
THE TEETOTALLING WINEBIBBER: A CASE STUDY FOR THE INTERNATIONAL SALE OF GOODS

Stephen M. Shrewsbury*

ABSTRACT

Case studies are very effective pedagogical tools available to business and legal educators. Hypothetical fact patterns provide instructors an additional advantage of being able to modify facts to target particular learning goals for students. This article presents a substantial case study and teaching notes for a hypothetical international sale of goods transaction. The facts presented will necessitate student research and examination of a wide range of legal issues related to contract negotiation and interpretation, shipping and related difficulties that might arise during contract execution, and issues related to disputes over the quality of goods. Questions in the study require students to research and apply various aspects of the Convention for the International Sale of Goods (CISG), financing options for buyers and sellers, options for reducing risk, use of terms of trade (INCOTERMS) and risk of loss, Carriage of Goods by Sea Act (COGSA), Foreign Corrupt Practices Act (FCPA), and legal issues related to dispute resolution and jurisdiction in international business. The intent of the questions is to guide students to analyze and practically apply international business principles they have been exposed to in their studies. The case study is suitable for graduate level courses with facts and questions tailorable in either number or complexity for other students as the instructor desires.

KEYWORDS

International sale of goods, international business law, INCOTERMS, CISG, COGSA, FCPA

* Associate Professor of Legal Studies, Rusche College of Business, Stephen F. Austin State University and retired Air Force Colonel. Colonel Shrewsbury practiced international law in six countries, including Turkey, Greece, Germany, England, Afghanistan, and Japan, and while stationed on the islands of Guam and Oahu, Hawaii.

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INTRODUCTION

One of the most effective tools available to educators in business or legal education is the use of case studies. They functionally serve to exercise the student's mind in applying concepts learned in the classroom to practical, factual situations. As one prominent business school dean notes, “[c]ases expose students to real business dilemmas and decisions . . . [c]ases teach students how to apply theory in practice and how to induce theory from practice.”¹ Case studies can be designed and used in a wide-variety of ways, from simple hypothetical fact situations to complex real-world cases, depending on the instructor’s goals. When used in conjunction with the study of legal principles, hypothetical cases have the advantage of the writer being able to shape the hypothetical in ways that do not “muddy the jurisprudential waters” as may exist where actual cases are used.²

This paper describes a substantial hypothetical case study for educators in international business law or other courses related to the international sale of goods. It is comprehensive enough for graduate business or law students, but readily adaptable to upper-level undergraduate work as necessary. The case study provides a hypothetical factual scenario involving negotiation and execution of an international contract for the sale of goods that raises contract negotiation and interpretation issues, shipping and related difficulties that might arise during contract execution, and issues related to the quality of goods that creates a dispute between the parties. The case study is intended to be wide ranging and cover a number of topics of interest, including the application of the Convention for the International Sale of Goods (CISG),³ financing options and reducing risk in international transactions in goods, use of terms of trade (INCOTERMS) and risk of loss,⁴ Carriage of Goods by Sea Act (COGSA),⁵ Foreign

¹ Nitin Nohria, *What the Case Study Method Really Teaches*, HARV. BUS. REV. (Dec. 21, 2021), <https://hbr.org/2021/12/what-the-case-study-method-really-teaches>.

² Scott J. Burnham, *The Hypothetical Case in the Classroom* 37 J. OF LEGAL EDUC. 405, 406 (1987).

³ U.N. Convention on Contracts for the International Sale of Goods, *opened for signature* Apr. 11, 1980, 1489 U.N.T.S. 3 (entered into force Jan. 1, 1988) [hereinafter *CISG*].

⁴ See Analysis of Questions *infra* at Section III(B) p. 207 (discussing case study question five).

⁵ Carriage of Goods by Sea Act, 46 U.S.C. § 30701-30707 (2021).

Corrupt Practices Act (FCPA),⁶ and issues involving dispute resolution and jurisdiction in international business.

In proceeding, Part II of the paper presents the hypothetical fact pattern for students to begin their research and preparation for answering a series of questions following. These are listed in Part III for readers to see the flow of the questions. Part IV of the paper then discusses the applicable law and analysis related to each question, and includes teaching notes with practical considerations for educators using the study. The background and analysis sections are not intended to be comprehensive, but detailed enough to provide a solid understanding of the legal and practical issues raised by the questions.

I. THE CASE STUDY

A. *Case Study Background*

This case study utilizes a somewhat typical international sale of goods scenario involving the sale of non-alcoholic wine by a Greek winemaker to a U.S. restaurateur in Colorado. The purpose is to present a substantially complex scenario that can pertain to a wide variety of topics students would be exposed to when analyzing an international business transaction and its relationship to the legal principles underlying that transaction. The intent of the specific questions is to guide students to analyze and practically apply international business principles they have been exposed to in their studies.

B. *The Hypothetical*

McKenzie McCormick is owner of a chain of restaurants called “Tapas and Vino” in Colorado, primarily located along the front range in cities like Denver and Colorado Springs, and in upscale mountain communities such as Aspen and Vail, among others. Along with tapas (small plates), McCormick designs wine tastings that patrons can order as sample

⁶ The Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (2021).

pairings with the food. The Tapas and Vino collection of wines has grown impressively, particularly with customers desiring to try high quality wines by the glass. As a result, the company's customer base has grown rapidly. With the popularity of the restaurant chain booming, McCormick is expanding into select high-income locations in Utah, Arizona, and New Mexico.

For some time, Tapas and Vino customers have asked whether they could sample low alcohol or non-alcoholic wines. McCormick was familiar with non-alcoholic wine and had tried a few domestically produced versions but did not think they were of the quality necessary to sell in her restaurants. Nonetheless, non-alcoholic wine is becoming increasingly popular in the U.S. In particular, McCormick learned that many of her customers were interested in alcohol-free wine because recent medical studies have proven that drinking it had some of the same positive medical benefits as alcoholic wine.⁷ Of course, the wine must also taste very good. As a result of the demand, McCormick did some research and discovered that, while non-alcoholic wines were readily available, high-quality versions were relatively scarce. She also noted that many of the higher quality non-alcoholic wines were available from various wineries in Europe.

McCormick then looked for possible sources of vintners that produced or would be able to produce high quality alcohol-free wines. She eventually called Vasilis Doukas, a native of Greece who owns the renowned "Doukas" vineyard and winery in the Peloponnese area of the country near Corinth. Doukas has a French mother whose family owned a large winery estate near Burgundy, France. He studied wine-making in France and later returned to Greece to enter the winemaking business. Doukas had been producing wines there for about 20 years and had an excellent reputation as a master winemaker known for some of the very best red and white wines in all of Europe. Doukas told McCormick he had been experimenting with making non-alcoholic wine for some time and

⁷ See, e.g., Neha Mathur, *Study reveals that wine consumption has an inverse relationship to cardiovascular mortality*, NEWS MED. LIFE SCIS. (June 20, 2023), <https://www.news-medical.net/news/20230620/Study-reveals-that-wine-consumption-has-an-inverse-relationship-to-cardiovascular-health.aspx> (discussing the benefits of alcoholic wine, this extensive study also demonstrated that "de-alcoholized" wine had significant antioxidant effects on the body).

had been considering producing some samples to try out the market. As a result, McCormick flew to Athens on July 1 and drove to the winery. She tried tastings of several of the wines and particularly enjoyed the highest quality reserve red and white wines that Doukas produced, which sold wholesale for between €80 and €150 per bottle, depending on the type, quality, and age.

McCormick asked if Doukas could produce high-quality alcohol-free wine from his wines that currently sold for around €100 euros per bottle. Doukas stated he could use his existing stocks of wine to produce a non-alcoholic wine by employing either a reverse osmosis process or vacuum distillation. The first was more expensive, but very importantly, did not affect the nose of the wines (their aromas), whereas the second removed many of the floral aromas of the wine. McCormick told Doukas she was only interested if the resulting wine would be of substantially the same quality it was before removing the alcohol and asked him to provide her some prices on both red and white alcohol-free versions of his highest quality wines in that price range. Doukas told her he would need a few days to determine which wines he would start with to produce the non-alcoholic versions.

On July 10, Doukas called McCormick at her office and informed her he was able to produce non-alcoholic versions of his existing wines in her price range that tasted very close to the originals. Doukas then asked McCormick what quantity of wine she had in mind. McCormick stated she was interested in 40 cases each of red and white wine of several styles she would select to supply all of her current and planned restaurant locations in time for the upcoming holiday season. Doukas replied that it would take a little time to do the calculations to determine the final cost and that he would notify her as soon as possible.

On July 22, Doukas sent an email to McCormick proposing that he could produce several varieties of “high-quality non-alcoholic Greek-style red and white wine” from his existing premium wines. Regardless of which samples McCormick selected, the final cost would be €96,000 for 80 cases of the wine. McCormick would need to make an initial payment of €20,000 before Doukas would start production and a final payment of €76,000 euros upon delivery of the bill of lading and other required documents to McCormick after the wine was shipped. Doukas stated that the

wine could be ready for shipment within 90 days of McCormick letting him know which wine samples she preferred for production. He also attached a pro forma invoice that relayed the above sales information.⁸ On the back of the pro forma invoice was a “Terms and Conditions” section that specified that the terms of the final payment would be cash against documents, use of a CPT INCOTERM for shipping, and that if any dispute were to arise between the parties, it would be resolved by arbitration at the Department of Arbitration of the Athens Chamber of Commerce and Industry (ACCI) using Greek law.

