

PUTTING THE CISG WHERE IT BELONGS: IN THE UNIFORM COMMERCIAL CODE

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I. INTRODUCTION

As lawyers and law students, judges, practitioners, and academics, we are each tasked with the obligation of taking to memory countless acronyms, but it is unlikely that many of us will spend any sleepless nights considering the CISG.¹ This conclusion might be supported by the unsophisticated observation that the United States Supreme Court has never visited the text of the United Nations Convention on Contracts for the International Sale of Goods (“CISG” or “the Convention”).² A closer investigation reveals that even among the lower courts that have examined the CISG, many of these courts have made a consistently pitiable effort of analyzing the language of this important treaty.³ At the same time, it is difficult to overlook the

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¹ United Nations Convention on Contracts for the International Sale of Goods, 52 Fed. Reg. 6262 (Mar. 2, 1987) [hereinafter CISG], available at <http://www.cisg.law.pace.edu/cisg/text/treaty.html>.

² The latest writ of certiorari involving the CISG, which was denied by the Supreme Court, was an appeal from the Fifth Circuit in 2008. *Tiber Shipping L.L.C. v. BP Oil Int’l Ltd.*, 555 U.S. 821 (2008).

³ See James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales*, 32 CORNELL INT’L L.J. 273, 275 (1999) (“Despite the CISG’s political and economic significance to the United States, for the past decade, U.S. courts and attorneys have overlooked, misconstrued, and misapplied the terms of the Convention.”); see also *Stawski Distrib. Co. v. Browary Zywiec S.A.*, 349 F.3d 1023 (7th Cir. 2003) (failing to explain Article 1 of the CISG); *Golden Valley Grape Juice & Wine, L.L.C. v. Centrisys Corp.*, No. CV F 09-1424

vast arena of goods that are home to the CISG's purview. The CISG governs the actions of every American seller that contracts to buy clothing from China, wine from Italy, chocolate from Switzerland, and countless other goods.⁴ It supplies the rights and obligations that buyers have to sellers, sellers have to buyers, and the rules applicable to a dispute when an injured party seeks to enforce those rights.⁵

Legally speaking, the Convention is a treaty signed by the United States, and as such, it preempts domestic contract law when a contract for the sale of goods is made between a buyer and a seller who each have their principal places of business in two different nations that are party to the CISG.⁶ The CISG is the international equivalent of the more easily recognizable Article 2 of the Uniform Commercial Code ("UCC"), which governs the sale of goods between domestic buyers and sellers.⁷ It is important to emphasize that the CISG is a wholly independent body of contract law and entirely separate from its more popular half-sibling, the UCC.⁸ And much like quarreling siblings, the provisions of the CISG and the UCC are not always complementary, but may be outcome determinative in a variety of issues.⁹

LJO GSA, 2010 WL 347897, at *2 (E.D. Cal. Jan. 22, 2010) (stating incorrectly that the CISG may always be excluded by a choice-of-law provision).

⁴ See CISG, *supra* note 1, at art. 1(1)(a) ("This Convention applies to contracts of sale of goods between parties whose places of business are in different States . . . when the States are Contracting States . . ."). China, Italy, and Switzerland are among the signatories of the CISG. See United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary General, Chapter X: International Trade and Development, United Nations Convention on Contracts for the International Sale of Goods (Apr. 11, 1980), available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en.

⁵ See CISG, *supra* note 1, at art. 4 ("This Convention governs . . . the rights and obligations of the seller and buyer arising from [a contract of sale].").

⁶ CISG, *supra* note 1, at art. 1(1)(a) ("This Convention applies to contracts of sale of goods between parties whose places of business are in different States . . . when the States are Contracting States . . ."). According to Article 1(1)(b), the CISG may also apply "when the rules of private international law lead to the application of the law of a Contracting State." CISG, *supra* note 1, at art. 1(1)(b). However, the United States has expressly declared a reservation and thus effectively opted out of this approach. United Nations Convention on Contracts for the International Sale of Goods, Sept. 21, 1983, S. TREATY DOC. No. 98-9 (1983), available at <http://www.cisg.law.pace.edu/cisg/biblio/reagan.html>.

⁷ See U.C.C. § 2-102 (2003) ("[T]his Article applies to transactions in goods . . .").

⁸ See 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 (1991) (explaining that the CISG governs the international sale of goods whereas the UCC governs the sale of goods between two domestic parties).

⁹ See Harry M. Flechtner, *Another CISG Case in the U.S. Courts: Pitfalls for the Practi-*

Despite these two bodies of law governing separate contracts, many United States courts erroneously fail to apply the CISG in situations in which its application is appropriate, even mandated by law.¹⁰ For at least twenty-four years since the adoption of the CISG in the United States, scholars have chastised these courts and offered their own suggestions as to what they deem to be the failure of some judges and lawyers to recognize the scope of the CISG.¹¹ Also during that time, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) and the American Law Institute (“ALI”) commenced more than one revision of Article 2 of the UCC, though not to the effect of reproducing the CISG’s scope into the text of the UCC.¹²

Recognizing that the CISG is an independent body of law but also dependent on the American public’s greater familiarity with the UCC,¹³ this Comment will propose that the UCC itself should be amended to include explicit language that Article 2 does not apply to a sale of goods contract when a buyer and seller have their principal place of business in two different contracting states under the CISG. The revision should encompass no more than a slight modification of the current scope provision of the UCC, making clear only that the

tioner and the Potential for Regionalized Interpretations, 15 J.L. & COM. 127, 131-32 (1995) (“The Statute of Frauds is only one area in which CISG makes significant, potentially outcome-determinative changes in U.S. sales law. Other such areas include, but certainly are not limited to, contract formation, parol evidence, the effect of missing contractual terms, and remedies.” (footnotes omitted)).

¹⁰ See, e.g., *Berry v. Ken M. Spooner Farms, Inc.*, No. C05-5538FDB, 2006 WL 1009299, at *1 (W.D. Wash. Apr. 13, 2006) (describing that the CISG did not apply in a contract of goods between a buyer whose place of business was in Mexico and a seller whose place of business was in the United States, even though both countries are party to the CISG), *rev’d*, *Berry v. Ken M. Spooner Farms, Inc.*, 254 F. App’x 646 (9th Cir. 2007); see also *infra* Part III.

¹¹ See, e.g., William S. Dodge, *Teaching the CISG in Contracts*, 50 J. LEGAL EDUC. 72, 73 (2000) (suggesting that the CISG be taught in law school Contracts courses).

¹² See John E. Murray, Jr. & Harry M. Flechtner, *The Summer, 1999 Draft of Revised Article 2 of the Uniform Commercial Code: What Hath NCCUSL Rejected?*, 19 J.L. & COM. 1, 4 (1999) (describing the revision of Article 2); *Recommendation of the Permanent Editorial Board for the Uniform Commercial Code to Withdraw the 2003 Amendments to UCC Articles 2 and 2a from the Official Text of the Uniform Commercial Code*, 65 CONSUMER FIN. L.Q. REP. 150, 161 (2011) (describing the failure of the suggested 2003 Amendments to the UCC).

¹³ See Alicia Journey Whitlock & Boris S. Abbey, *Who’s Afraid of the CISG?—Why North Carolina Practitioners Should Learn a Thing or Two About the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 30 CAMPBELL L. REV. 275, 275 (2008) (describing the CISG as an “unfamiliar body of law” as compared with the UCC).

CISG will govern in such instances, but not incorporating other substantive provisions or international norms into the text of the UCC.

Part II of this Comment will provide a historical and analytical background of the CISG. Part III will address the different ways in which United States courts misapply the CISG, paying close attention to how these courts interpret the Convention's scope. Part IV will analyze the opinions of several scholars with regard to why the CISG is misapplied and where the solutions to this problem may lie, while Part V will derogate from this conventional scholarly approach and examine the utility of amending the UCC in a more surgical way than the UCC Drafting Committee has done to date. Finally, Part VI will conclude with a summary of the benefits and possible developments of this approach.

II. BACKGROUND OF THE CISG

The United Nations Commission on International Trade Law ("UNCITRAL") is the organizational body that prepared the text of the CISG prior to its being duly adopted by the United States and sixty-one other countries at the Vienna Convention in April 1980.¹⁴ The United States signed the Convention in August 1981;¹⁵ it was approved by the Senate in October 1986 and ratified in December of the same year.¹⁶ The CISG then formally entered into force on January 1, 1988, and remains federal law today.¹⁷ To date, it is also a body of contract law in seventy-eight other countries, known as "Contracting States" to the Convention.¹⁸

¹⁴ See UNCITRAL Secretariat, Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods, U.N. DOC. V.89-53886 (June 1989), available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.

¹⁵ See United Nations Treaty Collection, *supra* note 4.

¹⁶ *Id.*

¹⁷ See *id.* (stating when the CISG entered into force).

