

The Development of a Federal CISG Common Law in U.S. Courts: Patterns of Interpretation and Citation

MARLYSE McQUILLEN*

I. INTRODUCTION: CISG HISTORY AND ARTICLE VII	509
II. DEVELOPING A FEDERAL CISG COMMON LAW IN UNITED STATES FEDERAL COURTS	512
A. <i>Applicability of the CISG</i>	512
1. APPLICABILITY TO DISTRIBUTORSHIP AGREEMENTS	513
2. DETERMINING PRINCIPAL PLACE OF BUSINESS FOR THE APPLICABILITY OF THE CISG	515
3. CIRCUMVENTING THE APPLICABILITY OF THE CISG: ARTICLE 6 OPT-OUT REQUIREMENTS	518
B. <i>The Pre-emptive Effect of the CISG over the U.C.C. and Relevant State Law</i>	520
1. PRE-EMPTION OF STATE CONTRACT LAW	520
2. OUTLIER INTERPRETATIONS OF THE PRE-EMPTIVE EFFECT OF THE CISG ON STATE LAW	524
C. <i>Interpretation of Contractual Rights and Obligations Under the CISG</i>	527
1. ESTABLISHING A STANDARD FOR DETERMINING THE TIMING OF INSPECTION AND NOTICE OF NON-CONFORMING GOODS	528
2. BURDEN ALLOCATION IN PROVING INSPECTION AND NON-CONFORMITY OF GOODS	531
D. <i>Damages Under the CISG: Article 74 and Preserving the American Rule</i> ..	533
III. CONCLUSION	537

I. INTRODUCTION: CISG HISTORY AND ARTICLE VII

On January 1, 1988, the United Nations Convention on Contracts for the International Sale of Goods (“CISG”), a multilateral treaty adopted in 1980 after more than twelve years of preparation by the United Nations Commission on International Trade Law (“UNCITRAL”), came into effect in the United States and twelve other signatory nations.¹ Fueled by the desire to facilitate and promote international trade, the CISG attempts to create harmonized rules governing the formation of cross-border contracts and substantive default

* J.D. Candidate 2007, University of Miami School of Law.

1. The United Nations certified text of the CISG is found at 52 Fed. Reg. 6262, 6264-280 (Mar. 2, 1987). See Joanne M. Darkey, *A U.S. Court’s Interpretation of Damage Provisions Under the U.N. Convention on Contracts for the International Sale of Goods: A Preliminary Step Towards an International Jurisprudence of CISG or a Missed Opportunity?*, 15 J.L. & COM. 139, 139 (1995).

rules regulating the content of such contracts.²

In the absence of a supra-national adjudicative body to resolve interpretive issues, the CISG put the matter in the hands of the national courts of CISG signatories, but at the same time gave these courts an interpretive compass in Article 7 of the CISG. Article 7 provides:

(1) 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.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it, are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.³

Whether this compass is an adequate prevention against divergent interpretations and pre-CISG choice of law problems depends upon how seriously and diligently national courts adhere to it and, according to some, how much of an "internationalist culture" such courts develop.⁴

Now with more than sixty signatories to the CISG,⁵ the potential for divergent interpretations is greater, as is the challenge of developing a more internationalist judicial culture. In an effort to fill the institutional vacuum of authoritative CISG interpretation, additional structures and guides have surfaced.⁶ 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 deci-

2. The Preamble to the CISG states:

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. See Conference on Contracts for the International Sale of Goods, Vienna, Austria, Mar. 10-Apr. 11, 1980, *Final Act of the United Nations Conference on Contracts for the International Sale of Goods*, U.N. Doc. A/CONF.97/18 (Apr. 10, 1980), reprinted in 19 INT'L LEGAL MATERIALS 668, 671 (1980).

3. CISG, *supra* note 1, art. 7.

4. ALAN P. SWAN & JOHN F. MURPHY, *CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS* 3 (2d ed. 1999).

5. Clayton P. Gillette, *The Law Merchant in the Modern Age: Institutional Design and International Usages Under the CISG*, 5 CHICAGO J. INT'L L. 157, 171 (2004).

6. UNCITRAL has published an online CISG Case Digest publishing CISG court decisions. UNCITRAL, *Digest of Case Law on the CSIG*, http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html (last visited Nov. 15, 2006). Additionally, Pace Law School has created an online compendium of CISG cases and legislative history. Pace Law School Institute of International Commercial Law, *Electronic Library on International Commercial Law and the CISG*, <http://www.cisg.law.pace.edu> (last visited Oct. 30, 2006).

sions are issued by lower courts.⁷ Access to decisions also poses problems of lack of familiarity with foreign legal systems and precedent.⁸ Mere access does not provide national courts, reading conflicting decisions, with assistance in resolving interpretive issues.⁹

Notwithstanding these issues, scholars agree that foreign CISG case law should play a part in a national court's reasoning and, therefore, figure into a national court's obligation to adhere to the interpretive mandate of Article 7 of the CISG.¹⁰ However, the precedential weight a national court should assign to foreign CISG case law is debatable. Addressing this issue, one scholar observed:

[T]he national courts in the many Contracting States resemble - and sometimes act like - 'members of an orchestra without a conductor'; and though we find many good examples of harmonious CISG interpretation, the numerous CISG musicians do not - and cannot be compelled to always play the same tune.¹¹

This Note examines this statement within the context of the United States' CISG jurisprudence.

From 1988 to 2006, federal courts in the United States have issued approximately fifty decisions, mostly unreported, that reference the CISG. While courts in only ten of those cases directly or indirectly consider international law,¹² a majority of courts look across federal jurisdictions for guidance in dealing with cases of first impression. In so

7. Joseph Lookofsky, *Digesting CISG Case Law: How Much Regard Should We Have?*, 8 VINDOBONA J. INT'L COM. L. & ARB. 181, 184-87 (2004) (Austria).

8. *Id.*

9. *Id.* at 192.

10. *Id.* at 193. See also Franco Ferrari, *International Sales Law and the Inevitability of Forum Shopping: A Comment on Tribunale Di Rimini*, 26 November 2002, 23 J.L. & COMM. 169, 172 n.12 (2004).

11. Lookofsky, *supra* note 7, at 185 (quoting Peter Schlechtriem, *Uniform Sales Law in the Decisions of the Bundesgerichtshof* (Todd J. Fox trans.), <http://www.cisg.law.pace.edu/cisg/biblio/slechtriem3.html>).

12. The ten cases which directly or indirectly consider international law are: *B.P. Oil Int'l v. Empresas Estatal Petroleos de Ecuador*, 332 F.3d 333, 337 (5th Cir. 2003); *MCC-Marble Ceramic Ctr. Inc. v. Ceramica Nuova d'Agostino, S.p.A.*, 144 F.3d 1384, 1390 (11th Cir. 1998) (commenting that the court was unable to find foreign case law on the Pace site that addressed the issue of parol evidence); *Chicago Prime Packers, Inc. v. Northam Food Trading Co. (Chicago Prime Packers II)*, 320 F. Supp. 2d 702, 712 (N.D. Ill. 2004); *Amco Ukrservice v. Am. Meter Co.*, 312 F. Supp. 2d 681, 686-87 (E.D. Pa. 2004); *Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd.*, No. 01 C 5938, 2003 WL 223187, at *4-5 (N.D. Ill. Jan. 30, 2003); *Usinor Industeel v. Leeco Steel Prods., Inc.*, 209 F. Supp. 2d 880, 886 (N.D. Ill. 2002); *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support*, No. 00 CIV.9344(SHS), 2002 WL 465312, at *3, *5 (S.D.N.Y. March 26, 2002); *Shuttle Packaging Sys., L.L.C. v. Tsonakis*, No. 1:01-CV-691, 2001 WL 34046276, at *9 (W.D. Mich. Dec. 17, 2001); *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, No. 99C4040, 2001 WL 1000927, at *4 (N.D. Ill. Aug. 29, 2001), *rev'd*, 313 F.3d 385 (7th Cir. 2002); *Med. Mktg. Int'l v. Internazionale Medico Scientifica, S.R.L.*, No. CIV. A. 99-0380, 1999 WL 311945, at *2 (E.D. La. May 17, 1999).

doing, these courts have contributed to a relatively uniform CISG jurisprudence on the CISG topics that re-emerge and have developed a federal CISG common law.

This Note analyzes the development of the United States' CISG jurisprudence by grouping the cases into four loose categories and examining citation and interpretive patterns within those categories. The case categories are as follows: Applicability of the CISG, CISG Pre-emption, Interpretation of Rights and Duties, and Damages under the CISG. While tracing how the United States' orchestra harmonizes interpretation of issues that arise in these categories, this Note takes up the question whether established interpretations as well as outlier cases comply with the interpretive mandate in Article 7 of the CISG to promote the development of international trade. Recognizing that the promotion of international trade is a normative concept, this Note approaches the issue from the standpoint that stability and certainty in commercial relations facilitate international trade.

II. DEVELOPING A FEDERAL CISG COMMON LAW IN UNITED STATES FEDERAL COURTS

A. *Applicability of the CISG*

As a preliminary matter, it is critical to note the development of a similar pattern of citation and introduction to the applicability and interpretation of the CISG that is emerging in the United States courts. The first articulation can be found in *Delchi Carrier SpA v. Rotorex Corp.*, where the Second Circuit began its discussion by observing that "there is virtually no case law under the Convention," then referring to the text and principles underlying the CISG, Article 7(1) and the Uniform Commercial Code ("U.C.C.") as interpretive guides.¹³ Since then, federal district courts, particularly in the Second, Seventh, and Ninth Circuits, have continually adopted the *Delchi* court's commentary on the dearth of CISG case law, acknowledged the interpretive mandate in Article 7 of the CISG, and identified the potential guidance offered by U.C.C. case law dealing with similar provisions to the CISG.¹⁴ Nodding across cir-

13. 71 F.3d 1024, 1028 (2d Cir. 1995). On the topic of U.C.C. case law, the *Delchi* court specifically states: "Caselaw interpreting analogous provisions of Article 2 of the . . . UCC may also inform a court where the language of the relevant CISG provisions tracks that of the UCC. However, UCC caselaw 'is not *per se* applicable.'" *Id.* (quoting *Orbisphere Corp. v. United States*, 13 Ct. Int'l Trade 866, 882 (Ct. Int'l Trade 1989)).