On July 25, McCormick sent Doukas an email stating that his offer price was acceptable and asking him to air ship the sample wines to the Tapas and Vino headquarters in Denver. Attached to the email was an “Sales Acknowledgment” form that stated that Doukas’s “proposal was accepted subject to approval of the samples to be produced and the other terms and conditions contained in this acknowledgment.” Among the listed terms and conditions in the form was that the contract would be governed by Colorado law.

A few weeks later, on August 20, Doukas air-shipped five non-alcoholic samples of each of his various red and white wines in the €100 price range. Each of the sample bottles had a label that indicated the particular type of wine and year. McCormick was thrilled with the results of her tastings and chose the two red and two white samples she liked best. She then notified Doukas of her selections and asked that he ship 20 cases of each of the four wines. Doukas replied that he was delighted and would produce the wines and ship them by ocean freight on or before Nov. 1, to arrive at the Tapas and Vino headquarters in Denver by Nov. 15.

On Oct. 24, the wine was ready for shipping. Winery employees loaded the wines into trucks and brought them to the port in Corinth, where Doukas had arranged for ocean shipping. Doukas received the bill of lading from the carrier and forwarded it, along with the invoice and a draft

⁸ See *Pro Forma Invoice*, INT’L TRADE ADMIN., <https://www.trade.gov/pro-forma-invoice> (last visited Jan. 7, 2024) (highlighting that for international sales of goods contracts, a pro forma invoice is a common quotation document sellers provide buyers describing the goods, their price, and setting delivery conditions and payment terms); see also LARRY A. DiMATTEO & LUCIEN J. DHOOGHE, *INTERNATIONAL BUSINESS LAW: A TRANSACTIONAL APPROACH* 292–93 (2d. ed. 2006) (describing the allocation of costs between the seller and the buyer in a pro forma invoice).

for final payment through his bank to McCormick's bank in Colorado, who then notified McCormick the documents were available for examination. McCormick went to the bank to review the documents. She noted that the invoice stated that the shipment consisted of 20 cases each of the red and white wine "non-alcoholic" wine types she had selected and the pricing schedule. McCormick endorsed the draft, making the final payment of €76,000 as required, and awaited arrival of the shipment.

The wine arrived in Denver on Nov. 10. McCormick opened one of the cases to inspect. She was very pleased with the look of the bottles. Each was labeled as "Dealcoholized Wine" below the name of the wine and the vineyard. However, McCormick also noticed the words "Non-alcoholic wine—contains less than 0.5 percent alcohol by volume" at the bottom of the label. McCormick was confused and called Doukas to inquire about the alcoholic content of the wine. She reminded Doukas that she wanted a wine that was completely free of alcohol. Doukas stated that he had offered "non-alcoholic" wines, and that in the international wine industry the terms "non-alcoholic" and "alcohol-free" are commonly understood to contain a small amount of alcohol. He had also labeled the wine according to the labeling requirements of U.S. law. McCormick was not satisfied with the explanation and stated Doukas must replace the wine or she would be suing him for damages. Needless to say, Doukas was extremely upset.

II. THE QUESTIONS

Immediately following the hypothetical, students are presented a series of 11 questions, along with related sub-questions to research and answer. In practical terms, the number of questions and the level of research and writing required of students has proven adequate for a substantial graduate student project in a semester length course. Of course, the list of questions can be trimmed or otherwise modified to increase the case study's scope, or reduce its complexity to adjust for undergraduates or for other purposes.

Case Study Questions

1. What law applies to this contract? Explain. If both parties want the CISG to apply, what should they do? If both parties want the UCC or Greek law to apply, what should they do?
2. On what date did Doukas make a valid offer to McCormick? Explain why the offer was valid under the applicable law.
3. Was McCormick's order acknowledgement on July 25 a valid acceptance of the Doukas's offer? At what point was a contract formed between the parties? If so, describe all of the terms of the resulting contract between the two parties.
4. Assume that Doukas and McCormick have not dealt with each other before. Both want to reduce their risk in this transaction and McCormick wants to consider financing options. Explain the options the two parties might use to achieve these two objectives? Which type of arrangement do you think the two parties most likely have used in this case?
5. Assume that the two parties agreed to a CPT INCOTERM. What are INCOTERMS? What responsibilities would the buyer and seller have under the CPT term? At what point would the risk of loss pass from the seller to the buyer?
6. What if after Doukas arranges shipping, a Greek customs official informed McCormick she had to send the customs official a 500-euro payment in order for the shipment to be "expedited" and loaded onto the ship. Otherwise, the shipment might be delayed significantly. Would payment of this fee be a potential violation of U.S. law? If so, what law and why?
7. Might the "grease payment" exception under U.S. law apply to the above situation? If so, what would McCormick need to do in this situation to comply with U.S. legal requirements? Even if the payment were determined to be legal, would it be ethical for McCormick to make the payment? What factors would help you determine this? What should McCormick do in this situation?
8. Assume that the container ship carrying the shipment of wine was passing through the Suez Canal on the way to South Africa for an intermediate delivery of goods before heading to the U.S. There is a blockage on the canal when a ship just in front of the

- container ship runs aground.⁹ As a result, the delivery is delayed for two months before the canal can be cleared. Which party had the risk of loss in this case? Explain. Might McCormick be completely excused from performing the contract under the CISG as a result of the delay? Explain.
9. Would the ocean carrier be responsible for the loss if the containership had run aground in South Africa due to bad weather and the wine was destroyed? Would your answer change if the cargo was loaded at the port of Corinth, in Greece, and at the time the ship left the port, it had a loose propeller that fell off in the middle of the Mediterranean Sea, causing a significant delay? Which party would be responsible in that case and why? Did Doukas expressly create any express or implied warranties for the wines in the contract under the CISG? If so, describe what they were.
 10. Did either party breach the contract in this case? Describe in detail why or why not. What might each party argue? (This should be a substantially long and well-researched answer). If Doukas breached the contract, describe what remedies would be available to McCormick.
 11. Assume McCormick files a breach of contract lawsuit in the federal district court in Denver. Would the district court have subject matter and personal jurisdiction in this case? Explain. What do you think the court would decide to do in this case?

⁹ See *Egypt's Suez Canal Blocked by huge container ship*, BBC NEWS (Mar. 24, 2021), <https://www.bbc.com/news/world-middle-east-56505413> (reporting upon a container ship which became wedged across Egypt's Suez Canal in March 2021 causing worldwide concern).

III. ANALYSIS OF QUESTIONS AND TEACHING NOTES

A. *Objectives of the Case*

This case study is designed for students to apply a substantial series of individual international business law subject areas to a practical example of an international business transaction. Although all of the hypothetical events in these questions would be unlikely to occur in any one transaction, each could realistically occur in a typical one.

The case study will challenge students in several areas, including: a) exercising research skills b) engaging in critical thinking about international commercial transactions; c) increasing writing skills to convey complex information in a clear way; d) encouraging creative thinking about options available to the parties in international business transactions when more than one option or answer is possible in a given situation; e) increasing appreciation of the intersection of law and ethics in international business; and f) considering the value of dispute avoidance and dispute resolution in business.

B. *Analysis of Questions*

1. What law applies to this contract? Explain. If both parties want the CISG to apply, what should they do? If both parties want the UCC or Greek law to apply, what should they do?

a. *The Applicable Law*

One of the purposes of the CISG was to adopt uniform rules for international goods contracts that would “promote the development of international trade.”¹⁰ As a result, it is the default uniform law for many of the world’s international sales of goods contracts.¹¹ The CISG was adopted on April 11, 1980 and entered into force on January 1, 1988.¹² There are

¹⁰ CISG, *supra* note 3, at Preamble.

¹¹ Ronald A. Brand, *The CISG: Applicable Law and Applicable Forums*, 38 J. L. & COM. 137, 141 (2019), https://scholarship.law.pitt.edu/fac_articles/455.

¹² CISG, *supra* note 3; see *International Conventions*, CORNELL L. SCH. LEGAL INFO. INST.,

currently 94 countries that have ratified the convention.¹³ With uniformity as its goal, the CISG was designed to be self-executing and is considered to be so by U.S. courts and commentators.¹⁴ Thus, with regard to U.S. law, the CISG did not need to implement legislation, and practitioners need only look at the text in the convention for the law.¹⁵ Article 1 of the CISG applies the convention to the sales of goods between parties located in states that have adopted it.¹⁶ In this hypothetical, the parties are located in the U.S. and Greece and since both countries are signatories to the CISG,¹⁷ the CISG is thus the applicable law unless the parties opt out of its application under Article 6.¹⁸ CISG, Art. 6 allows the CISG's exclusion as the

https://www.law.cornell.edu/wex/international_conventions#:~:text=Conventions%20between%20two%20states%20are,states%20are%20called%20multilateral%20treaties (last visited Jan. 7, 2024) (defining “convention” as a treaty while further explaining that a bilateral treaty is a treaty between two nation states, whereas a multilateral treaty is a treaty between more than two nation states).

