concerning judicial adherence to precedent and the role of

Conference of Commissioners on Uniform State Laws and the International Unification of Private Law, 13 U. PA. J. INT'L BUS. L. 227 (1992).

30. See U.C.C. § 1-103 (1998).

31. It has always been understood that

[c]ommercial law in the United States relies on the "law merchant." [See, e.g., U.C.C. § 1-103.] The classic work on the law merchant, *Lex Mercatoria*, makes the point that this body of authority is not one created by judges, but by the customs of merchants. Of course, by the late 1600s the common law lawyers and judges had assumed roles which previously had been performed by merchants, and the courts themselves declared the custom, which was incorporated as a part of the common law. Thus was commercial custom translated into judicial precedent, and commercial law, informed by commercial custom, grew as case law. Unity of law and custom has been a goal of commercial law ever since.

Miller & Ring, *supra* note 11, at 2. Karl Llewellyn, in defense of the Code, stated that it seeks "to remake the sales law of New York . . . in order that the law may be made to conform to commercial practice, and may be read and make sense." 1 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMITTEE FOR 1954 AND RECORD OF HEARINGS ON THE UNIFORM COMMERCIAL CODE 113 (1954) [hereinafter 1954 NEW YORK COMMITTEE REPORT].

courts in the evolution of commercial law.³² More specifically, commercial law (judicially based or statutory) should rest on a set of real-world practices and expectations. When these expectations and practices change, there should be a careful reworking and modernization of traditional and archaic legal concepts. Once the relationship between changing commercial practices and the development of the law is understood, judicial legislation can be shown to pose no significant challenge to the general legitimacy and meaningfulness of the doctrine of *stare decisis*.³³

Part I briefly reviews the basic arguments against using the CISG as a model for the revision of article 2 of the Code. These arguments are evaluated to determine if they would also caution against courts drawing on the CISG in formulating common-law rules. The analysis seeks to show that the CISG should not be viewed as an inherently hostile influence on courts deciding domestic cases.

Part II explains that the law—as originally taught to and learned by judges—creates habits of thought not easily broken. These habits are not troublesome merely because they significantly influence the process by which principles and policies are fashioned into standards of decision; rather, habits can force courts to act as guardians of a past that may no longer be relevant.³⁴ Accordingly, courts cannot be relied upon to carefully develop incremental solutions to important problems and to effectuate legislative will. Eventually, however, legislative changes will be able to exert a meaningful influence on even the most intellectually stubborn judge, and new habits will develop.

The remainder of Part II seeks to discover the force of habit in three Code cases. The concern is not whether the particular decision is normatively correct. The cases are used to demonstrate an approach that contributes to, and is inherent in, the judicial process.

32. For a brief overview of the drafting history of the CISG, see *infra* note 35 and accompanying text. Although the discussion centers around the CISG, it applies with equal force to any international instrument. The CISG was chosen because it covers a wide and important area of the law and represents a major step towards international uniformity of commercial law. Moreover, sales law is an especially timely topic in light of the fact that the twelve-year project to revise article 2 of the UCC is likely to continue for at least one more year.

33. For a discussion of the doctrine of *stare decisis*, see *infra* notes 120-129 and accompanying text.

34. It is not suggested here that this feature of the common-law system is always a bad thing. To the contrary, by promoting stability, a historically oriented system of decision making protects from abrupt defeat expectations invited by existing commercial arrangements. The point is that we pay a price for that stability. When so employed, it slows or halts the prudent reformulation of doctrine.

Finally, Part III suggests that by creating a new legal environment for decision making, the CISG may mediate habits of thought and profoundly affect the course of domestic law. This Part looks at several provisions of the CISG and speculates which are most likely to influence the future shape of commercial law.

I. THE CASE AGAINST THE CISG AS A MODEL FOR LEGISLATIVE REFORM

The CISG represents the culmination of more than two generations of international negotiation and received unanimous approval by delegations representing sixty-two national legal systems at a diplomatic conference convened by the United Nations General Assembly in Vienna in 1980.³⁵ Since its adoption, the CISG has been ratified (or acceded to) by a total of fifty-seven countries, including the three NAFTA trading partners.³⁶ The CISG contains a comprehensive set of rules governing the formation, performance, and remedies for breach of contracts within its jurisdictional scope. Unless otherwise agreed, the CISG applies to “contracts of sale of goods between parties whose places of business are in different States . . . when the States are Contracting States.”³⁷ Since the CISG has the preemptive force of federal law, it will preempt article 2 when applicable, but otherwise article 2 will continue to operate unfettered by the operative principles and rules that apply to actions brought under the Convention. Thus, buyers and sellers in the United States are faced with two uniform

35. Efforts to draft a generally acceptable uniform law on international sales had been under way for over 50 years. UNIDROIT began the process in 1930 when it undertook to draft a uniform law on international sales. Draft laws were considered at diplomatic conferences held at the Hague in 1951 and 1964. See M.J. Bonell, *Introduction to the Convention*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 3-7 (M.J. Bonell ed., 1987). These conferences produced two conventions, the Uniform Law on the International Sale of Goods and the Uniform Law on the Formation of Contracts for the International Sale of Goods. See *id.* at 4. These two conventions were largely unsuccessful and what followed was a 1978 convention held by UNCITRAL and the 1980 convention in Vienna. For a good historical introduction to the CISG, see Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183, 189-95 (1994).

36. The United Nations maintains a website for up-to-date information on the current state of ratifications. See *United Nations Treaty Series* (visited Nov. 14, 1999) <<http://www.un.org/Depts/Treaty/collection/series/search.htm>>.

37. CISG, *supra* note 18, art. 1(1)(a). The CISG also applies “when the rules of private international law lead to the application of the law of a Contracting State.” *Id.* art. 1(1)(b). Because the United States did not adopt article 1(1)(b) (as allowed under article 95), the CISG will not apply to American sales contracts when international private law leads to the application of a contracting country’s own law.

legal texts, one for domestic and the other for international contracts for the sale of goods.

It is tempting to say that the CISG is the international equivalent of UCC article 2. Yet, despite some similarities, the CISG does not necessarily resemble current article 2 in either scope or substance.³⁸ Roughly, the question is to what extent the CISG should serve as a model for revising article 2. There are certainly reasons to look beyond uniformity among the states or among nations and strive for uniformity between domestic and international law.³⁹ In a discussion of this issue, Professor Richard E. Speidel, the former Reporter for the article 2 drafting committee, observed that in today's world of centralized and interdependent markets "a dualism between domestic and international sales law seems arbitrary, if not quaint and archaic."⁴⁰ He offers the following hypothetical:

Suppose a Canadian seller, whose sole place of business is in Canada, manufactures goods for export to the United States and to Mexico. The product is advertised in both countries. The goods are sold and shipped to a distributor in New York whose sole place of business is in the United States and who then resells to buyers in either Mexico or the United States. Suppose, further, that a resale buyer claims that the goods do not conform to its expectations of quality and that commercial loss has resulted. There is no damage to property or injury to person.⁴¹

Consideration of the possible lawsuits and the likelihood that the applicable substantive law will not be the same forces the conclusion

38. For example, in terms of scope, the CISG expressly excludes from its coverage consumer sales (unless the seller neither knew nor ought to have known that the goods were purchased for consumer use) and also excludes sales of ships, aircraft, and electricity. *See id.* art. 2. The Code has no such exclusions. In terms of substance, such doctrines as "Nachfrist," *see infra* note 302 and accompanying text, and "Price Reduction," *see CISG, supra* note 18, art. 50, are foreign to the Code.

39. *See, e.g.,* Speidel, *supra* note 29, at 170. Professor Speidel posits:

Although CISG and Article 2 operate in separate spheres, the transactions governed do not observe the sometimes arbitrary jurisdictional lines between domestic and international law. For example, uniformity would eliminate uncertainty and surprise over the scope of state (UCC) and federal (CISG) sales law and avoid disruptions in transactions that originate as domestic sales and conclude, through export, as international sales. This is particularly true where disputes over the quality of the goods are directly involved. Since this import-export transaction pattern is a reality in international sales, a sharp line between domestic and international sales law seems contrived.

Id. (footnote omitted).

40. *Id.* at 171.

41. *Id.* at 178-79 (footnote omitted). The reason for the commercial loss limitation is that the CISG does not address that aspect of products liability that pertains to death or personal injury. *See CISG, supra* note 18, art. 5. Damage caused by the goods to other property is, however, within the scope of the Convention. *See id.* arts. 1-6.

that vertical uniformity, at least in this context, is highly desirable. If the claimant is the New York distributor who sues the Canadian seller, the CISG applies.⁴² Suppose that a Mexican resale buyer sues the New York distributor and the Canadian seller. The resale buyer has no claim under the CISG against the Canadian seller,⁴³ but does have a CISG claim against the New York distributor.⁴⁴ Finally, assume the claimant is a United States resale buyer who sues both the New York distributor and the Canadian seller. In this case, the UCC governs the suit between the two United States parties, and private international law rules will dictate what law (UCC or Canadian law) will be used to resolve the dispute with the Canadian seller.⁴⁵

If all of this seems confusing, it is. Far from simply being an interesting theoretical exercise, the choice between the CISG and the UCC may be outcome-determinative.⁴⁶ The result is pervasive uncertainty in the contracting process, and the market effect of uncertainty is inefficiency. For example, the Canadian seller in the foregoing hypothetical simply does not know in advance what law will govern if the goods turn out to be defective. Lacking necessary information, it cannot be certain what its potential liability would be. This makes it difficult to shape each transaction so that the burdens and risks are allocated in an acceptable manner. Moreover, the fact that the buyer's expectation of quality derived from the seller's express or implied representations has greater protection under article 2 than under the CISG may have disastrous consequences for an intermediate seller in the position of the New York distributor. Assuming that it is liable to a United States buyer for breach of warranty, it may be

42. See CISG, *supra* note 18, art. 1(1)(a).

43. The CISG does not speak directly to the issue of privity of contract. It does, however, provide that the Convention "governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract." *Id.* art. 4. Moreover, article 35(1) limits quality disputes to what the contract requires. This language strongly suggests that the CISG applies only to the two-person sale between commercial parties. Assuming that a court would be unwilling to read the terms "seller," "buyer," and "contract" broadly so as to bring these remote sale cases within the scope of the Convention, is the Mexican buyer without a remedy against the Canadian seller? Presumably, the outcome depends on the applicability of the domestic sales law made relevant by choice of law rules. If the UCC were applicable, the seller's liability would ultimately depend on whether the resale buyer is able to recover on a direct warranty theory (recall that the goods were advertised in Mexico) under UCC section 2-313 or as a third-party beneficiary under UCC section 2-318.

44. See *id.* art. 1(1)(a).

45. See *supra* notes 42-43 and accompanying text.

46. See Speidel, *supra* note 29, at 181-86.

surprised to learn that it is unable to pass that liability upstream to its seller.⁴⁷

For legal scholars concerned about reducing transaction costs for transnational trade and for the article 2 drafting committee, the question is where to go from here. Answers diverge sharply. All acknowledge, to some extent, the importance of harmonizing domestic and international laws. Some, however, argue that the CISG is an inappropriate model for revised article 2,⁴⁸ while others contend that, although it is unlikely that the committee would adopt the CISG with little or no change, there should be some strategy for coordination that would identify those CISG provisions that should be incorporated into the Code.⁴⁹ Notwithstanding the perceived benefits of harmonization, the drafting committee has largely ignored the CISG.⁵⁰ As Professor Speidel states, "[T]he process of harmonization to date has been *ad hoc* and reflects highly selective borrowing."⁵¹

Now consider some of the factors that support the drafting committee's position not to fully embrace the CISG and whether these same factors suggest that courts, too, should be immune from the adoption of international perspectives or approaches. Each of these factors is multifaceted and cannot be fully explored here. The

47. For example, the CISG and article 2 seemingly agree on the treatment of the so-called implied warranties. Without saying so, the standards of quality in article 35(2) of the CISG closely track the UCC's implied warranties of merchantability and fitness for a particular purpose. See U.C.C. §§ 2-314 to -315 (1998). The track is not completely parallel, however, because under article 2 goods that are "fit for the ordinary purposes for which such goods are used" may still not "pass without objection in the trade under the contract description." *Id.* § 2-314(2). Thus, when the implied warranty is made, the scope of merchantability protection is somewhat higher under article 2 than under the CISG. It is therefore possible for the New York distributor to breach this warranty when it sells in a Code-governed transaction but have no claim against its seller in a CISG-governed transaction.

48. See, e.g., Gabriel, *supra* note 29, at 2001-13; Speidel, *supra* note 29, at 171-78.

49. See Winship, *supra* note 27, at 50. Winship suggests that the committee "might identify (1) issues so important that differences between the two laws should be justified; (2) issues so relatively unimportant that there is no reason for differences even in language; and (3) devices to ensure that sellers and buyers know how the two laws complement each other." *Id.* at 48.

50. It is worth recalling that one of the reasons given by the Permanent Editorial Board Study Committee for revising article 2 was the existence of "competing and better solutions to sales problems" in the CISG. PEB Study Group: Uniform Commercial Code, Article 2 Executive Summary, in 46 BUS. LAW. 1869, 1871 (1991). It is also worth noting that Finland and Sweden revised their domestic sales laws in light of the Convention. See Winship, *supra* note 27, at 46 n.13.

51. Speidel, *supra* note 29, at 169. For example, the drafting committee had the CISG in mind when it decided to delete the definitions of delivery terms in Part 3 of the current Code, see U.C.C. § 2-319 (Interim Draft Nov. 1999), and expanded the seller's right to "cure" a nonconforming tender, see *id.* § 2-508.

discussion is confined to those aspects on which commentators generally agree.

A. *Differences in Background Law*

One argument against the wholesale adoption of the CISG is that there is no established fit between it and the well-established principles of the common law of contracts.⁵² Article 2, in contrast, was drafted as part of a comprehensive commercial law system consisting not only of the various sections within an article and the several articles but also of domestic common law and statutes external to the Code.⁵³ Seen this way, commercial law has, or should have, certain characteristics of orderliness, systematic and interrelated rules, and a precise, consistent terminology that gives it a rational structure. It is for this reason that the drafters of the Code were comfortable leaving gaps in article 2 to be filled by a considerable body of case law.⁵⁴ The chief concern is that because the CISG was not drafted with any particular legal system in mind, there will be no reliable source of gap fillers.⁵⁵ Thus, the advantages of clarity and certainty, superior accessibility, and the

52. See Gabriel, *supra* note 29, at 2003-04; Speidel, *supra* note 29, at 171-72. Actually, the argument is broader. In addition to maintaining a fit between article 2 and the common law, commentators have pointed out that article 2 is a component part of a commercial code in which there is a consistency of definitions and policies. See Gabriel, *supra* note 29, at 2004-05; Speidel, *supra* note 29, at 172.

53. See U.C.C. § 1-103 (1998). The fact that each article of the Code is part of a much larger system means that today's drafters must view their task (at least in part) as making sure that the topics dealt with in the Code fit together in a logical way. This requires not only that the sections in each article be compatible, but additionally, that there be a systematic tying together of the several articles. Moreover, the ability to recommend particular decisions will depend on the drafting committee's insight into the location of the doctrine in question within the entire commercial world order. I have argued that several decisions of the drafting committee are inexplicable in terms of policy and fail to accommodate essential policies expressed elsewhere in the Code and, in some cases, in the law outside of the Code. See Peter A. Alces & David Frisch, *Commercial Codification as Negotiation*, 32 U.C. DAVIS L. REV. 17, 28-44 (1998).

54. Section 1-103 of the Code sanctions the use of non-Code principles of law and equity. It provides, "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." U.C.C. § 1-103. However, determining when the Code has displaced a particular non-Code rule is no easy matter. See David Frisch, *Buyer's Remedies and Warranty Disclaimers: The Case for Mistake and the Indeterminacy of U.C.C. Section 1-103*, 43 ARK. L. REV. 291, 333-43 (1990).

55. The CISG provides that gaps in coverage are to be filled first by internal analogy when the CISG contains an applicable general principle and, in the absence of a guiding principle, by reference to the rules of private international law. See CISG, *supra* note 18, art. 7(2).

economy of the common law as a source of fallback principles are lost.

As an illustration of the mesh between article 2 and non-Code law,⁵⁶ consider the simple contract formation issue of when a mailed acceptance takes effect. On this point the Code is silent—but not the common law. Every first-year law student learns that a mailed acceptance is effective to make a contract when and where mailed, i.e., the “mailbox” rule.⁵⁷ By virtue of UCC section 1-103, this rule supplements the Code and it was, therefore, unnecessary for the drafters of article 2 to include such a provision. They knew what they were getting when they chose this course. But suppose that a context develops in which there are conflicting common law rules stated in different opinions. For example, what if there ceased to be a single, invariant, and comprehensive statement of the mailbox rule? In such a case, legislative silence may no longer be the appropriate response.

This ambiguity is exactly what has happened in the area of electronic contracting. Reacting to case law⁵⁸ and the perception that electronic communication is more akin to a face-to-face conversation

56. From the inception of the article 2 drafting project, attention has been paid to the common law. In 1987, Professors Speidel and Mooney submitted an influential memorandum to the Permanent Editorial Board for the Uniform Commercial Code. See Richard E. Speidel & Charles W. Mooney, Jr., Proposal for a Preliminary Study on a Possible Project for the Revision of Article 2, UCC (1987) in *THE EMERGING NEW UNIFORM COMMERCIAL CODE* 409 (1989). The memorandum's stated purposes were “to identify various areas of inquiry for the proposed Preliminary Study on the Revision of U.C.C. Article 2,” and to “provide a useful agenda for the work of an Article 2 study group.” *Id.* This memorandum was probably instrumental in the Permanent Editorial Board's decision to conduct a formal study. Referring to the potential tension between the general theory of contract in the Second Restatement of Contracts and article 2, the authors raised the possibility that some concepts now found in both may be dropped without consequence from article 2. See *id.* at 410 & n.2. They used as examples the duty of good faith and the doctrine of unconscionability. See *id.* at 410 n.2; see also U.C.C. § 1-203 (1998) (duty of good faith); *id.* § 2-302 (unconscionability); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (duty of good faith); *id.* § 208 (unconscionability). The unstated assumption is that these concepts will remain part of a larger body of commercial law, concurrently available to courts as a source of law for deciding cases under the Code.

57. This rule originated in the venerable case of *Adams v. Lindsell*, 106 Eng. Rep. 250 (K.B. 1818). For a critique of this rule, see Ian R. Macneil, *Time of Acceptance: Too Many Problems for a Single Rule*, 112 U. PA. L. REV. 947 (1964). See also RESTATEMENT (SECOND) OF CONTRACTS § 63 (1981) (“Unless the offer provides otherwise, . . . an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror.”).