¹⁸ The CISG has been signed and ratified in: Albania, Argentina, Armenia, Australia, Austria, Belarus, Belgium, Benin, Bosnia and Herzegovina, Bulgaria, Burundi, Canada, Chile, China, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Japan, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Lithuania, Luxembourg, Mauritania, Mexico, Mongolia, Montenegro, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Republic of Korea, Republic of Moldova, Romania, Russian Federation, San Marino, Serbia, Singapore, Slovakia, Slovenia, Spain, St. Vincent and the Grenadines, Sweden, Switzerland, Syrian Arab Repub-

As a consequence of the ratification of this multilateral treaty, the default United States contract law with respect to transactions between buyers and sellers of these seventy-eight other nations is the CISG and not Article 2 of the UCC.¹⁹ Furthermore, as federal law, the CISG is “the supreme Law of the Land” and preempts all conflicting state law.²⁰ This, however, comes with the caveat that any conflict between the CISG and the UCC is exceptionally rare because the scope of each is limited to international sales of goods and domestic sales of goods, respectively.²¹

The CISG serves two important purposes, which may be gleaned from the Preamble of the text.²² The first of these is to ensure legal certainty.²³ For example, imagine that an American buyer contracts with a Zambian seller for ten tons of copper. The seller delivers eleven tons to the buyer’s overseas facility in the capital city of Lusaka but the buyer refuses to pay for the additional ton. Whether

lic, the former Yugoslav Republic of Macedonia, Turkey, Uganda, Ukraine, United States of America, Uruguay, Uzbekistan, Venezuela (Bolivarian Republic of), and Zambia. *Id.*

¹⁹ See CISG, *supra* note 1, at art. 1(1)(a) (“This Convention applies to contracts of sale of goods between parties whose places of business are in different States . . . when the States are Contracting States . . .”).

²⁰ See U.S. CONST. art. VI. Article VI provides in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI.

²¹ See David Frisch, *Commercial Common Law, the United Nations Convention on the International Sale of Goods, and the Inertia of Habit*, 74 TUL. L. REV. 495, 503-04 (1999) (“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 legal texts, one for domestic and the other for international contracts for the sale of goods.”).

²² The Preamble, in relevant part, states:

THE STATES PARTIES TO THIS CONVENTION . . . BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade, HAVE AGREED as follows

CISG, *supra* note 1, at pmb1.

²³ See *id.* (stating that a purpose of the CISG is the “removal of legal barriers in international trade”).

an action is brought in the United States of America or in Zambia, which legal system applies? Once that is decided (most likely through a complicated conflicts of law analysis), one party's counsel may argue unfamiliarity with that body of law and may be unable to substantively establish whether a breach of contract occurred. Imagine, now, the disapproval of the Zambian seller if the buyer brought the dispute before a United States Federal District Court that applied the UCC. The outcome of the case could very likely be different, depending on which law governs the dispute. Therefore, the purpose of the CISG is to provide a consistent law that could be applied to ensure legal certainty.²⁴

The second goal of the CISG is to promote international trade.²⁵ The CISG accomplishes this goal because it is a uniform body of law, irrespective of nationality and legal tradition, and does not favor any party to the transaction that it governs.²⁶ In fact, the Convention is unique in that it combines both common law and civil law elements.²⁷ To illustrate again the example with our American buyer and Zambian seller, neither the law of the United States nor the law of Zambia will apply.²⁸ Rather, the borderless international law of the CISG will apply, creating, in effect, an incentive for both parties to contract and trade with one another because they will each at least be certain that one particular body of law will govern any disputes they might have, thereby promoting international trade.

When the United States ratified the CISG, it made a reservation to the treaty known as an "Article 95 declaration,"²⁹ which elim-

²⁴ *Id.*

²⁵ *See id.* (stating that a purpose of the CISG is to "promote the development of international trade").

²⁶ Bruno Zeller, *Four Corners: The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods*, INSTITUTE OF INTERNATIONAL COMMERCIAL LAW (May 19, 2003), <http://www.cisg.law.pace.edu/cisg/biblio/4corners.html> ("[T]he CISG is truly a neutral law favoring neither party.").

²⁷ *See* Whitlock & Abbey, *supra* note 13, at 278-79 ("[T]he requirement of good faith contained in Article 7(1) of the CISG is not generally recognized in English common law, but is an important concept in civil law states. Furthermore, the principles of interpretation of the CISG follow both an objective approach, an important common law concept, and a subjective approach, followed in civil law states." (footnotes omitted)).

²⁸ *See* CISG, *supra* note 1, at art. 1(1)(a) ("This Convention applies to contracts of sale of goods between parties whose places of business are in different States . . . when the States are Contracting States . . .").

²⁹ Joseph Lookofsky, *The 1980 United Nations Convention on Contracts for the Interna-*

inated Article 1(1)(b) from the American text.³⁰ Article 1(1)(b) requires the CISG's application to a dispute when the rules of private international law find that a contracting nation's law should govern.³¹ Because of the expressed reservation in the United States, the CISG only applies to situations that satisfy Article 1(1)(a), namely a transaction for the international sale of goods when the parties have their places of business in different nations party to the Convention.³² An exception to this rule occurs only when the transaction between the parties is expressly excluded by the CISG itself.³³ Accordingly, our hypothetical American and Zambian parties may choose to opt-out of the CISG as permitted under Article 6 of the Convention.³⁴ But despite this permission, it is almost impossible to opt out of the Convention because an effective opt-out requires highly specific language that is often unmanageable to satisfy.³⁵ For example, might the parties agree to be governed by the UCC and explicitly state in their contract that they will use "U.S. law," the CISG most likely still applies

tional Sale of Goods, in INTERNATIONAL ENCYCLOPAEDIA OF LAWS—CONTRACTS 34 (Jacques H. Herbot ed., Supp 29 2000), available at <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky.html>.

³⁰ United Nations Convention on Contracts for the International Sale of Goods, Sept. 21, 1983, S. TREATY DOC. No. 98-9 (1983).

³¹ CISG, *supra* note 1, at art. 1(1)(b) ("This Convention applies to contracts of sale of goods between parties whose places of business are in different States . . . when the rules of private international law lead to the application of the law of a Contracting State.").

³² CISG, *supra* note 1, at art. 1(1)(a).

³³ See Marcia J. Staff, *United Nations Convention on Contracts for the International Sale of Goods: Lessons Learned from Five Years of Cases*, 6 S.C. J. INT'L L. & BUS. 1, 5 (2009) (analyzing when the CISG applies). Further, the CISG does not apply to sales of personal goods or services. CISG, *supra* note 1, at art. 2(a) (discussing personal goods); CISG, *supra* note 1, at art. 3 (discussing personal services). Moreover, the CISG does not apply to those circumstances listed in Article 2(b)-(f). CISG, *supra* note 1, at art. 2 (listing sales "(b) by auction; (c) on execution or otherwise by authority of law; (d) of stocks, shares, investment securities, negotiable instruments or money; (e) of ships, vessels, hovercraft or aircraft; (f) of electricity"). Finally, it does not apply to issues of validity, liability for death, or liability for personal injury. CISG, *supra* note 1, at art. 4; CISG, *supra* note 1, at art. 5.

³⁴ See CISG, *supra* note 1, at art. 6 ("The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.").

³⁵ See Thomas J. Drago & Alan F. Zoccolillo, *Be Explicit: Drafting Choice of Law Clauses in International Sale of Goods Contracts*, INSTITUTE OF INTERNATIONAL COMMERCIAL LAW, (July 26, 2002), <http://www.cisg.law.pace.edu/cisg/biblio/zoccolillo1.html> ("The simplest way to exclude the application of the CISG or „opt out“ is by inserting a choice of law provision in the international sale contract. However, choice of law clauses must explicitly provide that the Convention is inapplicable to the international sale of goods transaction in order to ensure that it will not be applied.").

because the CISG *is* federal U.S. law.³⁶

III. A CASE-BY-CASE ANALYSIS

Courts in the United States have misapplied the scope of the CISG in at least three ways. One means of misapplying the scope of the Convention is when a court fails to explicitly state when the CISG applies or does not apply.³⁷ Another way a court may misapply the scope of the Convention is by stating the scope of the CISG in a manner that misinterprets the literal meaning of Article 1(1)(a).³⁸ Finally, a court may wholeheartedly refuse to acknowledge the CISG's scope on the basis of counsel's failure to raise the application of the Convention until too late in the proceedings.³⁹

A. When Courts Failed to State the Scope of the CISG

Some courts, especially in earlier decisions on the Convention, failed to state the scope of the CISG when the Convention was applicable to the dispute at hand.⁴⁰ In 1993, the Fifth Circuit did not indicate the scope of the CISG in a case in which the CISG presumably should have applied.⁴¹ It was, however, an improvement from the lower court's failure to acknowledge the existence of the CISG at all because, although the Fifth Circuit conceded that the CISG existed as a body of law, it did not describe when the CISG should be applied.⁴²

³⁶ *See id.* ("Practitioners should be aware that clauses specifying the laws of a country or a specific U.S. State will not, in most instances, effectively exclude the application of the Convention.")

³⁷ *See, e.g., Stawski Distrib. Co.*, 349 F.3d 1023 (failing to explain Article 1 of the CISG).