¹³ See CISG, *supra* note 3 (noting Rwanda as the most recent country to ratify the convention, which occurred on Sept. 22, 2023).

¹⁴ See, e.g., *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1024 (2d Cir. 1995) (stating that the CISG is “a self-executing agreement”); see Richard E. Speidel, *The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 NW. J. INTL. & BUS. 165, 166 (1995) (noting that in the U.S., the CISG is a “self-executing treaty with the preemptive force of federal law”); see *It's Intoxicating, Inc. v. Maritim Hotegesellschaft mbH*, No. 11-CV-2379, 2013 WL 3973975, at 36. (M.D. Pa. July 31, 2013) (holding that the CISG is a “self-executing treaty with the preemptive force of federal law . . . which applies to contracts for the sale of goods between parties whose place of business are in different States.”).

¹⁵ See *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F.3d 894, 897 (7th Cir. 2005) (explaining that courts look at the CISG's provisional language and general principles because case law provides little guidance).

¹⁶ CISG, *supra* note 3, at art. 1(a).

¹⁷ See A. Kritzer, *CISG: Table of Contracting States*, INST. INT'L COM. L., <https://iicl.law.pace.edu/cisg/page/cisg-table-contracting-states> (last updated Oct. 18, 2023) [hereinafter *CISG Table*].

¹⁸ CISG, *supra* note 3, at art. 6.

choice of law when it otherwise applies, but only if the parties have opted out of its use clearly and expressly.¹⁹

It should be noted that the CISG only governs contract formation and the “rights and obligations of the seller and the buyer arising from such a contract.”²⁰ It does not apply to legal issues not provided for in the convention.²¹ In order to determine if CISG applies, one needs to first look at the specific language of the articles to determine those that directly or indirectly apply to particular legal issues that may arise in a contract governed by it. If the CISG does not apply, then, the applicable domestic law of one of the parties determines the issue.²²

Accordingly, a well-drafted CISG contract should contain clear references to the applicable law of any legal areas not governed by the CISG. For example, whether a person was a valid agent of one of the parties to a CISG contract would be determined by the applicable national law of one of the parties since the CISG is silent on the issue of agency.²³ Another example would be, in which forum a dispute would be adjudicated should it arise, since the CISG is silent on this issue.²⁴

b. Teaching Notes

In this case, both parties made a reference to a choice of law in the documents sent to each other. Doukas’s reference to a choice of law was contained in his proposal of July 22 in which he referenced dispute resolution by arbitration in Athens using Greek law. McCormick’s reference to choice of law was in the sale acknowledgment attachment to her July

¹⁹ See *BP Oil Int’l, Ltd., v. Empresa Estatal Petroleos*, 332 F.3d 333, 337 (5th Cir. 2003) (holding that if the parties decide to exclude the CISG, “it should be expressly excluded by language which states that it does not apply . . .”).

²⁰ CISG, *supra* note 3, at art. 4.

²¹ *Id.* at art. 4(a) (stating that the Convention is only concerned with sales contract and the “rights and obligations of the sellers and buyer arising from such contract” not with the validity of the contract or other issues like whether Colorado or Greek law would apply); see also Hypothetical *supra* Section I(B) p. 184

²² See Franco Ferrari, *PIL and CISG: Friends or Foes*, 31 J.L. & COM. 45, 92 (2012-2013) (citing Oberster Gerichtshof [OGH] [Supreme Court] Oct. 22, 2001, 1 Ob 77/01g (Aus.)).

²³ Ferrari, *supra* note 22, at 92.

²⁴ See CISG, *supra* note 3.

25 email to Doukas referencing the application of Colorado law.²⁵ This is a type of “battle of the forms” situation where opposing terms are contained in documents exchanged by the parties.²⁶ In this case, however, the conflicting choice of law language was not effective in overriding the CISG as the law applicable to the contract because there was no language in the resulting contract that expressly opted out of it.²⁷

Additionally, the issue of the applicable domestic law for any non-CISG issues that might arise is unclear from the hypothetical since the documents exchanged by the parties did not agree on the issue. As an academic matter, this could create later difficulties, though such cases are relatively rare.²⁸

2. On what date did Doukas make a valid offer to McCormick? Explain why the offer was valid under the applicable law.

Part II of the CISG governs the formation of contracts. Art. 14(1) provides that an offer to a specific person or persons is one that is “sufficiently definite and indicates the intention of the offeror to be bound in the

²⁵ See Hypothetical *supra* Section I(B) p. 184.

²⁶ See *Northrop Corp. v. Litronic Indus.*, 29 F.3d 1173, 1174 (7th Cir. 1994) (explaining that the traditional definition of “battle of the forms” is where one party makes an offer on a preprinted form and the offeree responds with its own form that contains conflicting terms, which creates discrepancies between the two forms).

²⁷ See *BP Oil*, *supra* note 19; see also *Maritim Hotegesellschaft mbH*, No. 11-CV-2379, 2013 WL 3973975, at 16 (holding that a choice of law provision must expressly select the law that will apply *and* affirmatively state the CISG will not apply to the contract).

²⁸ See Peter Winship, *The Hague Principles, the CISG, and the 'Battle of Forms'*, 4 Penn St. J.L. & Int'l Aff. 151, 155 (2015) (explaining that conflicting choice of law clauses in a battle of the forms situation can create difficult problems should disputes arise, however only a small number of CISG cases have had to deal with conflicting choice of law terms); see also Francesca Ragno, *The CISG and the Choice Of Law: Two Worlds Apart?*, 38 J.L. & Com. 245, 259-60 (2019-2020) (explaining that the Rome I Regulations do not address battle of the forms issues and thus the issue is better addressed by the Hague Principles).

case of acceptance.”²⁹ Art 14(1) also requires an offer to contain information that would allow for determining a quantity and price.³⁰

In reviewing the facts of the case, Doukas’s July 10 phone call to McCormick was not an offer because he merely indicated that he would be able to produce non-alcoholic wine and inquired as to the quantity and type of wine McCormick might want.³¹ There were not enough details or other indications in the phone that Doukas intended to be legally bound by his statements, especially since he continued asking clarifying questions of McCormick.³² Additionally, while the goods were fairly well described in the phone call, the quantity and price were only loosely referenced.

On the other hand, Doukas’s July 22 email to McCormick was a valid offer under Art. 14(1). Doukas offered to send sample wines for selection, and the email was quite detailed in proposing that he could produce high-quality non-alcoholic Greek-style red and white wine from several of his existing premium wines.³³ He provided a cost of €96,000 for 80 cases and included a payment schedule, a time frame to produce and ship the wine, and an attached pro forma invoice that contained payment terms and dispute resolution information.³⁴ Based on the level of detail contained in the email and the variety of contract terms referenced, including specific information about quantity and price, it is reasonable to conclude that Doukas intended to be bound by his proposal should McCormick accept it.³⁵

3. Was McCormick’s order acknowledgement on July 25 a valid acceptance of the Doukas’s offer? At what point was a contract formed between the parties? Describe all of the terms of the

²⁹ CISG, *supra* note 3, at art. 14(1).

³⁰ *Id.*

³¹ See Hypothetical *supra* Section I(B) p. 184.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ See E. ALLAN FARNSWORTH, *CONTRACTS*, 108-109 (1982) (explaining offer as “a promise that is conditional on some action by the promisee if the legal effect of the promisee’s taking that action is to make the promise enforceable.”).

resulting contract between the two parties.

a. The Acceptance

CISG, Art. 18 provides that a statement or conduct by the offeree that indicates assent to the offer is a valid acceptance.³⁶ Silence or inactivity does not amount to acceptance.³⁷ The CISG also adopts a modified common law mirror image rule.³⁸ The common law rule is that an acceptance must mirror “the terms proposed by the offer without the slightest variation.”³⁹ While some commentators have asserted that the CISG uses the general common law mirror image rule,⁴⁰ this is not entirely accurate. CISG, Art. 19(1) states the default rule that a reply to an offer that contains “additions, limitations, or other modifications is a rejection of the offer and constitutes a counter-offer.”⁴¹ While this language mirrors the common law rule, it is immediately followed by Art. 19(2), which adds that a reply to an offer that contains additional or different terms that do not materially alter the terms of the offer become part of the contract unless the offeror objects.⁴² Therefore, non-material additions of different terms become part of the contract unless objected by the offeror, which is a softer version of the common law rule.

b. Teaching Notes

McCormick’s email to Doukas on July 25 included an order confirmation specifically accepting his offer “subject to approval of the samples

³⁶ CISG, *supra* note 3, at art. 18.

³⁷ *Id.*

³⁸ CISG, *supra* note 3, at art. 19(1).

³⁹ FARNSWORTH, *supra* note 35, at 138.

⁴⁰ See 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 (1997) (asserting the CISG follows the mirror image rule under pre-UCC common law allowing the offeror to be master of the offer).

⁴¹ CISG, *supra* note 3, at art. 19(1).