14. *Second Circuit*: *Genpharm Inc. v. Pliva-Lachema A.S.*, 361 F. Supp. 2d 49, 54 (E.D.N.Y. 2005); *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*, 201 F. Supp. 2d 236, 281 (S.D.N.Y. 2002); *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support*, No. 00 CIV.9344(SHS), 2002 WL 465312, at *3 (S.D.N.Y. Mar. 26, 2002); *Claudia v. Olivieri Footwear Ltd.*, No. 96 Civ. 8052(HB)(THK), 1998 WL 164824, at *4 (S.D.N.Y. Apr. 7, 1998); *Helen Kaminski Pty. Ltd. v.*

cuits, these courts have developed a stock citation pattern for introducing a CISG issue or for addressing parties' contentions that the CISG is applicable to the dispute.

Turning to the relevant CISG provisions, Article 1 serves as the primary provision setting forth the sphere of the application of the CISG. Article 1(1) establishes that the CISG applies to contracts involving the sale of goods between (a) parties whose principal places of business are in contracting states or (b) when rules regarding conflict of laws result in the application of a contracting state's law.¹⁵ Having made an Article 95 reservation, United States courts only apply the CISG when both parties are from contracting states.¹⁶ This provision is straightforward and, in the usual case, offers no room for divergent interpretation.

Articles 3, 6, and 10 further define the applicability of the CISG but leave more room for interpretation. Article 3 clarifies what constitutes a sale of goods,¹⁷ and Article 10 explains, in the case of parties with operations in several countries, that the principal place of business is "that which has the closest relationship to the contract and its performance."¹⁸ Article 6 contains an "opt-out" provision which allows parties to completely exclude application of the CISG to their contract or to vary the applicability of certain provisions of the CISG.¹⁹

1. APPLICABILITY TO DISTRIBUTORSHIP AGREEMENTS

The goods-services divide set forth in Article 3 appears in the United States' CISG jurisprudence in contracts related to distributor-

Mktg. Austl. Prods., Inc., Nos. M-47(DLC), 96B46519, 97-8072A, 1997 WL 414137, at *2 (S.D.N.Y. July 23, 1997).

Seventh Circuit: Caterpillar, Inc. v. Usinor Industeel, 393 F. Supp. 2d 659, 673 (N.D. Ill. 2005); Raw Materials, Inc. v. Manfred Forbereich GmbH & Co., No. 03 C 1154, 2004 WL 1535839, at *3 (N.D. Ill. July 7, 2004); Chicago Prime Packers, Inc. v. Northam Food Trading Co. (*Chicago Prime Packers II*), 320 F. Supp. 2d 702, 708-09 (N.D. Ill. 2004); Mitchell Aircraft Spares, Inc. v. Eur. Aircraft Serv. AB, 23 F. Supp. 2d 915, 919 (N.D. Ill. 1998).

Ninth Circuit: Asante Techs., Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142, 1147 (N.D. Cal. 2001); Supermicro Computer Inc. v. Digitechnic, S.A., 145 F. Supp. 2d 1147, 1151 (N.D. Cal. 2001).

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

16. Article 95 allows CISG signatories to derogate from Article 1(1)(b). CISG, *supra* note 1, art. 95. For further illustration of the operation of Article 95, see Peter Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, 1-1 to 1-53, 1-30 (Nina M. Galston & Hans Smit eds., 1984).

17. Article 3 uses an "essence" of the contract test to distinguish goods and services contracts. In relevant part, Article 3(2) states: "This convention does not apply to contracts in which the preponderant part of the obligation of the party who furnishes the goods consists in the supply of labour or other services." CISG, *supra* note 1, art. 3(2).

18. *Id.* art. 10.

19. Parties' derogation from specific CISG provisions is subject to Article 12 of the CISG. CISG, *supra* note 1, art. 12.

ships and joint ventures. In 1997, a district court in the Southern District of New York dealt with an issue of first impression in *Helen Kaminski Pty. Ltd. v. Marketing Australian Products, Inc.*²⁰ The issue in that case was whether an amendment to a distributorship agreement addressing specified goods was sufficient to trigger application of the CISG to a dispute related only to the original terms of the agreement, phrased in terms of minimum requirements.²¹ Without citing specific CISG provisions, the court held that distributorship agreements that do not specify definite quantities and prices cannot be characterized as enforceable contracts for the sale of goods and therefore do not fall under the CISG.²² When the issue resurfaced two years later in the Eastern District of Pennsylvania, the court in *Viva Vino Import Corp. v. Farnese Vini S.R.L.* held that the CISG did not apply to an exclusive distributorship agreement.²³ In so doing, the *Viva Vino* court expressed agreement with the reasoning of the *Helen Kaminski* court in the Southern District of New York, but also specifically cited Article 14 of the CISG to sustain its holding.²⁴ The court also noted that its decision departed from state law interpretations under the U.C.C. that exclusive distributorship agreements qualified as contracts for the sale of goods.²⁵

In 2004, the Eastern District of Pennsylvania revisited the issue in the context of joint venture agreements in *Amco Ukrservice & Prompriladamco v. American Meter Co.*²⁶ The *Amco* court extended the holdings in *Helen Kaminski* and *Viva Vino* to conclude that the CISG does not cover a joint venture agreement which lacks sufficient price and quantity terms.²⁷ In doing so, the *Amco* court cited both decisions, discussed Article 14, and considered two German appellate cases.²⁸ Further, the *Amco* court, in rejecting the defendant's construction of the CISG as embracing the supply provisions of a distributorship agreement, considered the policy behind such a reading. Specifically, the *Amco* court noted that imposing an artificial distinction between the supply and "relationship" elements of a distributorship agreement would have a

20. Nos. M-47 (DLC), 96B46519, 97-8072A, 1997 WL 414137, at *2 (S.D.N.Y. July 23, 1997).

21. *Id.* at *2-3.

22. *Id.* at *3. The court made no mention of Article 14, which states that an offer is "sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price." CISG, *supra* note 1, art. 14.

23. No. CIV.A.99-6384, 2000 WL 1224903, at *1-2 (E.D. Pa. Aug. 29, 2000).

24. *Id.* at *1.

25. *Id.*

26. *Amco Ukrservice & Prompriladamco v. Am. Meter Co.*, 312 F. Supp. 2d 681 (E.D. Pa. 2004).

27. *Id.* at 687.

28. *Id.* at 686-87.

“destabilizing” effect on commerce and would lead to “unjust” results whereby a manufacturer could not only invoke the CISG to establish a breach of contracts claim based on a “best efforts” provision, but also could invoke Article 14’s quantity and price requirements to insulate it from a breach of contract claim by the distributor.²⁹ Bolstered by two unreported domestic decisions and foreign case law, the court ventured to publish its decision.

2. DETERMINING PRINCIPAL PLACE OF BUSINESS FOR THE APPLICABILITY OF THE CISG

Since the Second Circuit in *Delchi Carrier SpA v. Rotorex Corp.* implied that the CISG provides independent grounds for federal question jurisdiction under 28 U.S.C. §1331, parties who cannot rely on diversity jurisdiction have lodged their battle for federal jurisdiction under Article 10 of the CISG.³⁰ Article 10(a) of the CISG provides that the focus of a principal place of business inquiry should be on the place “which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.”³¹ While this analysis requires individual consideration of the facts of a particular dispute, United States courts have established two notable guideposts in its application.

As a preliminary matter, federal courts interpreting Article 4 along with Article 10 have held that the CISG applies only to buyers and sellers,³² and that the involvement of third parties in the performance of the contract is irrelevant to the applicability of the CISG.³³ In *Usinor Indus-teel v. Leeco Steel Products, Inc.*, the Northern District of Illinois held, *inter alia*, that the “CISG does not govern the rights of third parties who are not parties to the contract.”³⁴ To arrive at this position, the court analyzed the text of Article 4 and cited the State Department’s interpretation of Article 4 and the work of two American scholars.³⁵ The

29. *Id.* at 687.

30. *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1027-28 (2d Cir. 1995) (noting that the CISG, a self-executing treaty enacted under federal law, provides a private right of action).

31. CISG, *supra* note 1, art. 10.

32. *Usinor Indus-teel v. Leeco Steel Prods., Inc.*, 209 F. Supp. 2d 880, 885 (N.D. Ill. 2002). See also *Am. Mint L.L.C. v. GOSoftware, Inc.*, No. Civ.A. 1:05-CV-650, 2005 WL 2021248, at *3 (M.D. Pa. Aug. 16, 2005).

33. *Usinor Indus-teel*, 209 F. Supp. 2d at 885. See also *Grace Label Inc. v. Kliff*, 355 F. Supp. 2d 965, 971 (S.D. Iowa 2005).

34. *Usinor Indus-teel*, 209 F. Supp. 2d at 885.