³⁸ *See, e.g., Golden Valley Grape Juice & Wine, L.L.C.*, 2010 WL 347897, at *2 (stating incorrectly that the CISG may always be excluded by a choice-of-law provision).

³⁹ *See, e.g., Ho Myung Moolsan, Co. v. Manitou Mineral Water, Inc.*, No. 07 Civ. 07483 RJH, 2010 WL 4892646, at *1, *2 (S.D.N.Y. Dec. 2, 2010) (finding that a South Korean buyer failed to timely argue that the CISG applied to a contract between himself and a United States seller).

⁴⁰ *See, e.g., Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., Inc.*, 993 F.2d 1178, 1182-83 (5th Cir. 1993) (using Texas law to govern a dispute between an American buyer and Chinese seller).

⁴¹ *Id.*; *see also* Harry M. Flechtner, *More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, "Validity" and Reduction of Price Under Article 50*, 14 J.L. & COM. 153, 163 (1995) (stating that even though *Beijing Metals* did not resemble a sale of goods contract, there is ample authority to support that it was a contract for the sale of goods).

⁴² *See Beijing Metals*, 993 F.2d at 1182 (stating that the district court relied on the parol evidence rule).

The facts of the case are not important except that the dispute involved an American buyer and a Chinese seller.⁴³ The Fifth Circuit, veiled in a footnote, stated that the American buyer wanted the CISG and not Texas law to govern the dispute.⁴⁴ Remarkably, the court did not delve into an analysis of when the CISG should apply and whether the contract met the elements of Article 1.⁴⁵ Rather, it determined that because the case hinged on the application of the parol evidence rule, and because both the CISG and Texas' version of the UCC had similar provisions regarding the parol evidence rule, the choice of law was inconsequential.⁴⁶ Naturally for the court, when faced with what it viewed as equivalent provisions, it chose to continue its opinion using Texas law, the law with which it was more familiar.⁴⁷

This choice, however, was probably outcome determinative because the parol evidence rule is not firmly rooted in the text of the CISG.⁴⁸ Rather, the court entirely missed its opportunity to define the scope of the CISG and apply the Convention to this dispute. Had the court not erroneously determined that the CISG and the UCC were both identical with respect to the parol evidence rule, it probably would have begun its analysis with Article 1 of the CISG, determining that the CISG would apply to the contract at issue.

Three years later, the Ninth Circuit similarly failed to pen a sentence as to the CISG's application.⁴⁹ The case was *Attorneys Trust v. Videotape Computer Products*⁵⁰ and involved a Taiwanese seller and an American buyer.⁵¹ To make matters clearer, the party named second to the dispute was listed in the court's opinion as, "CMC Magnetics Corporation aka CMC, a Republic of China Corpo-

⁴³ See *id.* at 1179 n.1.

⁴⁴ *Id.* at 1182 n.9.

⁴⁵ See *id.* ("We need not resolve this choice of law issue, because our discussion is limited to application of the parol evidence rule (which applies regardless), duress, and fraudulent inducement; however, the district court may need to do so on remand.").

⁴⁶ *Id.*

⁴⁷ See *Beijing Metals*, 993 F.2d at 1182 n.9 (choosing to apply Texas law).

⁴⁸ See Flechtner, *supra* note 41, at 158 (stating that the decision might have been different if the court applied the CISG because the Convention rejects the purpose of the parol evidence rule).

⁴⁹ *Attorneys Trust v. Videotape Computer Prods., Inc.*, 93 F.3d 593 (9th Cir. 1996).

⁵⁰ 93 F.3d 593 (9th Cir. 1996).

⁵¹ *Id.* at 594.

ration.”⁵² Although the court ultimately determined that the CISG did not apply because the Taiwanese party brought the matter up too late in the proceedings,⁵³ the court should have first explained whether the parties met the scope of the CISG at all. Ultimately, however, the court did not define the scope of the CISG.⁵⁴ Submitting that the Fifth Circuit might have not done so because Taiwan was arguably not a party to the CISG,⁵⁵ the opposite conclusion may be reached owing to Taiwan’s unique relationship with China which was, and still is, party to the CISG,⁵⁶ and the court’s own designation of the corporation as “a Republic of China Corporation.”⁵⁷

In 2003, in *Stawski Distributing Co. v. Browary Zywiec S.A.*,⁵⁸ the Seventh Circuit remanded a case from a Northern District of Illinois decision that did not cite to the CISG, but instead applied Illinois law in a contract between an American buyer and Polish seller.⁵⁹ In an opinion by Judge Easterbrook, the Seventh Circuit failed to discuss the scope of the CISG, instead determining that Illinois law applied.⁶⁰ Both courts stated that the seller was “located” in Poland, but location is irrelevant under the CISG because the requisite question is whether the seller had its principal “place[] of business” in Poland.⁶¹ For this reason, this case and the aforementioned provide no guidance for future courts when determining when the CISG should apply to a dispute.

⁵² *Id.* at 593.

⁵³ *Id.* at 600.

⁵⁴ *See id.* (“[W]hen an action is filed directly in the district court the federal courts are empowered to determine their own jurisdiction. . . . Thus, while AT and CMC might wish that they had not entered our portals, they did—their tergiversation comes too late.”).

⁵⁵ Bailey, *supra* note 3, at 283.

⁵⁶ *See* United Nations Treaty Collection, *supra* note 4 (identifying China as a party to the CISG). China became party to the CISG in 1986. *Id.*

⁵⁷ *Attorneys Trust*, 93 F.2d at 593.

⁵⁸ 349 F.3d 1023 (7th Cir. 2003).

⁵⁹ *Stawski Distrib. Co. v. Zywiec Breweries PLC*, No. 02 C 8708, 2003 WL 22595266, at *1 (N.D. Ill. Nov. 10, 2003) (applying the Illinois Beer Industry Fair Dealing Act to a contract for the sale of goods between an American and a Polish party), *vacated sub nom. Stawski Distrib. Co.*, 349 F.3d 1023.

⁶⁰ *Stawski*, 349 F.3d at 1024-25.

⁶¹ *See* CISG, *supra* note 1, at art. 1 (“This Convention applies to contracts of sale of goods between parties whose places of business are in different States.”).

B. When Courts Made an Ambiguous Analysis of the Scope of the CISG

In other cases, courts engaged in the venture to define the scope of the CISG, but this journey produced only an ambiguous statement of the scope of the treaty.⁶² A California court, in *OrthoTec, LLC v. EuroSurgical, S.A.*,⁶³ did just this in an unpublished opinion from 2007. The court briefly described the applicability of the CISG in a footnote, stating, “The CISG is an international treaty governing contracts for the sale of goods between parties living in those countries that have signed the treaty.”⁶⁴ Although dicta, the statement was not accurate because the CISG does not mandate application when parties live in a country, but rather when parties have their “places of business” in that country.⁶⁵ Similarly, the Second Circuit, in *Delchi Carrier SpA v. Rotorex Corp.*,⁶⁶ stated that the CISG applied to “sales contracts,”⁶⁷ whereas in practice, the CISG only applies to sale of goods contracts, which is one subset of sales contracts.⁶⁸

Another way in which courts may confuse the scope of the CISG is by stating that the CISG may be excluded if the parties contractually agree that the law of a particular nation will apply instead of the CISG.⁶⁹ However, this is not always accurate because the law of a certain jurisdiction may indeed be governed by the CISG.⁷⁰ This

⁶² See, e.g., *OrthoTec, LLC v. EuroSurgical, S.A.*, No. B179387, 2007 WL 1830810, at *12 n.13 (Cal. Ct. App. June 27, 2007) (stating that the CISG governed contracts between two nations “that have signed the treaty” (emphasis added); see also *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1027 n.1 (2d Cir. 1995) (stating that the CISG applied to all “sales contracts”).

⁶³ No. B179387, 2007 WL 1830810 (Cal. Ct. App. June 27, 2007).

⁶⁴ *Id.* at *12 n.13.

⁶⁵ CISG, *supra* note 1, at art. 1(1)(a).

⁶⁶ 71 F.3d 1024 (2d Cir. 1995).

⁶⁷ *Delchi*, 71 F.3d at 1027 n.1.

⁶⁸ CISG, *supra* note 1, at art. 1(1) (“This Convention applies to contracts of sale of goods . . .”).

⁶⁹ See, e.g., *OrthoTec*, 2007 WL 1830810, at *12 n.14 (stating that the CISG was excluded because the parties chose to be governed by California law); see also William P. Johnson, *Understanding Exclusion of the CISG: A New Paradigm of Determining Party Intent*, 59 BUFF. L. REV. 213, 215 (2011) (“It simply is not the case that a choice-of-law clause by itself has the effect of excluding application of the CISG.”).