⁴² CISG, *supra* note 3, at art. 19(2).

to be produced and the other terms and conditions contained in this acknowledgment.”⁴³ In the attachment was language stating that Colorado law would apply to the contract. The question arises whether McCormick’s confirmation email contained any material additions or exceptions to Doukas’s July 22 proposal. CISG, Art. 19(3) helps answer the question by stating that terms that relate to “liability [and] settlement of disputes are considered to alter the terms of the offer materially.”⁴⁴ Thus, while McCormick’s language referencing Colorado commercial law asserted that it would become a term of the contract in the absence of an objection by Doukas, it did not do so for two reasons. First, for the reasons previously noted, the CISG applied to the contract since there was no clear opt-out language in the contract.⁴⁵ Secondly, McCormick’s reference to Colorado law relates directly to potential liability and dispute settlement. Thus, under Art. 19(3), the term was material and altered the terms of the Doukas’s July 22 proposal, which contained language that disputes would be settled using Greek law. Accordingly, even though Doukas did not object to this language in McCormick’s confirmation email, his silence did not operate as an acceptance.⁴⁶

c. Contract Formation

Since McCormick’s confirmation was arguably not a valid acceptance of Doukas’s offer under CISG Art. 19, was there a valid contract in this case? In accordance with Art. 19, a reply to an offer that contains a material addition constitutes a counter-offer.⁴⁷ Therefore, McCormick’s confirmation that contained the addition of a material term was a counter-

⁴³ See Hypothetical *supra* Section I(B) p. 184.

⁴⁴ See CISG, *supra* note 3, at art. 19(3).

⁴⁵ See Hypothetical *supra* Section I(B) p. 184.

⁴⁶ See CISG, *supra* note 3, at art. 18(1); *see, e.g.*, *Solae, LLC v. Hershey Canada Inc.*, 557 F. Supp. 2d 452, 458 (D. Del. 2008) (ruling that a forum clause contained in Solae’s “Conditions of Sale” did not act to modify the contract between the two parties in the absence of Hershey’s express agreement); *see also* *Chateau Des Charmes Wines Ltd. v. Sabate USA Inc.*, 328 F.3d 528, 531 (9th Cir. 2003) (holding that under the CISG, a forum selection clause which was orally agreed to be unenforceable); *cf.* *It’s Intoxicating, Inc.*, 2013 WL 3973975, at 50 (holding that while silence or inactivity cannot constitute acceptance under art. 18 of the CISG, affirmative action does “indicate assent to an offer”).

⁴⁷ See CISG, *supra* note 3, at art. 19(1).

offer to Doukas. However, while Doukas did not expressly accept the terms of McCormick's confirmation email, he took affirmative action as a result of it by first shipping wine samples to McCormick and once she chose the samples and notified Doukas, the winery produced those selected wines for shipment. Under CISG, Art. 8, statements made or conducted by the parties are interpreted "according to the understanding that a reasonable person of the same kind as the other party" would have under the circumstances.⁴⁸ Moreover, due consideration is given to all the relevant circumstances and subsequent conduct of the parties.⁴⁹ Additionally, CISG, Art. 18(3) states an offeree can assent by performing an act such as dispatching the goods if the practice of the parties supports doing so.⁵⁰ Here, McCormick notified Doukas of her wine choices, which indicated her assent to his production and shipping of the wine, and Doukas indicated his assent by telling McCormick he would produce and ship the wine by Nov 1. Other actions of the parties, such as McCormick's initial payment, and the shipping arrangements by Doukas also indicate the two parties assent to the primary terms contained in Doukas's initial offer.

d. What are the Terms of the Contract?

The terms of the contract between the Doukas and McCormick are those terms applicable by operation of law (i.e. the application of the CISG),⁵¹ and those terms that the two parties assented to affirmatively or through contract execution: the sale of 80 cases of red and white wine (the samples of which would be approved by the buyer), a total price of 96,000 euros with a 20,000 euro initial payment by the buyer, subsequent payment

⁴⁸ CISG, *supra* note 3, at art. 8(2).

⁴⁹ CISG, *supra* note 3, at art. 8(3).

⁵⁰ See CISG, *supra* note 3, at art. 18(3).

⁵¹ CISG, *supra* note 3; see also Applicable Law *supra* Section III(B)(1)(a) p. 191.

by cash against documents,⁵² ocean freight with a shipping term of CPT,⁵³ a shipping date on or before Nov. 1, and dispute resolution by arbitration in Athens. As previously noted, the issue of the applicable domestic law for legal issues not covered by the CISG was not settled under the terms of the contract.⁵⁴

4. Assume that Doukas and McCormick have not dealt with each other before. Both want to reduce their risk in the transaction and McCormick wants to consider financing options. Explain the options the two parties might use to achieve these two objectives? Which type of arrangement do you think the two parties most likely have used in this case?

Financing is defined as “money that a person or company borrows for a particular purpose, or the process of getting this money or arranging for it to be paid.”⁵⁵ Approximately 80-90 percent of world trade relies on the use of trade finance options.⁵⁶ Besides access to capital, a key goal of the parties in any sale-of-goods transaction is to reduce risk to themselves stemming from the transaction.⁵⁷ In the buying and selling of goods, buyers have the option to pay in advance before receiving the goods, and sellers have the option of shipping the goods before receiving payment.⁵⁸

⁵² See Documentary Sale *infra* Section III(B)(4)(a) p. 200 (stating the “ownership of goods and rights of possession is transferred from seller to buyer through delivery of a negotiable document of title”).

⁵³ See *infra* note 108 and accompanying text.

⁵⁴ See Teaching Notes *supra* Section III(B)(1)(b) at p. 193.

⁵⁵ *Financing*, CAMBRIDGE DICTIONARY (2023), <https://dictionary.cambridge.org/us/dictionary/english/financing>.

⁵⁶ Trade Finance, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/coher_e/tr_finance_e.htm (last visited Dec. 30, 2023).

⁵⁷ See Chris B. Murphy, *Trade Finance: What It Is, How It Works, Benefits*, INVESTOPEDIA, <https://www.investopedia.com/terms/t/tradefinance.asp> (explaining that trade finance may protect against inherent risks of international trade such as currency fluctuations and political instability) (last updated Sept. 29, 2023).

⁵⁸ *Methods of Payment*, INT’L TRADE ADMIN. U.S. DEPT. COM., <https://www.trade.gov/methods-payment#:~:text=Open%20Account,30%2C%2060%20or%2090%20days> (last visited Dec. 30, 2023) (explaining cash-in-advance payment options and open account (open credit) transactions where goods are shipped and delivered before payment is due).

Ideally, however, sellers prefer cash in advance from new foreign buyers before shipping goods.⁵⁹ Buyers, on the other hand prefer open credit terms, whereby the seller ships the goods, and the buyer pays on or after the goods arrive.⁶⁰ Each of these methods results in one of the parties accepting all the risk; either that the buyer will not pay after the seller ships (payment risk), or the seller will not ship after the buyer pays (delivery risk).⁶¹

Thus, in order to reduce payment and delivery risk and thereby increase the likelihood of trade, especially in international business, two primary options are available to the parties: 1) use of a documentary sale; or 2) use of a letter of credit.⁶² Both of these methods reduce risk in different ways, and both can also be used as a financing option in international trade.⁶³

a. The Documentary Sale

A documentary sale is where the ownership of goods and right of possession is transferred from the seller to the buyer through delivery of a negotiable document of title issued by an ocean carrier.⁶⁴ It is a useful tool in international trade developed over many centuries and used worldwide.⁶⁵ A negotiable document of title is evidence of the ownership of the goods referenced in the document.⁶⁶ Accordingly, whoever owns the

⁵⁹ RICHARD SCHAFFER ET AL., INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT 121 (10th ed. 2018).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See *A guide to payment methods in international trade*, ALIBABA (Feb. 3, 2021), <https://seller.alibaba.com/businessblogs/pxkp76iz-a-guide-to-payment-methods-in-international-trade> (explaining five types of payment methods and used to reduce payment and delivery risk).

⁶³ *Id.*

⁶⁴ See SCHAFFER ET AL., *supra* note 59, at 122.

⁶⁵ *Id.* (explaining how documentary sales spread by custom and practice from medieval trade routes to modern common law and civil law countries of Europe).

⁶⁶ *Id.*

document of title is entitled to possess the goods.⁶⁷ When issued by ocean carriers, these negotiable documents are called “bills of lading.”⁶⁸ With regard to reducing risk, the documentary sale process reduces uncertainty for both the buyer and seller by ensuring that the seller releases the title to the goods at the time the buyer pays for it.⁶⁹

To start the documentary sales process, the buyer and seller first agree to use it as part of their contract.⁷⁰ Sometimes, this process is described in a contract as “cash against documents” or “documents against payment.”⁷¹ This part of the documentary sales process is often called a “documentary collection” or a similar name.⁷² The seller then delivers the goods to the ocean carrier who provides the bill of lading to the seller.⁷³ The ocean carrier is now in possession of the goods, but the seller has title to the goods since they are in possession of the bill of lading. The bill of lading also serves two other purposes. It is a receipt for the goods, i.e., proof that the carrier received the goods from the seller without any visible or apparent damage, and it is a contract of carriage for the goods as between the seller and the carrier.⁷⁴

The seller also creates a commercial invoice for the goods, and after gathering any other documents required under the contract, indorses the bill of lading, forwards the documents through the seller’s bank to the buyer’s bank.⁷⁵ In a documentary sale, the documents will always include an invoice for the goods, a “draft,” which is a negotiable instrument used to make payment for the bill of lading, and instructions to the seller’s bank.⁷⁶ Additional documents that may be required in a contract may

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See SCHAFFER ET AL., *supra* note 59, at 128 (explaining that parties may specify in the contract that payment terms are “cash against documents”(CAD) or “documents against payment” (D/P).