35. *Id.* (citing Richard Speidel, *The Revision of UCC Article 2, Sales in Light of the United Nation Convention on Contracts for the International Sale of Goods*, 16 NW. J. INT’L L. & BUS. 165, 173 (1995); Caroline Delisle Klepper, *The Convention for the International Sale of Goods: A*

strength of this reasoning led a district court in the Middle District of Pennsylvania in *American Mint L.L.C. v. GOSoftware Inc.*, to require the parties to the case to submit supplemental briefs on the issue of whether a German parent of an American subsidiary was a party to the original sales contract to buy goods from an American concern.³⁶ The court analyzed the text of the CISG and cited *Usinor Industeel* for the proposition that if the German parent was not a party to the contract, the CISG would not apply and the court would lose subject matter jurisdiction.³⁷ Moreover, the *American Mint* court implied that the fact that the goods were shipped to the parent in Germany and serviced by the seller in Germany may be irrelevant if the parties could show that the American subsidiary technically purchased the goods.³⁸ After reviewing the briefs, the court determined that it was the American subsidiary that had contracted with the American supplier and dismissed the action.³⁹

In a less ambiguous case, the Southern District of Iowa stated that the CISG does not apply to a contract between parties whose principal place of business is in the same contracting state, even when a third-party is involved in the formation of the contract.⁴⁰ In *Grace Label, Inc. v. Kliff*, the court dismissed the argument that the CISG applied to a contract between an American middleman buying Britney Spears trading cards from an American manufacturer merely because the goods were destined for a Mexican end-user who had participated in initial quality control.⁴¹

The first articulation of Article 10's principal place of business inquiry arose in *Asante Technologies, Inc. v. PMC-Sierra, Inc.*⁴² *Asante* involved a breach of warranty claim brought by an American buyer against a Canadian seller with a place of business in Oregon and set guideposts barring application of the CISG to third parties.⁴³ The *Asante* court also established an outline of the factors to be used in the place of business test, which determines the place of business by looking for the location with "the closest relationship to the contract and its performance."⁴⁴

Practical Guide for the State of Maryland and its Trade Community, 15 MD. J. INT'L L. & TRADE 235, 239 (1991)).

36. *Am. Mint L.L.C. v. GOSoftware, Inc.*, No. Civ.A. 1:05-CV-650, 2005 WL 2021248, at *3 (M.D. Pa. Aug. 16, 2005).

37. *Id.* at *3.

38. *Id.*

39. *American Mint*, 2006 WL 42090, at *5.

40. *Grace Label Inc. v. Kliff*, 355 F. Supp. 2d 965, 971 (S.D. Iowa 2005).

41. *Id.* at 968-71.

42. 164 F. Supp. 2d 1142 (N.D. Cal. 2001).

43. *See id.* at 1144-45.

44. *Id.* at 1148 n.5.

In *Asante*, the Canadian seller directed the American buyer to make purchases through a non-exclusive American distributor, and the buyer, in four out of five contracts, complied. After deciding that the parties' choice of law clause was ineffective, the court cited Article 10, characterized the dispute as a breach of contract and breach of warranty action, and rejected the buyer's argument that the American distributor acted as an agent for the Canadian seller.⁴⁵ The *Asante* court then addressed the buyer's argument that the seller's office in Oregon, which housed a number of engineers who had communicated with the buyer, constituted a place of business in the United States.⁴⁶ The court rejected this argument and concluded that the representations at issue emanated directly from the Canadian seller.⁴⁷ The court listed a number of factors that it considered in reaching this decision, primarily relying on the buyer's contacts with the Canadian operation: the buyer corresponded directly with the seller at its Canadian address; the seller sent a revised set of specifications from its headquarters in Canada; the buyer was aware that the goods were manufactured in Canada; and Canada was the site of the seller's corporate headquarters, sales and marketing office, public relations department, main warehouse, and design and engineering operations.⁴⁸ The *Asante* court concluded that these contacts indicated that the "closest relationship" to the seller's performance was Canada, and therefore the CISG applied, and the court could retain federal question jurisdiction.⁴⁹

The issue resurfaced in *McDowell Valley Vineyards, Inc. v. Sabaté USA Inc.*, another breach of warranty case.⁵⁰ Although the *McDowell Valley Vineyards* court reached an opposite conclusion to the *Asante* court, it cited the *Asante* factors (particularly the emanation factor), distinguished the case,⁵¹ and determined that the seller's principal place of business was the United States rather than France.⁵² Thus, the court concluded that the CISG did not apply and that it therefore lacked federal question jurisdiction over the dispute.⁵³ Though foreign case law

45. *Id.* at 1147-48. The court's reasoning on this issue is discussed *infra* in the context of problems of contract formation involving a battle of the forms.

46. *Id.* at 1149.

47. *Id.* at 1148-49.

48. *Id.*

49. *Id.* at 1149.

50. No. C-04-0708 SC, 2005 WL 2893848, at *1 (N.D. Cal. Nov. 2, 2005).

51. *Id.* at *3-4. After citing Article 1 and Article 10 of the CISG, the *McDowell* court found that the representations at issue emanated from the American affiliate, the correspondence regarding a proposed cure issued from the American affiliate, and the American affiliate housed the goods. The court stated that these contacts superseded the contract's relationship to France, namely that the goods were manufactured and marketed in France. *Id.*

52. *Id.* at *4.

53. *Id.*

plays a lesser role in the reasoning of these cases than case law from sister circuits, the domestic case law interpretations of Article 10 are remarkably consistent with foreign CISG case law.⁵⁴

3. CIRCUMVENTING THE APPLICABILITY OF THE CISG: ARTICLE 6 OPT-OUT REQUIREMENTS

The treatment by federal courts of attempts to opt-out of application of the CISG serves as yet another example of the harmonization of international and domestic interpretations within the United States' CISG jurisprudence. The first occasion in which a federal court dealt with opt-out requirements was in *St. Paul Guardian Insurance Co. v. Neuromed Medical Systems & Support GmbH*.⁵⁵ In that case, an American buyer and a German seller included a choice of law clause selecting German law and a forum-selection clause favoring German courts in their contract.⁵⁶ In *Neuromed*, a district court in the Southern District of New York found that the absence of an express opt-out provision in the contract resulted in the application of German law, which under the circumstances would lead to the application of the CISG.⁵⁷ In arriving at this conclusion, the *Neuromed* court omitted an analysis of Article 6, but cited Article 1(1)(a) and the interpretive mandate under Article 7, which it characterized as requiring a "regard . . . to be paid to comity and interpretations grounded in its underlying principles" rather than national law.⁵⁸ Moreover, the *Neuromed* court supported this position by citing various scholarly commentaries dealing with comparative and German interpretations of the CISG and by conveying its reluctance to "undermine" the objectives of the CISG.⁵⁹

In *Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd.*, the Northern District of Illinois confronted a choice of law clause selecting Ontario provincial law and held that contractual attempts to avoid the CISG must expressly designate the law of a non-CISG jurisdiction as the applicable

54. See Alison E. Butler, *Interpretation of 'Place of Business': Comparison Between Provisions of the CISG (Article 10) and the Counterpart Provisions of the PECL*, 6 VINDOBONA J. INT'L COM. L. & ARB. 275, 276-79 (2002) (Austria).

55. No. 00 CIV. 9344(SHS), 2002 WL 465312, at *1 (S.D.N.Y. Mar. 26, 2002).

56. *Id.*

57. *Id.* at *3.

58. *Id.*

59. *Id.* (citing Larry A. DiMatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 YALE J. INT'L L. 111, 133 (1997)); Martin Karollus, *Judicial Interpretation and Application of the CISG in Germany 1988-1994*, in REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 51 (Cornell Int'l Law Journal ed., 1995) (internal citations omitted); Annemieke Romein, *The Passing of Risk: A Comparison Between the Passing of Risk Under the CISG and German Law* (June 1999), <http://www.cisg.law.pace.edu/cisg/biblio/romein.html>.

law or expressly state that the CISG does not control.⁶⁰ Though the *Ajax* court omitted any citations to *Neuromed*, it relied on Article 6 as authority for the express statement requirement.⁶¹ Furthermore, the *Ajax* court, citing *Asante*, confirmed that the designation of the law of a province in Canada, a CISG signatory, triggers the application of the national law of the signatory, namely the CISG.⁶²

In the same year, the Fifth Circuit, dealing with a forum-selection clause in favor of Ecuador in *BP Oil International, Ltd. v. Empresa Estatal Petroleos de Ecuador*, arrived at the same conclusion as the *Ajax* court.⁶³ Reversing the district court's finding that the Ecuadorian contract law governed the contract, the Fifth Circuit noted that the law governing international contracts in Ecuador, a CISG signatory, "necessarily incorporates" the CISG into domestic law.⁶⁴ Moreover, the Fifth Circuit, citing Article 6 language from the federal line of CISG opt-out cases⁶⁵ and scholarly commentary,⁶⁶ affirmed the proposition that parties need to affirmatively opt-out of the CISG in their contracts. In addition, the Fifth Circuit, referring to Article 7(1), stated that the express opt-out requirement "promote[d] uniformity and the observance of good faith in international trade, two principles that guide interpretation of the CISG."⁶⁷

The Middle District of Pennsylvania issued the most current articulation of the affirmative opt-out requirement under Article 6 in *American Mint L.L.C. v. GOSoftware, Inc.*⁶⁸ Dealing with a choice of law clause selecting Georgia state law, the Middle District of Pennsylvania, in harmony with the Fifth Circuit's interpretive pattern, cited Article 6 of the CISG and the most current federal line of opt-out cases.⁶⁹ Through cross-circuit communication and citation, the requirement that contractual opt-outs must explicitly exclude application of the CISG has become a firmly-rooted feature of federal CISG common law. Moreover, this reading is consistent with most foreign CISG case law on the

60. No. 01 C 5938, 2003 WL 223187, at *2-3 (N.D.Ill. Jan. 30. 2003).

61. *Id.* at *2.