⁷⁰ See *Drago & Zoccolillo*, *supra* note 35 (“Practitioners should be aware that clauses specifying the laws of a country or a specific U.S. State will not, in most instances, effectively exclude the application of the Convention.”).

was illustrated in *OrthoTec*, in which the California Court of Appeal for the Second District affirmed a decision from the Superior Court of Los Angeles, which did not apply the CISG because the parties allegedly opted out of it by excluding the term “CISG” from the choice-of-law clause and inserting the words “California law” instead.⁷¹ However, California law incorporates the provisions of the CISG because federal law preempts it, which, in this case, is the CISG.⁷² Even though parties may derogate from the use of the Convention through Article 6,⁷³ the mere inclusion of a choice-of-law provision does not automatically exclude application of the CISG.⁷⁴

OrthoTec is not the only case that makes this fatal, but understandingly complex, conflicts of law error.⁷⁵ The misstep in *OrthoTec* is so common that courts around the country replicate the same language when referring to the conflicts of laws analysis. One case among many is *American Biophysics Corp. v. Dubois Marine Specialties*.⁷⁶ There, a Canadian buyer and an American seller agreed upon a choice-of-law provision which stated that the agreement between them “shall be construed and enforced in accordance with the

⁷¹ *OrthoTec*, 2007 WL 1830810, at *12 n.14.

⁷² The difference is small but important:

A majority of arbitral tribunals and national courts around the world have held that a choice of law clause in an international sale of goods contract which selects the laws of a Contracting State means that the Convention (and not the domestic commercial laws of such Contracting State) shall apply to the contract. This position is taken, for the most part, because the Contracting States have incorporated the Convention into the laws of their country, and the law of such Contracting State which governs international commercial contracts for the sale of goods is the CISG.

Drago & Zoccolillo, *supra* note 35.

⁷³ CISG, *supra* note 1, at art. 6 (“The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.”).

⁷⁴ In referring to the *OrthoTech* case, one scholar noted:

Unfortunately, while this characterization of the sphere of application of the CISG may be true as a general matter, the language is not precise, and the statement will not be accurate in every instance. The language is not precise to the extent that it suggests—though without explicitly asserting—that if an agreement is not silent as to choice of law, then the CISG would automatically be excluded and would therefore not apply.

Johnson, *supra* note 69, at 233.

⁷⁵ See, e.g., *Am. Biophysics Corp. v. Dubois Marine Specialties*, 411 F. Supp. 2d 61, 63 (D.R.I. 2006).

⁷⁶ 411 F. Supp. 2d 61 (D.R.I. 2006).

laws of Rhode Island.”⁷⁷ The United States District Court for the District of Rhode Island cited a 2004 Pennsylvania District Court decision, *Amco Ukrservice v. American Meter Co.*,⁷⁸ in establishing its own scope provision, explaining that the “CISG governs „contracts for the sale of goods where the parties have places of business in different nations, the nations are CISG signatories, and the contract does not contain a choice of law provision.”⁷⁹ It then proceeded to cite dicta from cases⁸⁰ such as *Delchi Carrier SpA, Viva Vino Import Corp. v. Farnese Vini S.R.L.*,⁸¹ *Fercus, S.R.L. v. Palazzo*,⁸² and *Claudia v. Olivieri Footwear Ltd.*,⁸³ each of which made this fatal error.⁸⁴ Furthermore, the cases cited in *American Biophysics* are not limited to that opinion alone, but also appear in other decisions as well.⁸⁵ This trend is dangerous because it creates greater accessibility of imprecise language, as this language may appear in other opinions as

⁷⁷ *Id.* at 62.

⁷⁸ 312 F. Supp. 2d 681 (E.D. Pa. 2004).

⁷⁹ *Am. Biophysics*, 411 F. Supp. 2d at 63 (emphasis added) (citations omitted) (quoting *Amco*, 312 F. Supp. 2d at 686). *Amco* cited to *Fercus, S.R.L. v. Palazzo*, No. 98 CIV. 7728(NRB), 2000 WL 1118925, at *3 (S.D.N.Y. Aug. 8, 2000). *Amco*, 312 F. Supp. 2d at 686.

⁸⁰ *Am. Biophysics*, 411 F. Supp. 2d at 64-65.

⁸¹ No. CIV.A. 99-6384, 2000 WL 1224903 (E.D. Pa. Aug. 29, 2000).

⁸² No. 98 CIV. 7728(NRB), 2000 WL 1118925 (S.D.N.Y. Aug. 8, 2000).

⁸³ No. 96 Civ. 8052 (HB)(THK), 1998 WL 164824 (S.D.N.Y. Apr. 7, 1998).

⁸⁴ *See Delchi*, 71 F.3d at 1027 n.1 (“If, as here, the agreement is silent as to choice of law, the Convention applies if both parties are located in signatory nations.” (citation omitted)); *Viva Vino*, 2000 WL 1224903, at *1 (“When two foreign nations are signatories to the CISG, that Treaty governs contracts for the sale of goods between parties whose places of business are in such nations unless the contract contains a choice of law provision to the contrary.” (citations omitted)); *Fercus*, 2000 WL 1118925, at *3 (“The C.I.S.G. applies to any sale of goods when: (1) the contracting parties have places of business in different nations; (2) the nations are signatories to the Convention; and (3) the contract between the parties does not have a choice of law provision.” (citations omitted)); *Claudia*, 1998 WL 164824, at *4 (“When two foreign nations are signatories to [the CISG] . . . the Convention governs contracts for the sale of goods between parties whose places of business are in these different nations, absent a choice-of-law provision to the contrary.” (citations omitted)).

⁸⁵ *See, e.g.*, *Schmitz-Werke Gmbh Co. v. Rockland Indus., Inc.*, 37 F. App’x 687, 691 (4th Cir. 2002) (citing *Delchi* and *Caludia*); *see also* *Caterpillar, Inc. v. Usinor Industeel*, 393 F. Supp. 2d 659, 673 (N.D. Ill. 2005) (citing *Delchi* in stating that “[t]he CISG applies to international sales contracts between parties that are located in signatory countries, and who have not opted out of CISG coverage at the time of contracting”); *see also* *Supermicro Computer, Inc. v. Digitechnic, S.A.*, 145 F. Supp. 2d 1147, 1151 (N.D. Cal. 2001) (citing *Delchi* in stating that “[a] contract governed by the CISG may include a choice of law provision. If, as here, the agreement is silent as to choice of law, the CISG applies if both parties are located in signatory nations”).

well.

As late as 2010, a United States District Court in California made this same gaffe.⁸⁶ The opinion in *Golden Valley Grape Juice & Wine LLC v. Centrisys Corp.*⁸⁷ stated, “The CISG governs contracts for the sale of goods between parties whose places of business are in different nations, if the nations are Contracting States, *unless* the subject contract contains a choice-of-law provision.”⁸⁸ The statement made in *Golden Valley* may be even more inaccurate than the cases cited by *American Biophysics* because the court in *Golden Valley* implied that the CISG will never govern a dispute whenever parties choose a law to govern their dispute,⁸⁹ however, this is hardly true.⁹⁰

Fortunately, this problem might be disappearing, albeit slowly. In *Forestal Guarani, S.A. v. Daros International, Inc.*,⁹¹ a New Jersey District Court misapplied the scope of the CISG by suggesting that if the parties include a different choice-of-law provision, then that choice would govern and not the CISG.⁹² This mistake was corrected on appeal when the Third Circuit removed the language from its decision.⁹³ Despite such assurances, the problem still persists so long as imprecise language appears in cases printed in official reporters.

⁸⁶ See *Golden Valley*, 2010 WL 347897, at *2 (stating that the CISG governs a contract unless the parties choose a different law to govern their dispute).

⁸⁷ No. CV F 09-1424 LJO GSA, 2010 WL 347897 (E.D. Cal. Jan. 22, 2010).

⁸⁸ *Id.* at *2 (emphasis added).

⁸⁹ Johnson, *supra* note 69, at 244.

By stating that the CISG governs a contract “unless the subject contract contains a choice-of-law provision,” the court seems to be stating that if the subject contract does contain a choice-of-law clause, then the CISG necessarily does not govern the contract. And unlike the language used in *Viva Vino*, this court appears to suggest that any choice-of-law clause would have that effect, not only a “choice of law provision to the contrary.”

Id. (footnote omitted).

⁹⁰ See Drago & Zoccolillo, *supra* note 72.

⁹¹ No. Civ. A 03-4821 JAG, 2008 WL 4560701 (D.N.J. Oct. 8, 2008), *vacated and remanded sub nom*, *Forestal Guarani S.A. v. Daros Int’l, Inc.*, 613 F.3d 396 (3d Cir. 2010).

⁹² *Id.* at *3 (“Parties to a contract . . . may . . . include an alternative choice of law provision. . . . The inclusion of an alternative choice of law provision must, however, be announced explicitly in the contract.” (citation omitted)).

⁹³ *Forestal Guarani S.A. v. Daros Int’l Inc.*, 613 F.3d 395, 397 (3d Cir. 2010) (stating only that “[t]he CISG applies to contracts of sale of goods between parties whose places of business are in different States . . . when the States are Contracting States” (second alteration in original) (citations omitted) (quotation marks omitted)).