⁷¹ *Id.*

⁷² *Id.* at 127; *see also*, Methods of Payment: Documentary Collections, INT’L TRADE ADMIN. U.S. DEPT. COM., <https://www.trade.gov/documentary-collections> (last visited Dec. 30, 2023) (highlighting the process for exchanging shipping documents for payment).

⁷³ See SCHAFFER ET AL., *supra* note 59 at 122.

⁷⁴ *Id.* at 124.

⁷⁵ *Id.* at 128.

⁷⁶ *Id.* at 128-29.

include a certificate of inspection, a marine insurance policy, a certificate of origin, or other documents.⁷⁷ Upon receiving the documents from the seller's bank, the buyer's bank—called the “collecting bank”—then notifies the buyer that it has the documents and will release them to the buyer upon collection of their payment on the draft.⁷⁸ As noted previously, the documentary sale process reduces risk to both the buyer and seller.⁷⁹ However, it does not eliminate risk to the seller completely because the buyer can always refuse to pay for the documents.⁸⁰

The draft—also called a “bill of exchange”⁸¹—is one of the documents prepared by the seller and is a negotiable instrument for the buyer to pay for the goods described in the invoice and to take possession of the bill of lading. It is an order of payment to the seller, drawn on the buyer or the buyer's bank, upon delivery of the documents to the buyer.⁸² A seller may prepare a “sight draft,” whereby the buyer is obligated to pay the collecting bank “on sight” of the documents after they are notified that the documents are available for collection.⁸³ Thus, in a documentary sale, the buyer has the obligation to pay for the documents upon presentation, even if the goods have not yet arrived at the destination.⁸⁴

⁷⁷ *Id.* at 128.

⁷⁸ *Id.* at 129.

⁷⁹ SCHAFFER ET AL., *supra* note 59, at 122.

⁸⁰ *See Methods of Payment: Documentary Collections*, INT'L TRADE ADMIN. U.S. DEPT. COM. fig.1, <https://www.trade.gov/methods-payment> (last visited Dec. 30, 2023, 4:20 PM) (detailing how banks act as facilitators to minimize risk for sellers though a risk of non-payment remains).

⁸¹ *See* SCHAFFER ET AL., *supra* note 59, at 180 (comparing the bill of exchange to a bank check because both are “unconditional order[s] to pay a sum of money”).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *See id.* at 129; *see also* *Biddell Bros. v. Clemens Horst Co.* [1911] 1 (KB) 934, 939 (appeal taken from Eng.) (ruling that the buyer did not have the right to delay paying for the goods until after their arrival, in order to inspect them before payment).

b. Acceptance Financing in a Documentary Sale

Acceptance financing involves the seller sending a “time draft” instead of a sight draft during the documentary sale process, if called for in the contract.⁸⁵ The contract indicates this by calling for “documents against acceptance” or similar language,⁸⁶ instead of “cash against documents.”⁸⁷ If a time draft is used, the seller creates a draft that, instead of being payable on sight, is payable at a later date that the seller writes on the draft.⁸⁸ When the collecting bank presents the draft and other documents to the buyer, the buyer stamps “accepted” on the draft, signing and dating it. This creates a “trade acceptance,” which obligates the buyer to pay the seller at the time specified on the draft.⁸⁹ The draft is then sent back to the seller through banking channels.⁹⁰ Once received, the seller can then either hold the draft until the date of maturity—in essence, financing the buyer—or sell the time draft to a bank at a discount for cash,⁹¹ thus reducing the seller’s payment risk.⁹² Of course, whether a bank is willing to accept a time draft and pay the seller for it depends on the bank’s assessment of the buyer’s creditworthiness and the likelihood of the buyer paying for the draft at maturity.⁹³

⁸⁵ See SCHAFFER ET AL., *supra* note 59, at 181 (defining a time draft as a “draft due at a future date or after a specified period”).

⁸⁶ *Id.*

⁸⁷ *Id.* at 128.

⁸⁸ *Id.* at 181.

⁸⁹ *Id.*

⁹⁰ SCHAFFER ET AL., *supra* note 59, at 181.

⁹¹ *Id.*

⁹² *See id.*

⁹³ *Id.* at 181–82 (explaining the use of bank acceptances and how foreign buyers with unquestionable creditworthiness, such as multinational corporations, carry little risk for bank acceptances).

c. *International Documentary Letters of Credit for the Sale of Goods*

Another common risk reduction and financing process used in international trade is the use of documentary letters of credit.⁹⁴ These letters of credit are primarily governed by the Uniform Customs and Practice for Documentary Credits (hereinafter “UCP”), which is a standardized set of rules recognized worldwide.⁹⁵ These rules were needed to standardize uniformity in using letters of credit internationally and were first developed by the International Chamber of Commerce in 1933.⁹⁶ The UCP was last amended in 2007 to its current version, the UCP 600.⁹⁷ The UCP is not law, but it is accepted and followed worldwide, most notably by banks, courts, and other decision-making bodies.⁹⁸

The letter of credit process differs in some significant ways from the documentary sales process described previously.⁹⁹ First, if the contract requires the use of a documentary letter of credit, the buyer must apply to a bank that issues letters of credit, called the “issuing bank.”¹⁰⁰ The issuing bank’s willingness to issue a letter of credit is dependent on the buyer’s creditworthiness, but it allows a buyer to do business with a seller who is unwilling to extend credit to the buyer themselves.¹⁰¹ The buyer applies for the letter of credit and provides instructions to the issuing bank based on the details contained in the contract between the buyer and seller.¹⁰² The buyer’s letter of credit application requests that the bank issue a letter

⁹⁴ See *id.* at 184–85 (defining a letter of credit as a bank’s obligation to pay a sum of money upon the happening of an event[s]).

⁹⁵ SCHAFFER ET AL., *supra* note 59, at 185–86.

⁹⁶ Khadija Khartit, *The Evolution and History of Letters of Credit*, TRADE FIN. GLOB. (Aug. 17, 2023), <https://www.tradefinanceglobal.com/posts/evolution-history-of-letters-of-credit/>.

⁹⁷ *Id.*

⁹⁸ See SCHAFFER ET AL., *supra* note 59, at 186.

⁹⁹ See Documentary Sale *supra* Section III(B)(4)(a) p. 200.

¹⁰⁰ See SCHAFFER ET AL., *supra* note 59, at 187.

¹⁰¹ *Id.* at 184, 190.

¹⁰² *Id.* at 187 (explaining the credit application process).

of credit in favor of the seller, where the bank promises to purchase the seller's documents covering a specific quantity and description of goods so long as the documents meet the requirements of the letter of credit.¹⁰³ The issuing bank then sends the letter of credit to the correspondent bank in the seller's country called the "advising" bank, which notifies and advises the seller that it has a letter of credit for the seller to examine.¹⁰⁴

At this point, it is important for the seller to examine the documentary requirements in the letter of credit to ensure that the requirements match the documents required to be furnished by the seller in the contract itself.¹⁰⁵ This is because if the seller is unable to meet the documentary requirements in the letter of credit, then the issuing bank will not pay them.¹⁰⁶ Typical documentary letters of credit will require a variety of documents to be presented by the seller, similar to those documentary sales.¹⁰⁷ These will include a commercial invoice, bill of lading, and a draft, as well as other documents required in the contract such as a shipping insurance policy or a certificate of origin or inspection.¹⁰⁸

The letter of credit requires the seller to deliver the required documents without discrepancies and within a particular time frame to a bank designated to collect the documents. This bank—usually called the "nominated" bank—is often also the advising bank.¹⁰⁹ As noted, the seller must be careful that the documents do not contain discrepancies from the document requirements outlined in the letter of credit.¹¹⁰ This is especially true

¹⁰³ *Id.*

¹⁰⁴ *Id.* 190.

¹⁰⁵ See SCHAFFER ET AL., *supra* note 59, at 190 (stating how the sellers' examination process helps ensure that all requirements of the credit can be met).

¹⁰⁶ *Id.* at 191 (illustrating how banks cannot be reimbursed by buyers if the sellers' documents do not comply with all requirements of the letter of credit).

¹⁰⁷ *Id.* at 192–93 (explaining how letters of credits often include documents such as commercial invoices, the ocean bill of lading, insurance policies, and certificates of analysis and inspection); see also *supra* text accompanying notes 67–69.

¹⁰⁸ See *Documentary Letters of Credit: A Practical Guide*, INT'L TRADE FIN. SERV., https://instruction2.mtsac.edu/rjagodka/Importing_Information/Letter_Of_Credit_Guide.pdf (last visited Dec. 31, 2023) (outlining documents typically required in documentary letters of credit).