62. *Id.* at *3 (citing *Asante Techs., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001) (holding that a choice of law clause selecting the law of British Columbia resulted in application of the CISG)).

63. 332 F.3d 333 (5th Cir. 2003).

64. *Id.* at 337.

65. *Id.* (citing *Asante*, 164 F. Supp. 2d at 1150; *Ajax*, 2003 WL 223187, at *3; *Neuromed*, 2002 WL 465312, at *3).

66. *Id.* at 337 (citing RALPH H. FOLSOM, MICHAEL W. GORDON & JOHN A. SPANOGLE, JR., INTERNATIONAL BUSINESS TRANSACTIONS 12 (2d ed. 2001)).

67. *Id.*

68. *Am. Mint L.L.C. v. GOSoftware, Inc.*, No. Civ.A. 1:05-CV-650, 2005 WL 2021248, at *2-3 (M.D. Pa. Aug. 16, 2005).

69. *Id.* (citing *BP Oil*, 332 F.3d at 337; *Asante*, 164 F. Supp. 2d at 1150).

topic.⁷⁰

B. *The Pre-emptive Effect of the CISG over the U.C.C. and Relevant State Law*

1. PRE-EMPTION OF STATE CONTRACT LAW

The acceptance of the pre-emptive effect of the CISG was gradual and due in part to early statements that state law enactments of the U.C.C. which tracked similar CISG provisions could aid the federal courts in interpreting gaps in the CISG.⁷¹ At the same time, some courts recognized that U.C.C. case law “is not *per se* applicable.”⁷² This recognition gained more prominence with the recurrence of issues involving CISG provisions that conflicted with the U.C.C. The most notable example lies in the development of federal jurisprudence and debate surrounding the CISG’s stance on the admission of parol evidence.

While the U.C.C. expressly restricts the use of evidence of prior or contemporaneous agreements to aid in contractual interpretation, the CISG does not contain an explicit provision regarding the admissibility of such extrinsic evidence.⁷³ Article 8(3) of the CISG, however, emphasizes that courts should give “due consideration . . . to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties” to determine the intent of the parties.⁷⁴ Predating any judicial treatment of the issue, academic speculation loomed, with one commentator remarking that “[w]e are struck by a new world where there is . . . no parol evidence rule.”⁷⁵ In a more grounded reaction, John O. Honnold doubted the viability of the parol evidence

70. Louis F. Del Duca & Patrick Del Duca, *Selected Topics Under the Convention on International Sale of Goods (CISG)*, 106 DICK. L. REV. 205, 216-18 (2001).

71. *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2d Cir. 1995). See also subsequent cases listed in footnote 14, *supra*.

72. *Id.* (quoting *Orbisphere Corp. v. United States*, 726 F. Supp. 1344, 1355 (Ct. Int’l Trade 1989)). See also *Chicago Prime Packers, Inc. v. Northam Food Trading Co. (Chicago Prime Packers III)*, 408 F.3d 894, 898 (7th Cir. 2005); *Genpharm Inc. v. Pliva-Lachema A.S.*, 361 F. Supp. 2d 49, 55 (E.D.N.Y. 2005); *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*, 201 F. Supp. 2d 236, 281 (S.D.N.Y. 2002); *Claudia v. Olivieri Footwear Ltd.*, No. 96 Civ. 8052(HB)(THK), 1998 WL 164824, at *4 (S.D.N.Y. Apr. 7, 1998).

73. U.C.C. § 2-202 (2003) prohibits the use of parol evidence to contradict the parties’ written agreement, but § 2-202 does allow evidence of course of dealing, course of performance, and usage of trade to supplement or explain the agreement.

74. CISG, *supra* note 1, art. 8(3).

75. John E. Murray, Jr., *An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 11, 12 (1988).

rule under the CISG.⁷⁶ Honnold read Article 8(3)'s mandate to give "due consideration" to all relevant evidence to "relieve" courts from domestic interpretative rules which would otherwise bar such evidence from consideration.⁷⁷ Honnold's reading soon became the norm in academic circles.⁷⁸

In the face of academic pronouncements, the Fifth Circuit, in *Beijing Metals & Minerals Export/Import Corp. v. American Business Center, Inc.*, stated that the parol evidence rule would apply "regardless" of whether the contract was governed by the CISG or Texas law.⁷⁹ The Fifth Circuit declined to engage in any interpretation of the CISG, rather it merely noted that there was "'virtually no U.S. case law'" on the CISG.⁸⁰ The *Beijing Metals* decision sparked criticism and awakened only marginal support for the proposition that the CISG supported the application of the parol evidence rule.⁸¹ The judicial tide turned, however, in *MCC-Marble Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.*⁸²

In *MCC-Marble*, the Eleventh Circuit, mindful of the U.C.C.'s prohibition on the use of parol evidence and the lack of an express CISG provision permitting its use, interpreted the CISG to reject the parol evidence rule.⁸³ Following Honnold's reading of Article 8(3), the Eleventh Circuit interpreted Article 8(1)'s mandate to use the intent of the parties as an interpretive guide and further reasoned that the CISG, unlike the U.C.C., had no requirement that an agreement be evidenced in writing.⁸⁴

76. See JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* § 110, at 170-71 (2d ed. 1991).

77. *Id.* at 171.

78. See HERBERT BERNSTEIN & JOSEPH LOOKOFSKY, *UNDERSTANDING THE CISG IN EUROPE* 29 (1997); Henry D. Gabriel, *A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code*, 7 *IND. INT'L & COMP. L. REV.* 279, 281-82 (1997); 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, 57 (1991).

79. *Beijing Metals & Minerals Export/Import Corp. v. Am. Bus. Ctr., Inc.*, 993 F.2d 1178, 1183 n.9 (5th Cir. 1993).

80. *Id.* (citing *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992)).

81. See Harry M. Flechtner, *Recent Development: CISG, 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, 157 (1995); Peter J. Calleo, Note, *The Inapplicability of the Parol Evidence Rule to the United Nations Convention on Contracts for the International Sale of Goods*, 28 *HOFSTRA L. REV.* 799 (2000); but see David H. Moore, Note, *The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*, 1995 *BYU L. REV.* 1347 (1995).

82. 144 F.3d 1384 (11th Cir. 1998).

83. *Id.* at 1390-91.

84. *Id.* at 1389 (contrasting Article 11 of the CISG with U.C.C. § 2-201's statute of frauds provision).

The Eleventh Circuit also cited dictum from *Filanto S.p.A. v. Chilewich International Corp.*⁸⁵ to conclude that the CISG rejected the parol evidence rule and chided the Fifth Circuit for ignoring *Filanto* and declining to analyze the text of the CISG.⁸⁶ The Eleventh Circuit stated, “[a]s persuasive authority for this court, the *Beijing Metals* opinion is not particularly persuasive on this point.”⁸⁷ In contrast to the *Beijing Metals* decision, the Eleventh Circuit’s bold pronouncement in *MCC-Marble* became the persuasive authority to harmonize federal CISG jurisprudence in the context of parol evidence rule pre-emption.

A district court in the Second Circuit, dealing with the same issue in the same year, concluded that “contracts governed by the CISG are freed from the limits of the parol evidence rule and there is a wider spectrum of admissible evidence to consider in construing the terms of the parties’ agreement.”⁸⁸ In reaching this decision, the *Olivieri* court began by noting the interpretive mandate of Article 7 and then looked to the text of the CISG⁸⁹ as well as relevant academic commentary.⁹⁰

In the same year, a district court in the Seventh Circuit heard *Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB* and also addressed the issue of parol evidence.⁹¹ The court noted that no binding precedent in the jurisdiction existed and looked to its sister circuits for guidance.⁹² Arriving at the same conclusion as the Eleventh and Second Circuits, the *Mitchell* court adopted the holding and reasoning in *MCC-Marble* and discussed the case in detail.⁹³ The *Mitchell* court also cited language from *Olivieri* and referred back to the *Filanto* dictum.⁹⁴ Further, the *Mitchell* court not only found that the CISG pre-empted arguments under state law invoking the parol evidence rule, but also distinguished between contract formation under the CISG and general

85. 789 F. Supp. at 1238 n.7.

86. *MCC-Marble Center, Inc.*, 144 F.3d at 1390.

87. *Id.*

88. *Claudia s.n.c. v. Olivieri Footwear Ltd.*, 1998 WL 164824, at *5 (S.D.N.Y. 1998).

89. *Id.* at *4-6. First, the court noted that Article 11 of the CISG recognized the validity of oral contracts and in determining the existence of such contracts, provided that “any evidence that may bear on the issue of formation is admissible.” *Id.* at *5. Second, the court noted that Article 9, which binds parties to agreed usages and established practices, supported the interpretation of the CISG as allowing the admission of any evidence helpful to determine the scope of a CISG-governed contract. *Id.* at *6.

90. *Id.* Specifically, the court cited the work of Larry A. DiMatteo in *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internalization of Contract Law Equal Unexpected Contractual Liability*, 23 SYRACUSE J. INT’L L. & COM. 67, 103 (1997), and in *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 YALE J. INT’L L. 111, 127 (1997).

91. 23 F. Supp. 2d 915 (N.D. Ill. 1998).

92. *See id.* at 919.

93. *Id.* at 919-20.

94. *Id.* at 920.

CISG interpretive rules.⁹⁵ In light of the use of parol evidence to illuminate disputes governing contract formation, this distinction is a notable example of autonomous CISG interpretation and the development of an internationalist culture in United States courts.