C. When Courts Rejected the CISG on the Basis of Counsel Error

In other cases, judges exercised their discretion not to hear arguments on the CISG when counsel failed to timely raise the applicability of the Convention.⁹⁴ This occurred when the Oregon Court of Appeals reviewed a decision by a lower court in *GPL Treatment, Ltd. v. Louisiana-Pacific Corporation*,⁹⁵ involving a Canadian seller and an American buyer.⁹⁶ Logically, the dispute should have been governed by the CISG, as the parties ultimately argued, but the court applied the UCC instead.⁹⁷ By the time plaintiff's counsel raised the issue that the CISG should govern, the judge deemed it too late.⁹⁸ Irrespective of who was at fault, the judge determined that he would not state the scope of the CISG in his opinion and did not explain why a sales contract between a Canadian party and an American party was not governed by the CISG.⁹⁹

On appeal, the dissenting judge argued that applying the CISG would have been outcome determinative of the dispute.¹⁰⁰ At the same time, the dissent must be chastised for making this observation not in the text of the dissent, but in the text of a footnote.¹⁰¹ When the case was appealed, the Supreme Court of Oregon also failed to mention the CISG,¹⁰² perhaps out of deference to the lower court's decision not to apply the text. Still, the court should have at least stated the scope of the CISG and noted that it would have applied normally, absent counsel error.

⁹⁴ See, e.g., *GPL Treatment, Ltd. v. Louisiana-Pacific Corp.*, 894 P.2d 470, 477, n.4 (Or. Ct. App. 1995) (stating that the introduction of the CISG was untimely), *aff'd*, 914 P.2d 682 (Or. 1996).

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

⁹⁶ *Id.* at 471.

⁹⁷ *Id.* at 477 n.4 (Leeson, J., dissenting) (stating that the introduction of the CISG was untimely).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *GPL Treatment*, 894 P.2d at 477 n.4 (Leeson, J., dissenting) (“Article 11 of the CISG does not require a contract to be ‘evidenced by writing’ and, thus, would defeat L-P’s statute of frauds defense if the trial court abused its discretion under ORCP 23 B in ruling that plaintiffs’ attempt to raise the CISG was untimely and that they had waived reliance on that theory.”).

¹⁰¹ *Id.*

¹⁰² See *GPL Treatment, Ltd. v. Louisiana-Pac. Corp.*, 914 P.2d 682, 683 (Or. 1996) (stating that the case was governed by the UCC).

Similar events took place in 2010 in *Ho Myung Moolsan Co. v. Manitou Mineral Water, Inc.*¹⁰³ In a prior injunction proceeding, the parties, a South Korean buyer and American seller, argued solely on the basis of New York State contractual law.¹⁰⁴ The buyer only cited to the CISG after discovery was completed in a motion for summary judgment on the amended complaint.¹⁰⁵ The court determined that the buyer waited too long to discuss the CISG because the buyer “consented to the application” of New York law in that it relied upon it in its briefs and up until discovery was complete.¹⁰⁶ Commendably, the court expressly stated that the CISG would have governed had the discovery been made sooner; however, the court did not explain why the CISG would have applied.¹⁰⁷

D. The Effects of Misapplication

The careless application of the CISG’s scope provision not only harms the positions of the parties involved in the dispute or the legitimacy of the international legal system, but it also creates harmful effects throughout the American legal community. Perhaps most importantly, courts are failing an elementary exercise in the basic tenets of constitutional law.¹⁰⁸ The preemption that takes place with respect to the CISG is similar to that which occurs in Article 7 of the UCC, when federal laws regarding bills of lading preempt the provisions in Article 7.¹⁰⁹ The misapplication of the scope of even one of these, be it Article 7 or Article 2 of the UCC, is a major difference in the law.¹¹⁰

Secondly, misapplication of the scope of the CISG imperils

¹⁰³ No. 07 Civ. 07483 RJH, 2010 WL 4892646 (S.D.N.Y. Dec. 2, 2010).

¹⁰⁴ *Id.* at *2.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

¹⁰⁹ See Henry Gabriel, *The Revision of the Uniform Commercial Code—How Successful Has it Been?*, 52 HASTINGS L.J. 653, 654 (2001) (stating that UCC Article 7 is preempted by the Federal Bill of Lading Act and the United States Warehouse Act).

¹¹⁰ See Flechtner, *supra* note 9.

professional obligations as well.¹¹¹ Attorneys who do not familiarize themselves with the CISG risk their reputations because failing to determine that the CISG governs a contract usually constitutes malpractice.¹¹² An attorney violates international professional standards when he is not aware of the CISG's applicability to a dispute when application of the CISG would benefit his client.¹¹³

Next, misapplication of the CISG hampers the benefits of American buyers and sellers to the rich streams of international commerce that the CISG is designed to provide.¹¹⁴ The world is increasingly more global and the United States participates in that global trade, both as an importer and exporter.¹¹⁵ The CISG governs relations with seventy-eight nations around the world, including seven out of the ten largest economies as measured by gross domestic product.¹¹⁶ It even governs China, whose trade with the United States is nothing short of colossal.¹¹⁷ With every stitch of fabric on a shirt or blouse from China governed by the CISG, the Convention clearly stretches to the everyday fabric of American life.¹¹⁸

V. SCHOLARLY CONCEPTIONS OF THE PROBLEM AND HISTORICAL SOLUTIONS

Throughout the thirty-two years since the CISG's birth, many scholars have identified a vast range of problems that may describe why the CISG is susceptible to being ignored by the American legal

¹¹¹ Ronald A. Brand, *Professional Responsibility in a Transnational Transactions Practice*, 17 J.L. & COM. 301, 336-37 (1998).

¹¹² *Id.* at 337 (describing the liabilities that exist when lawyers fail to recognize or disclose the CISG).

¹¹³ *Id.*

¹¹⁴ See Johnson, *supra* note 69, at 213-14 (describing the trillion dollar trade that comprises our "cross-border arrangements").

¹¹⁵ See *id.* (describing the United States' role as an importer and exporter of goods).

¹¹⁶ See *Report for Selected Countries and Subjects*, INT'L MONETARY FUND, WORLD ECONOMIC OUTLOOK DATABASE FOR SEPTEMBER 2011 (2011), available at <http://tinyurl.com/IMF-September-2011> (listing the United States, China, Japan, Germany, Russia, France and Italy as among the top ten nations with the highest gross domestic product in the world).

¹¹⁷ See *Foreign Trade—U.S. Trade with China*, U.S. CENSUS BUREAU, <http://www.census.gov/foreign-trade/balance/c5700.html> (last visited Oct. 18, 2012) (calculating the imports and exports from and to China per month in 2011).

¹¹⁸ See generally Flechtner, *supra* note 9, at 138 ("In this age of global commerce, seemingly routine transactions are subject to CISG.").

community.¹¹⁹ Scholars have also identified several suggestions in an attempt to rectify what they conceive to be the problem, from enacting federal legislation to adopting a more comprehensive law school curriculum.¹²⁰

A. The Historical Problem

Some scholars interpret the principal problem against recognizing the CISG as one of a lack of personal knowledge concerning the applicability of the CISG, and at least one preeminent scholar finds fault with judges.¹²¹ Judges, after all, are tasked with determining what is relevant law and should, according to some, “transcend their usual perspective[s] shaped by familiar domestic sales concepts.”¹²² In addition to judges, many other scholars point a finger at lawyers and cite disappointing statistics, such as a questionnaire prepared in Florida in 2000 in which most members of the Florida Bar’s Section on International Law confessed their unfamiliarity with the CISG.¹²³ To the author’s knowledge, no similar study has been published since 2000.

In addition, at least one scholar acknowledges the neglect of the Convention both inside the courtroom and inside the classroom, noting that, “a good deal of the ignorance among lawyers must be attributed to their lack of exposure to the CISG in law school.”¹²⁴ Indeed, the Florida survey found that casebooks neglected the CISG

¹¹⁹ See, e.g., Flechtner, *supra* note 41, at 154 (stating that the problem is lack of judicial knowledge); Whitlock & Abbey, *supra* note 13, at 275 (stating that the problem is that the CISG is intentionally ignored because it is not as familiar as the UCC).

¹²⁰ See Bailey, *supra* note 3, at 285 (suggesting the enactment of federal legislation in order to make the law governing sales of goods more consistent); Dodge, *supra* note 11, at 73 (suggesting the adoption of a more comprehensive law school curriculum in order to make the CISG more accessible to future practitioners).

¹²¹ See, e.g., Flechtner, *supra* note 41, at 154 (explaining situations in which judges applied the UCC instead of the CISG and provided erroneous precedent for future decisions).

¹²² *Id.*

¹²³ Dodge, *supra* note 11, at 75 (describing a questionnaire sent to 100 selected members and twenty-four members on the Executive Committee to the Florida Bar’s Section on International Law, in which most indicated no knowledge of the CISG at all) (citing Michael Wallace Gordon, *Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles as Reflected in One State’s (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice*, 46 AM. J. COMP. L. 361, 368 (1998)).