¹⁰⁹ See SCHAFFER ET AL., *supra* note 59, at 191.

¹¹⁰ *Id.* at 195 (explaining that though the majority of jurisdictions require strict compliance with letters of credit requirements, in the U.S. and some European courts, minor

for the commercial invoice, whose description of the goods must exactly match the description of the goods in the letter of credit.¹¹¹ If the seller delivers the required documents to the nominated bank in conformance with the letter of credit, then the bank has five days to examine the documents.¹¹² If conforming, the bank will pay the seller on the draft and send the documents to the issuing bank seeking reimbursement.¹¹³ The issuing bank then notifies the buyer that it has the complying documents, and the buyer arranges to pay the issuing bank the money it paid the seller for the documents.¹¹⁴

A contractual requirement for the buyer to obtain a letter of credit reduces risk for the seller even more than in a documentary sale because the letter of credit guarantees payment to the seller by a bank, rather than by the buyer, so long as the seller complies with requirements in the letter of credit.¹¹⁵ Risk is also reduced for the buyer because the buyer's payment obligation does not arise until the goods have been shipped by the seller.¹¹⁶

discrepancies are allowed for typographical errors (citing *Voest-Alpine Trading Co. v. Bank of China*, 167 F. Supp. 2d 940, 942 (S.D. Tex. 2000)).

¹¹¹ See *Courtaulds N. Am., Inc. v. N.C Nat'l Bank*, 528 F.2d 802, 806 (4th Cir. 1975) (ruling that the description of goods in a commercial invoice must correspond exactly with their description in the letter of credit); INT'L CHAMBER OF COM., PUB. NO. 600, UNIF. CUSTOMS & PRAC., at art. 18(c) (2007) [hereinafter *UPC 600*] (stating that the "description of the goods, services or performance in a commercial invoice must correspond with that appearing in the credit."); see SCHAFFER ET AL., *supra* note 59, at 196 (warning export managers and advising bankers to describe goods "in the exact wording and form" used in the letter of credit).

¹¹² See SCHAFFER ET AL., *supra* note 59, at 191.

¹¹³ Hariesh Manaadiar, *What is a letter of credit, how it works and who needs it*, SHIPPING FREIGHT RES. (June 1, 2020), <https://www.shippingandfreightresource.com/letter-of-credit/>.

¹¹⁴ *Id.*; see also John H. Head, *How Letters of Credit Operate in International Commercial Transactions: An Introduction to the UCP*, 77 J. Kan. B. Ass'n 16, 17 (2008) (explaining that issuing banks earn fees for temporarily accepting the risk that buyers might default on their letter of credit).

¹¹⁵ Head, *supra* note 114; see SCHAFFER ET AL., *supra* note 59, at 184–85.

¹¹⁶ *Methods of Payments*, *supra* note 58.

d. Teaching Notes

Given that both the use of a documentary sale and a letter of credit reduce risk and can serve as financing devices, which option the parties to this contract would choose, depends on the party's viewpoint. The financing option that reduces the most risk for Doukas is the letter of credit since he is guaranteed payment by a bank. The financing option that reduces the most risk for McCormick is the documentary sale because she is guaranteed delivery before she pays for the documents.

5. Assume that the two parties agreed to a CPT INCOTERM. What are INCOTERMS? What responsibilities would the buyer and seller have under the CPT term? At what point would the risk of loss pass from the seller to the buyer?

a. Goods Shipping Responsibilities and Risk of Loss

In an international sale of goods contract, a key consideration for the parties is the determination of which party is responsible for shipping the goods to the buyer and at what point does the risk of loss for the goods pass from the seller to the buyer.¹¹⁷ Of course, the buyer and seller could agree to the specifics of these issues by drafting their own original language in the contract, but unless well understood by both parties, doing so might lead to confusion and potential dispute later.¹¹⁸

One way to avoid this is by using standardized industry trade terms. Each party has an understanding of a trade term used in a sales contract as it is objectively understood by a third party, which makes it unlikely for there to be a disagreement regarding how the delivery term allocates responsibility and risk between the seller and buyer.¹¹⁹ Accordingly, the majority of international sales contracts use trade terms.¹²⁰

¹¹⁷ See SCHAFFER ET AL., *supra* note 59, at 135.

¹¹⁸ See William P. Johnson, *Analysis of Incoterms as Usage Under Article 9 of the CISG*, 35 U. PA. J. INT'L L. 379, 382 (2014).

¹¹⁹ *Id.* at 381.

¹²⁰ See Juana Coetzee, *The Interplay Between Incoterms and the CISG*, 32 J.L. & Com. 1, 2 (2013).

b. Allocation of Responsibilities and Risk Using INCOTERMS

INCOTERMS are defined by the International Chamber of Commerce (ICC),¹²¹ an institutional representative of 45 million companies worldwide.¹²² INCOTERMS are a set of eleven three-letter trade terms first published in 1936,¹²³ and “provide internationally accepted definitions and rules of interpretation for the most common commercial terms used in contracts for the sale of goods.”¹²⁴ INCOTERMS have been revised several times, with the last update in 2020.¹²⁵ They allocate the responsibility for certain tasks and costs related to the shipping of goods, as well as the allocation of responsibilities procurement of transportation and marine insurance, customs formalities, and allocation of risk.¹²⁶

INCOTERMS are arranged in order with the buyer having the most responsibilities to the least.¹²⁷ The first term, EXW (Ex Works), allocates all responsibilities to the buyer, with the seller’s only responsibility being making the goods available for pickup at the seller’s place of business.¹²⁸ The risk of loss passes to the buyer as soon as the goods are picked up there.¹²⁹ The last term, DDP (Delivered Duty Paid), allocates all

¹²¹ See *Incoterms Rules History*, INT’L CHAMBER OF COM., <https://iccwbo.org/business-solutions/incoterms-rules/incoterms-rules-history/> (last visited Dec. 31, 2023).

¹²² See *About ICC*, INT’L CHAMBER OF COM., <https://iccwbo.org/about-icc-2/> (last visited Dec. 31, 2023).

¹²³ See *Incoterms Rules*, INT’L CHAMBER OF COM., <https://iccwbo.org/business-solutions/incoterms-rules/> (last visited Dec. 31, 2023).

¹²⁴ *Incoterms Rules History*, *supra* note 121.

¹²⁵ See *Incoterms 2020*, INT’L CHAMBER OF COM., <https://iccwbo.org/business-solutions/INCOTERMS-rules/INCOTERMS-2020/#block-accordion-1> (last visited Dec. 31, 2023).

¹²⁶ See Coetzee, *supra* note 120, at 4; see *Incoterms 2010 Rules Chart of Responsibility*, SCARBROUGH GRP. (2010), <https://thescarbroughgroup.com/wp-content/uploads/2021/02/Incoterms-Chart-3.pdf> [hereinafter *Incoterms Chart of Responsibility*], for a one-page view of responsibilities under each of the 11 Incoterms.

¹²⁷ SCHAFFER ET AL., *supra* note 59, at 137-38 (outlining the risk of loss from seller to buyer as seen in Exhibit 5.3).

¹²⁸ *Id.* at 138.

¹²⁹ *Id.*

responsibilities to the seller, with the buyer's only responsibility being to take possession of the goods at the location named in the contract.¹³⁰ With DDP, the risk of loss does not reach the buyer until the buyer takes possession of the goods at the destination.¹³¹

c. The CPT INCOTERM

The CPT (Carriage Paid To) INCOTERM applies to all modes of transportation, so use of the term is appropriate when several transportation methods are required to deliver the goods to their final destination.¹³² Under the CPT trade term, the seller has the responsibility to contract for transportation and pay for freight charges, as well as obtain an export license, if one is required. The CPT term assumes the parties have agreed to a documentary sale.¹³³ The buyer's duties are to purchase the document of title and take delivery from the last carrier, as well as pay import duties and enter the goods through customs.¹³⁴ The buyer also has the responsibility to purchase their own marine insurance.¹³⁵ Lastly, under the CPT term, the risk of loss passes from seller to the buyer when the seller delivers the goods to the first carrier.¹³⁶

¹³⁰ Sam Franklin, *Understanding the Delivered Duty Paid (DDP) Incoterm*, BLOOM GRP. (July 8, 2022), <https://www.letsbloom.com/blog/incoterm-ddp/>.

¹³¹ SCHAFFER ET AL., *supra* note 59, at 139.

¹³² See Sam Franklin, *Understanding the Carriage Paid to (CPT) Incoterm*, BLOOM GRP. (July 8, 2022), <https://www.letsbloom.com/blog/incoterm-cpt/> [hereinafter *Understanding the CPT Incoterm*] (explaining that CPT can be used for all modes of transportation including sea, air, rail freight, road, and inland waterway transport); see also *Incoterms Chart of Responsibility*, *supra* note 126.

¹³³ SCHAFFER ET AL., *supra* note 59, at 139 (noting that a documentary sale is assumed under the CPT term); see also *Understanding the CPT Incoterm*, *supra* note 132 (clarifying that in a CPT transaction the risk passes from seller to buyer once the seller delivers the goods to the first agreed upon destination—essentially passing title to the buyer).