As federal courts gradually accepted and became more familiar with the CISG, they made more explicit and broad pronouncements of the CISG's pre-emptive effect. The *Asante* court, dealing with a case of first impression in the Ninth Circuit, was the first to make such a bold announcement.⁹⁶ Referring to cases interpreting the requirements of federal pre-emption, namely the need for evidence of congressional intent, the *Asante* court found that Congress and the Executive intended the CISG to pre-empt state law.⁹⁷

The *Asante* court reached that conclusion by examining the language of the CISG preamble indicating that the purpose of adopting uniform rules was the "removal of legal barriers in international trade" and tracing echoes of that language in pre-ratification communications by the Executive to Congress.⁹⁸ Manifesting an independent regard for the principles and objectives of the CISG, the court stated:

[T]he expressly stated goal of developing uniform international contract law to promote international trade indicates the intent of the parties to the treaty to have the treaty pre-empt state law causes of action.

The availability of independent state contract law causes of action would frustrate the goals of uniformity and certainty embraced by the CISG.⁹⁹

The *Asante* court also backed up its conclusion with supporting academic commentary.¹⁰⁰

95. *Id.* at 918, 920. The dispute involved a Swedish party which resulted in differential application of the CISG and Illinois contract law. *Id.* at 918. In note 16 of its ratification agreement, Sweden declared that it would not be bound by Part II, the contract formation section of the CISG. *Id.* Therefore, the court concluded that only Part I of the CISG, which included the relevant provisions permitting the admission of parol evidence, applied to the dispute. *Id.* The court applied Illinois contract law to the issues of contract formation. *Id.*

96. *Asante Techs., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1150-52 (N.D. Cal. 2001). As discussed in the section on CISG opt-out requirements, the court concluded that the CISG applied through the choice of law clause favoring Canadian law. *Id.* at 1150. The court's statements on pre-emption appear in the context of its consideration of the Plaintiff's contention that California law applied. *Id.* at 1149-50.

97. *Id.* at 1151 (citations omitted).

98. *Id.* Specifically, the *Asante* court looked to statements in the President's Letter of Transmittal of the CISG to the Senate and the Secretary of State's Letter of Submittal of the CISG to the President that affirmed that the objective of the CISG was to reduce legal uncertainty in cross-border transactions and in doing so, promote international trade. *Id.*

99. *Id.*

100. *Id.* at 1151-52 (citing William S. Dodge, *Teaching the CISG in Contracts*, 50 J. LEGAL EDUC. 72 (2002) ("[T]he CISG . . . pre-empts state common law and the UCC."); David Frisch,

Less than a year later, federal district courts in both the Second and Seventh Circuits confirmed the proposition that the CISG, when applicable, pre-empts both the U.C.C. and state contract law. In *Usinor Industrie v. Leeco Steel Products, Inc.*, the court acknowledged that, in cases involving buyers and sellers, the CISG pre-empts "domestic sales law that otherwise would govern the contract, such as Article 2 of the UCC."¹⁰¹ Noting that CISG pre-emption was an issue of first impression in its district, the *Usinor* court cited *Asante*, echoed the Northern District of California's reasoning in using the Supremacy Clause, and also looked to other sources of academic commentary.¹⁰²

In an opinion that more closely tracked the reasoning in *Asante*, a district court in the Second Circuit, by implication, also concluded that the CISG pre-empted state contract law.¹⁰³ As in *Asante*,¹⁰⁴ the *Geneva Pharmaceuticals* court referred to the CISG preamble as indicative of both presidential and congressional intent that ratification of the CISG would help promote and develop international trade, and the court further cited the same academic authority the *Asante* court relied on.¹⁰⁵ In addition, the *Geneva Pharmaceuticals* court directly quoted *Asante* for the propositions that the objectives behind the CISG harmonization effort support pre-emption of state law causes of action and that a contrary reading would frustrate these objectives, namely uniformity of substantive rules and commercial certainty.¹⁰⁶ As such, both *Geneva Pharmaceuticals* and *Usinor*, in part, suggest the development of a federal common law supporting CISG pre-emption. However, other portions of these opinions have the potential to undermine the CISG's preemptive effect in the federal courts of the United States.

2. OUTLIER INTERPRETATIONS OF THE PRE-EMPTIVE EFFECT OF THE CISG ON STATE LAW

Both *Geneva Pharmaceuticals* and *Usinor*, as well as *Stawski Dis-*

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) ("[T]he CISG . . . will pre-empt article 2 when applicable.")).

101. 209 F. Supp. 2d 880, 884-85 (N.D. Ill. 2002).

102. *Id.* (citing Sunil R. Harjani, *The Convention on Contracts for the International Sale of Goods in United States Courts*, 23 HOUS. J. INT'L L. 49, 53 (2000); 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 N.W. J. INT'L L. & BUS. 165, 166 (1995); Michael A. Tessitore, *The U.N. Convention on International Sales and the Seller's Ineffective Right of Reclamation Under the U.S. Bankruptcy Code*, 35 WILLAMETTE L. REV. 367 (1999)).

103. *Geneva Pharm. Tech. Corp. v. Barr Labs., Inc.*, 201 F. Supp. 2d 236, 285 (S.D.N.Y. 2002).

104. *Asante Techs., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1151-52 (N.D. Cal. 2001).

105. *Geneva Pharm.*, 201 F. Supp. 2d at 285-86.

106. *Id.* at 285 (quoting *Asante*, 164 F. Supp. 2d at 1151).

tributing Co., Inc. v. Zywiec Breweries PLC, introduce disturbing implications for United States federal courts' compliance with Article 7 of the CISG.¹⁰⁷ *Geneva Pharmaceuticals* and *Usinor*, both recognizing the pre-emptive effect of the CISG, when applicable, determined that the CISG did not apply to the cases at bar. In *Geneva Pharmaceuticals*, the court arrived at this conclusion in the context of promissory estoppel claims. Applying New Jersey contract law, the court confused the validity of contractual provisions, a subject not covered under the CISG (per Article 4(a)), with contract formation, which is covered under the CISG.¹⁰⁸ The *Geneva Pharmaceuticals* court examined the defendant's argument - that the contract lacked consideration - under New Jersey law, which requires consideration for a contract to be valid.¹⁰⁹ In contrast, the CISG contains no provision requiring consideration for the formation of a contract. Equally unsettling is the *Geneva Pharmaceuticals* court's refusal to apply Article 16(2),¹¹⁰ the CISG's version of promissory estoppel resulting in a binding agreement, on the grounds that the parties failed to argue for such an interpretation.¹¹¹ The *Geneva Pharmaceuticals* court does recognize commentary suggesting such an interpretation, however, the court limits the CISG's pre-emptive effect of that interpretation to promissory estoppel claims which use the CISG to "avoid the need to prove the existence of a 'firm offer.'"¹¹² The *Geneva Pharmaceuticals* court's narrow reading, based on the parties' omission of an Article 16(2)-based promissory estoppel argument, at least considers the proposition that contrary application of state law might frustrate the CISG's attempt to achieve uniformity in commercial law involving international commercial transactions.¹¹³

Such consideration is entirely absent in *Usinor*. In contrast to the *Geneva Pharmaceuticals* court, the *Usinor* court ignored the plaintiff's argument that the use of Article 2 of the U.C.C. to pre-empt the CISG would contradict the interpretive mandate of Article 7.¹¹⁴ Specifically, the plaintiff argued that the application of the U.C.C. imposes a burden on parties to examine local sales law and local security interest law, and thus undermined the CISG's objective of promoting international

107. No. 02 C 8708, 2003 WL22290412, at *1 (N.D. Ill. Oct. 6, 2003).

108. *Geneva Pharm.*, 201 F. Supp. 2d at 281-82.

109. *Id.* at 283.

110. *Id.* at 286-87. Article 16(2)(b), in relevant part, provides that an offer cannot be revoked "if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer." CISG, *supra* note 1, art. 16(2)(b).

111. *Geneva Pharm.*, 201 F. Supp. 2d at 287.

112. *Id.* at 286-287.

113. *Id.* at 287.

114. *Usinor Industeel v. Leeco Steel Prods., Inc.*, 209 F. Supp. 2d 880, 882-83 (N.D. Ill. 2002).

trade.¹¹⁵ Failing to address these considerations, the *Usinor* court determined that the U.C.C. pre-empted the CISG in this replevin action.¹¹⁶ Despite the contract's retention of title provision, the court found that the CISG did not apply because of the presence of a third-party to the dispute over ownership of the goods.¹¹⁷ In doing so, the *Usinor* court took a literal view of the application of the CISG, specifically that the CISG only applies to buyers and sellers.¹¹⁸ In this case, the third-party, a bank, issued a loan to the buyer and demanded the goods as collateral.¹¹⁹ This loan occurred after the conclusion of the contract and therefore the bank had no security interest in the goods prior to the contract.¹²⁰ Thus, as the plaintiff argued and the State Department's interpretation affirmed,¹²¹ the exclusions of Article 4 of the CISG do not affect the CISG's applicability.¹²² Without a security interest that predated the contract, the contract established that the seller retained title to the goods until the buyer tendered payment. In other words, the contract confirmed the seller's continued right to the goods. As such, the post-hoc interest did not relate to the contract and did not exclude application of the CISG. The *Usinor* court's narrow textual reading of Article 4, an implied contradiction of domestic interpretation, and its refusal to consider the implications of its decision on the facilitation of cross-jurisdictional sales transactions results in non-compliance and disregard for Article 7's interpretive mandate.

In like manner, albeit in a different context, another district court in the Seventh Circuit also held that state law pre-empted the CISG.¹²³ In *Stawski Distributing v. Zywiec Breweries PLC*, the Northern District of Illinois dealt with a breach of contract claim related to the early termination of a beer distributorship. In imposing a state law requirement of termination for good cause, the court determined that the Illinois Beer

115. *Id.* at 883.

116. *Id.* at 887.