58. See, e.g., *Dickey v. Hurd*, 33 F.2d 415, 418 (1st Cir. 1929) (holding that the place where telegraphed acceptance was received was the place where the contract was formed). Section 64 of the Second Restatement of Contracts treats acceptance by any medium of instantaneous two-way communication the same as if the parties were in the presence of one another.

than it is to paper-based communication, the article 2 drafting committee has decided to scrap the mailbox rule in favor of a time-of-receipt rule when an "offer" evokes an electronic message in response (the "acceptance").⁵⁹ In short, article 2 cannot be isolated from the legal system in which it will operate, and to draft wisely, that system must be understood and taken into account.

The argument that the CISG was not drafted within a context of established principles of domestic law is a serious warning to the article 2 drafting committee, yet it is by no means a conclusive argument against selective borrowing by that committee or by those courts that view the judiciary as an instrument of legal change. To conclude otherwise is essentially to take the position against any and all legal change. "New" law, whether effectuated by legislation or by judges, will inevitably alter the corresponding background law. Historically, this has never prevented drafting committees from revising the Code or judges from adopting new rules to implement new policies or inventing new implements for old policies.

B. *Differences in Scope*

Moreover, some argue the CISG is not appropriate *in toto* as a model for revising article 2 because the scope of each instrument is different.⁶⁰ To be sure, the Convention does not track the Code in every respect. In the first place, the CISG expressly excludes from its coverage consumer sales and sales of ships, aircraft, and electricity.⁶¹ The scope of the Code is not so limited. A further limitation upon the scope of the CISG is that, although it governs the formation of the sales contract and the rights and obligations of the buyer and the seller, it excludes certain questions relating to "the validity of the contract or of any of its provisions or of any usage."⁶² In contrast, article 2 contains rules of validity,⁶³ including what is perhaps the most powerful and far-reaching of all validity doctrines, the doctrine of

59. See U.C.C. § 2-204(e)(3)(A) (Interim Draft Nov. 1999).

60. See, e.g., Gabriel, *supra* note 29, at 2005-08; Speidel, *supra* note 29, at 173-74.

61. See CISG, *supra* note 18, art. 2. The consumer sales exception does not apply if the seller "at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use." *Id.*

62. *Id.* art. 4(a). Capacity to contract, agency, fraud, duress, and coercion are among the supplementary domestic doctrines that can bear on validity. 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 (1993).

63. See, e.g., U.C.C. § 2-718(1) (1998) ("A term fixing unreasonably large liquidated damages is void as a penalty."); *id.* § 2-725(1) ("By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.")

unconscionability.⁶⁴ Finally, the scope of the CISG differs from the Code in three other important respects: first, the CISG is not concerned with the effect of the contract on the property in the goods sold;⁶⁵ second, it does not apply to claims for death or personal injury caused by the goods;⁶⁶ and third, it is silent on the rights of third persons who are not parties to the contract.⁶⁷

The principle problem with this argument as a basis for rejecting the CISG is that the issue of scope is complex and sometimes highly controversial. An example of this is the brief history of the drafting committee's involvement with computer software and other related intangibles. In November 1992, the committee was instructed by the NCCUSL to prepare a review of article 2 focusing on sections that may require revision if software contracts are included in article 2.⁶⁸ To carry out this new charge, the committee adopted what became known as the "hub and spoke" approach.⁶⁹ The idea was that the scope of revised article 2 would be broadened to cover three transactions involving the transfer of interests in personal property: the sale of goods, the lease of goods, and the transfer of intangibles such as data, technology, and other intellectual property.⁷⁰ The objective of this approach was to state principles common to all in the "hub" and to state principles unique to each in the "spoke."⁷¹ In 1995, however, the NCCUSL formed a separate article 2B committee to deal with software and licenses of information and directed the article 2 committee to return to its original job of drafting a new sales article.⁷²

64. See *id.* § 2-302.

65. See CISG, *supra* note 18, art. 4(b). Article 2, on the other hand, includes not just a statement of the good faith purchase doctrine, see U.C.C. § 2-403 (1998), but also statements that define the remedial rights on the claims of third persons. See, e.g., *id.* § 2-502 (buyer's right to goods on seller's insolvency); *id.* § 2-402 (rights of seller's creditors against sold goods).

66. See CISG, *supra* note 18, art. 5. In a proper case, article 2 permits recovery for all types of injury. See U.C.C. § 2-715(2) (1998) ("Consequential damages resulting from the seller's breach include . . . injury to person or property proximately resulting from any breach of warranty.").

67. Article 2 permits certain claims to be brought by parties not in privity who are affected by the goods. See U.C.C. § 2-318 (1998).

68. See Raymond T. Nimmer et al., *License Contracts Under Article 2 of the Uniform Commercial Code: A Proposal*, 19 RUTGERS COMPUTER & TECH. L.J. 281, 290 (1993).

69. See *id.* at 318-22.

70. See *id.* at 319-28.

71. See *id.* at 319-20.

72. See U.C.C. art. 2B preface (Tentative Draft Apr. 28, 1998).

This decision was made, not because the hub and spoke approach was illogical, but because it was controversial.⁷³

Another example is the controversy of whether article 2 should apply to products liability cases involving personal injury or injury to property other than the goods sold. The current impetus for this debate is the ALI's recent adoption of the Third Restatement of Torts: Products Liability,⁷⁴ which addresses the liability of commercial manufacturers and sellers for harm caused by their defective products.⁷⁵ The Third Restatement is the Institute's effort to restate products liability law more than a quarter century after section 402A was adopted as part of the Second Restatement of Torts. It is not surprising that the Institute would seek to jealously guard the turf carved out by the new Restatement and argue for a diminished role for the Code in this important area. Specifically, there is disagreement over whether the tests for merchantability and defectiveness should be the same when personal injuries or damage to property are involved. The article 2 committee's eventual response will be to describe the merchantability/defect relationship in the official comments rather than in the black-letter Code law, an apparent attempt to legislate by comment:

When recovery is sought for injury to person or property, whether goods are merchantable is to be determined by applicable state products liability law.

When, however, a claim for injury to person or property is based on an implied warranty of fitness under Section 2-405 or an express warranty under Sections 2-403 or 2-408, this Article determines whether an implied warranty of fitness or an express warranty was made and breached, as well as what damages are recoverable under Section 2-806.⁷⁶

In these circumstances, it is odd to suggest that the CISG cannot substitute for article 2 merely because the scope of each is different. To be sure, the committee has never assumed that the scope of revised

73. See *id.* The fate of the hub and spoke project is reminiscent of what happened to the so-called "New Payments Code." The goal of that project was to combine UCC articles 3 and 4 and other areas of commercial law dealing with payments into one unified treatment within the Code. Opposition was so strong that after years of work the project was dropped. See Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 *LOY. L.A. L. REV.* 743, 745-46 (1993).

74. The ALI finally adopted the Restatement on May 20, 1997.

75. See generally Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability—The American Law Institute's Process of Democracy and Deliberation*, 26 *HOFSTRA L. REV.* 743 (1998) (describing the transition from the Second to the Third Restatement).

76. U.C.C. § 2-404 cmt. 4 (Proposed Final Draft May 1, 1999) (emphasis omitted).

article 2 would remain the same as the current version. It is thus plausible that, after careful review and deliberation, the committee would choose to narrow the scope of article 2 in conformity with the CISG even if the consequence of that decision is to produce a Code that is radically different from the present one. Moreover, if the committee prefers a broader statute, it always has the option of choosing the CISG initially and then adding provisions to extend its scope where appropriate. Finally, rejection of the CISG has no bearing on the less global issue of whether some of its provisions are suitable for incorporation into revised article 2 or the common law either in substitution of, or in addition to, existing rules.

One other facet of the scope argument should be mentioned: the absence in the CISG of certain provisions with which American attorneys have long been familiar. For example, there is no statute of frauds⁷⁷ or parol evidence rule,⁷⁸ or requirement of good faith in the performance and enforcement of a contract.⁷⁹ These gaps in the CISG's coverage do not justify a general preference for the historical scope of article 2. These rules would require some reconsideration even if the drafting committee faced no problems of scope. Those who urge rejection of the CISG because these provisions are absent must explain why any perceived problem caused by the substantive gaps created cannot be handled by selective supplementation.

77. The CISG provides that "[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form." CISG, *supra* note 18, art. 11. Article 12, however, permits contracting states to make a declaration under article 96 to prevent the application of article 11. *See id.* art. 12. If either party to a contract has its place of business in a contracting state that has made such a declaration, then applicable domestic law dictates the extent to which an evidentiary writing is necessary. *See id.*; *id.* art. 96. Interestingly, the article 2 drafting committee decided to abolish the statute of frauds in 1993, *see* U.C.C. § 2-201 (Revised Draft Dec. 21, 1993), and reversed that decision in 1996, *see id.* § 2-201 (Revised Draft July 1997).

78. The language of CISG article 8 that "due consideration is to be given to all relevant circumstances of the case" is essentially a rejection of the parol evidence rule. CISG, *supra* note 18, art. 8(3). Unfortunately, not all courts agree with this conclusion. *Compare* MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino, S.P.A., 144 F.3d 1384, 1388-89 (11th Cir. 1998) (holding that article 8(3) permits the introduction of parol evidence), *with* Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., Inc., 993 F.2d 1178, 1182-83 n.9 (5th Cir. 1993) (stating that the parol evidence rule applies to CISG cases).

79. "Good faith" is a basic principle running throughout article 2. *See, e.g.*, U.C.C. §§ 1-203, 1-201(19), 2-103(1)(b) (1998). Good faith is relevant to interpretation of the CISG only; there is no general obligation that the parties carry out their obligations in good faith. *See* CISG, *supra* note 18, art. 7(1). Notwithstanding the literal language of article 7(1), some commentators have suggested that it does impose a duty to act in good faith in a CISG-covered case. *See* Peter Winship, *Commentary on Professor Kastely's Rhetorical Analysis*, 8 Nw. J. INT'L L. & BUS. 623, 630-35 (1988).

In sum, in deciding whether to adopt the CISG, it is not enough to point out the differences in scope between it and the current article 2. It is also necessary for the drafting committee to have the appropriate conception regarding the scope of the new statute. Although much more can and should be said about issues of scope, the purpose of this subpart is to facilitate a better understanding of the options that were available to the drafting committee and to show that the choices made should not necessarily affect the influence the CISG might have with courts.

C. *Differences in Substance*

From the very beginning, it was obvious to everyone involved in the drafting of the CISG that successful delocalization of commercial law depended upon a spirit of compromise. This is quite understandable. Those participating in the project represented a variety of legal traditions, cultures, and economic systems. If the participants had insisted on retaining domestic legal concepts, it is clear that nothing would have been accomplished.⁸⁰

Consider the question of interest. Article 78 states that if a party fails to pay the price or any other "sum that is in arrears," the other party is entitled to interest on it.⁸¹ Notice that nothing is said about the formula to calculate the rate of interest. This is because the provisions on interest were the subject of great controversy and differences of opinion; hence, it was difficult to agree on a solution that would satisfy the majority. First, different national legal systems treat the entitlement to interest differently, and some even forbid the charging of interest entirely.⁸² A further difficulty arose from the fact that any reference to an external standard, such as the official discount rate or the prime rate, would not work because these rates do not exist in

80. See Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 268 (1984) ("The Convention of necessity is a compromise between the long held doctrinal tenets of the common-law system and the civil-law systems; between individualistic, capitalistic [sic] systems and collectivistic, socialistic systems; between developed, industrial societies and underdeveloped societies seeking a new international economic order.").

81. CISG, *supra* note 18, art. 78.

82. See Jelena Vilus, *Provisions Common to the Obligations of the Seller and the Buyer*, in INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 239, 252 (Petar Šarčević & Paul Volken eds., 1986). For example, the Muslim countries objected to an interest rate provision because it would be contrary to Islamic law. See *id.* Curiously, Muslim countries do permit the buyer to recover interest in cases where the seller is bound to return the price. Consequently, they did not object to article 84(1) which provides that "[i]f the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid." CISG, *supra* note 18, art. 84(1).

some countries.⁸³ Finally, there was disagreement as to whether the rate, however defined, should be one applicable in the creditor's country or in the buyer's.⁸⁴ Legislative silence was, therefore, chosen as the perfect compromise. The result is that article 78 is "a provision based, as it were, on the highest common factor."⁸⁵

Given such a background, it should not be surprising to discover that the CISG does not follow the style or arrangement of article 2. Many of the articles in the CISG are drafted differently, and many new terms are employed. The approach of the CISG to the buyer's rights on an improper delivery is a good example. Under the Code, if the seller's tender fails in any respect to conform to the contract, the buyer may either accept or reject the goods.⁸⁶ Once the goods have been accepted, the buyer can avoid an action for the price only if permitted to revoke her acceptance.⁸⁷ If the buyer has either rightfully rejected or justifiably revoked acceptance, she may then cancel the contract.⁸⁸ A key distinction between the Code and the CISG is that the latter makes "avoidance" the remedial linchpin of the buyer's right to terminate the contractual relationship of the parties.⁸⁹ The remedy of avoidance will, in turn, depend on whether the seller has committed a "fundamental breach."⁹⁰ If the seller has committed a fundamental breach, the buyer can avoid the contract. Subject to one exception, if the seller has not committed a fundamental breach, the buyer cannot avoid the contract.⁹¹ As Professor Harry Fletchner concisely

83. See B. Nicholas, *Article 78*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION, *supra* note 35, at 568, 569-70.

84. See *id.*

85. U.N. Conference on Contracts for the International Sale of Goods, 11th plen. mtg. at 226, U.N. Doc. A/CONF.97/19 (1981). During the course of the Conference's preparations, article 78 was referred to as article "73 bis." See *id.* at 486.

86. This is known as the Code's "perfect tender rule." See U.C.C. § 2-601 (1998). The perfect tender rule is, however, limited to single-delivery contracts. If the contract is an installment contract, see *id.* § 2-612(1), the buyer may reject a delivery only "if the non-conformity substantially impairs the value of that installment and cannot be cured." *Id.* § 2-612(2).

87. See *id.* §§ 2-607 to -608. Unlike the remedy of rejection, revocation of acceptance is permitted only if the nonconformity causes substantial impairment of value. See *id.* § 2-608(1). Both rightful rejection and justifiable revocation relieve the buyer of the responsibility to pay for the goods and entitle the buyer to market/contract price or cover damages. See *id.* §§ 2-711 to -713.

88. See *id.* § 2-711(1). The buyer's right to cancel is located in section 2-703(f).

89. See CISG, *supra* note 18, art. 49.

90. See *id.* art. 49(1)(a). A breach "is 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," provided this result is foreseeable. *Id.* art. 25.

91. There is one situation apart from fundamental breach that allows a buyer to avoid the contract. Under article 49, the buyer can avoid the contract if, in the case of nondelivery, the seller does not or will not deliver the goods within the additional time fixed by the buyer

explained, "For those schooled in Article 2 of the U.C.C., the Convention's use of avoidance/nonavoidance rather than acceptance/nonacceptance significantly changes the analysis of remedies. In some situations, the Convention's approach produces notably different results."⁹² For instance, suppose that the seller tenders goods with minor defects. The article 2 buyer can reject (avoid) and recover damages to compensate for the lost favorable exchange.⁹³ Moreover, if the exchange turns out to be a bad bargain, the perfect tender rule provides the buyer with an easy means of escape.⁹⁴ Because the CISG contains a single standard of fundamental breach applicable in all circumstances, avoidance (rejection) is not a remedial option.⁹⁵ Under the CISG, therefore, the exchange will go forward with damages or other remedies to compensate for the defects.

There are several other notable differences in substance between the CISG and article 2. For example, the contract formation scheme is one aspect of the CISG in which a lawyer trained in the common law and the Code is likely to find some surprises. One striking feature of the Convention's formation rules is that an acceptance of an offer is effective when it reaches the offeror and not when mailed as provided by the common-law "mailbox rule."⁹⁶ However, one important effect of the mailbox rule is retained: an offeror may not revoke an offer once the offeree has dispatched her acceptance.⁹⁷

A more appreciable disparity is that the CISG's provisions defining acceptance seem to codify the common-law "mirror-image" rule.⁹⁸ If the purported acceptance contains any additions, limitations, or other modifications of an offer, article 19(1) labels it as a rejection and a counteroffer.⁹⁹ Article 19(2) apparently softens this rule somewhat by providing that if the additional or different terms do not

in a *Nachfrist* notice under article 47. See *id.* arts. 47, 49. For discussion of the *Nachfrist* procedure, see *infra* note 286 and text accompanying notes 295-302.

92. 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, 57 (1988).

93. See U.C.C. § 2-601 (1998). This example assumes a single-delivery contract. For a discussion of installment contracts, see *supra* note 86.

94. See U.C.C. § 2-601. This statement embodies two assumptions. The first is that the seller cannot or chooses not to cure the breach under section 2-508. The second assumption is that the buyer is not acting in bad faith under section 1-203 or section 2-103(1)(b).

95. See CISG, *supra* note 18, arts. 25, 49.

96. See *id.* art. 18(2). For a discussion of the "mailbox rule," see *supra* note 57 and accompanying text.

97. See CISG, *supra* note 18, art. 16(1).

98. See *id.* art. 19. For a further discussion of this rule, see *infra* notes 146-161 and accompanying text.

99. See CISG, *supra* note 18, art. 19.

“materially alter” the terms of the offer, a contract is formed unless the offeror objects to the discrepancy.¹⁰⁰ However, when one considers the breadth of the Convention’s definition of terms that materially alter an offer, it is obvious that the CISG has adopted the mirror-image rule hook, line, and sinker.

Section 2-207 of the Code, on the other hand, approaches the matter from an entirely different direction.¹⁰¹ Section 2-207(1) radically departs from the mirror-image rule by providing that an expression of acceptance containing additional or different terms operates as an acceptance unless the acceptance is expressly made conditional on the offeror’s assent to the additional terms.¹⁰² This difference in approach is most relevant in transactions involving what has become known as the “battle of the forms.”¹⁰³

In those situations where the parties have exchanged writings containing varying terms, short of performance, there will be fewer binding contracts under the CISG than under the Code. Moreover, the Convention and the Code will probably lead to different results in the event that the parties exchange conflicting forms and subsequently perform. Assuming that the offeree’s reply contains terms that are materially different from those contained in the offer, two outcomes are possible under the Code: (1) If the reply constitutes the requisite “definite and seasonable expression of acceptance,” a contract is formed on the offeror’s terms;¹⁰⁴ or (2) If the reply is not an acceptance, the contract formed by performance will include only those terms on which the writings of the parties agree, together with any necessary Code gap fillers.¹⁰⁵ In disputes governed by the CISG, the resulting contract will always be on the terms of the party who

100. *See id.*

101. *See* U.C.C. § 2-207 (1998).