¹²⁴ *Id.* at 76 (footnote omitted).

and contracts professors paid little or no attention to the text in contracts courses and other legal courses such as sales.¹²⁵

Another contingent of scholars suggest not that the CISG is ignored but rather that parties opt out of the Convention intentionally.¹²⁶ This proposition is more difficult to prove because, as should be readily obvious by now, there is little data available that reveal the extent to which American attorneys are aware of the CISG, much less as to whether practicing attorneys routinely draft contracts with the intent to opt out of the application of the CISG.¹²⁷

Assuming that the Convention is unintentionally ignored, it is a daunting task for scholars to determine the reasons. Although the issue in past years might have been premised on insufficient case law regarding the Convention, this is hardly persuasive anymore due to the increasing number of judicial decisions involving CISG disputes each year.¹²⁸ Even so, comparatively speaking, the United States reports fewer CISG cases than other nations, especially civil law jurisdictions.¹²⁹

It is more realistic that the CISG is ignored because it is a self-executing treaty in the United States.¹³⁰ The legislative history

¹²⁵ See Michael Wallace Gordon, *Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles as Reflected in One State's (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice*, 46 AM. J. COMP. L. 361, 371 (1998) ("The survey provided no real surprises to me, partly because of the experiences related to me about the judicial rejection of the CISG by two state judges, and because of my occasional discussions with my colleagues about the inclusion of these subjects in their casebooks and class materials.").

¹²⁶ See, e.g., Staff, *supra* note 33, at 3 ("Numerous countries, including the United States, have opted out of some provisions of the Convention."); see also Drago & Zoccolillo, *supra* note 35.

¹²⁷ See generally Gordon, *supra* note 125, at 368-69 (providing only a very general discussion regarding a party's knowledge as to the CISG's opt-out provision).

¹²⁸ Flechtner, *supra* note 9, at 137 ("An increasing number of disputes governed by the Convention are now reaching the end of the pipeline and are generating court decisions.").

¹²⁹ Jacob Ziegel, *The Scope of the Convention: Reaching Out to Article One and Beyond*, 25 J.L. & COM. 59, 68 (2005) (showing that international civil law jurisdictions decide more cases regarding the CISG than common law jurisdictions).

¹³⁰ A self-executing treaty is a treaty that does not require federal legislation but is binding as soon as it is ratified. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment."). If the treaty does not state otherwise, it is up to the courts to determine whether a treaty requires additional legislation. See *United States v. Postal*, 589 F.2d 862, 877 (5th Cir. 1979) ("Apart from those few instances in which the language of the provision expressly calls for legislative implementation or the subject matter is within the exclusive jurisdiction of Congress, the

of the CISG recognizes that the CISG is a self-executing treaty,¹³¹ along with the executive branch of government,¹³² and the subject matter of the treaty.¹³³ As a result, in 1986, the CISG was signed and ratified without any formality.¹³⁴ It was not given a place within the U.S. Code, but rather was “simply dumped, without introduction or comment, into the Appendix to Title 15 of the U.S. Code, the effect of which one cannot find the CISG in the U.S. Code unless one already knows it exists and where it is located.”¹³⁵

On the other hand, there may be entirely different reasons for the misapplication of the CISG, such as cultural, economic, legal, and practical factors. Culturally, American nationals played a small role in the formation of the Convention, whereas German scholars played a central role and consequentially, Germans are more exposed to the text.¹³⁶ Economically speaking, attorneys must expend time, money, and other resources to become familiar with a different body of law,

question is purely a matter of interpretation.”); *see also* Bailey, *supra* note 3, at 276 (“[A]s a self-executing treaty under U.S. law, the CISG is virtually unknown to U.S. courts and practitioners. The result is that the CISG is frequently ignored by both U.S. attorneys and courts.”).

¹³¹ *See* Bailey, *supra* note 3, at 281-82 (“During the sixth session of the UNCITRAL Working Group charged with drafting what would become the CISG, the Working Group decided that the treaty should be drafted so that the provisions would be applicable to international sales contracts without the need of parallel domestic legislation. Therefore, to speed implementation and acceptance, the negotiating parties (which included the United States) drafted the CISG to be a self-executing treaty.” (footnote omitted)).

¹³² *See Message from the President of the United States, Transmitting the United Nations Convention on Contracts for the International Sale of Goods, Adopted by a United Nations Conference of Sixty-Two States on April 11, 1980*, S. Treaty Doc. No. 98-9, 98th Cong., 1st Sess. (1983), *reprinted at* <http://www.cisg.law.pace.edu/cisg/biblio/reagan.html> (containing a letter dated August 30, 1983 from Secretary of State George Schultz to President Reagan stating, “The Convention . . . is self-executing and this requires no federal implementing legislation to come into force throughout the United States”).

¹³³ Bailey, *supra* note 3, at 282 (“With the exception of a few routine diplomatic aspects addressed in the final articles of the treaty, the CISG’s focus is devoted entirely to the substantive law regulating the sale of goods between private parties. This characteristic is typical of self-executing treaties. Moreover, unlike a non-self-executing treaty, the CISG does not alter or affect the relationships among the signatory nations in their capacity as sovereign nations.” (footnotes omitted)).

¹³⁴ *Id.* at 281-82 (stating that self-executing treaties do not need parallel legislation in order to be enforceable).

¹³⁵ *Id.* at 282 (footnote omitted).

¹³⁶ *See* Ziegel, *supra* note 129, at 70 (“I was told that every German law student would be exposed to at least some discussion of the CISG during his law school career[,] as compared to the paucity of discussion of the Convention at most U.S. law schools[,] and that many graduate theses at German law schools were devoted to the Convention.”).

which may be off-putting to many new practitioners.¹³⁷ Finally, some authorities are firmly committed in their belief that the CISG does not deserve its status as governing contract law because it does not control certain issues or because it is a weak body of law.¹³⁸ And practically speaking, the United States has had less practice with regard to international transactions because it is geographically positioned without many neighbors, whereas nations in Europe have had more historical opportunities to engage in international transactions as a matter of routine.¹³⁹

Then there are scholars, such as Anthony Winer, who claim that the CISG is an illegitimate body of law.¹⁴⁰ Winer borrows from Thomas Franck's theory of legitimacy and practical business rules to determine that the CISG is not legitimate and thus intentionally not applied or misapplied by judges and lawyers.¹⁴¹ However, as discussed above, no data indicate whether the CISG is intentionally not applied or misapplied, and furthermore, the CISG, whether a reputable body of contract law or not, is the law, and unless it is repealed, it is governing law, and should be examined as such.

B. The Proffered Solutions

With regard to the issue that the CISG is a self-executing treaty, at least one scholar suggests implementing federal legislation that formally incorporates the CISG.¹⁴² This "parallel legislation," as

¹³⁷ *Id.* at 71 ("[T]he parties may not find it an economical use of scarce resources . . . to become familiar with a different body of law in case their expectations turn out to be wrong.").

¹³⁸ *Id.* at 72-73 (describing weaknesses of the substantive law of the CISG).

¹³⁹ See Flechtner, *supra* note 41, at 176 ("The judiciary of some other countries, particularly in Europe, may have a leg up on achieving the proper viewpoint because they have long been forced to deal with cross-border transactions and foreign law.").

¹⁴⁰ Anthony S. Winer, *The CISG Convention and Thomas Franck's Theory of Legitimacy*, 19 *Nw. J. INT'L L. & BUS.* 1, 56 (1998).

This lack of legitimacy stems *inter alia* from the Convention's insistence that courts interpret it in internationally uniform ways, the difficulty of its amendment, the extremely broad scope of its coverage, the circumstances of its preparation, its determination to stand alone as a self-sufficient law of international sales distinct from other municipal laws, and the large number of parties it affects.

Id.

¹⁴¹ *Id.* at 43-56.

¹⁴² See Bailey, *supra* note 3, at 285.

suggested, could be incorporated directly into the U.S. Code, where it is more likely to be visible by the public and by the judiciary.¹⁴³ The North American Free Trade Agreement (“NAFTA”) is a successful example.¹⁴⁴ This may be a helpful course of action by providing another venue for the discovery of the CISG, and making its text more obvious to the public.

Another way to promote greater awareness of the CISG is to increase the availability of CISG commentary. Decisions from many contracting states are available on the Internet on databases such as CLOUT,¹⁴⁵ which provides a plethora of case law and other materials on the CISG. There are also many helpful guides to the CISG written in English by American authors.¹⁴⁶ Additionally, the Pace University CISG website is a cornerstone of CISG research across the globe.¹⁴⁷ But despite the greater ease of access, mere availability to these materials does not guarantee enhanced results if courts are left to misapply the scope of the Convention.¹⁴⁸

Perhaps a final way to increase awareness is to teach the Convention in every first-year contracts law course around the nation.¹⁴⁹ One scholar assures that this simple change would not require much reallocation of course time.¹⁵⁰ His approach may be beneficial in

¹⁴³ *Id.* at 285-86.

¹⁴⁴ *Id.* at 285.

¹⁴⁵ See CASE LAW ON UNCITRAL TEXTS (CLOUT), http://www.uncitral.org/uncitral/en/case_law.html (last visited Oct 18, 2012).