117. *Id.* at 885-87.

118. *Id.* at 885-86. See the discussion on *Usinor*, *supra* section II.A.2, on the application of the CISG with regard to third parties.

119. *Id.* at 882.

120. *Id.* at 883.

121. *Id.* at 885. Specifically, the State Department interprets the CISG to exclude, pursuant to subparagraph (b) of Article 4, disputes relating to "[w]hether the sale to the buyer cuts off outstanding property interests of third persons" from the CISG. *Id.*

122. *Id.* In relevant part, Article 4 states that the CISG "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. . . . [I]t is not concerned with . . . the effect which the contract may have on the property in the goods sold." *Id.*

123. *Stawski Distrib. Co. v. Zywiec Breweries PLC*, No. 02 C 8708, 2003 WL 22290412, at *2 (N.D. Ill. Oct. 6, 2003).

Industry Fair Dealing Act (“IBIFDA”),¹²⁴ a state law enacted pursuant to the states’ Twenty-first Amendment reserved powers, trumped the application of the CISG.¹²⁵ Using the Federal Arbitration Act as an example of IBIFDA pre-empted federal law, the *Stawski Distributing* court likened an international treaty to domestic federal law.¹²⁶ In doing so, the court essentially chose concerns of federalism over international obligation. This decision is disturbing, especially in light of the fact that no CISG provision imposes a termination for cause or fault requirement in any contract.¹²⁷ While this issue has not yet re-emerged, its implications may be far-reaching in the context of goods with alcohol content. As such, it also imposes a burden on the parties to research laws governing alcohol in each of the various states of destination of the goods. This burden frustrates the CISG’s goal of promoting uniformity and certainty and facilitating the conduct of international trade.

C. *Interpretation of Contractual Rights and Obligations Under the CISG*

The United States courts’ interpretation of buyers’ and sellers’ rights and obligations under the CISG represents yet another area in which one can perceive the emergence of a federal CISG common law. The issues that have surfaced thus far fall into three sub-sections. The first, the mode of interpretation, appeared in the context of the use of parol evidence in determining the scope of contractual obligations. This sub-section, discussed above in the context of the CISG’s pre-emptive effect over state contract law, is a particularly significant example of domestic harmonization of CISG interpretation and compliance with Article 7. Expressing due regard for international interpretive uniformity, the line of cases rejects the deeply rooted contractual doctrine prohibiting the admission of parol evidence. As the sub-section on parol evidence was covered in the above discussion, this section will focus on the other two other identified sub-sections: (1) rights related to time for inspection and notice of non-conformity of goods and (2) burden allocations and scope in proving non-conformity of goods.

124. Beer Industry Fair Dealing Act, 815 ILL. COMP. STAT. 720/2 (1999).

125. *Stawski Distrib. Co.*, 2003 WL 22290412, at *1-2.

126. *Id.* at *2 (stating that “there is no persuasive reason to suggest that the CISG must be treated any differently [than the Federal Arbitration Act]”).

127. From the facts of the case, it is unclear whether the distributorship agreement imposed definite price and quantity terms so as to bring it within the ambit of the CISG. In the event that the distributorship did not contain such terms, it is unsettling that the court refused to apply the CISG on grounds of pre-emption rather than independent and insular grounds for CISG inapplicability.

1. ESTABLISHING A STANDARD FOR DETERMINING THE TIMING OF INSPECTION AND NOTICE OF NON-CONFORMING GOODS

Articles 38 and 39 of the CISG establish a buyer's rights both to inspect goods and to avoid the contract in the event of non-conformity.¹²⁸ This right is qualified by a buyer's obligation to provide the seller with notice of non-conformity.¹²⁹ In addition to allowing deferral of inspection if the contract sets forth shipping obligations, Article 38, in relevant part, states:

The buyer must examine the goods . . . within as *short* a period as is *practicable* in the circumstances.

. . . .

If the goods are redirected in transit or redispached by the buyer without a *reasonable opportunity* for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or dispatch, examination may be deferred until after the goods have arrived at the new destination.¹³⁰

While this provision establishes that a buyer must inspect the goods within a certain time frame, it provides scant guidance for determining the limits of that time frame. Nor does Article 38 direct courts regarding how to determine the extent of a reasonable opportunity of inspection in the context of deferred inspection.

Turning to Article 39, this provision establishes, in relevant part:

The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a *reasonable* time after he has discovered it or ought to have discovered it. . . .

[T]he buyer loses the right to rely . . . if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer.¹³¹

Though the time line is more specific than Article 38, Article 39 does not provide factors guiding courts' analysis of whether a notice given within two years arrives within a reasonable time. These gaps in the CISG invite independent judicial interpretation of such time lines.

In step with the international interpretive trend, United States courts recently clarified factors governing a reasonableness standard to adjudicate disputes concerning a buyer's right to inspect goods and a buyer's

128. CISG, *supra* note 1, arts. 38, 39.

129. *Id.*

130. *Id.* (emphasis added).

131. *Id.* (emphasis added).

obligation to provide the seller with notice of non-conforming goods.¹³² This development can be traced through *Shuttle Packaging Systems, L.L.C. v. Tsonakis*¹³³ and the three opinions issued in *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*¹³⁴

In *Shuttle Packaging*, a district court in the Sixth Circuit denied the buyer's motion for a preliminary injunction.¹³⁵ To defeat the buyer's attempt to prove the element of irreparable harm, the seller argued, *inter alia*, that the buyer's unreasonable delay in providing notice of the lack of conformity of the goods constituted a fundamental breach of contract under Article 25 of the CISG.¹³⁶ According to the seller, the buyer lost its right to rely on the non-conformity of the goods as cause for withholding payment, thereby committing a contractual breach that terminated the contract and relieved the seller of its obligation to adhere to the terms of the contract.¹³⁷

The *Shuttle Packaging* court, while ultimately excusing the seller's performance on other grounds, concluded that the buyer provided notice of non-conformity within "a reasonable time."¹³⁸ In reaching this holding, the court found that the text of Articles 38 and 39 "reveal[s] an intent that buyers . . . promptly" conduct inspections and notify sellers of non-conformity.¹³⁹ However, the court found it "clear" that Articles 38 and 39 loosen this requirement when prompt notification is not "practicable."¹⁴⁰ The court determined that the buyer's delay was justified by several factors, including: the "complicated, unique" nature of the goods (namely machinery used in manufacturing), the mode of delivery of the goods, and the need to train the buyer's employees on the use of the

132. See Larry A. DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT'L L. & BUS. 299, 359-64 (2004).

133. 1: 01-CV-691, 2001 WL 34046276, at *4 (W.D. Mich. Dec. 17, 2001).

134. *Chicago Prime Packers, Inc. v. Northam Food Trading Co. (Chicago Prime Packers III)*, 408 F.3d 894 (7th Cir. 2005); *Chicago Prime Packers, Inc. v. Northam Food Trading Co. (Chicago Prime Packers II)*, 1 (N.D. Ill. 2004); *Chicago Prime Packers, Inc. v. Northam Food Trading Co. (Chicago Prime Packers I)*, No. 01 C 4447, 2003 WL 21254261 (N.D. Ill. May 29, 2003).

135. *Shuttle Packaging*, 2001 WL 34046276, at *11.

136. *Id.* at *9.

137. *Id.* at *9-10. The obligation at issue was a contractual provision containing a non-compete agreement. *Id.*

138. *Id.* at *9 (quoting CISG, *supra* note 1, art. 39). Though recognizing the legitimacy of the buyer's complaints of non-conformity, the court determined that the substance of those complaints did not constitute a "fundamental or even a substantial breach of the contract by the seller" that would justify the buyer's withholding of payment. *Id.* at *10. In other words, the court determined that the buyer could not rely on the non-conformity of the goods or the extent of the non-conformity rather than the late notification to the seller. *Id.*

139. *Id.*

140. *Id.*

goods.¹⁴¹ Further, the court affirmed the importance of the nature of the goods on the reasonableness requirement by distinguishing foreign CISG case law that “concern[ed] the inspection of simple goods.”¹⁴²

In *Chicago Prime Packers I*, a district court in the Northern District of Illinois applied the factors promulgated in the *Shuttle Packaging* reasonableness test.¹⁴³ In contrast to the *Shuttle Packaging* court’s analysis of a reasonable time for notice of non-conforming, complicated machinery, the *Chicago Prime Packers I* court dealt with a different type of good, namely meat. Aside from applying federal CISG case law, the district court considered Section 2-606(1) of the U.C.C., cited state law construing those provisions, and added the factor of industry custom and usage to the *Shuttle Packaging* analysis.¹⁴⁴ The court, however, rejected the seller’s argument that as a matter of domestic law, a one-month delay in notification of the non-conformity of perishable goods was unreasonable.¹⁴⁵ In the absence of evidence of industry custom, the court determined that material questions of fact remained as to what constituted a reasonable time for the inspection and notification of meat’s lack of conformity.¹⁴⁶

After trial, the district court in *Chicago Prime Packers II* again looked to the *Shuttle Packaging* test, as well as to foreign CISG case law.¹⁴⁷ Considering both sources of law, the *Chicago Prime Packers II* court found that (1) the meat, even in its frozen state, was subject to the

141. *Id.* (noting that official notice of non-conformity was preceded by correspondence regarding the operation and functioning of the machinery).

142. *Id.* The court did not cite to specific cases from foreign jurisdictions but only generally addressed the foreign authority the seller brought to the court’s attention.

143. *Chicago Prime Packers, Inc. v. Northam Food Trading Co. (Chicago Prime Packers I)*, No. 01 C 4447, 2003 WL 21254261, at *4 (N.D. Ill. May 29, 2003).