102. *See id.* Section 2-207(2) resolves the issue of which provisions are part of the final contract.

103. The official comments to UCC section 2-207 give a classic description of the battle of the forms phenomenon:

A frequent example . . . is the exchange of printed purchase order and acceptance (sometimes called “acknowledgment”) forms. Because the forms are oriented to the thinking of the respective drafting parties, the terms contained in them often do not correspond. Often the seller’s form contains terms different from or additional to those set forth in the buyer’s form. Nevertheless, the parties proceed with the transaction.

Id. § 2-207 cmt. 1. If the parties do not proceed with the transaction because one party repudiates, the issue becomes whether the exchange of forms created a contract.

104. *Id.* § 2-207(1).

105. *See id.* § 2-207(3); *see also id.* §§ 2-305 to -311 (identifying the gap fillers to be used unless the parties agree otherwise).

sends the last counteroffer.¹⁰⁶ Although the identity of that party will naturally depend on the circumstances, most often it will be the seller who acknowledges the buyer's purchase order before shipping the goods. Thus, under the CISG, because acceptance of the goods by the buyer is an acceptance of the seller's counteroffer, the buyer is bound by the provisions in the acknowledgment.¹⁰⁷ In short, the CISG resurrects the "last shot" outcome that article 2 rejects.

There are many other aspects of the CISG that are different from the Code. These differences take many forms, but most spring from a tendency to fashion compromises among legal traditions and economic regions.¹⁰⁸ This tendency is not, by itself, a problem. Compromise can be considered a problem only against some normative background that distinguishes good commercial law from bad commercial law. Those who have taken the position that article 2 should not be modeled after the CISG because the latter is substantively different must therefore distinguish objectionable from unobjectionable differences. This they have not done. There is, however, at least one legitimate reason for resisting wholesale adoption of an instrument that draws heavily on diverse traditions and backgrounds. If the CISG were suddenly to replace the Code, it would unsettle understandings and case law that have grown up around the present statutory structure and language. To the extent that continuity with the past is normatively compelling, the rejection of the CISG as the "new" article 2 is normatively warranted as well. The more difficult questions are whether courts should or will take a constructive role in the implementation of particular CISG innovations and what effect, if any, the CISG is likely to have on the future application of the Code. First, however, we must appreciate the usefulness of the concept of habit to explain why particular cases are decided in a certain way. As the next Part suggests, habit possesses strong motivational properties likely to affect judicial attitudes.

II. THE RELEVANCE OF HABIT IN SHAPING JUDICIAL OUTCOMES

The traditional legal model of judicial decision making posits that the law and the dispute determine outcomes. In this model, judges are viewed as neutral arbiters who remain unfettered by societal biases

106. See CISG, *supra* note 18, art. 19.

107. The seller will argue that by accepting the goods, the buyer engaged in "conduct . . . indicating assent to [the] offer." *Id.* art. 18(1).

108. See Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443, 452-80 (1989).

and can focus on case facts, precedent, and legislative intent when deciding cases.¹⁰⁹ In contrast, the dominant tendency of social scientists is to emphasize that the law holds little sway in shaping outcomes.¹¹⁰ The underlying premise of this extralegal model is that judges resolve disputes based on external factors, such as the judges' role orientations, attitudes, partisanship, and parochial values.¹¹¹ Yet these theoretical approaches are insufficient as complete explanations for judicial decision making. While both models of behavior have many advantages and lead to insights that the other ignores, neither one provides a complete understanding of the factors that influence judges. Perhaps most important, each model assumes that only legal or extralegal cues matter. What is needed, therefore, is a more

109. See, e.g., J. WOODFORD HOWARD, JR., *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS* 162 (1981) ("Only one [circuit] judge [surveyed] unqualifiedly endorsed the view that judges should merely interpret the law, a traditional conception of judicial duty still prominent on several state supreme courts and trial courts."); C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* 3 (1996) ("In many cases dispute resolution . . . approximates the traditional, mechanical model of judicial norm enforcement—that is, the trial judge 'finds' the law, 'fits' the law to the facts, and rules in favor of the litigant whose facts fit the law."). For a judicial expression of this view, see *United States v. Butler*, 297 U.S. 1 (1936), in which the United States Supreme Court stated:

It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. . . . When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.

Id. at 62.

110. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 1 (1993) ("As we demonstrate, the legal model serves only to cloak—to conceal—the motivations that cause the justices to decide as they do.").

111. See, e.g., DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* 72 (1976) ("[A]ll three factors—goals, rules, and situations—may affect decisions and outcomes."); ROWLAND & CARP, *supra* note 109, at vii ("[P]olitical scientists rejected the assumptions of mechanical, precedent-bound jurisprudence in favor of the heretical notion that justices' decisions could be characterized as 'votes,' and that these votes were motivated by their personal beliefs and policy preferences."); James L. Gibson, *Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model*, 72 AM. POL. SCI. REV. 911, 911 (1978) ("[T]here appears to be a consensus that attitudes and role orientations are important predictors of behavior . . ."); Michael W. Giles & Thomas G. Walker, *Judicial Policy-Making and Southern School Segregation*, 37 J. POL. 917, 919 (1975) ("The racial attitudes developed by these judges through a lifetime cannot be expected to disappear with the acquisition of judicial robes."); S. Sidney Ulmer, *The Discriminant Function and a Theoretical Context for Its Use in Estimating the Votes of Judges*, in *FRONTIERS OF JUDICIAL RESEARCH* 335, 342 (Joel B. Grossman & Joseph Tanenhaus eds., 1969) ("[A] judge, in selecting a response to a particular situation, must have some knowledge of his preferences, the alternative actions open to him, and the relationship or effect of these actions on his preferences.").

dynamic model that addresses both types of cues.¹¹² This Part does not purport to advance such a fully integrated attitude-behavior model, nor does it attempt to identify all the variables playing a role in the decision process. Other scholars are better equipped to carry out such a mission. Instead, the goal is to develop a partial explanation of judicial behavior that links case outcomes to habit and then to look for corroborating evidence of this explanation in several reported cases.

In general, early behavioral research on judicial decision making was uniconceptual in its approach. The predominant model focused almost exclusively on attitude as the key predictor of behavior.¹¹³ As originally stated, this rests on the assumption that judges, like most other decision makers in political institutions, render their decisions based upon their personal attitudes and values.¹¹⁴ Specifically, judges' attitudes dictate the substantive objectives they hope to achieve through their decisions. Thus, the notion that behavior is predicated solely on external legal stimuli is explicitly rejected. Yet, while attitude may be a partial explanation for behavior, there can be little doubt that additional factors affect the process.

We seem to know intuitively that judges do not, and cannot, simply do what they want. Without some external restraints, courts would lose their moral and political legitimacy. There must be norms of behavior that constrain the activities of judges. Several scholars have suggested that the relationship between attitudes and behavior is, therefore, modified by the concept of role orientation.¹¹⁵ Role

112. See ROWLAND & CARP, *supra* note 109, at 131-51; see also Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 334 (1992) (“[T]he most complete explanation of judicial outcomes should incorporate legal and extralegal factors. Seen in this light, the views of neither the classical legal thinkers nor the behavioralists are incorrect; but they are incomplete.”).

113. See Gibson, *supra* note 111, at 912 (“There is little question that the predominant paradigm of judicial decision making places judges’ attitudes in the center of the process. Indeed, it is not an overstatement to assert that attitudinal approaches have become the traditional nontraditional mode of judicial analysis.”).

114. See, e.g., Glendon Schubert, *Judicial Attitudes and Voting Behavior: The 1961 Term of the United States Supreme Court*, 28 LAW & CONTEMP. PROBS. 100, 134-35 (1963) (“[V]ariance in the voting behavior of the justices during the 1961 Term can be adequately accounted for by the differences in their attitudes towards the fundamental issues of civil liberty and economic liberalism.”); Joseph Tanenhaus, *The Cumulative Scaling of Judicial Decisions*, 79 HARV. L. REV. 1583, 1583 (1966) (“[V]alue structure leads to judicial attitudes, to predispositions toward deciding given types of cases in particular ways. A judge may, for example, be predisposed to support—or to deny—legal claims by labor unions, criminal defendants, racial minorities, federal regulatory agencies, or state and local authorities.”).

115. See Victor Eugene Flango et al., *The Concept of Judicial Role: A Methodological Note*, 19 AM. J. POL. SCI. 277, 280 (1975) (“Preliminary data analysis convinced us that judicial discretion was in fact composed of not one but two separate dimensions—precedent orientation and public orientation.”); James L. Gibson, *The Role*

orientation has been defined as a "psychological construct which is the combination of the [judge's] perception of the role expectations of significant others and his or her own norms and expectations of proper behavior for a judge."¹¹⁶ When role orientations are combined with attitudes, a model of behavior is created that predicts that judges will do what they prefer only if they believe that it would be consistent with what they are supposed to do.¹¹⁷

If judges' decisions are a function of their attitudes and role orientations, it is fruitful to consider the processes through which these attitudes and orientations are acquired. Although one can conceive of many sources of influence,¹¹⁸ the specific effect of law schools on judges' values cannot be ignored.¹¹⁹ The impact of a law school education on behavior can be easily demonstrated through reference to one of the most fundamental aspects of judge-based law—the practice of precedent.

Precedent is best known as *stare decisis et non quieta movere*, translated to mean "let the decision stand and do not disturb things which have been settled"¹²⁰ or "stand by the precedents and do not disturb the calm."¹²¹ It is this system of precedent that is emblematic of legal study, described as "the task of training students to discern the 'holdings' of cases and to determine whether those precedent cases have been followed, appropriately distinguished, or overruled in subsequent cases."¹²² Students are taught not only that adherence to

Concept in Judicial Research, 3 LAW & POL'Y Q. 291, 302-04 (1981); Thomas D. Unga & Larry R. Baas, *Judicial Role Perceptions: A Q-Technique Study of Ohio Judges*, 6 LAW & SOC'Y REV. 343, 343 (1972).

116. Gibson, *supra* note 111, at 917.

117. *See id.* One important dimension of role orientation concerns the criteria that judges consider to be legitimate determinants of decisions—that is, the extent to which factors other than existing case law can appropriately be considered. A judge who believes it is proper to be influenced by variables other than precedent is far more likely to be creative in her decisions (some might refer to her as an activist judge) than one who does not. *See id.* at 917-18.

118. It has been suggested, for example, that the greatest impact on the values of judges derives from career experiences. *See* C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978*, 75 AM. POL. SCI. REV. 355, 359-60 (1981).

119. *See, e.g.*, RICHARD NEELY, JUDICIAL JEOPARDY: WHEN BUSINESS COLLIDES WITH THE COURTS 64 (1986) ("Students try to please their teachers throughout their lives; therefore, the type of education that a professional class receives influences the actions of that class for a generation.").

120. John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 1 n.2 (1983) (quoting Justice Arthur Goldberg).

121. *Id.* (quoting Justice Stanley Reed).

122. Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 3, 3 (1989).

precedent increases efficiency¹²³ and predictability,¹²⁴ but that justice in fact requires that like cases be treated alike.¹²⁵ Precedent creates a reverence for the past that is almost certainly a value that influences attitude and helps define the relationship between role orientations and the legitimacy of various decision-making criteria.¹²⁶

The concept of precedent is not necessarily confined to the courtroom; it is also used in nonlegal decision making. Often we give weight to prior decisions simply because they are similar to the situation at hand.¹²⁷ In everyday explanations of behavior, this is what we call habit, especially if habit is conceptualized, as it is here, as an acquired behavioral disposition based on past conduct.¹²⁸ Judges, too, surely acquire habits of decision making influenced by an allegiance to

123. The use of precedent dispenses with the need for a judge to reinvent the law in each and every case. Justice Cardozo made this point when he stated that "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921).

124. Predictability is the most common justification for precedent. See David Lyons, *Formal Justice and Judicial Precedent*, 38 VAND. L. REV. 495, 496 (1985) ("The reason most often given for the practice of precedent is that it increases the predictability of judicial decisions."); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368 (1988) ("The most commonly heard justification for the doctrine of stare decisis rests on the need for certainty in the law."). Without predictability, people would be unable to plan their affairs—business or otherwise—with any degree of legal certainty. See Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, N.Y. ST. B.J., July 1990, at 15, 18 (noting that predictability of outcome "is especially important in cases involving property rights and commercial transactions").

125. The justice argument can be summarized as follows: "Like cases must be treated alike or else someone is being treated unfairly; therefore, decision makers must treat the parties in the instant case the same as parties in earlier cases were treated." Theodore M. Benditt, *The Rule of Precedent*, in PRECEDENT IN LAW 89, 90 (Laurence Goldstein ed., 1987).

126. See *supra* notes 115-125 and accompanying text; see also Theodore L. Becker, *A Survey Study of Hawaiian Judges: The Effect on Decisions of Judicial Role Variations*, 60 AM. POL. SCI. REV. 677, 678-79 (1966) (suggesting that judges believe that the most important variable that can permissibly influence their behavior is precedent).

127. See JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 198 (MacMillan Co. 2d ed. 1921) (1909) ("Precedent has a very wide meaning. It covers everything said or done which furnishes a rule for subsequent practice, especially in matters of form or ceremony."); Benditt, *supra* note 125, at 89 ("The idea of following precedent has a powerful hold on us, not only within law but also outside of it.").

128. In simple terms, habit denotes one's customary way of behaving. It is a "relatively consistent pattern of thought or attitudes." J.P. CHAPLIN, *DICTIONARY OF PSYCHOLOGY* 210 (1968). As early as 1890, William James proposed that habits act as motivators and maintain social structure by providing continuity to experience and behavior. In his words, "Habit is thus the enormous fly-wheel of society, its most precious conservative agent. It alone is what keeps us all within the bounds of ordinance, and saves the children of fortune from the envious uprisings of the poor." 1 WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* 121 (Dover Publications, Inc. 1950) (1890).

precedent and an emotional attachment to the legal traditions taught in law school. Karl Llewellyn put it this way:

The foundation, then, of precedent is the official analogue of what, in society at large, we know as folkways, or as institutions, and of what, in the individual, we know as habit. And the things which make for precedent in this broad sense are the same which make for habit and for institutions. It takes time and effort to solve problems. Once you have solved one it seems foolish to reopen it. Indeed, you are likely to be quite impatient with the notion of reopening it. Both inertia and convenience speak for building further on what you have already built; for incorporating the decision once made, *the solution once worked out*, into your operating technique *without reexamination* of what *earlier went into* reaching your solution. . . . Finally, it is clear that if the written records both exist and are somewhat carefully and continuously consulted, the possibility of change creeping into the practices unannounced is greatly lessened. . . . [T]he lawyer searches the records for convenient cases . . . [and] capitalizes the human drive toward repetition by finding, by making explicit, by urging, the prior cases.¹²⁹

The intellectual stubbornness brought on by habit may lead judges to reject not only optional innovations that may present themselves but may also provoke them to construe mandatory provisions as if no change had occurred. Dean Roscoe Pound provides a powerful example of the latter process in his appraisal of the Field Code of Procedure on the one-hundredth-year anniversary of its adoption by New York.¹³⁰ The Field Code, truly a historic achievement, literally rid procedural law of centuries of accumulated archaisms and abolished the distinction between actions at law and suits in equity.¹³¹ The problem with its adoption, according to Pound, was that although the law was ripe for change, the legal profession was not.¹³² The courts were simply unwilling to take a constructive role in implementing the reforms contained in Field's remarkable code, preferring, instead, to maintain historical continuity.¹³³ Some courts even went so far as to declare it beyond the reach of the legislature to

129. K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 64-65 (1951); see also ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 82 (1938) ("Tenacity of a taught legal tradition is much more significant in our legal history than the economic conditions of time and place.").

130. See Roscoe Pound, *David Dudley Field: An Appraisal*, in DAVID DUDLEY FIELD: CENTENARY ESSAYS 3, 13-14 (Alison Reppy ed., 1949).

131. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 931-39 (1987) (critiquing the merger of law and equity in the Field Code).

132. See Pound, *supra* note 130, at 13-14.

133. See *id.*

alter a scheme so fundamental as the division between law and equity.¹³⁴ Moreover, the courts were not the only saboteurs of the Field Code; the law schools, too, contributed to the maintenance of the pre-Code system by refusing to teach the new law in the spirit in which it was written.¹³⁵

The inertia of habit, however, is not forever. Eventually, when the supporting environment for performance shifts (e.g., the law changes), new behaviors develop. Today, the innovations of the Field Code are accepted as a matter of course. Unfortunately, David Dudley Field would have needed to wait an additional eighty years to see his ideas finally take hold.¹³⁶

At this point, some are likely to remain skeptical about the contention that what is being called habit influences judicial behavior. They may argue that the analysis so far presented proves too little because there are other, more conventional, explanations for judicial decisions—for instance, the possibility that the court simply misunderstood the relevant law. But there is one distinct respect in which this criticism misses the point. This Article does not argue that an explanation based on habit is always preferred, nor that habit is always causal. The suggestion is only that habit may be a factor and

134. *See id.* at 14.

135. *See id.* In this connection, consider another interesting bit of historical reflection:

Man is the creature of habit. To some extent doing away with conscious effort and deliberation permits a fuller life. On the other hand, being the slave of habit induces an indifferent acquiescence in things as they are and have been. Examine the history of the criminal code of England. Sir Samuel Romilly advocated and eventually secured the passage in the House of Commons of a bill to abolish the death penalty for stealing privately, in a shop, goods to the value of five shillings. But when this modest reform went to the House of Lords it was defeated by the united opposition of Lord Chief Justice Ellenborough and Lord Chancellor Eldon who consistently fought any change in the law, urging that the existing law was the very perfection of reason and that the criminal code could not be too severe. Ellenborough stormed and blustered and threatened, and Eldon implored and entreated and wept over the proposal to bring about "startling and dangerous innovations." Ellenborough summed up his views on the bill by saying: "There is a dangerous spirit of innovation abroad upon this subject, but against which I have ever and always shall be a steady opposer." Yes, it has truly been said that, for many, there is no pain as great and as hard to bear as the pain of a new idea.

Bernard L. Shientag, *The Human Element in Judicial and in Administrative Procedure*, in DAVID DUDLEY FIELD: CENTENARY ESSAYS, *supra* note 130, at 215, 218 (footnote omitted).

136. As Pound points out:

Much of what is now accepted as a matter of course in legal procedure could have been attained at least eighty years before the Federal Rules of 1938 if Field's Code of Civil Procedure had been developed and applied in its spirit instead of in the spirit of maintaining historical continuity.