¹⁴⁶ See, e.g., JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (Kluwer Law International, 3d ed. 1999); see also PETER SCHLECHTRIEM & PETRA BUTLER, UN LAW ON INTERNATIONAL SALES: THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (2008).

¹⁴⁷ See ELECTRONIC LIBRARY ON INTERNATIONAL COMMERCIAL LAW AND THE CISG, <http://www.cisg.law.pace.edu/> (last visited Oct. 18, 2012).

¹⁴⁸ See Marlyse McQuillen, *The Development of a Federal CISG Common Law in U.S. Courts: Patterns of Interpretation and Citation*, 61 U. MIAMI L. REV. 509, 510-11 (2007) (“The increased availability of CISG decisions from signatory nations, however, is not a panacea. As scholars note, the value of decisions that contain little or no reference to the reasoning behind a case’s holding may be marginal, especially when such decisions are issued by lower courts.”).

¹⁴⁹ See Dodge, *supra* note 11, at 72-74 (suggesting teaching the CISG in contracts courses around the United States).

¹⁵⁰ *Id.* at 73.

Teaching the CISG in Contracts *does not* require one to become an expert in international law; it can be taught just like the UCC, as a separate body of contract rules that apply in particular circumstances. Teaching the CISG *does* require some reallocation of class time, but not a great

terms of expanding access of the CISG, but it is unclear how it would affect members of the bar who have fulfilled their contracts requirement without reference to the Convention.

VI. REVISING THE UCC

The solutions offered in the preceding section do not immediately remedy the problem that has plagued this country for the last twenty-four years. The reason why is quite obvious: they were never implemented. Although previous efforts to join the CISG and UCC are not new, the proposals seeking to unite the texts fail to expressly state the scope of the CISG, much like the cases described in Part IV.¹⁵¹ Instead, the UCC should be amended to expressly state the scope of the CISG. This proposal would only be possible by methodically revising the current UCC.¹⁵² Therefore, it is of primary importance to examine the revision process before determining what must be changed and how it must be done.

A. General Nature of UCC Revisions

Article 2 of the UCC has been revised in the past, though not to the extent of acknowledging the supremacy of the CISG with respect to international sales contracts.¹⁵³ In order for the CISG to occupy a central position in academia and a rightful position in domestic courts, NCCUSL and the ALI must approve the revision.¹⁵⁴ In order for this to be accomplished, the proposed revision must be very minimalistic and encompass no more than a few sentences in the text of Article 2.

deal.

Id.

¹⁵¹ See, e.g., Winship, *supra* note 8, at 49-50 (linking the UCC and CISG but failing to state the scope of the CISG).

¹⁵² Fred H. Miller, *Realism Not Idealism in Uniform Laws—Observations from the Revision of the UCC*, 39 S. TEX. L. REV. 707, 714-15 (1998) (describing the UCC revision process).

¹⁵³ See *Recommendation of the Permanent Editorial Board*, *supra* note 12, at 161 (describing the most recent rejection of a UCC revision).

¹⁵⁴ Miller, *supra* note 152.

I. Past Attempts

A revision of the UCC may be initiated in a variety of ways.¹⁵⁵ Regardless of the motivation for revision, the procedure begins in much the same way each time: first, a study group is created to determine whether there is a valid need for a modification of the existing UCC.¹⁵⁶ If the study group recommends a change, the recommendation must be approved by both NCCUSL and the ALI.¹⁵⁷ Next, “a Drafting Committee composed of six to ten Commissioners is appointed.”¹⁵⁸ The committee drafts the proposed statute, which must then again be approved by the NCCUSL and the ALI.¹⁵⁹ Following approval, commissioners from every state work for the enactment of the statute by each state’s legislature.¹⁶⁰

Within months after the CISG took force in the United States, a study group was created to determine whether Article 2 of the UCC should be revised.¹⁶¹ One of the specific inquiries of the group was to consider the impact of the new international commercial law on the revision of Article 2 of the UCC.¹⁶² That study group recommended a revision, but expressly stated that it “did not decide whether Article 2 should be revised in light of CISG.”¹⁶³ It did, however, suggest in-

¹⁵⁵ *Id.* at 712-13.

In three situations, the revision effort sprang from an influential law review article. In several more cases, the work began with a study and, in one case, a further drafting effort, under the auspices of the Permanent Editorial Board (PEB) for the Uniform Commercial Code. Finally, the remaining Code revision efforts began with work in the American Bar Association, particularly in the UCC Committee of the Business Law Section. Thus, none of the Code revision efforts began without some respectable reasons, and basic plans.

Id. at 713.

¹⁵⁶ Gabriel, *supra* note 109, at 657-58.

¹⁵⁷ *Id.* at 658.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 658-59.

¹⁶¹ See Murray & Flechtner, *supra* note 12, at 1 (stating that the Study Committee met in 1988).

¹⁶² 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, 1996 (1998).

¹⁶³ Permanent Editorial Board of the Uniform Commercial Code, *PEB Study Group: Uniform Commercial Code, Article 2 Executive Summary*, 46 BUS. LAW. 1869, 1876 (1991) [hereinafter PEB].

corporating at least some provisions of the CISG's substantive law into the UCC.¹⁶⁴

In 1991, Professor Peter Winship offered three proposals to incorporate the CISG into the UCC.¹⁶⁵ Of the proposals, only one briefly mentioned revising Article 2's scope, with otherwise no indication of how this would be done.¹⁶⁶ The study group, much like Winship, focused too greatly on the content of the CISG as a basis for the revisions and not enough on the procedure.¹⁶⁷ The majority and perhaps entirety of the revision's efforts were spent on determining which articles of the UCC and CISG were inconsistent with each other and whether the CISG's more international approach with respect to that article should prevail.¹⁶⁸ Ultimately, however, the study group rejected using the CISG as a model to revise Article 2.¹⁶⁹ In fact, the CISG made only a relatively minor impact with respect to the Drafting Committee as it concerned a substantive and not a procedural matter.¹⁷⁰ In the end, the committee determined that the CISG would be an inappropriate model for the UCC, leaving no mention of the

¹⁶⁴ *Id.* at 1874 (offering several proposals to amend the UCC to make it more like the CISG, including: "The Study Group agreed that § 2-201 should either be repealed or revised. Rec. A2.2(1). Deletion is supported by the British experience, CISG, and the intuitive judgment of attorneys and commentators").

¹⁶⁵ Winship, *supra* note 8, at 46-49 (substituting the UCC with the CISG; coordinating the UCC and the CISG as it concerns issues that are different in the two laws; and linking the UCC and CISG).

¹⁶⁶ *Id.* at 49.

A third suggested category would focus on specific provisions that link the two laws. The definition of U.C.C. Article 2's scope, for example, might include a reference to the Convention's sphere of application. Likewise, the choice-of-law section in Article 1 might be re-examined to provide guidance for those circumstances when the Convention refers to choice-of-law rules.

Id.

¹⁶⁷ Besides noting a need to look at the "[e]xistence of competing and better solutions to sales problems in treaties, e.g. CISG," the Study Group did not focus on the possibility of adding a procedural limitation to limit the scope of the UCC. PEB, *supra* note 163, at 1871-72.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1881 (deciding not to incorporate the CISG's provisions into UCC provisions dealing with terms of delivery).

¹⁷⁰ See Gabriel, *supra* note 162, at 2013-14 ("The drafting committee, acknowledging, as the drafters of the CISG did, that there are no clear universal delivery terms, and because usages and customs change over time, decided that it was best to rely on custom or external legal rules for the meaning of delivery terms.").

CISG in the current version of the text.¹⁷¹

Perhaps the group learned from these failed efforts because in 2003 it approved Amendments to Uniform Commercial Code Article 2.¹⁷² However, prior to the enactment of the 2003 Amendments in any state, the Permanent Editorial Board (“PEB”) requested their removal from the UCC, a decision that was approved by both NCCUSL and the ALI in 2011.¹⁷³ As a result, the current version of the UCC does not include any of the proposed 2003 Amendments.¹⁷⁴

The 2003 Amendments to the UCC would have added Section 2-108, an entirely new provision stating that the UCC might be “subject to other law” but nowhere explicitly mentioning the CISG.¹⁷⁵ At the same time, the amendments incorporated an Official Comment which would have recognized the existence of the CISG, though again not explicitly stating the scope of the CISG.¹⁷⁶ In addition to these changes, the 2003 Amendments made other substantive revisions to the UCC, such as modifying the language that governs contract formation.¹⁷⁷ Currently, the UCC does not contain Section 2-108 or an Official Comment linking it to the CISG.¹⁷⁸

2. *Analysis of the Drafting Committee*

It is imperative to learn from the mistakes of past revisions of

¹⁷¹ *Id.* at 1996 (describing that the CISG had had “very little influence” on the UCC. Henry Gabriel, the Reporter for the drafting committee, described the failure in this way:

As a member of the drafting committee who has spent six years with the project, I am convinced that the CISG is not an appropriate model for Article Two. Such factors as Article Two’s coverage of products liability law as well as the extension of seller liability to nonprivity parties, which I believe are sound and correct policies in contemporary domestic law, do not conform with the structure and underlying policies of the CISG.