144. *Id.* at *4 (comparing the first two situations in U.C.C. § 2-606(1) to Articles 38 and 39 of the CISG). U.C.C. § 2-606(1) (2003) provides that acceptance occurs in three alternative situations:

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or (b) fails to make an effective rejection (subsection (1) of Section 2—602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or (c) does any act inconsistent with the seller’s ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him. (subsection (1) of Section 2—602).

U.C.C. § 2-606(1) (2003).

145. *Id.* at *6. Specifically, the court rejected the authority of *Meat Requirements Coordination, Inc. v. GGO*, 673 F.2d 229 (8th Cir. 1982).

146. *Chicago Prime Packers I*, 2003 WL 21254261, at *6. Further, the court noted the buyer’s argument that frozen meat did not qualify as a perishable good thereby warranting a longer notification period.

147. *Chicago Prime Packers, Inc. v. Northam Food Trading Co. (Chicago Prime Packers II)*, 320 F. Supp. 2d 702, 712-15 (N.D. Ill. 2004).

same prompt inspection as a perishable good,¹⁴⁸ (2) a “short” time for inspection of perishable goods is upon or near the date of delivery or receipt by the buyer,¹⁴⁹ and (3) notification of non-conformity of perishable goods, in line with the legislative intent of the CISG, should “follow shortly” after such prompt inspection.¹⁵⁰ On the basis of this determination, the court held that the buyer failed to directly or indirectly inspect the meat as required by Article 38 and that the buyer’s delayed notification of non-conformity, as a result of its delayed inspection, revoked its ability to rely on the non-conformity as provided by Article 39.¹⁵¹ As a final note, the *Chicago Prime Packers II* court characterized the CISG’s objective in requiring prompt notice as an attempt “to avoid controversies such as this” wherein delays prevent parties from reliably determining the condition of the goods.¹⁵² On appeal, the Seventh Circuit affirmed the decision in *Chicago Prime Packers III*.¹⁵³

2. BURDEN ALLOCATION IN PROVING INSPECTION AND NON-CONFORMITY OF GOODS

At the latter stages of the *Chicago Prime Packers* dispute, the court confirmed that the burden of proving the lack of conformity of goods rested with the buyer.¹⁵⁴ This section explores the basis of, and reasoning behind, that conclusion and evaluates the consistency of it with interpretations in foreign CISG case law and its compliance with Article 7’s interpretive mandate.

Hearing the seller’s motion for summary judgment, the *Chicago Prime Packers I* court did not address the burden of persuasion in the non-conformity context because the seller, as the primary movant, bore the burden of proving that no genuine issue of material fact would need to be tried.¹⁵⁵ The issue of burden allocation first surfaced in *Chicago Prime Packers II*. The district court initially reasoned that the buyer, the defendant in this case, bore the burden to prove non-conformity because it relied on the non-conformity of the meat as an affirmative defense to

148. *Id.* at 714.

149. *Id.* at 712-13 (citing to a German decision (citation omitted) and Danielle Alexis Thompson, *Translation of Oberlandesgericht Karlsruhe Decision of 25-06-1997 Including Commentary—Buyer Beware: German Interpretation of the CISG Has Lead [sic] to Results Unfavorable to Buyers*, 19 J.L. & COM. 245, 249-50 (Spring 2000)).

150. *Chicago Prime Packers II*, 320 F. Supp. 2d at 713 (citing Alessandro Rizzieri, *Decision of the Tribunal of Vigevano, Italy, July 12, 2000*, 20 J.L. & COM. 209, 217 (Spring 2001)).

151. *Id.* at 714.

152. *Id.* at 715.

153. *Chicago Prime Packers, Inc. v. Northam Food Trading Co. (Chicago Prime Packers III)*, 408 F.3d 894, 900 (7th Cir. 2005).

154. *Id.* at 898-900.

155. *Chicago Prime Packers I*, 2003 WL 21254261, at *2.

withholding payment for the goods.¹⁵⁶ However, the district court, complying with Article 7, ultimately based its decision to allocate the burden of proof on the buyer on foreign CISG case law.¹⁵⁷

On appeal, the Seventh Circuit, without directly citing foreign CISG case law, affirmed the district court in *Chicago Prime Packers III*.¹⁵⁸ The Seventh Circuit, however, also complied with Article 7. After noting that no CISG provision allocated the burden of proving the non-conformity of goods, the Seventh Circuit turned to the U.C.C. and commentary on the CISG to fill the interpretive gap. First, the Seventh Circuit likened Article 35, the CISG warranty provision, to Section 2-314 of the U.C.C.¹⁵⁹ Then, the Seventh Circuit noted that the similar warranty structures suggested that the CISG, like the U.C.C., gave the buyer the burden of proving the lack of conformity of the goods to the warranty issued by the seller.¹⁶⁰ In support of its reading under the U.C.C., the Seventh Circuit cited several academic works reaching a similar result under the CISG.¹⁶¹ Thus, despite its omission of foreign CISG case law, the Seventh Circuit engaged in an in-depth textual analysis of the CISG.

The *Chicago Prime Packers* dispute represents a positive departure from the approach employed by the Fourth Circuit in *Schmitz-Werke GmbH & Co. v. Rockland Industries, Inc.*¹⁶² An outlier case, *Schmitz-Werke's* reasoning relied entirely upon state warranty law.¹⁶³ After determining that the CISG was silent on burden allocation, the Fourth Circuit, without attempting to find other textual clues to the intent or objective of the CISG and without referring to CISG commentary, assumed that the burden of proof rested with the buyer.¹⁶⁴ In support of this position, the Fourth Circuit turned to state products liability law.¹⁶⁵ The Fourth Circuit went on to temper the buyer's burden of proof by

156. *Chicago Prime Packers II*, 320 F. Supp. 2d at 710.

157. *Id.* at 712 (internal citations omitted). Specifically, the court cited a CISG opinion by a Netherlands court in *Fallini Stefano & Co. s.n.c./Foodic BV*, Arrondissementsrechtbank [Rb.] [ordinary court of first instance], Roermond, Dec. 19, 1991, (Neth.), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=34&step=Abstract>.

158. *Chicago Prime Packers III*, 408 F.3d at 898-99.

159. *Id.* at 898.

160. *Id.*

161. *Id.* (quoting FOLSOM, GORDON, & SPANOGLE, JR., *supra* note 66, at 39; citing Larry A. DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 N.W. J. INT'L L. & BUS. 299, 400 (2004)).

162. 37 F. App'x 687 (4th Cir. 2002).

163. *Id.* at 691-93.

164. *Id.* at 692.

165. Specifically, the court stated that "a plaintiff in a products liability case must show that the product in question is defective, even if the cause of action is for breach of an express or implied warranty." *Id.* at 692 (citations omitted).

requiring that the buyer show a defect and proof that the goods were unfit for their intended purpose, rather than requiring that the buyer explain the "exact nature of the defect."¹⁶⁶ Despite its non-inclusion of persuasive authority from the Seventh Circuit, the Fourth Circuit arrived at the same result reached both by the applicable federal CISG common law and foreign CISG case law.¹⁶⁷

D. *Damages Under the CISG: Article 74 and Preserving the American Rule*

This section explores the development of federal CISG common law on the extent to which the CISG permits attorneys' fees as consequential damages. The damage awards available in the United States under domestic law are generally thought to depart markedly from the damages offered in other legal systems, specifically the United States' grant of punitive damage awards and refusal, in most cases, to award attorneys' fees to the prevailing party.¹⁶⁸

Articles 74-76 of the CISG afford relief through awards of consequential and expectation damages.¹⁶⁹ Though it is said that the CISG damage scheme is "designed to place the aggrieved party in as good a position as if the other party had properly performed under the contract," it is silent on whether the award of attorneys' fees to the aggrieved party plays a part in that design.¹⁷⁰ This section focuses on how federal courts preserve the American approach to attorneys' fees under the CISG.

Article 74 provides for damages for contractual breach that consist of a sum equal to the loss suffered and contemplates that loss of profits are also recoverable if they are a consequence of the breach. Article 74, however, does restrict recovery:

Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of

166. *Id.* Further, the court rejected the argument that expert testimony is always required in such cases.

167. *See, e.g.,* Landgericht Koblenz [LG] [District Court], July 7, 1995, docket number 14 S 358/94 (F.R.G), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950707g1.html>; Handelsgericht Zurich [HG] [Commercial Court] Nov. 30, 1998, docket number HG 930634/O (Switz.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/981130s1.html>.

168. *See* Norman Braslow, *The Recognition and Enforcement of Common Law Punitive Damages in a Civil Law System: Some Reflections on the Japanese Experience*, 16 ARIZ. J. INT'L & COMP. L. 285, 300-02, 356-58 (1999).