¹³⁴ Carriage Paid To (CPT), Windward, <https://windward.ai/glossary/what-is-carriage-paid-to-cpt/> (last visited Dec. 30, 2023) (outlining the buyer's responsibilities under CPT).

¹³⁵ Kelsey Schenk, *Incoterms explained: Carriage Paid to (CPT)*, CUST. SUPPORT (Oct. 9, 2019), <https://www.customssupport.com/insights/incoterms-explained-carriage-paid-cpt>.

¹³⁶ *Id.*; see also *Understanding the CPT Incoterm*, *supra* note 132.

d. Teaching Notes

With a CPT INCOTERM in the contract, Doukas would have the obligation to arrange for shipping of the wine to McCormick, which would involve multimodal shipping from Doukas's winery to Tapas and Vino in Denver, e.g. a port in Greece, ocean shipping to a port in the U.S, and train or truck delivery to Denver. Once Doukas delivers the wine to the first carrier, he would receive the bill of lading and forward it through banking channels, along with the other required documents to McCormick. McCormick would have the obligation to purchase the documents upon presentation and take delivery of the wine upon its arrival in Denver. The risk of loss would transfer to McCormick once the goods were delivered to the first carrier.

6. What if after Doukas arranged shipping, a Greek customs official informed McCormick she had to send the customs official a 500-euro payment in order for the shipment to be "expedited" and loaded onto the ship. Otherwise, the shipment might be delayed significantly. Would payment of this fee be a potential violation of U.S. law? If so, what law and why?

a. International Business and Ethics

Business ethics is a high priority subject in most business schools in the U.S and for very good reasons.¹³⁷ Ethical issues in business abound, especially in international business given the variety of ethical standards in varying cultures around the world.¹³⁸ Ethical problems in international

¹³⁷ See Lyle F. Schoenfeldt, et al., *The teaching of business ethics: A survey of AACSB member schools*, 10 J. BUS. ETHICS 237, 237 (1991) (stating that over 90 percent of educational institutions have significant ethics curriculum); see also *Ethics Education Increases at World's Top-50 Business Schools, According to DePaul University Study*, DEPAUL (Dec. 13, 2006), https://wdat.is.depaul.edu/newsroom/year_2006/1537.html.

¹³⁸ See, e.g., Dennis A. Pitta, et al., *Ethical issues across cultures: Managing the differing perspectives of China and the USA*, 16 J. CONSUMER MKTG., 240, 240 (1999)

business generally occur in relation to five basic areas: a business's relationship with its employees, its customers, the environment, industrial espionage, and corruption.¹³⁹ Corruption is defined as the abuse of entrusted power for private gain,¹⁴⁰ and is most often associated with bribery because of its commonality in international business. Corruption is endemic worldwide, with progress against the proliferation of corruption stalled since 2017 in 95 percent of countries.¹⁴¹

In the U.S., the principal law used to combat bribery is the Foreign Corrupt Practices Act (FCPA).¹⁴² It consists of two parts, anti-bribery provisions, and detailed recordkeeping requirements.¹⁴³ The FCPA applies to residents of the U.S. and any business worldwide that files periodic reports to the Securities and Exchange Commission (covered person).¹⁴⁴ A covered person violates the law if five elements are met. They are:

1. a payment, offer, authorization, or promise to pay money or anything of value;
2. to a foreign government official (including a party official or manager of a state-owned concern), or to any other person, knowing that the payment or promise will be passed on to a foreign official;
3. with a corrupt motive;
4. for the purpose of (a) influencing any act or decision of that person, (b) inducing such person to do or omit any action in violation of his

(describing the relationship between China and the USA and the need for understanding their respective cultural ethics).

¹³⁹ Andreea-Daniela Gangone, *Ethical Issues in International Business*, 10 ANNALS "STEFAN CEL MARE" UNIV. SUCEAVA 189, 192 (2010).

¹⁴⁰ *What Is Corruption?*, TRANSPARENCY INT'L, <https://www.transparency.org/en/what-is-corruption> (last visited Dec. 30, 2023).

¹⁴¹ *2022 Corruption Perceptions Index Reveals Scant Progress Against Corruption As World Becomes More Violent*, TRANSPARENCY INT'L (Jan. 31, 2023), <https://www.transparency.org/en/press/2022-corruption-perceptions-index-reveals-scant-progress-against-corruption-as-world-becomes-more-violent>.

¹⁴² 15 U.S.C. § 78dd-1 (1998).

¹⁴³ *The Foreign Corrupt Practices Act: An Overview*, JONES DAY (Jan. 2010), <https://www.jonesday.com/en/insights/2010/01/the-foreign-corrupt-practices-act-an-overview> [hereinafter *FCPA Overview*].

¹⁴⁴ *Id.*

lawful duty, (c) securing an improper advantage, or (d) inducing such person to use his influence to affect an official act or decision;

5. in order to assist in obtaining or retaining business for or with, or directing any business to, any person.¹⁴⁵

In essence, a violation of the FCPA is the payment of monetary value to a foreign government official intended to influence the official to take an action, refrain from taking an action, or secure a wrongful advantage for the covered person making the payment.¹⁴⁶ The payment must be made with “corrupt motive,” which is where a person “acts voluntarily and intentionally, with an improper motive of accomplishing either an unlawful result or a lawful result by some unlawful method or means.”¹⁴⁷ It’s been understood that “[t]he term ‘corruptly’ is intended to connote that the offer, payment, and promise was intended to influence an official to misuse his official position.”¹⁴⁸

b. Teaching Notes

The goal of this question is for the student to recognize the U.S. law applicable to the hypothetical situation and apply the FCPA’s elements to the facts to determine whether the making of even a modest payment of 500 euros to the Greek official would be a violation of the statute’s elements absent a legal exception. In determining this, the most problematic element would be proving the buyer’s corrupt motive, since it was the foreign government official who demanded the payment and there are no facts to indicate that if McCormick made such a payment, she intended for the Greek official to misuse his position.

¹⁴⁵ See *id.* (summarizing the practices prohibited in foreign trade stated in 15 U.S.C. §78dd-1(a), 78dd-2(a), 78dd-3(a)); see also *United States v. Seng*, 934 F.3d 110, 142 (2d Cir. 2019) (holding that the term “‘corruptly’ is intended to connote that the offer, payment, and promise was intended to influence an official to misuse his official position”) (quoting *United States v. Kozeny*, 667 F.3d 122, 135 (2d Cir. 2011)).

¹⁴⁶ See, e.g., *United States v. Kay*, 359 F.3d 738, 743 (5th Cir. 2004) (discussing the prohibition of payments to foreign officials under the FCPA).

¹⁴⁷ *U.S. v. Seng*, 934 F.3d at 142.

¹⁴⁸ *Id.*

7. Might the “grease payment” exception under the FCPA apply to the above situation? If so, what would McCormick need to do in this situation to comply with US legal requirements? Even if the payment were determined to be legal, would it be ethical for McCormick to make the payment? What factors would help you determine this? What should McCormick do in this situation?

a. Exceptions for Making Certain Payments Under the FCPA

The FCPA contains three provisions allowing covered persons to escape the FCPA’s anti bribery provisions for certain payments to foreign government officials.¹⁴⁹ Two are affirmative defenses, the first of which relate to situations where the foreign country’s law specifically allows such payments.¹⁵⁰ The second applies to payments for reasonable and bona fide expenditures, such as travel or lodging expenses made to or incurred by a foreign government official that are directly related to selling products or services, or to executing or performing a contract with the foreign government.¹⁵¹ The third provision is an exception to the FCPA’s application in situations where a “facilitating or expediting payment” is made to foreign official or political party to “expedite or to secure the performance of a routine governmental action” by the foreign official or political party.¹⁵²

This provision is usually referred to as the “grease payment” exception.¹⁵³ In order to qualify for this exception to the FCPA, “payments must relate to the performance of routine, non-discretionary government functions such as the issuance of routine licenses or the provision of phone, power, and water service; providing police protection or mail delivery; or scheduling inspections associated with contract performance or the

¹⁴⁹ See FCPA Overview, *supra* note 143; see also 15 U.S.C. § 78dd-1(b)-(c) (1998) (listing exceptions and affirmative defenses).

¹⁵⁰ 15 U.S.C. § 78dd-1(c)(1).

¹⁵¹ *Id.* § 78dd-1(c)(2).

¹⁵² *Id.* § 78dd-1(b).

¹⁵³ See FCPA Overview, *supra* note 143.

shipment of goods.”¹⁵⁴ The grease payment exception is intended to be a narrowly construed exception to an otherwise broad statutory prohibition¹⁵⁵ and to apply generally to payments to low-level employees who provided a routine service to expedite that service.¹⁵⁶ However, relying on the grease payment exception is quite risky because the U.S. government has provided little guidance to help companies or individuals determine what conduct qualifies as a “facilitating payment.”¹⁵⁷

b. FCPA Record-Keeping Requirements

It is important to remember that the FCPA contains explicit record-keeping and internal control requirements, in addition to its anti-bribery provisions.¹⁵⁸ The FCPA’s anti-bribery provisions are intended to be prescriptive.¹⁵⁹ However, the statute’s record-keeping requirements are prescriptive.¹⁶⁰ In fact, the statute’s accounting and record-keeping provisions go well beyond simply addressing the bribery of foreign officials.¹⁶¹ In creating the FCPA, one of the key considerations was how accounting practices in the U.S. allowed companies to make bribery payments in the

¹⁵⁴ *Id.*; see also 15 U.S.C. § 78dd-1(b).