Pound, *supra* note 130, at 14.

that paying attention to it will enhance our understanding of decision making. In order to explore this point further, let us consider some modern examples in which the close functional relationship between habit and outcome may have been obscured by the potentially misleading nature of traditional explanations.

A. *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*

The well-known case *Roto-Lith, Ltd. v. F.P. Bartlett & Co.* provides a perfect example of the force of habit that contributes to, and is inherent in, the judicial process.¹³⁷ In *Roto-Lith*, the buyer, a manufacturer of cellophane bags, mailed the seller a written order to purchase a drum of "N-132-C" emulsion, stating "End use: wet pack spinach bags."¹³⁸ The seller mailed the buyer an acknowledgment of the order three days later and shipped the goods on the next day.¹³⁹ The acknowledgment, which arrived no later than the goods, was a preprinted form. On the front, in conspicuous type, all warranties, express and implied, were disclaimed, and the sale was made "subject to the terms on the reverse side."¹⁴⁰ On the reverse side, a clause stated that the buyer assumed the risk "for results obtained from use of these goods, whether used alone or in combination with other products."¹⁴¹ Moreover, the form limited the seller's liability to "replacement of any goods that materially differ from the Seller's sample order on the basis of which the order for such goods was made."¹⁴² Finally, a clause provided that "[i]f these terms are not acceptable, Buyer must so notify Seller at once."¹⁴³ The buyer accepted and paid for the goods without objection.¹⁴⁴ When the emulsion proved to be defective and the buyer sought damages for breach of warranty, the court had to determine whether the disclaimer and the remedy limitation clauses in the seller's acknowledgment form relieved the seller of liability.¹⁴⁵

Consider what would have been the common-law response to the *Roto-Lith* facts and the seemingly inevitable tension between "freedom from contract" and the modern business practice of using standard forms. According to traditional contract doctrine, an acceptance must

137. 297 F.2d 497 (1st Cir. 1962), *overruled by* *Ionics, Inc. v. Elmwood Sensors, Inc.*, 100 F.3d 184 (1st Cir. 1997).

138. *Id.* at 498 (internal quotations omitted).

139. *See id.*

140. *Id.* (internal quotations omitted).

141. *Id.* at 499 (internal quotations omitted).

142. *Id.* (internal quotations omitted).

143. *Id.* (internal quotations omitted) (emphasis omitted).

144. *See id.*

145. *See id.* at 498.

be on the terms proposed by the offeror without the slightest variation. If there is a variance, no matter how minute, the purported acceptance acts as a counteroffer and thereby a rejection of the offer.¹⁴⁶ Thus, application of the "ribbon-matching" or "mirror-image" rule in *Roto-Lith* would lead to the conclusion that because of the discrepancies in the buyer's order and the seller's acknowledgment, there was no contract when those forms were exchanged. But what about the fact that the buyer paid for and used the goods?

A common-law corollary of the mirror-image rule is a maxim colorfully called "the last-shot principle."¹⁴⁷ This principle is premised on the simple notion that once the parties have performed, there is a contract, and since each form subsequent to the first is a counteroffer, the resulting contract must be on the terms of the party who sends the last counteroffer, which is then accepted by the other party's performance.¹⁴⁸ Therefore, the controlling terms are those contained in the last shot fired.¹⁴⁹ In *Roto-Lith*, because the seller had the good fortune to fire last, the terms in its acknowledgment would define the contract.¹⁵⁰ Thus, the common-law result would be that seller breached no warranty and, in any event, limited its liability to replacement of the goods.

However, *Roto-Lith* was not a common-law case governed by common-law rules.¹⁵¹ Rather, for the first time, the court was given the opportunity to apply section 2-207 of the Code to the "battle of the

146. See RICHARD E. SPEIDEL ET AL., SALES AND SECURED TRANSACTIONS 508 (5th ed. 1993) ("Every student knows of the 'mirror-image' rule of general contract law: An 'acceptance' which varies the terms of an offer is not an acceptance at all, but a counter-offer."); see also *Dickey v. Hurd*, 33 F.2d 415, 418-19 (1st Cir. 1929) (holding that the language of an acceptance must be "unequivocal, unconditional, and without variance"); *Langellier v. Schaefer*, 31 N.W. 690, 691 (Minn. 1887) (holding that an acceptance is vitiated by "[any] qualification of departure from" the terms of an offer); *Poel v. Brunswick-Balke-Collender Co.*, 110 N.E. 619, 621-22 (N.Y. 1915) (holding that an acceptance must not vary from the offered terms); RESTATEMENT (FIRST) OF CONTRACTS § 60 (1932) ("A reply to an offer, though purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance but is a counter-offer."); K.N. Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance*, I, 48 YALE L.J. 1, 30 (1938).

147. At least one writer has attributed this term to Professor William Hawkland. See Frederick D. Lipman, *On Winning the Battle of the Forms: An Analysis of Section 2-207 of the Uniform Commercial Code*, 24 BUS. LAW. 789, 792-93 (1969).

148. See Paul Barron & Thomas W. Dunfee, *Two Decades of 2-207: Review, Reflection and Revision*, 24 CLEV. ST. L. REV. 171, 176-77 (1975); Daniel A. Levin & Ellen Blumberg Rubert, *Beyond U.C.C. Section 2-207: Should Professor Murray's Proposed Revision Be Adopted?*, 11 J.L. & COM. 175, 177-78 (1992).

149. See Barron & Dunfee, *supra* note 148, at 176-77.

150. See *Roth-Lith*, 297 F.2d at 498-99.

151. See *id.* at 499.

forms."¹⁵² The drafters intended this section to alter substantially the common-law mirror-image rule by providing in subsection (1) that an expression of acceptance creates a binding contract, even though it contains additional or different terms, unless the acceptance is coupled with language making it conditional upon the offeror's assent to the new terms.¹⁵³ If the offeree does not use such conditional language, the new terms are to be treated as proposals for additions to the contract already created.¹⁵⁴ Between "merchants," such terms become part of the contract unless, inter alia, they materially alter it.¹⁵⁵

The *Roto-Lith* court was unwilling to countenance such a fundamental change from common-law doctrine:

Perhaps it would be wiser in all cases for an offeree to say in so many words, "I will not accept your offer until you assent to the following: * * *" But businessmen cannot be expected to act by rubric. It would be unrealistic to suppose that when an offeree replies setting out conditions that would be burdensome only to the offeror he intended to make an unconditional acceptance of the original offer, leaving it simply to the offeror's good nature whether he would assume the additional restrictions. To give the statute a practical construction we must hold that a response which states a condition materially altering the obligation solely to the disadvantage of the offeror is an "acceptance * * * expressly * * * conditional on assent to the additional * * * terms."¹⁵⁶

This was the court's first misstep. Totally ignored was the treatment of material additions in subsection (2).¹⁵⁷ If the addition of a material term in the offeree's response automatically creates a counteroffer, then why does subsection (2) characterize it as a "proposal[] for addition to the contract?"¹⁵⁸ Quite clearly, a proposal for addition to the contract is a far different thing than a counteroffer. By misconstruing the Code in this manner, the court effectively applied the mirror-image rule.

The court's second misstep occurred when it brought back to life the last-shot doctrine and held that the buyer became bound by the terms in the seller's acknowledgment when it accepted the goods with

152. *See id.* The First Circuit applied Massachusetts law, and the Code in that state was enacted in 1958, just four years before the case was decided. *See id.*

153. *See* Barron & Dunfee, *supra* note 148, at 176-79.

154. *See* U.C.C. § 2-207(2) (1998).

155. *See* Barron & Dunfee, *supra* note 148, at 181-83 n.32.

156. *Roto-Lith*, 297 F.2d at 500.

157. *See* U.C.C. § 2-207(2).

158. *Id.*; *see also* *Roto-Lith*, 297 F.2d at 499 (quoting section 2-207).

knowledge of those terms.¹⁵⁹ This time the court failed to consider section 2-207(3), which the drafters added primarily to cover the situation where the initial exchange of forms has not resulted in a contract, but the parties perform as if they had a contract.¹⁶⁰ In such cases, the terms of the contract "consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this [Code]."¹⁶¹ Thus, subsection (3) avoids the unfair imposition of the last-shot rule. If it had been properly applied in *Roto-Lith*, the seller's disclaimer and remedy limitations clauses would not have been part of the contract.

By now, courts¹⁶² and commentators¹⁶³ alike acknowledge that the *Roto-Lith* court frustrated the purpose of section 2-207 and

159. See *Roto-Lith*, 297 F.2d at 500.

160. See William D. Hawkland, *In Re Articles 1, 2 and 6*, 28 TEMP. L.Q. 512, 525 (1955).

Amended subsection [(3)] continues a rule of basic contract law which makes enforceable "implied" contracts formed by the conduct of the parties. While the subsection is undoubtedly redundant, it was included by the draftsmen to make it clear that subsequent performance by the parties can save a contract, even though initially no binding agreement had been formed because of the conflict of forms.

Id.

161. U.C.C. § 2-207(3).

162. See, e.g., *C. Itoh & Co. (America) v. Jordan Int'l Co.*, 552 F.2d 1228, 1235 n.5 (7th Cir. 1977) (noting that *Roto-Lith* has been criticized by commentators and not followed by courts); *Alloy Computer Prods., Inc. v. Northern Telecom, Inc.*, 683 F. Supp. 12, 14-15 (D. Mass. 1988) (following *Roto-Lith* notwithstanding the argument that "*Roto-Lith* has been subjected to academic and judicial criticism, because it reverses the outcome that the plain language of § 2-207 would lead parties to expect"); *Leonard Pevar Co. v. Evans Prods. Co.*, 524 F. Supp. 546, 551 (D. Del. 1981) ("*Roto-Lith* . . . does not reflect the underlying principles of the Code."); *Ebasco Servs., Inc. v. Pennsylvania Power & Light Co.*, 402 F. Supp. 421, 437 (E.D. Pa. 1975) ("*Roto-Lith* . . . has not been treated kindly by the cases or the commentators."); *Uniroyal, Inc., v. Chambers Gasket & Mfg. Co.*, 380 N.E.2d 571, 578 (Ind. Ct. App. 1978) (stating that *Roto-Lith* "revives the 'last-shot' technique" and "subvert[s] the very purpose of § 2-207").

163. In the first edition of their well-known casebook, Professors James White and Robert Summers used the phrase "infamous case" to describe *Roto-Lith*. See JAMES J. WHITE & ROBERT S. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 26 (1972); see also William B. Davenport, *How to Handle Sales of Goods: The Problem of Conflicting Purchase Orders and Acceptances and New Concepts in Contract Law*, 19 BUS. LAW. 75, 85-86, 86 n.30 (1963) ("In the course of its opinion the court remarked with respect to § 2-207, 'The statute is not too happily drafted.' The draftsmen of the Code could, with equal propriety, say of *Roto-Lith*, 'The opinion is not too happily written.'" (citation omitted)). Nor did *Roto-Lith* fare better in the plethora of student notes it generated. See, e.g., Note, *Nonconforming Acceptances Under Section 2-207 of the Uniform Commercial Code: An End to the Battle of the Forms*, 30 U. CHI. L. REV. 540 (1963); Recent Case, 111 U. PA. L. REV. 132 (1962); Recent Case, 76 HARV. L. REV. 1481 (1963). But see Note, *Uniform Commercial Code: Variation Between Offer and Acceptance Under Section 2-207*, 1962 DUKE L.J. 613, 617 (characterizing *Roto-Lith* as "an equitable recognition of reasonable commercial expectations").

produced one of the most egregious misinterpretations of the Code to date. Surely the critics are right that section 2-207 is a "miserable, bungled, patched-up job," and "arguably the greatest statutory mess of all time."¹⁶⁴ But such a view certainly cannot excuse the court's error, nor is it a sufficient explanation of why it occurred. According to the account of judicial decision making advanced here, the court's application of the statute cannot be so easily disentangled from the judges' background characteristics, including their preferences and attitudes.

Recall that *Roto-Lith* was decided in 1962. Each judge on the panel received his legal education before the Code was enacted, and each was appointed to the bench when the mirror-image rule was being applied by courts "with a rigor worthy of a better cause."¹⁶⁵ Presumably, here is a case where the longtime habit of taught law resulted in an intellectual attitude toward the issues that clouded the judges' reading of the new Code and provided an alternative set of rules for the court to apply. Only after thirty-five years of criticism and a revision of the official comments to section 2-207¹⁶⁶ did the First Circuit finally admit its mistake in *Roto-Lith*.¹⁶⁷ This time the panel consisted of three judges for whom experience and learning had led to a habit of taught law that was decidedly different.

164. Letter from Grant Gilmore to Robert S. Summers (Sept. 10, 1980), in SALES AND SECURED TRANSACTIONS, *supra* note 146, at 513, 514.

165. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 2-21, at 102 (3d ed. 1987). The judges who participated in *Roto-Lith* were Bailey Aldrich (LL.B., 1932), John Hartigan (LL.B., 1913), and Peter Woodbury (LL.B., 1927).

166. The official comments to section 2-207 were revised in 1966, evidently in response to the *Roto-Lith* case. In particular, a new comment 7 was added, which reads as follows:

In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made. In such cases, where the writings of the parties do not establish a contract, it is not necessary to determine which act or document constituted the offer and which the acceptance. The only question is what terms are included in the contract, and subsection (3) furnishes the governing rule.

U.C.C. § 2-207 cmt. 7 (1998) (citation omitted).

167. *See Ionics, Inc. v. Elmwood Sensors, Inc.*, 110 F.3d 184, 188-90 (1st Cir. 1997). The court clearly rejected the doctrine that the buyer's acceptance of the goods constitutes an acceptance of the seller's terms, i.e., the last-shot rule. Not explicitly overruled, however, was the holding in *Roto-Lith* that a response materially altering the offer is expressly conditional under section 2-207(1). Presumably, it was not necessary for the court to address this issue because the seller's form in *Ionics*, in fine print, stated that the seller was willing to sell, "BUT ONLY UPON THE TERMS AND CONDITIONS SET FORTH HEREIN AND ON THE REVERSE SIDE HEREOF AS A COUNTEROFFER." *Id.* at 185 (internal quotations omitted).

[I]n both the basic course on Contracts and advanced courses on Sales, teachers and casebook authors have routinely denounced . . . *Roto-Lith, Ltd. v. F.P. Bartlett & Co.* for the past thirty years. Indeed, many first-year students have realized that the *Roto-Lith* court not only distorted the text of section 2-207, but also subverted the purposes of the Code by applying the mirror image and last shot rules to an exchange of form documents. An entire generation of lawyers and judges has thus learned that neither mirror image nor last shot belongs in Article 2.¹⁶⁸

This discussion suggests that when intellectual habit no longer corresponds to features of the legal environment, the habit will change. However, the story of *Roto-Lith* proves that we may have to wait for the next generation of lawyers and judges before this happens.

B. *International Harvester Credit Corp. v. American National Bank*

A second example of the influence of the intellectual habit of taught law on judicial decision making is *International Harvester Credit Corp. v. American National Bank*, in which the Florida Supreme Court addressed for the first time the rule of priority contained in UCC section 9-312(4).¹⁶⁹ On April 8, 1969, the borrower in that case, Machek Farms, Inc., executed an installment note and security agreement in favor of American National Bank.¹⁷⁰ The security interest encompassed equipment presently owned by Machek and also equipment that might be acquired in the future.¹⁷¹ On April 25, 1969, Machek purchased, on credit, two items of farm equipment from Florida Truck and Tractor Company.¹⁷² Florida Truck retained a security interest in these items, but no financing statement was ever filed.¹⁷³ On August 8, 1969, seven additional items of equipment were purchased from Florida Truck on similar terms.¹⁷⁴ Florida Truck subsequently assigned the August 8 contract to International Harvester Corporation.¹⁷⁵ On September 3, 1969, more than ten days after

168. Alexander M. Meiklejohn, *Castles in the Air: Blanket Assent and the Revision of Article 2*, 51 WASH. & LEE L. REV. 599, 658 (1994) (footnotes omitted).

169. 296 So. 2d 32 (Fla. 1974). Section 9-312(4) provides: "A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral or its proceeds if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within ten days thereafter." U.C.C. § 9-312(4) (1998).

170. *See American Nat'l Bank v. International Harvester Credit Corp.*, 269 So. 2d 726, 727 (Fla. Dist. Ct. App. 1972), *rev'd*, 296 So. 2d 32 (Fla. 1974).

171. *See id.*

172. *See id.*

173. *See id.*

174. *See id.*

175. *See id.*

Machek received possession of the equipment, International Harvester filed a financing statement.¹⁷⁶ After Machek defaulted on both contracts, it voluntarily returned all of the equipment purchased to Florida Truck.¹⁷⁷ On December 7, 1970, American National Bank instituted a replevin suit seeking possession of the farm equipment on the basis of its earlier-in-time security agreement and financing statement.¹⁷⁸

The question thus became: Does a previously perfected security interest in after-acquired property take priority over the interest held by a purchase money secured party who failed to file within the ten-day grace period of section 9-312(4)?¹⁷⁹ It is doubtful that anyone schooled in article 9 would give the wrong answer to such a simple, straightforward question. Every law student who takes a course in article 9 is taught that if the seller or lender advancing the funds for the purchase of goods fails to file within ten days after the debtor receives the goods, the special purchase money priority is lost and, therefore, the relative priority of the claimants is to be decided according to the rules of section 9-312(5).¹⁸⁰ This will usually mean that the secured party who files first will have priority. Since American National Bank filed to perfect its security interest in Machek's after-acquired

176. *See id.*

177. *See id.*

178. *See id.*

179. *See* U.C.C. § 9-312(4) (1998). The term "purchase money security interest" is defined in section 9-107, which provides that a security interest is purchase money to the extent that it is:

- (a) taken or retained by the seller of the collateral to secure all or part of its price;
- or (b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

Id. § 9-107.