Id. at 2014.

¹⁷² *Recommendation of the Permanent Editorial Board*, *supra* note 12, at 160.

¹⁷³ *Id.* at 161.

¹⁷⁴ *Id.* at 160.

¹⁷⁵ *See, e.g.*, COMMERCIAL AND DEBTOR-CREDITOR LAW: SELECTED STATUTES 2011 EDITION 866 (Douglas G. Baird et al. eds., 2011).

¹⁷⁶ *Id.* at 867. Comment 2, in its entirety, states: “In subsection (1), it is assumed that this article is subject to any applicable federal law, such as the United Nations Convention on Contracts for the International Sale of Goods, 15 U.S.C. App., or the Magnuson-Moss Warranty Act, 15 U.S.C. Sections 2301-2312.” *Id.*

¹⁷⁷ *Id.* at 872 (stating what amended Section 2-204 would have added).

¹⁷⁸ *See* U.C.C. § 2-102 (2003).

the UCC in order to effectuate a change in the future. Richard E. Speidel, formerly Chief of the PEB Study Group and Reporter to the Drafting Committee, shared his experience regarding the problems of the Drafting Committee in a symposium in 2001 following the rejection of the CISG from Article 2.¹⁷⁹ As Speidel understood it, three problems were inherent in the UCC revisions: first, there were commonly disagreements as to what to revise, and as such, the frequent solution was to put the contested topic in the official commentary or to leave the matter to the courts to decide.¹⁸⁰ Second, there was rarely empirical data concerning the need for any particular revision of the UCC.¹⁸¹ Finally, Speidel stated that no revision is “politically neutral” and that this hampers the revision process.¹⁸²

These hindrances might exist in many of the attempted revisions of the UCC, but they are not present in all, and would not be problematic were the UCC amended to fit the scope of the CISG. First, a revision may be politically neutral. Amending the UCC to include the scope of the CISG is politically neutral because the CISG already is federal law and this would only constitute a procedural change.¹⁸³ Second, enough data exists concerning the need to revise the UCC to include a provision about the scope of the CISG, mainly because courts are consistently misapplying the scope of the CISG.¹⁸⁴ Finally, disagreement concerning this course of action is unlikely, and even assuming there is, the alternative (i.e., leaving the matter to the courts) is no different from the problem itself.¹⁸⁵ In addition, a revision should not be hidden away in the Official Comment to the UCC because a corollary problem is that the CISG receives insufficient exposure, a problem which would not be solved through insertion in the official commentary.¹⁸⁶

¹⁷⁹ Richard E. Speidel, *Revising UCC Article 2: A View from the Trenches*, 52 *Hastings L.J.* 607, 607 (2001).

¹⁸⁰ *Id.* at 608.

¹⁸¹ *Id.* at 608-09.

¹⁸² *Id.* at 609.

¹⁸³ *See supra* Part IV.

¹⁸⁴ *See supra* Part III.

¹⁸⁵ *See supra* Part III.

¹⁸⁶ *See supra* Part IV.A.

B. A New Proposal

Earlier proposals to revise the UCC might have failed on the basis that they were too far-reaching and overly ambitious.¹⁸⁷ Any future revision to incorporate the CISG should be more simple and limited to a single purpose: to correctly state the scope of the UCC by including the scope of the CISG within Section 2-102 of the UCC.¹⁸⁸ Section 2-102 does not currently limit the scope of the UCC to domestic sales of goods, but rather provides:

Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repel any statute regulating sales to consumers, farmers or other specified classes of buyers.¹⁸⁹

The final clause of Section 2-102 (“nor does this Article impair or repel any statute regulating sales to consumers . . .”) is the only phrase in the entire UCC that deals with transactions subject to any other law.¹⁹⁰ No other sections or comments discuss the applicability of other statutes or the scope of the CISG.¹⁹¹ Accordingly, this Comment proposes incorporating the following language:

This Article is preempted by federal law. It does not apply when a sale of goods, as defined by the United Nations Convention on Contracts for the International Sale of Goods (“CISG”), is the transaction between parties to a dispute having their principal place of business in different Contracting States. This Article is subject to all exceptions set forth in the CISG. It may not be derogated by a choice-of-law provision if the chosen law is also the law of the CISG.

¹⁸⁷ See Gabriel, *supra* note 162, at 2013-14.

¹⁸⁸ See U.C.C. § 2-102 (2003).

¹⁸⁹ See *id.*

¹⁹⁰ Murray & Flechtner, *supra* note 12, at 12.

¹⁹¹ *Id.*

Although this suggestion is sufficient to resolve the problems discussed, one might also consider the utility of providing a list of contracting states to the Convention. However, it is not practicable to provide such data within the UCC itself because nations continue to join the Convention.¹⁹² It might be helpful, however, to provide a method to procure such list to accentuate that the UCC is non-operational with respect to sales of goods between American buyers or sellers and their counterparts in nations listed as contracting states.¹⁹³

Several other nuances concerning this revision must be identified. First, the proposed text should modify Section 2-102 of the UCC and should not be placed in the official commentary or in any other section of the text. After all, the primary issue is that the CISG is not visible enough; it makes little sense to amend the UCC if the CISG is not cited in the black letter law. Second, a proposal to revise the UCC in this way should not be accompanied with suggestions for other substantive revisions to the UCC and should only comprise the procedural changes in the text stated above. In this way, the proposed revision to the UCC might pass through NCCUSL and the ALI without much controversy or delay. This would be extremely desirable in order to curtail any new decisions that might incorrectly state the scope of the Convention.

This revision would also eradicate those problems discussed in Section IV of this Comment while taking into account all of the underlying goals described therein. For instance, the proposed revision takes into account that the CISG is a self-executing treaty because it puts the CISG in a place where it is more familiar and recognized by the American public. Of course, each of the states must approve the change in order for it to have effect, so the commissioners in charge of enacting the statute must first be successful in many or in most states.¹⁹⁴ However, once the revision does become state law in at least one state, it will be readily accessible to any researcher of contract law. Moreover, this revision takes into account the despondent state of domestic case law because judges might not be hos-

¹⁹² The last nation to join the Convention was San Marino. United Nations Treaty Collection, *supra* note 4.

¹⁹³ *See id.*

¹⁹⁴ *See generally* Gabriel, *supra* note 109, at 659 (describing that commissioners are in charge of securing the approval of the UCC in every state).

tile to a body of law that they have relied upon in past decisions (the UCC) as compared to a relatively new body of law they know little about (the CISG).¹⁹⁵ The revision also takes into account the failure to teach the CISG in most law schools because Article 2 of the UCC is taught in every contracts course.¹⁹⁶ This means that the CISG will become more familiar to law students, even without a school's need to dedicate an entire course to the Convention.

This proposal is a unique way to deal with the conflict between state and federal law in an issue that is largely reserved to the states.¹⁹⁷ For the very reason that Americans are conditioned to look to the UCC with respect to contract issues, it is logical that a federal law that preempts traditional contract law, which would otherwise escape one's purview, should be incorporated in that state law. Admittedly, it is a nontraditional approach, but it is not an imprudent one; rather, it is one motivated by the problems that are observed in our present day case law.

VII. CONCLUSION

This Comment has discussed the misapplication of the CISG's scope in various courts throughout the United States and the effects that these shortcomings in case law have on the American legal community and the global public at large. It has looked to the guidance of several scholars and identified many problems and solutions that have been suggested by those most knowledgeable over the years. In the end, this Comment separates itself from those traditional views and proposes that the scope of the CISG be amended directly into the text of the UCC in order to adequately address the failure of lawyers, law students, judges, practitioners, and academics. Only a limited and meticulous change in the UCC may turn the tide in bringing an issue that was largely reserved to the states¹⁹⁸ back to the federal government and to the supreme obligation to respect treaty law.

There is one final caveat: The Convention is not destined for success merely if its scope is finally understood. The misapplication

¹⁹⁵ See generally Whitlock & Abbey, *supra* note 13 (describing the CISG as "an unfamiliar body of law" as compared with the UCC).

¹⁹⁶ See Dodge, *supra* note 11, at 72 (stating that most contracts professors teach their students Article 2 of the UCC).

¹⁹⁷ See *id.* at 79 (stating that contract law is largely "state law").

¹⁹⁸ *Id.*

of the scope of the CISG is, however, a large impediment in the face of properly applying the Convention. Likewise, the CISG is not a perfect body of law, and neither can it be. It is moreover not contrary to the UCC because the two texts govern separate contracts entirely.¹⁹⁹ But most importantly, the CISG is not at war with the UCC. Quite the contrary, it is a complement and “counterpart” to the UCC,²⁰⁰ and, as its less popular younger sibling, it should be included within the UCC itself.

¹⁹⁹ See Frisch, *supra* note 21, at 503-04.

²⁰⁰ Winer, *supra* note 140, at 2.