169. CISG, *supra* note 1, arts. 74-76.

170. Elizabeth D. Lauzon, Annotation, *Construction and Application of United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 200 A.L.R. FED. 541, § 14 (2005).

contract.¹⁷¹

This restriction on recovery may also be read as an expansion on the definition of loss contemplated by Article 74. The first and only case in the federal courts to grant attorneys' fees in a contract dispute under the CISG seized on this reading. In *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, a district court in the Northern District of Illinois rejected the defendant's argument that the "American Rule" barred the award of attorneys' fees in a contractual dispute governed by the CISG.¹⁷²

The district court, enjoying subject matter jurisdiction through application of the CISG, endeavored to break with home tradition in its development of federal CISG common law. In awarding the seller attorneys' fees, the district court, however, secured its holding with two quivers. The court noted that the American Rule does not come into play when a statute provides for an award or in cases of bad faith, where the court may exercise its inherent power to award attorneys' fees.¹⁷³ The court first noted that the United States was in the minority in withholding recovery for attorneys' fees in contract disputes.¹⁷⁴ The court then recited the defendant's stipulations that the CISG applied to the contract and that the defendant "foresaw or should have foreseen" that in the event of its nonpayment for the goods, the plaintiff would "incur litigation costs including attorneys fees" to recover payment.¹⁷⁵ In light of the defendant's admission that the loss of attorneys' fees was foreseeable and thus properly recoverable under Article 74, the court argued that *a fortiori*, a treaty that provides for attorneys' fees falls under the statute exception.¹⁷⁶

Aside from engaging in textual analysis of Article 74, the district court also found that this result helped achieve interpretive uniformity and advance commercial certainty in internal commerce.¹⁷⁷ Mindful that the court's interpretation of the CISG ran counter to the "home-town rule" in awarding attorneys' fees, the court bolstered its interpretation by analogizing the Eleventh Circuit's landmark rejection of the application of the domestic parol evidence rule in CISG cases in *MCC-*

171. CISG, *supra* note 1, art. 74 (emphasis added).

172. *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, No. 99 C 4040, 2001 WL 1000927, at *3 (N.D. Ill. Aug. 29, 2001).

173. *Id.* at *4-5.

174. *Id.* at *1 (citing John Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations*, 21 MICH. J. INT'L LAW, 1, 6-7 & nn. 20, 27 (1999); JOHN GOTANDA, SUPPLEMENTAL DAMAGES IN PRIVATE INTERNATIONAL LAW (1998)).

175. *Zapata Hermanos*, 2001 WL 1000927, at *2.

176. *Id.* at *3.

177. *Id.*

*Marble Ceramic Ctr. v. Ceramica Nuova D'Agostino, S.p.A.*¹⁷⁸ Moreover, the district court stated in *Zapata Hermanos* that awarding attorneys' fees to a Mexican plaintiff who in its own jurisdiction would recover them, best served the pre-contractual expectation interests of the aggrieved party.¹⁷⁹

Despite these bold pronouncements, the district court sought alternative grounds for its holding and also declined to publish its opinion. In its alternative holding, the district court determined that the defendant's conduct during the litigation demonstrated a level of bad faith that warranted the award of attorneys' fees by virtue of the court's inherent power.¹⁸⁰ Though unreported and decided on the basis of two holdings, the district court explicitly stated that both grounds equally supported its conclusion.¹⁸¹

On appeal, the Seventh Circuit reversed the district court's grant of attorneys' fees and in doing so, attacked both grounds of the district court's decision.¹⁸² The Seventh Circuit first noted that neither Article 74 nor any other part of the CISG expressly awarded attorneys' fees. Then, ignoring the district court's reasoning and the defendant's prior stipulation that the litigation loss was foreseeable, the Seventh Circuit deemed the matter unsettled and, per Article 7(2) of the CISG, left to domestic law.¹⁸³ Omitting any mention of Article 7(1), the Seventh Circuit asserted that the CISG "is about contracts, not procedure" and attributed other signatories' practice of awarding attorneys' fees under the CISG as simply a procedural fee-shifting scheme divorced from the application of the CISG.¹⁸⁴

The Seventh Circuit not only ignored Article 7(1) but went so far as to say that there "are no 'principles' that can be drawn out of the provisions of the Convention for determining whether 'loss' includes attorneys' fees."¹⁸⁵ Moreover, the Seventh Circuit speculated that the United States would not have signed the CISG "had it thought that in doing so it was abandoning the hallowed American Rule."¹⁸⁶ The Seventh Circuit

178. *Id.* at *2 (citing *MCC-Marble Ceramic Ctr. v. Ceramica Nuova D'Agostino, S.p.A.*, 144 F.3d 1384, 1391 (11th Cir. 1998)).

179. *Id.* at *4.

180. *Id.* at *5.

181. *Id.* at *6. In its final sentence, the court stated: "Accordingly Zapata is entitled to recover its attorneys' fees not only as an element of consequential loss under the Convention, but under the Court's inherent power to award attorneys' fees in cases of bad faith."

182. *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 313 F.3d 385, 388-90 (7th Cir. 2002).

183. *Id.* at 388.

184. *Id.*

185. *Id.*

186. *Id.* at 389.

previously identifying anomalies that might result if an Article 74 consequential loss theory could serve as a basis for granting attorney's fees, also noted that signatories with a pre-existing fee-shifting scheme would have had little or no occasion to consider the issue before ratifying the CISG.¹⁸⁷ Scholars contend that such signatories would be equally hesitant to abandon their own domestic schemes.¹⁸⁸

In fact, scholarship predating the Seventh Circuit's opinion persuasively argues that post-ratification, such signatories have not abandoned their domestic procedural rules.¹⁸⁹ Specifically, it is argued that the "vast majority" of foreign jurisdictions that have awarded attorney's fees in transactions governed by the CISG, "sub silentio, view[] recovery of attorneys' fees as a procedural matter governed by the law of the forum"¹⁹⁰ and that the holdings of the limited foreign opinions that engage substantively with awards of attorney's fees prior and during litigation under an Article 74 loss theory are ambiguous and merit minimal deference as precedent.¹⁹¹

Though apparently in line with other signatories who apply their domestic rules without recognizing the applicability of Article 74, the Seventh Circuit's interpretive methodology receives criticism, even by those who applaud its reasoning and result.¹⁹² Those who largely endorse the opinion still express disappointment that the Seventh Circuit missed the opportunity to clarify the proper application of Article 7(2) and in failing to analyze foreign case law or commentary, clung to the "homeward trend" rather than "moving towards a CISG perspective that transcends domestic ideology."¹⁹³ Suggesting the opinion lacks adequate "jurisprudential leadership" and "doctrinal clarity," other commentary also regrets that the Supreme Court, by refusing to hear the case, declined to provide such leadership.¹⁹⁴

The United States' "orchestra" has firmly taken the position that as

187. *Id.* at 388-89.

188. See Harry Flechtner & Joseph Lookofsky, *Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal*, 7 *VINDOBONA J. INT'L. COM. L. & ARB.* 93, 99-100 (2003) (Austria).

189. See Harry M. Flechtner, *Recovering Attorneys' Fees as Damages Under the U.N. Sales Convention (CISG): The Role of Case Law in the New International Commercial Practice, with Comments on Zapata Hermanos v. Hearthside Baking*, 22 *Nw. J. INT'L L. & BUS.* 121 (2002).

190. *Id.* at 153.

191. *Id.* at 125, 146; see also John Felemegas, *An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals*, 15 *PACE INT'L L. REV.* 91, 98-99, 104-06 (2003) (noting "strong support" for the position that this issue is not controlled by the CISG and that some opinions that analyze the issue under Article 74 are also based on domestic procedure).

192. *Id.*; Flechtner & Lookofsky, *supra* note 188, at 103.

193. Flechtner & Lookofsky, *supra* note 188, at 103.

194. Felemegas, *supra* note 191, at 129; see also *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 540 U.S. 1068 (2003) (refusing to grant certiorari).

of the Seventh Circuit's ruling in *Zapata Hermanos*, Article 74 does not contemplate attorneys' fees as a foreseeable consequential loss.¹⁹⁵ After the Seventh Circuit handed down *Zapata Hermanos*, the Northern District of Illinois fell back into line without question or comment in *Ajax* and in the *Chicago Prime Packers* litigation.¹⁹⁶ Taking a similar view of the Seventh Circuit's position, the Middle District of Pennsylvania, in *American Mint L.L.C. v. GOSoftware Inc.*, engaged in no textual analysis and simply cited the Seventh Circuit's holding as barring recovery of attorneys' fees under Article 74 of the CISG.¹⁹⁷

III. CONCLUSION

While the *Zapata Hermanos* decision and the line of cases which follow it diverge from the foreign practice of awarding attorneys' fees in CISG transactions, it is unsettled what interpretive inconsistency, if any, results from this divergence. At the very least, in this environment, our federal courts have remained internally consistent on this issue.

As the above metaphor suggests, harmonious and divergent interpretations of the CISG emerge from a group of signatory nations who face an institutional vacuum and, therefore, lack a conductor to alert its members to rogue interpretations and to compel doctrinal clarity. But maybe the metaphor is swollen and should be examined on a micro level first before assessing how well or how poorly the harmony plays out internationally. This Note has focused on the domestic development of a harmonious and unified body of federal law on the CISG.

In all four categories, one notices that concepts of the CISG's applicability, its pre-exemption, and its treatment of parol evidence and of contract performance emerge, congeal, and, surprisingly, look and sound like the interpretations of other CISG signatories. We have also generally seen that such internal domestic consistency arises when courts, paying heed to persuasive domestic precedent, CISG scholarship, and some foreign CISG caselaw, present and integrate their own reading of the CISG's text and venture to support what turns out to be a tempered and consistent result with policy concerns for commercial stability and uniformity.

195. *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 313 F.3d 385, 389 (7th Cir. 2002).

196. *Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd.*, No. 01 C 5938, 2003 WL 223187, at *7 (N.D. Ill. Jan. 30, 2003) (citing the holding in *Zapata Hermanos*, 313 F.3d at 389, without further comment); *Chicago Prime Packers, Inc. v. Northam Food Trading Co. (Chicago Prime Packers II)*, 320 F. Supp. 2d 702, 717 (N.D. Ill. 2004) (repeating the holdings in *Ajax*, 2003 WL 223187, at *7, and *Zapata Hermanos*, 313 F.3d at 389).

197. *Am. Mint L.L.C. v. GOSoftware, Inc.*, No. Civ.A. 1:05-CV-650, 2006 WL 42090, at *5 n.7 (M.D. Pa. Jan. 6, 2006) (citing *Chicago Prime Packers II*, 320 F. Supp. 2d at 717).