180. *See, e.g.*, 2 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 29-5, at 799 (1965) ("The one condition for priority under § 9-312(4) is that the purchase-money interest be perfected 'at the time the debtor receives possession of the collateral or within ten days thereafter.'" (quoting U.C.C. § 9-312(4))); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 24-5, at 868 (4th ed. 1995) ("[W]hat rule governs priority if the purchase money lender fails to comply with subsections (3) or (4) . . . ? [That] case is clearly governed by subsection (5) . . ."). At the time of the *International Harvester* decision, section 9-312(5) of the Code provided in pertinent part:

- (5) In all cases not governed by the rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4) of this section), priority between conflicting security interests in the same collateral shall be determined . . . in the order of filing if both are perfected by filing

U.C.C. § 9-312(5) (1962). This subsection was revised as part of the 1972 official revision of article 9, but not in a way that would have changed the court's analysis or the proper resolution of this case.

equipment long before International Harvester filed, American National Bank should have prevailed.¹⁸¹

While the result might seem obvious to today's law student, the Florida Supreme Court, in a "masterpiece of statutory destruction,"¹⁸² held otherwise. The court began its opinion by recognizing that a security interest in after-acquired property has priority under section 9-312(5) unless the purchase money security interest is filed within the requisite ten-day period.¹⁸³ So far, so good. However, the court completely negated this priority by concluding that it is limited to the debtor's equity, if any, in the property.¹⁸⁴ In most cases, this would be tantamount to having no interest at all. In reaching such an "inexplicable result,"¹⁸⁵ the court relied on unspecified constitutional and equitable principles that would be violated by granting a "windfall" to the secured party with the interest in after-acquired property.¹⁸⁶ Moreover, the court was influenced by the concept of title that is expressed as follows: "There really are no conflicting security interests in this situation. That security interest retained by the subsequent seller in the after-acquired property never passes to the buyer-debtor and thus never becomes subject to the earlier creditor's claim of security interest in such after-acquired property."¹⁸⁷ The court's holding subverts the drafters' clear intent to make the location of title irrelevant for article 9 priority purposes.¹⁸⁸

181. Every other court that had decided this issue would have awarded priority to American National Bank. See, e.g., *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964); *National Cash Register Co. v. Firestone Co.*, 191 N.E.2d 471 (Mass. 1963); *James Talcott, Inc. v. Franklin Nat'l Bank*, 194 N.W.2d 775 (Minn. 1972); *American Nat'l Bank & Trust Co. v. National Cash Register Co.*, 473 P.2d 234 (Okla. 1970); *Wilson v. Burrows*, 497 P.2d 240 (Utah 1972); *Burlington Nat'l Bank v. Strauss*, 184 N.W.2d 122 (Wis. 1971).

182. See Barkley Clark, *Secured Transactions*, 42 BUS. LAW. 1333, 1377 (1987).

183. See *International Harvester Credit Corp. v. American Nat'l Bank*, 296 So. 2d 32, 33-34 (Fla. 1974).

184. See *id.* Justice Carlton, in a lengthy dissent, makes the point that the majority actually awarded priority to the purchase money creditor:

When the property is sold to satisfy the debts, the purchase money loan is paid off first; anything left over is the debtor's equity, and this goes to the owner of the security interest in after-acquired property. What would have happened if the owner of the purchase money security interest had filed it within ten days and received an *absolute* priority? *The result would be exactly the same!*

Id. at 44 (Carlton, J., dissenting).

185. See RAY D. HENSON, *HANDBOOK ON SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* § 5-3, at 129 n.36 (2d ed. 1979).

186. See *International Harvester*, 296 So. 2d at 34-35.

187. *Id.* at 34.

188. See U.C.C. § 9-202 (1998) ("Each provision of this Article with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor."); see also *id.* § 1-201(37) ("The retention or reservation of title by a seller of goods

Can the court's reasoning be defended? No, but it can be explained. As the discussion below shows, the opinion has its roots in pre-Code law when the purchase money interest was even more favored by courts and legislatures than it is today. The result of *International Harvester* was to expand the purchase money priority significantly, in effect, restoring it to its pre-Code vigor.

As early as 1631, in *Nash v. Preston*, the English courts adopted the basic proposition that a purchase money lien is something special and should prevail over antecedent claims against the debtor or his property.¹⁸⁹ At that time, however, the priority of the lien was subject to significant limitations. Initially, its recognition was restricted to the field of real property, and it was used only to protect the purchase money creditor against such competing claimants as judgment creditors and those who asserted claims of dower, courtesy, and community property.¹⁹⁰ To explain this special priority, courts used the doctrine of transitory or instantaneous seisin: "The idea is that title shot into the grantee and out of him again into the purchase money mortgagee so fleetingly—*quasi uno flatu*, in one breath, as it were—that no other interest had time to fasten itself to it."¹⁹¹

Rationalized in this way, it was unclear whether a lender who had merely provided the debtor with the necessary funds to make the purchase was also entitled to claim purchase money status. Other issues, such as the priority of the purchase money security interest over a creditor with an interest in after-acquired property, were also left unexplored. Thus, as American courts began to develop an indigenous law of security interests in personal property security, they had a modest and somewhat incomplete background against which to build.¹⁹²

With few exceptions, there was no need for American courts in the early part of the nineteenth century to decide the type of issue that confronted the court in *International Harvester*. Courts were not concerned with this particular priority problem because the interest in after-acquired property was long considered to be "merely equitable" until the creditor was able to transform it into a legal interest by taking

notwithstanding shipment or delivery to the buyer (Section 2-401) is limited in effect to a reservation of a 'security interest.'"); *id.* § 2-401(1) ("Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest.").

189. 79 Eng. Rep. 767 (K.B. 1631).

190. See 2 GILMORE, *supra* note 180, § 28.1, at 743-48. The historical discussion in the text relies in large measure on Gilmore's classic treatise.

191. GEORGE E. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES 557-58 (1951).

192. See 2 GILMORE, *supra* note 180, § 28.1, at 743-48.

possession of the property or by filing a supplemental mortgage.¹⁹³ While the after-acquired property interest remained equitable, the priority of the purchase money lien was never questioned. It was not until the United States Supreme Court decided a series of railroad finance cases that the legal environment began to change.

The first significant case was *Pennock v. Coe*.¹⁹⁴ Responding to the economic realities of the time and the special needs of railroad finance, the Supreme Court approved the idea that railroad mortgages should include after-acquired property.¹⁹⁵ It was satisfied "that the mortgage attached to the future acquisitions, as described in it, from the time they came into existence" and thus had a "superior equity" over the claims of judgment creditors.¹⁹⁶ This decision encouraged state courts to extend recognition to after-acquired property interests, and even more venturesome state legislatures enacted statutes validating after-acquired property clauses in railroad and public utility mortgages.¹⁹⁷ Finally, the time was ripe for a contest between the purchase money lien and the prior interest in after-acquired property.

The Supreme Court was given the opportunity to resolve this issue in *United States v. New Orleans Railroad*.¹⁹⁸ In this 1870 case, two locomotives and ten cars (rolling stock) were subject to both unrecorded security interests in the form of purchase money bonds and the terms of an earlier recorded mortgage containing an after-acquired property clause.¹⁹⁹ Justice Bradley wrote:

The appellants contend, in the next place, that the decision upon the facts was erroneous; that the mortgages, being prior in date to the bond given for the purchase-money of these locomotives and cars, and being expressly made to include after-acquired property, attached to the property as soon as it was purchased, and displaced any junior lien. This, we apprehend, is an erroneous view of the doctrine by which after-acquired property is made to serve the uses of a mortgage. That

193. See *id.* § 28.1, at 746; see also *Metropolitan Trust Co. v. R.R. Equip. Co.*, 108 F. 913 (6th Cir. 1901) (holding that title remained in the vendor until the purchase money lien was paid fully, and that a mortgagee's interest was merely equitable); *Southern Sur. Co. v. Peoples State Bank*, 163 N.E. 659 (Ill. App. Ct. 1928) (holding that the validity of a lien depends on the mortgagee's taking possession of the goods).

194. 64 U.S. (23 How.) 117 (1860).

195. See *id.* at 130. The Court observed that "[t]here are many cases in this country confirming this doctrine, and which have led to the practice extensively of giving this sort of security, especially in railroad and other similar great and important enterprises of the day." *Id.*

196. *Id.* at 130-31.

197. See 2 GILMORE, *supra* note 180, § 28.1, at 748.

198. 79 U.S. (12 Wall.) 362 (1870). Gilmore refers to this case as a "monument of our jurisprudence." See 2 GILMORE, *supra* note 180, § 28.1, at 745.

199. See *New Orleans R.R.*, 79 U.S. (12 Wall.) at 364-65.

doctrine is intended to subserve the purposes of justice, and not injustice. Such an application of it as is sought by the appellants would often result in gross injustice. A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires; and if he purchase[s] property and give[s] a mortgage for the purchase-money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage, or judgment, or recognizance, can displace such mortgage for purchase-money. And in such cases a failure to register the mortgage for purchase-money makes no difference. It does not come within the reason of the registry laws. These laws are intended for the protection of subsequent, not prior, purchasers and creditors.²⁰⁰

If all of this sounds familiar, it should. Justice Bradley's language captures perfectly the Florida Supreme Court's reasoning in *International Harvester*.

After the *New Orleans Railroad* case, the breadth of the purchase money priority continued to grow, spreading from railroad rolling stock to other forms of property.²⁰¹ The priority was not dependent upon whether the purchase money creditor was a vendor who had retained title to the property under a conditional sale arrangement, or was a lender who had financed the purchase.²⁰² Nor did it matter whether the purchase money creditor had properly filed the agreement or even whether the transaction was valid against third parties under state law.²⁰³ The purchase money priority lien did, indeed, reign supreme.

200. *Id.*

201. See 2 GILMORE, *supra* note 180, § 28.3, at 753.

202. See *id.* § 28.2, at 749.

203. See *id.* § 28.2, at 748-49; see also *Holt v. Henley*, 232 U.S. 637 (1914) (providing relief to a purchase money creditor who failed to register); *Myer v. Western Car Co.*, 102 U.S. 1 (1880) (deciding in favor of a purchase money creditor despite his failure to register); *Fosdick v. Schall*, 99 U.S. 235 (1879) (holding that a vendor's failure to register does not defeat the priority of his lien because a mortgagee can take only the interest in property that a mortgagor acquired); *United States Fidelity & Guar. Co. v. G.W. Parsons Co.*, 235 F. 114 (8th Cir. 1916) (providing relief to a purchase money creditor despite the fact that the failure to file made the lien invalid as to third parties under state law); *Manhattan Trust Co. v. Sioux City Cable Ry.*, 76 F. 658 (N.D. Iowa 1896) (holding that the vendor retained property despite its failure to file in accordance with state statute). In instances where the after-acquired property lienor could demonstrate that it actually advanced funds in reliance upon the appearance of the debtor's unencumbered interest in the purchase money property, the result was sometimes otherwise. See, e.g., *Spencer v. Staines*, 291 N.W. 50 (Mich. 1940) (holding

The foregoing history of the purchase money lien was not lost on the drafters of article 9. While the pre-Code bias in favor of purchase money liens is continued, the drafters make clear in the official comments to section 9-312 (if the black letter language of the section were not clear enough) that the purchase money creditor must now take certain perfection steps if she wishes to escape from the basic first-in-time priority rule.²⁰⁴ Notwithstanding a statute that modernizes personal property security law and achieves a sensible balance of interests, the influence of pre-Code law was seemingly too strong for the Florida court to overcome. It was not until the legislature eventually stepped in and amended section 9-312 that the intellectual habit of taught law was finally broken.²⁰⁵

C. Diefenbach v. Gorney

The discussion in this Part has already indicated that the idea of title was not so easily dislodged from the realm of article 9, notwithstanding the drafters' pronouncement in section 9-202 that theories of title retention were not to interfere with the Code's explicit allocation of rights, obligations, and remedies. Another part of the Code in which the drafters sought to virtually abolish the concept of "title" or "property" is article 2.²⁰⁶ In pre-Code days, the concept served as a jack-of-all-trades in sales law. One only had to decide who had title, and then the answers would neatly follow to such diverse questions as where the risk of loss lay, whether the seller could maintain an action for the price, whether the buyer could replevy the goods, and whether the seller's or buyer's creditors could levy on the goods.²⁰⁷ But, for Karl Llewellyn, the neatness of such a singularity of issue was not worth the price:

that a statute requiring filing was intended for the protection of creditors during the period before filing); *Mississippi Valley Trust Co., v. Cosmopolitan Club, Inc.*, 162 A. 396 (N.J. Ch. 1932) (holding that a mortgagee who advanced large sums while unaware of an unfiled lien of purchase money creditor was protected).

204. See U.C.C. § 9-312 cmt. 4 (1998) ("Note that subsection (5) applies to cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4).").

205. In 1978, the Florida Legislature amended section 9-312(4) by adding the following sentence: "Failure to so perfect shall cause the priority of said purchase money security interest to be determined under subsection (5)." See 1978 Fla. Laws ch. 78-222 (codified as amended at FLA. STAT. ch. 679.312 (West 1990 & Supp. 1999)). However, it was not until 1986 that the Florida Supreme Court finally put *International Harvester* to rest in *ITT Industrial Credit Co. v. Regan*, 487 So. 2d 1047 (Fla. 1986).

206. See, e.g., U.C.C. §§ 2-102, 2-401 cmt. 1 (1998).

207. See 1 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION FOR 1955: STUDY OF THE UNIFORM COMMERCIAL CODE 445 (1955) [hereinafter 1955 NEW YORK COMMISSION REPORT]; see also K.N. Llewellyn, *Through Title to Contract and a Bit Beyond*,

The quarrel thus is, first, with the use of Title for purposes of decision as if the *location* of Title were determinable with certainty; and second, with the insistence on reaching for a single lump to solve all or most of the problems between seller and buyer—and even in regard to third parties.²⁰⁸

Thus, when the drafting of the Code began, Llewellyn was convinced that the time had come to scrap title as a means to resolve sales controversies. The unpredictability of application²⁰⁹ and emptiness of rational content²¹⁰ of title led Llewellyn to fear the effects of enshrining the prominent role of title in the Code. As he saw it, elimination of the doctrine was “one of the great clarifications that has been offered to the law of these United States over many years.”²¹¹ Making the most of their opportunity, Llewellyn and his crew of drafters made the bold move of relegating title to backseat status in article 2.²¹² In its place are specific rules premised on considerations peculiar to the problem at hand.²¹³ Gone is the one-issue-fits-all approach of pre-Code law.

But the drafters did not completely ignore the concept of title. Section 2-401, for example, provides rules for determining who has title, if that matters.²¹⁴ The preamble to the section indicates the limited relevance of the section's rules.²¹⁵ The rules should be

15 N.Y.U. L.Q. REV. 159, 169 (1938) (calling the concept of title in the sales context “an alien lump, undigested”).

208. Llewellyn, *supra* note 207, at 166.

209. Llewellyn explained: “Nobody ever saw a chattel’s Title. Its location in Sales cases is not discovered, but created, often *ad hoc*.” *Id.* at 165.

210. Referring to the concept of title, Llewellyn fancifully wrote, “when, in addition, ‘the property’ bounces around from party to party according to the issue, it begins to look as if ‘the property in the goods,’ as an issue-determiner, were in the mercantile cases a farmer far from the dell, and none too well adjusted to the new environment.” K.N. Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725, 733 (1939).

211. 1954 NEW YORK COMMITTEE REPORT, *supra* note 31, at 160.

212. The unimportance of the location of title is a theme the drafters thought worthy of repetition. See, e.g., U.C.C. §§ 2-401 cmt. 1, 2-505 cmt. 1, 2-706 cmts. 3, 11 (1998). Although most members of the academic community were pleased with the Code’s reformation of existing law, see, e.g., Arthur Linton Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?*, 59 YALE L.J. 821, 824-27 (1950); Elvin R. Latty, *Sales and Title and the Proposed Code*, 16 LAW & CONTEMP. PROBS. 3, 3-8 (1951), there were those who were not. See, e.g., Samuel Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 561-72, 588 (1950).

213. For example, the Code prescribes a separate set of rules on risk of loss, see U.C.C. §§ 2-509 to -510 (1998), the buyer’s right to replevin, see *id.* § 2-716, and the seller’s right to recover the purchase price, see *id.* § 2-709.

214. See *id.* § 2-401.

215. See *id.*

consulted only if a Code “provision refers to such title”²¹⁶ or when “situations are not covered by the other provisions of this Article and matters concerning title become material.”²¹⁷ The reference in the official comment to the class of relevant title situations serves only to remind one that title will no longer be used to solve *sales* problems. It still may be necessary, however, to the application of various regulatory statutes.²¹⁸

It is surprising, but true, that notwithstanding Llewellyn’s celebrated effort to demolish the importance of title by showing its tendency toward vacuity and by drafting rules to decide sales controversies in terms of objective facts, not all courts were immediately able to absorb the changes. Perhaps the area in which the pre-Code preoccupation with title lingered the longest was risk of loss. After all, when those who sat on the bench in the early days of the Code received their legal training, the concept of title was, and for generations had been, the vehicle used to allocate risk.²¹⁹ For some, the fact that article 2 abandoned this approach just did not seem to matter.

For example, the court in *Diefenbach v. Gorney* was not merely influenced by pre-Code law but actually decided the case on the basis of that law, notwithstanding the Code.²²⁰ In *Diefenbach*, the seller was a farmer who sold hay at auction with terms announced as “Cash Before Removal.”²²¹ The buyer was the high bidder, but as it turned out, he was short on cash.²²² With only \$500 in his pocket at the time,

216. *Id.* Several Code sections, typically of little importance, do contain a reference to title. *See id.* § 2-312 (warranty of title); *id.* §§ 2-326(3), 2-327(1) (incidents of sale or return); *id.* § 2-501(2) (seller’s insurable interest in goods); *id.* § 2-722 (cause of action for injury to goods). In addition, one important provision, section 2-403(1), pertaining to security of purchase and good faith purchase rules, also references title.

217. *Id.* § 2-401.

218. The comments to section 2-401 provide:

This section, however, in no way intends to indicate which line of interpretation should be followed in cases where the applicability of “public” regulation depends upon a “sale” or upon location of “title” without further definition. . . . It is therefore necessary to state what a “sale” is and when title passes under this Article in case the courts deem any public regulation to incorporate the defined term of the “private” law.

Id. cmt. 1; *see, e.g.*, *State v. Delta Air Lines, Inc.*, 356 So. 2d 1205, 1207 (Ala. Civ. App. 1978) (using section 2-401 to decide a sales tax issue); *Elliot v. State*, 254 S.E.2d 900, 901 (Ga. Ct. App. 1979) (using section 2-401 to decide a criminal law issue).

219. For a discussion of pre-Code risk of loss rules, *see infra* text accompanying notes 228-233.

220. 234 N.E.2d 813, 814 (Ill. App. Ct. 1968).

221. *See id.*

222. *See id.*

he was permitted to remove only \$500 worth of hay.²²³ Some months later, when the buyer returned to the seller's farm to pay for and take possession of the remainder of the hay, he discovered that it was gone.²²⁴ The seller, who was no longer living on the farm, had no explanation for the hay's mysterious disappearance.²²⁵ Notwithstanding his inability to deliver the hay, the seller sued and received a judgment for the balance of the purchase price.²²⁶ Although one could make the argument that this was a correct result under the Code, it is not an exaggeration to say that, today, no one with even the slightest exposure to article 2 would suggest that the court's reasoning was correct. In a nutshell, the court's justification for its decision in favor of the seller was as follows: "At a public auction, as soon as the property is 'knocked down' to the bidder, the title to the property passes to the bidder, subject however, to a lien on the property in favor of the seller for the amount of the bid."²²⁷

Be that as it may, the court's reasoning rested on a presumption of continuity with pre-Code law first announced in 1827 by the King's Bench in the venerable case of *Tarling v. Baxter*.²²⁸ Indeed, the factual and analytical similarities between *Tarling* and *Diefenbach* are startling. *Tarling*, too, involved the sale of hay which was lost (it burned) prior to the time it was paid for and delivered.²²⁹ The court thought it "quite clear that the loss must fall upon him in whom the property was vested at the time when it was destroyed by fire."²³⁰ Thus, the only question that had to be answered was where "the property" was located. Since the contract referred to a specific stack of hay, and the seller had nothing further to do, the court determined that "the property" passed to the buyer when the contract was made, even though the buyer did not have possession and would not have even the right to possession until the price was paid or tendered.²³¹ It should be noted that the decision in *Tarling* later served as the model for the risk of loss rules contained in the British Sale of Goods Act,²³² which, in

223. *See id.*

224. *See id.*

225. *See id.*

226. *See id.*

227. *Id.*

228. 108 Eng. Rep. 484 (K.B. 1827).

229. *See id.* at 485.

230. *Id.* at 486.

231. *See id.*

232. *See* Sale of Goods Act, 1893, 56 & 57 Vict., ch. 71, § 20 (Eng.) ("[W]hen the property [in the goods] is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not."). Section 18 of the Act provides the following rule for pinpointing the moment when the property in the goods passes to the buyer: "Where there is

turn, served as the model for the Uniform Sales Act that Professor Williston drafted in 1906.²³³

Again, the Code rejects "property" or "title" as the test for determining when risk of loss has passed. Instead, if the seller is in possession of goods to be delivered to the buyer without shipment, section 2-509(3) provides that "the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to buyer on tender of delivery."²³⁴ This radical change from pre-Code law minimizes cases where the risk shifts to the buyer before the seller has transferred possession and control of the goods.²³⁵ Implicit in the Code's approach is the assumption that before goods change hands, the seller is the one who is more likely to be insured against the loss.²³⁶ Although section 2-509(3) might have changed the result in *Diefenbach*, the court never mentioned it.²³⁷ Interestingly, the

an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed." *Id.* § 18 rule 1.

233. See UNIF. SALES ACT § 22 (1906), 3B U.L.A. 487-88 (1992) (replicating section 20 of the English Sale of Goods Act verbatim); *id.* § 19 rule 1, 3B U.L.A. 485 (replicating section 18, rule 1 of the English Sale of Goods Act).

234. U.C.C. § 2-509(3) (1998).

235. In the typical case, the seller, by any standard, will be a "merchant" and, therefore, the risk remains on the seller until "receipt" by the buyer. "Receipt" requires "physical possession" of the goods. See *id.* § 2-103(1)(c).

236. The official comments following section 2-509 explain:

The underlying theory of [the merchant rule of section 2-509(3)] is that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control of the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession.

Id. § 2-509 cmt. 3.

237. See *Diefenbach v. Gorney*, 234 N.E.2d 813, 813-14 (Ill. App. Ct. 1968). Whether the application of section 2-509(3) would have been outcome determinative would depend upon whether the seller was a "merchant." Section 2-104(1) defines merchant to mean:

[A] person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

U.C.C. § 2-104(1) (1998). The question of whether a farmer is a merchant in the context of various Code provisions has haunted courts and commentators alike. Although the issue usually arises and is discussed in the context of the statute of frauds, what a court would decide in a risk of loss situation when the "[f]armer appears in court outfitted in bib overalls and cowboy boots that cast off a faint perfume of manure," is anyone's guess. Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1176-78 (1985).

one Code section that the court did discuss merely codified a longstanding common-law rule.²³⁸

How does one explain the court's faulty reasoning and its selective application of Code sections? Perhaps the court took over a century of intellectual tradition and learning into account, implicitly if not explicitly. This would account for the theme of nonreform in an opinion grounded in the past. There is, indeed, good reason to believe that *Diefenbach* is additional evidence that the independent claim of taught law, and the problems it poses for the judicial enterprise, cannot be so easily overcome.

It is always possible to spot failures by courts to apply the law correctly if one looks hard enough and measures "failure" against some normative standard of how cases should be decided. Indeed, it is child's play to show that, when applying statutes, courts do not always reach the results the drafters intended. But judicial decision making, like any complex decision-making process, remains difficult to explain. The idea that a judge's legal perspective is partially a background of legal training and experience seems most compelling with respect to cases decided soon after legal rules change. We have seen that habits of thought may limit the effectiveness of the change until new habits have had time to develop. Eventually, however, legislative changes will be able to exert a meaningful influence on even the most intellectually stubborn of judges. With this account of the role that taught law plays in the decision-making process, together with how intellectual habits are mediated by legal change, we can now try to predict some of the effects that the CISG may have on the future course of domestic law.

III. THE RELEVANCE OF THE CISG TO THE DEVELOPMENT OF DOMESTIC LAW

The potential influence that the CISG might have on courts cannot be fully understood apart from the role that decisional law plays in the broader scheme of lawmaking. In their classic treatise on the legal process, Professors Hart and Sacks raise the issues that would have to be addressed:

How should courts conceive of their responsibility to keep this body of [unwritten] law alive and growing? When can they properly say, "the decisional law is settled, and any new development or change must

238. According to the court, UCC section 2-328(3) continues the rule that an "auction sale is complete when the property is knocked down to the bidder." *Diefenbach*, 234 N.E.2d at 814.

come from the legislature"? When are they obliged to say this? When, on the other hand, do they abdicate responsibility if they do so?²³⁹

This Part does not purport to present a complete functional analysis of these issues. In particular, it is assumed that, once understood, there will be general agreement that it would be appropriate for courts to adjust the development of decisional law in reaction to the CISG in certain respects. In addition, this Part takes no position on whether these adjustments would be based on normatively persuasive conceptions of "good" or "better" law. The discussion is confined to a sampling of instances where continued application of the CISG might, over time, modify present law by causing the formation of new habits of judicial decision making.

More specifically, subpart A considers the extent to which the CISG might encourage courts to expand the availability of specific relief. Subpart B discusses the seller's right of reclamation and the possibility that courts might rationally choose to enlarge its scope. Subpart C explains why it might be desirable to make the German procedure of *Nachfrist* a part of domestic law.

A. *The Expanded Availability of Specific Relief*

Few premises are recited so frequently, and so reflexively, as "specific performance is an extraordinary remedy developed . . . to provide relief when the legal remedies of damages and restitution are inadequate."²⁴⁰ This rule has its genesis in the centuries-old jurisdictional conflict between the English common-law courts and the courts of equity. The compromise that they eventually reached was that the courts of equity would step in and assume jurisdiction only in those cases where the aggrieved party could show that irreparable injury would result if equitable relief were refused. For buyers of goods, this meant that specific performance became the exception rather than the rule.²⁴¹ To see why this was so, one need only understand that a central assumption of this jurisdictional division was the homogeneity of goods. If the seller does not deliver the goods, the

239. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 341 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958).

240. CALAMARI & PERILLO, *supra* note 165, § 16-1, at 661.

241. Because specific performance in favor of sellers raises special concerns, this discussion is limited to the buyer's right to specific performance. One particular concern follows from the fact that the only difference between specific performance for the seller and an action for the price (damages), *see* U.C.C. § 2-709 (1998), is that enforcement of the former is by contempt. For some, this may conjure up unacceptable visions of a debtor's prison.

buyer will, most often, be able to obtain similar goods elsewhere. As a result, the buyer's expectation interest is fully vindicated by a damage award based on an imagined²⁴² or actual substitute purchase.²⁴³ There were, however, situations, sufficiently out of the ordinary, in which protection of the buyer's expectation demanded that the remedy be the right to obtain possession of the goods from the seller. Thus, where the goods were unique or not otherwise readily available in the marketplace, specific performance was granted.²⁴⁴

The outlines of specific performance remained unchanged until 1855 when the British Mercantile Law Commission was established to reconcile the civil-law rules of Scotland and the common-law rules found in the other countries comprising the United Kingdom.²⁴⁵ One question the commission had to answer was whether it should recommend "the limited view of specific relief traditional to the common law or the broad remedy of 'specific implement' under Scotch civil."²⁴⁶ The Commission recommended the latter.

"We see no reason why a buyer of goods should not be entitled to compel the seller to perform specifically his obligation to deliver them in terms of the contract. . . . We recommend that on this subject the laws of England and Ireland be assimilated to the law of Scotland."²⁴⁷

242. For example, one Code formula for measuring the buyer's damages is the difference between the market price at the time the buyer learned of the breach and the contract price. See U.C.C. § 2-713 (1998). The import of this remedy is that a market exists, giving the buyer the opportunity to enter into substitute transactions. If the buyer is forced to pay more than the contract price, the excess is recoverable from the seller. While in theory this calculation should put the buyer in the position he would have occupied had the seller performed, in practice it may not. See Ellen A. Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 258-60 (1963).

243. A measure of damages more accurate than the speculative market price/contract price formula is a calculation based on an actual substitute purchase. For example, UCC section 2-712 permits a buyer to "cover" by buying elsewhere and to recover from the seller the difference between the cover price and the contract price. See U.C.C. § 2-712 (1998).

244. No one would doubt that a careful study of pre-Code cases would yield uniqueness as a major explanatory principle. See D.A. Norris, Annotation, *Specific Performance, or Injunction Against Breach, of Contract for Sale of Tangible Personal Property*, 152 A.L.R. 4, 22-25 (1944). "The term 'unique' was used generally in the context of heirlooms, works of art, antiques, or goods having a *pretium affectionis*—a special value not measurable in dollars." Harold Greenberg, *Specific Performance Under Section 2-716 of the Uniform Commercial Code: "A More Liberal Attitude" in the "Grand Style"*, 17 NEW ENG. L. REV. 321, 324 (1982).

245. See 1955 NEW YORK COMMISSION REPORT, *supra* note 207, at 575.

246. *Id.*

247. *Id.* (omission in original) (quoting Second Report Mercantile Law Comm'n, 354 PARL. PAPERS 10 (King & Son 1855)).

The very next year this recommendation found its way into the English Sale of Goods Act.²⁴⁸ By itself, the expansion of specific performance in Great Britain probably would not have compelled courts in the United States to liberalize the granting of the remedy. However, the liberalization movement abroad profoundly influenced Professor Williston when he sat down to draft the Uniform Sales Act. With only a few minor variations, he copied section 68 directly from section 52 of the British Sale of Goods Act.²⁴⁹ It read in part:

Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages.²⁵⁰

Although this provision invited courts to reform specific performance practice by expanding the number of cases in which the remedy would be available, the invitation was refused. Courts continued to do what they did before the Uniform Sales Act.²⁵¹ This is not surprising; as Part II of this Article has shown, legal tradition and training can sometimes undercut statutory changes. The legal community had been so well indoctrinated to search solely for uniqueness that even the revolutionary language of the Uniform Sales Act fell on deaf ears.

The Code, not surprisingly, reserves specific performance for those cases "where the goods are unique or in other proper circumstances."²⁵² Ironically, however, this seemingly traditional statement belies the drafters' true intent, which they inexplicably decided to express in the comments. The drafters, apparently hoping

248. See Sale of Goods Act, 1893, 56 & 57 Vict., ch. 71, § 52 (Eng.). Section 52 of the Act provided:

In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.

Id.

249. See UNIF. SALES ACT § 68 (1906), 3B U.L.A. 501 (1992).

250. *Id.* Williston hoped that section 68 would "perhaps dispose courts to enlarge somewhat the number of cases where specific performance is allowed." 2 SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT § 601, at 1508 (2d ed. 1924).

251. Williston himself commented that the English Sale of Goods Act and section 68 had not been "much relied on by the courts . . . but they seem to afford a clear warrant for an extension of previously existing rules." 3 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 1419a, at 2525 n.37 (1920); see also 1955 NEW YORK COMMISSION REPORT, *supra* note 207, at 575 ("[D]ecisions have construed this language against a background of equity practice to require a showing that the remedy at law be inadequate.").

252. U.C.C. § 2-716(1) (1998).

to foster a liberalization of the remedy,²⁵³ offer in the comments an expanded definition of uniqueness that takes into account "the total situation which characterizes the contract."²⁵⁴ In addition, "relief may also be granted 'in other proper circumstances' and inability to cover is strong evidence of 'other proper circumstances'."²⁵⁵

While some commentators have noted an expansive post-Code trend toward the granting of specific performance,²⁵⁶ the majority of courts continue to couch their opinions in the traditional orthodoxy of uniqueness or peculiarity.²⁵⁷ The fact remains, however, that those courts which are now inclined to alter their traditional position on specific performance are free to do so under the rubric "other proper circumstances."²⁵⁸ But as the history above indicates, the influence of traditional limits on this powerful remedy is formidable, and the habitual patterns it has caused may be difficult to break. It may be that those courts which remain reluctant to grant specific performance except as an extraordinary remedy will continue to decide cases along historical lines until the next event occurs in the evolutionary process of liberalization. We can only speculate, but perhaps the next event has already occurred.²⁵⁹

253. See *id.* § 2-716 cmt. 1 ("[T]his Article seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale.").

254. *Id.* § 2-716 cmt. 2.

255. *Id.* It should also be noted that the drafters dropped the Uniform Sales Act requirement that the goods be specific or ascertained.

256. See, e.g., Greenberg, *supra* note 244, at 344 ("Examination of the cases decided since enactment of the Code in the various states reveals a continuing evolutionary trend toward liberalization of the availability of specific performance.").

257. For decisions denying specific performance, see *Weathersby v. Gore*, 556 F.2d 1247, 1257-58 (5th Cir. 1977) (cotton was not unique); *Abbott v. Blackwelder Furniture Co.*, 33 B.R. 399, 404 (W.D.N.C. 1983) (furniture was not unique); and *Pierce-Odom, Inc. v. Evenson*, 632 S.W.2d 247, 248-49 (Ark. Ct. App. 1982) (mobile home was not unique). For decisions granting specific performance, see *Fast v. Southern Offshore Yachts*, 587 F. Supp. 1354, 1357 (D. Conn. 1984) (yacht was unique); *Gay v. Seafarer Fiberglass Yachts, Inc.*, 14 U.C.C. Rep. Serv. 1335, 1335-38 (N.Y. Sup. Ct. 1974) (same); *Stephan's Mach. & Tool, Inc. v. D & H Mach. Consultants, Inc.*, 417 N.E.2d 579, 583 (Ohio Ct. App. 1979) (machine was unique); *Belleville v. Davis*, 498 P.2d 744, 748 (Or. 1972) (en banc) (one-half interest in taxi was unique); and *Madariaga v. Morris*, 639 S.W.2d 709, 712-13 (Tex. Ct. App. 1982) (Albert's Famous Mexican Hot Sauce was unique).

258. See, e.g., *In re Bullet Jet Charter Inc.*, 177 B.R. 593, 599 (Bankr. E.D. Ill. 1995); *King Aircraft Sales, Inc. v. Lane*, 846 P.2d 550, 556-57 (Wash. Ct. App. 1993).

259. Another liberalizing event may be in the offing. Revised article 2 may contain a provision declaring that courts may enforce a clause in a contract providing for specific performance. See U.C.C. § 2-716(a) (Interim Draft Nov. 1999). Considering the lack of litigation that these clauses have engendered over the years (counting both Code and non-Code cases), one has to assume that they rarely find their way into contracts. One can speculate that such a clause, despite being potentially advantageous to both parties, is rarely used because courts by and large do not feel that the use of such clauses dispenses with the need to establish the traditional prerequisites for specific relief. See, e.g., *Snell v. Mitchell*,

Consistent with the civil-law notion that specific performance is the aggrieved party's entitlement, article 46 of the CISG grants the disappointed buyer a broad right to compel the seller's performance as originally agreed. If the seller has not delivered the goods, the buyer is entitled to this remedy provided she has not resorted to a remedy inconsistent with an action to compel performance.²⁶⁰

There is, however, one major stumbling block facing a buyer who happens to file suit in the United States. The common law/civil law compromise found in article 28 allows the court to refrain from ordering performance if it would not do so under its own domestic law.²⁶¹ The outcome may, therefore, ultimately depend on the choice of forum. In the United States, for example, a court might withhold the remedy in any case in which the buyer could readily purchase replacement goods elsewhere.²⁶² But it is important to understand that while article 28 would not mandate specific performance in such a situation, neither would it necessarily preclude it. A United States court could presumably rely on article 7 and conclude that domestic

65 Me. 48, 50 (1876) ("Neither party to a contract can insist, as a matter of right, upon a decree for its specific performance."); *Manchester Dairy Sys., Inc. v. Hayward*, 132 A. 12, 15 (N.H. 1926) ("[A]uthority, if any here, is to be found, not in the express stipulations for equitable relief, but in the general principles limiting equitable jurisdiction."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 359 cmt. (1981) ("Because the availability of equitable relief was historically viewed as a matter of jurisdiction, the parties cannot vary by agreement the requirement of inadequacy of damages, although a court may take appropriate notice of facts recited in their contract."). In sum, the revision to article 2 would work a revolution in theory.

260. *See* CISG, *supra* note 18, 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.* It seems clear that a declaration by the buyer that the contract is avoided under article 49 is inconsistent with compelling delivery of the goods as contracted, whereas a claim for damages is not. *See id.* art. 45(2) ("The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.").

If the seller has delivered nonconforming goods, efficiency concerns justify a somewhat less liberal application of the specific performance remedy. Additional limitations on the remedy are, therefore, found in article 46, subsections (2) and (3). Under subsection (2), the buyer can demand substitute goods only if the nonconformity constitutes a fundamental breach, and she may not demand that the seller repair the defect under subsection (3) if it would be unreasonable in the circumstances. *See id.* art. 46. In the event the buyer elects to require the seller to deliver substitute goods, she is, of course, obligated to make restitution of the unsatisfactory goods "substantially in the condition in which he received them." *Id.* art. 82(1).

261. *See id.* art. 28. Article 28 provides:

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, 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.

Id.

262. *See* U.C.C. § 2-716 (1998).

restrictions on specific performance should be loosened in the context of CISG cases.²⁶³

What pertinence has this to the availability of specific performance in purely domestic cases? It just may be that the remedial scheme under the CISG will eventually have the effect of changing the remedy of specific performance from a limited remedy to a remedy more widely available. The process is dynamic in that courts are likely to encounter more requests for the remedy as CISG cases begin to proliferate.²⁶⁴ In turn, courts that favor expansion of the remedy are likely to disregard domestic limitations, which they are certainly free to do under article 28. In making these decisions, a new remedial jurisprudence will slowly develop, and old habits of restraint will be broken. Since the Code's "other proper circumstances" language can be used to support a great deal of judicial discretion, there would be no real statutory impediment to this change of attitude. In this manner, section 2-716 can truly have the liberalizing effect that Llewellyn and his drafting team intended.²⁶⁵

263. In an effort to achieve international uniformity, the drafters of article 7 caution courts against a parochial application of the Convention. "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." CISG, *supra* note 18, art. 7(1). See generally Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187 (1998) (exploring the difficulties caused by the several different language versions of the CISG).

264. For two explanations of why there have been so few domestic cases decided under the CISG and why that situation is not likely to continue, see V. Susanne Cook, *CISG: From the Perspective of the Practitioner*, 17 J.L. & COM. 343, 349-53 (1998), and John E. Murray, Jr., *The Neglect of CISG: A Workable Solution*, 17 J.L. & COM. 365, 365-79 (1998). It is not suggested here that specific performance will be the remedy of choice for most disappointed buyers under the CISG. On the contrary, it would most often be more efficient for a buyer who is able to procure substitute goods from some other party to do so and recover any additional costs as damages. Although specific performance may never become the natural remedy in the run-of-the-mill case, it seems reasonable to assume that, in the aggregate, there will be considerably more requests for specific performance when the CISG governs.

265. Consider, for example, the plight of the prepaying buyer who discovers that the breaching seller is insolvent. Is such a buyer entitled to specific performance? Today, there is case law that would support the availability of specific performance in such cases, see, e.g., *Proyectos Electronicos, S.A. v. Alper*, 37 B.R. 931, 933 (E.D. Pa. 1983), but not all courts, see, e.g., *Abbott v. Blackwelder Furniture Co.*, 33 B.R. 399, 404 (W.D.N.C. 1983), and commentators, see, e.g., Richard E. Speidel, *Advance Payments in Contracts for Sale of Manufactured Goods: A Look at the Uniform Commercial Code*, 52 CAL. L. REV. 281, 286-87 (1964) (seeing little support for this theory in view of section 2-716's emphasis on feasibility of replacement rather than commitment by the buyer), would agree. If the new article 2 takes effect, this issue will no longer be of any real importance where consumer goods have been identified to the contract. See U.C.C. § 2-502 (Interim Draft Nov. 1999) (providing that a prepaying buyer has the right to recover consumer goods in which he has a special property). It will, however, remain an issue of critical importance in consumer

B. *An Expanded Right of Reclamation*

Any extended discussion of article 2 invariably will touch on the subject of the buyer's insolvency.²⁶⁶ This is the case because even the most scrupulous buyer will find it difficult to perform when insolvent, and the seller likely will find that damages are not an adequate remedy. This raises an important policy issue: what special rights, if any, should be afforded the seller when the buyer's insolvency intervenes? Historically, the seller was permitted to rescind the contract and reclaim the goods if the delivery had been induced by the buyer's fraudulent misrepresentation of solvency or intention to pay.²⁶⁷ Indeed, some courts were even willing to infer fraud from the mere fact that the buyer was hopelessly insolvent at the time she took delivery in a credit transaction.²⁶⁸ In this situation, section 2-702 provides the modern reclamation remedy for credit sellers.²⁶⁹

(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

situations when the goods have not yet been appropriated to the contract or acquired by the seller and in nonconsumer sales. This is, therefore, one context in which buyers might benefit from a new judicial attitude toward specific performance.

266. Under the Code, "[a] person is 'insolvent' who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law." U.C.C. § 1-201(23) (1998).

267. See Larry T. Garvin, *Credit, Information, and Trust in the Law of Sales: The Credit Seller's Right of Reclamation*, 44 UCLA L. REV. 247, 254-61 (1996).

268. See *id.* at 259.

269. Apart from an explicit reclamation remedy for credit sellers, the Code also contains an implicit reclamation remedy for the so-called cash seller. See generally PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB COMMENTARY NO. 1: SECTION 2-507(2), in 3B U.L.A. 602, 602-05 (1992). This reclamation remedy may be needed when, for example, the buyer gives the seller a check which is later dishonored upon presentation. The remedy is said to be grounded in two sections. The first is section 2-507, which provides, "Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due." U.C.C. § 2-507(2) (1998). The second section is 2-511. This section provides that "payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment." *Id.* § 2-511(3). The discussion in the text, while focused specifically on the credit seller's reclamation remedy under section 2-702, is equally applicable to the unpaid cash seller's reclamation remedy. For purposes of this Article, both remedies raise identical issues of scope and the potential affect of the CISG on each is similar.

(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this Article (Section 2-403). Successful reclamation of goods excludes all other remedies with respect to them.²⁷⁰

New here is the explicit statutory recognition that the credit seller deserves some special protection even if granting that protection means she is being preferred over the seller's other creditors.²⁷¹ And what flows from this recognition? Upon reading the section, one cannot help but notice that the remedy it grants is subject to procedural and substantive limitations that put it beyond the grasp of most sellers who may wish to use it.²⁷² Moreover, most courts have placed an additional limitation on reclamation claims by requiring the seller to identify the goods she wishes to reclaim as those delivered under the contract.²⁷³ Their reasoning is statutory and not particularly convincing—the reference in section 2-702(2) to “the goods” must mean the “goods” first mentioned in the subsection (i.e., the goods actually received by the buyer).²⁷⁴

One consequence of this restrictive reading of section 2-702 is that the seller is out of luck if the original goods have been

270. U.C.C. § 2-702(2)-(3) (1998).

271. There was no section in the Uniform Sales Act that addressed reclamation directly. However, it did so indirectly in section 73 by preserving rules relating to fraud and misrepresentation. See UNIF. SALES ACT § 73 (1906), 3B U.L.A. 503 (1992). Courts understood this to mean that the pre-Act law of reclamation continued to apply. See Garvin, *supra* note 267, at 262. Notice that section 2-702 does not require proof of fraud or misrepresentation. It “takes as its base line the proposition that any receipt of goods on credit by an insolvent buyer amounts to a tacit business misrepresentation of solvency and therefore is fraudulent as against the particular seller.” U.C.C. § 2-702 cmt. 2. Moreover, comment 3 leaves little doubt that reclamation “constitutes preferential treatment as against the buyer's other creditors.” *Id.* cmt. 3.

272. See U.C.C. § 2-702. One author describes the chances of being able to clear the technical hurdles of section 2-702 as “mission impossible.” See Brian N. Siegal, *Reclamation from an Insolvent Vendee—Mission Impossible?*, 9 UCC L.J. 27, 43 (1976). It is not just compliance with the technical requirements of the section that the seller has to worry about; she must also be concerned about her priority vis-à-vis third parties who also claim an interest in the goods. The list of possible third-party claimants includes a purchaser from the buyer, a secured creditor of the buyer, a judgment creditor of the buyer, and the buyer's trustee in bankruptcy. This Article is not concerned with these priority conflicts; rather, its only concern is whether the seller has a reclamation right as against the buyer. Without such a right, third-party claims are irrelevant.

273. See, e.g., *In re Mayer Pollock Steel Corp.*, 157 B.R. 952, 959 (Bankr. E.D. Pa. 1993); *In re Dynamic Techs. Corp.*, 106 B.R. 994, 1004 (Bankr. D. Minn. 1989); *In re Wheeling-Pittsburgh Steel Corp.*, 74 B.R. 656, 658 (Bankr. W.D. Pa. 1987).

274. See, e.g., *Wheeling-Pittsburgh*, 74 B.R. at 659. It is difficult to believe that the statutory language is what dictates such a limitation when courts have reached the same conclusion with regard to the scope of the remedy available to reclaiming cash sellers. See, e.g., *In re Samuels & Co.*, 526 F.2d 1238, 1245 (5th Cir. 1976) (en banc).

transformed into goods of a different kind.²⁷⁵ As one commentator so elegantly put it, “[a] seller of cattle may not reclaim rump roast.”²⁷⁶ Notwithstanding the reason courts give for not permitting reclamation in these cases, the age-old property law doctrine of specification may be the key to understanding their reluctance. Specification occurs when a new article (a “nova species”) is made out of one person’s chattel through the skill and labor of another, as when *A*’s leather is made into shoes by *B*, or *X*’s grapes are made into wine by *Y*.²⁷⁷ If the specifier has succeeded in creating a new species of good, the original owner’s interest terminates; if not, the owner of the original good retains title to the end product.²⁷⁸ Although the doctrine is easily stated, its application often requires the skills of a metaphysician, for the determination of whether a certain chemical transformation or physical change has been sufficient to shift title to the specifier is fact-specific and inherently subjective.²⁷⁹ Whatever its difficulties, the

275. See, e.g., *Wheeling-Pittsburgh*, 74 B.R. at 658. Another consequence of even more significance is that the seller has no rights to the identifiable proceeds of the sale of those goods. See, e.g., *In re Coast Trading Co.*, 744 F.2d 686, 691 (9th Cir. 1984); *Samuels*, 526 F.2d at 1245; *In re Diversified Food Serv. Distribs., Inc.*, 130 B.R. 427, 430 (Bankr. S.D.N.Y. 1991); *In re Buyer’s Club Mkts., Inc.*, 100 B.R. 37, 38 (Bankr. D. Colo. 1989); *In re Landy Beef Co.*, 30 B.R. 19, 21 (Bankr. D. Mass. 1983). Essentially, what this means for the seller is that the reclamation remedy is valueless if the goods have been sold to a buyer in ordinary course or there is a secured party who has an interest in the goods as after-acquired collateral. To give the reclaiming seller a modicum of protection, one court allowed the seller to recover the proceeds remaining after the claim of the priority secured party had been satisfied. See *United States v. Westside Bank*, 732 F.2d 1258, 1263-65 (5th Cir. 1984). An additional difficulty not present in cases where the goods have been transformed complicates the question of whether the CISG is likely to have any effect on how courts treat proceeds claims. See *infra* text accompanying note 294.

276. Garvin, *supra* note 267, at 276; see also *Wheeling-Pittsburgh*, 74 B.R. at 659-60 (holding a seller of coal is not permitted to reclaim coke); *Landy Beef Co.*, 30 B.R. at 21 (holding a seller of calves is not permitted to recover beef).

277. See RAY ANDREWS BROWN, *THE LAW OF PERSONAL PROPERTY* § 6.2, at 50-51 (Walter B. Raushenbush ed., 3d ed. 1975). A related but conceptually distinct doctrine is that of accession. Accession occurs when a lesser good, the accession, is united with a principal good. As a result of this integration, title to the accession passes to the owner of the principal good. See *id.* § 6.1, at 49-50. An important similarity between the specification and accession doctrines is that both operate only when the end product cannot be divided. It is for this reason that one party must receive title to the whole product. This all-or-nothing approach is a consequence of the fact that “[t]he policy of the law favors absolute ownership in one when a partition is impossible, rather than a tenancy in common of undivided shares.” Kenneth B. Lane, Note, 22 *CORNELL L.Q.* 119, 123 (1936). Although the accession doctrine may also influence courts in the application of section 2-702, the discussion in the text is limited to specification because the reported cases are overwhelmingly specification-type cases.

278. See BROWN, *supra* note 277, § 6.2, at 50-51.

279. Compare *Riddle v. Driver*, 12 Ala. 590, 591-92 (1847) (wood transformed into charcoal is the same species of good), *Eaton v. Langley*, 47 S.W. 123, 125-26 (Ark. 1898) (timber transformed into cross ties is the same species of good), and *Burris v. Johnson*, 24

point is that the doctrine is an all-or-nothing approach to title—one party receives title to the whole good.

Pre-Code disputes involving secured parties may help to illuminate how a court might, today, be influenced by the doctrine of specification when applying section 2-702. It would seem that the doctrine would be relevant in a wide variety of cases where work is performed on collateral—for example, the manufacturing of an item from materials subject to a lien. In such a situation, the question of whether the secured party's interest will continue in the new product and embrace the increased value derived from the labor of the debtor would seem to require a specification analysis. Although not explicitly using the term "specification," a number of courts faced with such situations have used language indicating the need for the same type of *nova species* inquiry used in specification cases not involving liens.²⁸⁰ For example, the court in *Netzog v. National Supply Co.* observed:

It is not to be doubted that a mortgage placed upon some one article, will cover that article as subsequently changed, provided the integrity of the article remains. Precisely as with a mortgage on a house and lot, where the mortgage will remain a lien upon the house although painted and improved during the time of the existence of the mortgage and before it foreclosed.²⁸¹

Today, of course, courts would approach the matter differently in the context of article 9 where there is a manifested intention to change old habits.²⁸² But because there is nothing in article 2 that would cause a court to think differently about the doctrine of specification when a seller seeks to reclaim, old habits remain unbroken.²⁸³

Ky. (1 J.J. Marsh) 196, 197-98 (1829) (timber transformed into a boat frame is the same species of good), *with Lampton's Ex'rs v. Preston's Ex'rs*, 24 Ky. (1 J.J. Marsh) 454, 467 (1829) (clay transformed into fired brick is a new species of good), *and Potter v. Mardre*, 74 N.C. 36, 42 (1876) (timber transformed into a canoe is a new species of good).

280. *See, e.g., Comins v. Newton*, 92 Mass. (10 Allen) 518, 518 (1865); *Crosby v. Baker*, 88 Mass. (6 Allen) 295, 298 (1863); *Harding v. Coburn*, 53 Mass. (12 Met.) 333, 342-43 (1847).

281. 28 Ohio C.C. Dec. 112 (1905).

282. *See* U.C.C. § 9-315 (1998).

This section changes the law in some jurisdictions where a security interest in goods (e.g., raw materials) was lost when the goods lost their identity by being commingled or processed. Under this section the security interest continues in the resulting mass or product. . . .

Id. § 9-315 cmt. 2.

283. Not mentioned thus far is the problem of commingled goods. Specifically, is the right to reclaim extinguished if the seller delivers fungible goods that are subsequently commingled with similar goods from other sources in an identifiable mass? Most courts have answered "no" and have permitted the seller to reclaim a pro rata portion of the mass.

Unlike the Code, the CISG does not specifically address the seller's right to reclaim goods from the buyer. But this does not mean that the right does not exist. Rather, it leaves the ability to reclaim, if any, to be achieved through the catalogue of remedies provided for the unpaid seller. The first step on the road to reclamation is for the seller to declare the contract avoided under article 64(1).²⁸⁴ This she may do if the buyer's breach is fundamental,²⁸⁵ or if the seller has provided additional time for the buyer to pay or perform its other obligations under article 63 (a *Nachfrist* notice), and the buyer did not do so within that extra period, or the buyer otherwise notified the seller of her intention not to comply.²⁸⁶ Once the contract has been avoided, the seller will always have a right to restitution of the goods under article 81(2).²⁸⁷ Moreover, where the buyer has not paid the price, there are no legal restrictions on the seller avoiding the contract even after the buyer has held the goods for a substantial time.²⁸⁸ This alone represents a significant departure from the remedial rights granted unpaid sellers under the Code,²⁸⁹ but there is more. Article 84 supplements the seller's right of restitution by requiring that the buyer "account to the seller for all benefits which he has derived from the goods."²⁹⁰ Arguably, this permits the seller to extend the *in rem* right

See, e.g., In re Braniff, Inc., 113 B.R. 745, 753-54 (Bankr. M.D. Fla. 1990); *In re Wheeling-Pittsburgh Steel Corp.*, 74 B.R. 656, 660-61 (Bankr. W.D. Pa. 1987); *In re Charter Co.*, 54 B.R. 91, 93 (Bankr. M.D. Fla. 1985). This is in keeping with pre-Code law. *See, e.g., Clark v. William Munroe Co.*, 86 N.W. 816, 817 (Mich. 1901). Moreover, article 2 explicitly sanctions the sale of fungible goods. *See* U.C.C. §§ 1-201(17), 2-105(4), 2-314(2)(b) (1998).

284. *See* CISG, *supra* note 18, art. 64(1).

285. *See id.* art. 64(1)(a). The important concept of fundamental breach is defined in article 25. *See supra* note 90.

286. *See* CISG, *supra* note 18, art. 63. Essentially, the *Nachfrist* procedure enables the aggrieved party to make the other party's failure to perform by a particular date the equivalent of a fundamental breach. If failure to pay the purchase price when due is not itself sufficient to create a fundamental breach, using a *Nachfrist* notice can make it so. For further discussion of *Nachfrist*, *see* discussion *infra* Part III.C.

287. *See* CISG, *supra* note 18, art. 81(2) ("A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently."). Again, it should be emphasized that this Article is concerned only with the buyer/seller relationship. Because the CISG governs only the rights of parties to the sales agreement, *see id.* art. 4, local law may defeat the seller's right to claim restitution of the goods when certain third parties are involved.

288. A paid seller forfeits the right to avoid the contract unless she complies with the specified time limits. *See id.* art. 64(2).

289. Professor John Honnold, who is unquestionably the leading commentator on the CISG, observes that article 81(2) "has implications that may be surprising to those schooled in the common law." JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* § 444, at 562 (2d ed. 1991).

290. CISG, *supra* note 18, art. 84(2).

of restitution into the proceeds resulting from the sale or other disposition of the original goods or the product resulting from its processing.²⁹¹ In short, the seller's right of avoidance under the CISG produces a right of reclamation which is substantially broader and more potent than its UCC counterpart.

There is no question that the frequent application of the CISG can change how courts read particular UCC provisions such as section 2-702. Under the current version of the Code, the CISG holds out the promise of encouraging courts to permit reclamation in various situations not covered by 2-702 and reclamation of proceeds and products.²⁹² If and when revised article 2 takes effect, there may be one complicating factor. In an earlier draft, the unofficial comments following section 2-816 contain this statement: "The right to reclaim extends only to the goods involved and does not extend to any

291. To the extent that the buyer has created additional value by marketing the goods or by using its equipment and labor to transform the goods, however, some adjustment might be necessary. See HONNOLD, *supra* note 289, § 451.3, at 573 n.5 ("Presumably, the buyer could deduct the cost of redistribution; a similar adjustment would be appropriate when the goods have been processed."); see also *In re Performance Papers, Inc.*, 119 B.R. 127, 128-30 (Bankr. W.D. Mich. 1990) (holding that proceeds from the sale of goods by authorization of bankruptcy court in excess of seller's invoice price go to the bankruptcy estate).

Article 84(2) may also impel courts in non-CISG cases to more freely permit plaintiffs to recover damages measured by the gain realized by the party in breach rather than the plaintiff's lost expectation. Professor Farnsworth offers the following example:

Suppose that you and I have made a contract under which I am to sell you a widget for \$100, cash on delivery. At the time we made the contract, I valued the widget at \$90 and you valued it at \$110, so the contract seemed advantageous to both of us. But instead of delivering the widget to you, I found another buyer willing to pay \$125 and sold it to that buyer, realizing \$25 over our contract price. Since you still valued the widget at \$110, I offered you \$10 out of that \$25. Can you recover \$25 from me?

Since, according to conventional wisdom, my "mere" breach of contract is not a "wrong," you can recover only \$10 and not \$25. The \$10 that I offered you would put you in as good a position as you would have been in had the contract been performed, since that amount, plus the \$100 you have not paid me, equals the value of the widget to you.

E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1341-42 (1985) (footnote omitted).

292. Although section 2-702 provides the only route to reclamation for the buyer's misrepresentations of solvency or of intent to pay, see U.C.C. § 2-702(2) (1998), the Code is silent on whether the seller can reclaim for other reasons based on the common law of the state. At least one court has suggested that she can. See *In re Metal Tech. Mfg., Inc.*, 27 U.C.C. Rep. Serv. (CBC) 701, 705 (D. Utah 1979). But see ROBERT J. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 165, at 498-500 (1970) (suggesting that the Code is the exclusive source of remedies for sellers). Section 1-103 of the Code permits the application of non-Code rules in a Code-covered case unless those rules have been supplanted by the Code. Of course, the tricky question is whether the Code has supplanted the common-law or equitable rule. For a critical discussion of the various tests used by courts and suggested by commentators to answer this question, see Frisch, *supra* note 54.

proceeds of the goods.”²⁹³ Assuming that this statement will be part of the official comments, a court might have to break the habit of following the comments before it can break the habit of not recognizing a reclamation right to proceeds.²⁹⁴

C. *The Nachfrist Procedure*

The final example of how the CISG might affect the development of domestic law is rather different from those employed above. Here, the focus is not so much on how application of the Convention might cause courts to reverse prior decisions, but, rather, on the possibility that particular CISG rules might give birth to new principles.²⁹⁵

We have already seen that the article 25 definition of “fundamental breach” is applicable to both buyers and sellers and is one of the key concepts on which the remedial structure of the CISG is built.²⁹⁶ In particular, the concept triggers the aggrieved party’s right to avoid the contract.²⁹⁷ Suppose that the seller or buyer fails to perform

293. U.C.C. § 2-816(b) cmt. 5 (Proposed Final Draft May 1, 1999).

294. Interestingly, several commentators, including this author, have recently argued that the former habit should be broken. See, e.g., Peter A. Alces & David Frisch, *Commenting on “Purpose” in the Uniform Commercial Code*, 58 OHIO ST. L.J. 419, 458 (1997) (“[T]he comments are produced by a system that behaves quite differently from what is widely assumed.”); Laurens Walker, *Writings on the Margin of American Law: Committee Notes, Comments, and Commentary*, 29 GA. L. REV. 993, 1007-15 (1995) (depicting the comments as the product of special interest groups and arguing that, as such, they are not worthy of judicial deference).

295. Other legal systems have long played an important role in the development of the common law. Discussing the judge as legislator, Justice Cardozo noted:

Many of the gaps have been filled in the development of the common law by borrowing from other systems. Whole titles in our jurisprudence have been taken from the law of Rome. Some of the greatest of our judges—Mansfield in England, Kent and Story here—were never weary of supporting their judgments by citations from the Digest. We should be traveling too far afield if we were to attempt an estimate of the extent to which the law of Rome has modified the common law either in England or with us. Authority it never had. The great historic movement of the Reception did not touch the British Isles. Analogies have been supplied. Lines of thought have been suggested. Wise solutions have been offered for problems otherwise insoluble. None the less, the function of the foreign system has been to advise rather than to command. It has not furnished a new method. It has given the raw material to be utilized by methods already considered—the methods of philosophy and history and sociology—in the moulding of their products. It is only one compartment in the great reservoir of social experience and truth and wisdom from which the judges of the common law must draw their inspiration and their knowledge.

CARDOZO, *supra* note 123, at 123-24 (footnotes omitted).

296. See *supra* text accompanying notes 89-95.

297. Although article 25 is merely definitional, it is central to the application of other articles of the CISG. See CISG, *supra* note 18, art. 46 (buyer’s right to the remedy of specific

on the contract delivery or payment date. Can the aggrieved party avoid the contract merely because the other party's performance is late? If not, then the contract is still in force, and the aggrieved party must sit back and await the other party's performance, with only a claim for damages resulting from the delay. If, in contrast, an avoidance right exists, then the aggrieved party has an immediate right to declare the contract avoided and is free to enter into a substitute transaction. Most commentators have taken the position that there is no avoidance right, typically observing that a slight delay in performance will not cause the detriment and substantial deprivation necessary for the breach to be fundamental.²⁹⁸ At some point, however, the delay in performance will become sufficiently substantial to constitute a fundamental breach. The problem for the aggrieved party is that she has no certain way of knowing exactly when that point has been reached. There is always the risk that the court may later decide that the attempted avoidance was improper because the seller's failure to deliver or the buyer's failure to pay was not yet sufficiently serious to warrant so severe a remedy. If the aggrieved party jumps the gun and declares the contract avoided before the breach has ripened into a fundamental breach, then she will have repudiated the contract and will discover, much to her chagrin, that she, too, is in breach.²⁹⁹

performance); *id.* art. 49 (avoidance by the buyer); *id.* art. 51(2) (avoidance by the buyer when the seller has delivered only part of the goods or only part of the goods is nonconforming); *id.* art. 64 (avoidance by the seller); *id.* art. 70 (relationship of fundamental breach and risk of loss); *id.* art. 72 (avoidance for anticipatory breach); *id.* art. 73 (avoidance in the case of an installment contract).

298. See, e.g., *Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat*, U.N. Doc. A/CONF.97/5 (1979), reprinted in JOHN O. HONNOLD, *DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES* 404 (1989). "This Convention specifically rejects the idea that in a commercial contract for the international sale of goods the buyer may, as a general rule, avoid the contract merely because the contract delivery date has passed and the seller has not as yet delivered the goods." *Id.*, reprinted in *DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES*, *supra*, at 429.

It may be questioned, however, how often the buyer's failure to pay the price, take delivery of the goods or perform any of his other obligations under the contract and this Convention would immediately constitute a fundamental breach of contract if they were not performed on the date they were due.

Id., reprinted in *DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES*, *supra*, at 429.

299. See *infra* notes 309-316 and accompanying text. The anxiety that this situation creates is comparable to that suffered by a party who is forced to guess whether the other party's expression of inability or unwillingness to perform constitutes anticipatory repudiation.

The CISG's answer to the aggrieved party's dilemma is the German procedure of "*Nachfrist*" in articles 47 and 63.³⁰⁰ The aggrieved party is permitted to "fix an additional period of time of reasonable length for performance" by the breaching party.³⁰¹ If the goods are not delivered or the price not paid by the *Nachfrist* deadline, or if the breaching party declares that she will not perform as demanded, the aggrieved party can avoid the contract without concern for whether the breach was actually fundamental.³⁰² The *Nachfrist* procedure, therefore, enables either party to make time of the essence where the contract itself is silent, and to eliminate uncertainty whether the delay amounts to a fundamental breach.

What relevance does this have to domestic law? Many disputes in contemporary contract law involve the right of the aggrieved party to terminate the contract and sue for total breach. In these circumstances, the Second Restatement of Contracts articulates what has been described as a "sensible two-step analysis."³⁰³ The first step is to ascertain whether or not a breach is material. If it is, the aggrieved party is permitted to suspend performance.³⁰⁴ The determination of whether a breach is material must be made in the light of the contract circumstances of each case, including the extent to which the breach will deprive the aggrieved party of what she is

300. See CISG, *supra* note 18, arts. 47, 63. Section 326 of the German Civil Code provides in part:

(1) If, in the case of a mutual contract, one party is in default in performing, the other party may give him a reasonable period within which to perform his part with a declaration that he will refuse to accept the performance after the expiration of the period. After the expiration of the period he is entitled to demand compensation for non-performance, or to withdraw from the contract, if the performance has not been made in due time; the claim for performance is barred.

§ 326(1) BÜRGERLICHES GESETZBUCH (F.R.G.), translated in THE GERMAN CIVIL CODE 53 (Ian S. Forrester et al. trans., 1975).

301. CISG, *supra* note 18, art. 47(1) (buyer's *Nachfrist* right); *id.* art. 63(1) (seller's *Nachfrist* right).

302. See *id.* art. 49(1)(b). While the *Nachfrist* procedure applies to all of the buyer's and seller's obligations, it is a predicate for avoidance only if the seller has not delivered, see *id.*, or the buyer has failed to pay the price or take delivery of the goods. See *id.* art. 64(1)(b). The procedure would, therefore, serve no useful purpose when used with respect to contractual duties other than the foregoing.

303. See E. ALLAN FARNSWORTH, CONTRACTS § 8.15, at 633 (2d ed. 1990). Of course, this is not necessarily an unbiased opinion, coming as it does from the reporter for the project. As will soon be apparent, if the contract is covered by the Code, the consequences of a breach may be significantly different from those that follow from the breach of a non-Code contract. See *infra* notes 304-313 and accompanying text. For the sake of clarity, the discussion is, therefore, limited at this point to the latter type of contract.

304. See RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981).

entitled to expect under the contract.³⁰⁵ The second step in the analysis occurs when the aggrieved party makes the decision to terminate the contract. Under the terminology of the Second Restatement, the breach must be "total" to warrant this response.³⁰⁶ The difficulties mount because not every material breach is automatically a total breach. This is true in those instances in which the breaching party can cure the breach by remedying the deficiency in performance.³⁰⁷ As the comment to section 242 of the Second Restatement plainly states, the party in breach must ordinarily be afforded some opportunity to cure before termination is justified.³⁰⁸ How long is the period of time between suspension and termination? Here, again, there is no simple test to apply, and the aggrieved party who announces that the contract is at an end does so at her peril.³⁰⁹

The aggrieved party's rights when there has been a delay in the other party's performance have historically been troublesome, and are troublesome still. Cases in which the contract states that "time is of the essence" pose relatively few problems; unless there is some reason to question whether this phrase accurately reflects the intention of the parties, any delay will constitute a material and total breach.³¹⁰ In

305. A list of significant circumstances can be found in section 241 of the Second Restatement. *See id.* § 241.

306. *See id.* §§ 236-243.

307. *See id.* § 237 ("[I]t is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time."). *See generally* William H. Lawrence, *Cure After Breach of Contract Under the Restatement (Second) of Contracts: An Analytical Comparison with the Uniform Commercial Code*, 70 MINN. L. REV. 713 (1986) (comparing common-law and UCC treatments of cure).

308. *See* RESTATEMENT (SECOND) OF CONTRACTS § 242 cmt. a ("Ordinarily there is some period of time between suspension and discharge, and during this period a party may cure his failure."); *see also* Robert A. Hillman, *Keeping the Deal Together After Material Breach—Common Law Mitigation Rules, the UCC, and the Restatement (Second) of Contracts*, 47 U. COLO. L. REV. 553, 594 (stating that the Second Restatement "attempt[s] to lessen the impact of the material breach doctrine" by providing that the aggrieved party may only suspend her "performance until it is too late for the breaching party to cure the default").

309. The point is made by Professor Farnsworth, who explains that if the aggrieved party "acts precipitously and terminates before it is entitled to do so loses its defense, as well as its claim for damages for total breach, and will itself be liable for damages for total breach." FARNSWORTH, *supra* note 303, § 8.18, at 643; *see also* Walker & Co. v. Harrison, 81 N.W.2d 352, 355 (Mich. 1957) (stating that the decision to suspend and terminate "is fraught with peril, for should such determination, as viewed by a later court in the calm of its contemplation, be unwarranted, the repudiator himself will have been guilty of material breach and himself have become the aggressor, not an innocent victim"). Whether the material breach has ripened into a total breach depends on circumstances similar to those that are relevant to the materiality of the breach in the first place. *See* RESTATEMENT (SECOND) OF CONTRACTS § 242.

310. This is the position accepted by the Second Restatement:

contrast, if the contract is silent and is not for the sale of goods, courts have routinely concluded that time is not of the essence.³¹¹ Thus, there can be no termination without giving the breaching party a chance to cure. The problem for the aggrieved party is obvious; how much delay must she tolerate before she is free to look elsewhere for performance?

We can approach this problem by looking at an illustration drawn from the Second Restatement:

A contracts to build a house for *B* for \$50,000, progress payments to be made monthly in an amount equal to 85% of the price of the work performed during the preceding month, the balance to be paid on the architect's certificate of satisfactory completion of the house. Without justification *B* fails to make a \$5,000 progress payment. *A* thereupon stops work on the house and a week goes by. *A*'s failure to continue the work is not a breach and *B* has no claim against *A*. *B*'s failure to make the progress payment is an uncured material failure of performance which operates as the non-occurrence of a condition of *A*'s remaining duties of performance under the exchange. If *B* offers to make the delayed payment and in all the circumstances it is not too late to cure the material breach, *A*'s duties to continue the work are not discharged. *A* has a claim against *B* for damages for partial breach because of the delay.³¹²

Here, unfortunately, *A* has no sure way to know when she is free to leave the job and employ her assets elsewhere. The Second Restatement builds on this illustration with another:

B tenders the progress payment after a two-day delay along with damages for the delay. *A* refuses to accept the payment and resume work and notifies *B* that he cancels the contract. *B*'s tender cured his breach before *A*'s remaining duties to render performance were discharged, and *B* has a claim against *A* for total breach of contract,

It is, of course, open to the parties to make performance or tender by a stated date a condition by their agreement, in which event, absent excuse, delay beyond that date results in discharge. Such stock phrases as "time is of the essence" do not necessarily have this effect, although . . . they are to be considered along with other circumstances in determining the effect of delay.

RESTATEMENT (SECOND) OF CONTRACTS § 242 cmt. d (citations omitted).

311. See, e.g., *Kakalik v. Bemardo*, 439 A.2d 1016, 1020 (Conn. 1981); *Freeman v. Boyce*, 661 P.2d 702, 705-06 (Haw. 1983); *Leavitt v. Fowler*, 391 A.2d 876, 877-78 (N.H. 1978). Unless the contract is an installment contract, the Code permits cancellation if one party's performance is late. See U.C.C. § 2-601 (1998) (allowing the buyer to reject the goods if "the tender of delivery fail[s] in any respect to conform to the contract"); *id.* § 2-711 (allowing the buyer to cancel following rejection); *id.* § 2-703 (allowing the seller to cancel if the buyer fails to make payment when due).

312. RESTATEMENT (SECOND) OF CONTRACTS § 237 illus. 1 (emphasis added).

subject to a claim by *A* against *B* for damages for partial breach because of the delay.³¹³

Just like that, the innocent victim has himself become the bad person with responsibility for the more serious breach. How long should *A* have waited? Five days? Ten days? There is simply no way to know. Perhaps, then, our system should adopt a procedure like *Nachfrist* and permit a party in the position of *A* to make time of the essence by fixing an additional reasonable period of time after which she can safely declare the contract avoided if the other party has not performed. A procedure that encourages fixing such a deadline is attractive, in that it should reduce the inefficiencies that result from the uncertainty that plagues the present system.

One other useful context for the *Nachfrist* procedure bears mention. Not all agreements contain a provision for the time of performance. Suppose, for example, that in a contract for the sale of goods the parties do not agree, expressly or impliedly, on the time for delivery.³¹⁴ In such cases, section 2-309(1) provides that the time for delivery shall be a "reasonable time."³¹⁵ What is a reasonable time? There is no mechanical test to make this determination. The answer will vary from case to case, depending on such factors as "the nature of goods to be delivered, the purpose for which they are to be used, the extent of seller's knowledge of buyer's intentions, transportation conditions, the nature of the market, and so on."³¹⁶ The buyer must thus wait for the seller's performance without ever being sure when she has the right to cancel the contract because a reasonable time for delivery has expired. The buyer's position would be strengthened if she could rely on a *Nachfrist*-type notice given to the seller.

In summary, the *Nachfrist* procedure can improve an aggrieved party's ability to declare the contract canceled in the event of nonperformance, especially in instances in which the contract does not state that time is of the essence. Hence, it is reasonable to posit that once this procedure has been duly tested by experience in international sales, it will gradually creep into domestic commercial practice and its use will actually be encouraged by courts.

313. *Id.* § 242 illus. 1 (emphasis added).

314. Nor is there an applicable usage of trade, course of performance, or course of dealing that can be used to fix a delivery date.

315. See U.C.C. § 2-309(1) (1998).

316. WHITE & SUMMERS, *supra* note 180, § 3-5, at 89 (footnotes omitted).

IV. CONCLUSION

This Article uses the CISG to illustrate situations in which the emerging international commercial code may play an important role in the long-term development of purely domestic commercial law. Although it has been accepted that international law has the potential to help shape the law on a domestic level, this phenomenon has only been discussed in the context of legislation.³¹⁷ However, international instruments may also exert an influence on the behavior of judges greater than is commonly supposed. For it is surely the case that, in creating a new legal environment for decision making, these instruments are bound to mediate existing intellectual habits and encourage experimentation and growth in cases without an international character.³¹⁸

How much of an influence the instruments exert, and whether the judicial adoption of international perspectives can be squared with other goals or norms of domestic commercial law, remains to be explored. It is time to confront these issues directly so that legislators can reach a rational consensus when deciding how to respond to proposed international instruments. Once it is recognized that international law reform efforts involve not just international transactions, but domestic law, and, as a result, domestic transactions, legislative decisions can be seen to alter the fabric of modern commercial law, influencing an enormous range of substantive outcomes in the process. Efforts to ensure a clear understanding of this sort are among a wide range of steps designed to build a framework within which international law can develop and grow without unexpectedly and inappropriately disturbing the domestic legal system.

317. See, e.g., Boss, *supra* note 28.

318. The process of mediation works two ways. Not only are international developments likely to color judicial perception of domestic law, but a judge's understanding of domestic law is likely to have a similar influence on her application of international law. Not surprisingly, this latter possibility has not gone unnoticed by commentators. See, e.g., HONNOLD, *supra* note 298, at 1 (stating that domestic tribunals "will be subject to a natural tendency to read the international rules in light of the legal ideas that have been imbedded at the core of their intellectual formation").