¹⁵⁵ U.S. v. Kay, 359 F.3d at 745.

¹⁵⁶ *Id.* at 748; see also U.S. v. Duperval, 777 F.3d 1324, 1334-35 (11th Cir. 2015) (ruling that a payment to a high-ranking government official who administered foreign contracts was not a “grease payment,” even though the payment related to providing routine telephone service).

¹⁵⁷ See FCPA Overview, *supra* note 143.

¹⁵⁸ *Id.*

¹⁵⁹ See Stuart H. Deming, *The Potent and Broad-Ranging Implications of The Accounting and Record-Keeping Provisions of The Foreign Corrupt Practices Act*, 96 J. CRIM. L. & CRIMINOLOGY 465, 468 (2006).

¹⁶⁰ *Id.* at 468; see *Prescriptive*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/prescriptive> (last visited Dec. 31, 2023) (defining prescriptive as “saying exactly what must happen, especially by giving an instruction or making a rule”).

¹⁶¹ See Deming, *supra* note 159 at 467 (describing how the FCPA record keeping provisions directly affect business practices worldwide).

first place.¹⁶² To address this, the accounting and record-keeping provisions placed new and significant obligations on the worldwide operations of all entities subject to its terms to maintain records that accurately reflect transactions and dispositions of assets and to maintain systems of internal accounting controls.¹⁶³

c. Teaching Notes

In McCormick's situation, a defensible argument could be made that making the 500-euro payment to the Greek customs official met the grease payment exception's requirements. The payment would relate to the passing of the goods through customs and the scheduling of the shipping of the goods, both of which would arguably be a non-discretionary Greek government function. Nonetheless, such a payment could entail some legal risk to McCormick.

Pursuant to FCPA's record-keeping provisions, students should also note the importance of McCormick keeping accurate records if she decides to make the payment. The question also asks about the ethicality of making the payment to the Greek official vice its legality and is intended to draw out a student's thoughts and understanding of the difference between the two under these particular factual circumstances.

8. Assume that the container ship carrying the shipment of wine was passing through the Suez Canal on the way to South Africa for an intermediate delivery of goods before heading to the U.S. There is a blockage on the canal when a ship just in front of the container ship runs aground. As a result, the delivery is delayed for two months before the canal can be cleared. Which party has the risk of loss in this case? Explain. Suppose the parties did not agree to the use of an Incoterm in the contract, when would the risk of loss pass from Doukas to McCormick? Might McCormick be completely excused from performing the contract under the CISG

¹⁶² *Id.*

¹⁶³ *Id.*

as a result of the delay? Explain.

a. INCOTERMS and Risk of Loss

In contracts where the CISG is the applicable law and an INCOTERM is used, the term is incorporated into the CISG under Article 9(2).¹⁶⁴ Article 9(2) provides that the parties to the contract are considered to have impliedly made applicable usages that the parties knew or ought to have known are widely used in international trade.¹⁶⁵ Thus, since INCOTERMS are widely used, if one is contained in a CISG contract, the term supersedes the CISG's default rules on passage of risk of loss.¹⁶⁶

In cases where the buyer and seller decide not to use an INCOTERM in the contract, then risk of loss would be determined and governed under the law applicable to the contract.¹⁶⁷ Thus, where the CISG is the governing law, the default rules on passage of risk of loss pertain. These are located in Articles 66-69. Article 67(1) provides that if the seller will not hand the goods over to the buyer at a particular place, the risk of loss passes from the seller to the buyer when the goods are handed over to the first carrier for transmission to the buyer.¹⁶⁸ Under Article 66, loss or damage to the goods after the risk of loss has passed to the buyer, does not relieve the buyer from their obligation to pay the contract price.¹⁶⁹

¹⁶⁴ See *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co.*, 2011 U.S. Dist. LEXIS 110716, at *11 (S.D.N.Y. Sept. 28, 2011) (explaining that since INCOTERMS were incorporated into the CISG under Article 9(2), the INCOTERM in the contract entered into by the parties could not derogate from other provisions of the CISG, but must be read as consistent with those provisions); see also Coetzee, *supra* note 120, at 4, 6-7 (discussing whether INCOTERMS replace CISG default rules on delivery and risk entirely or whether they derogate from the rules).

¹⁶⁵ CISG, *supra* note 3, at art. 9(2).

¹⁶⁶ See Coetzee, *supra* note 120, at 4.

¹⁶⁷ See *id.* at 10 (discussing how the risks regulated by inadequate or incomplete INCOTERMS in a contract, should be governed by applicable domestic law).

¹⁶⁸ CISG, *supra* note 3, at art. 67(1).

¹⁶⁹ CISG, *supra* note 3, at art. 66.

b. Excusal from Contract Performance Under the CISG

Under CISG, Art. 79, a party is not liable to perform any obligations under the contract if the party's failure was due to "an impediment beyond his control" that was not reasonably foreseeable at the conclusion of the contract.¹⁷⁰ Additionally, if a party's failure to perform is due to a third party's failure, the requirements of Art. 79(1) apply to the third party as well.¹⁷¹ What constitutes an impediment beyond control is not defined in the CISG and is contested within various countries' legal systems, which may use domestic law excusal doctrines such as impossibility, force majeure, impracticability, and similar doctrines to help define the meaning.¹⁷² However, because of the lack of uniformity in these excusal doctrines, courts and other dispute tribunals rarely grant excusal under Art. 79, with only a handful of cases that have been sustained based on a claim of excuse.¹⁷³ Moreover, it appears that the vast majority, if not all, of the cases citing Art. 79 have involved a claim of impediment beyond control by the seller, not the buyer.¹⁷⁴

c. Teaching Notes

Because a CPT term was contained in the contract between Doukas and McCormick, it displaced the CISG default rules on risk of loss. However, the result is the same as that if an INCOTERM had not been in the contract. Since the contract calls for the goods to be shipped to the buyer, under either a CPT shipping term or Art. 67(1), the risk of loss would pass from Doukas to McCormick once he delivered the goods to the first carrier

¹⁷⁰ CISG, *supra* note 3, at art. 79(1).

¹⁷¹ CISG, *supra* note 3, at art. 79(2).

¹⁷² See Larry A. DiMatteo, *Contractual Excuse Under the CISG: Impediment, Hardship, and the Excuse Doctrines*, 27 PACE INT'L L. REV. 258, 274–79 (2015) (confirming that Article 79(2) is the most underutilized part of the CISG due to confusion over the meaning of "impediment" and the numerous national excuse doctrines in existence).

¹⁷³ *Id.* at 275.

¹⁷⁴ See, e.g., *id.* at 261–79 (discussing excuse claims made by sellers where *force majeure* was no exception).

involved in the shipping process.¹⁷⁵ Once Doukas delivered the wine to the first carrier, the risk of loss under the CPT term passed to McCormick at that time. As a result, if the wine became spoiled as a result of the delay, McCormick would suffer the loss. However, despite suffering such loss, McCormick would, nonetheless, be obligated to pay Doukas the contractual balance due for the wine, unless McCormick could claim excusal from payment upon another legal basis.

In the case of an impediment that merely caused a delay in a party's performance—such as a delay in delivery caused by the Suez event—CISG, Art 79(3) provides that the excuse to perform only applies during the period of time the impediment to performance exists.¹⁷⁶ Since the Suez Canal incident only caused a delay in the delivery of the wine, Doukas' and the ocean carrier's obligation to deliver by the contractual date would likely be excused, but McCormick's obligation to pay would likely not be affected. Her obligation to pay the remaining balance due was not triggered by her receipt of the wine, but rather, her receipt of the documents, since the contract called for a documentary sale.¹⁷⁷

9. Would the ocean carrier be responsible for the loss if the container ship had run aground in South Africa due to bad weather and the wine was destroyed? Would your answer change if the cargo was loaded at the port of Corinth, in Greece, and at the time the ship left the port, it had a loose propeller that fell off in the middle of the Mediterranean Sea, causing a significant delay? Which party would be responsible in that case and why?

¹⁷⁵ CISG, *supra* note 3, at art. 67(1); Incoterms Chart of Responsibility, *supra* note 126.

¹⁷⁶ CISG, *supra* note 3, at art. 79(3).

¹⁷⁷ See Documentary Sale *supra* Section III(B)(4)(a) p. 200.

a. Ocean Carrier Liability and the Carrier of Goods by Sea Act (COGSA)

The first international convention pertaining to liability for loss involving the international carriage of goods by sea was the International Convention for the Unification of Certain Rules Relating to Bills of Lading (The Hague Rules), which was signed in August, 1924.¹⁷⁸ The United States implemented the Hague Rules into U.S. law with the passage of the Carriage of Goods by Sea Act (COGSA) in 1936.¹⁷⁹ COGSA applies to all international sales of goods contracts that are either loaded or unloaded in a U.S. port.¹⁸⁰ The U.S. Supreme Court later ruled that COGSA also applied to multi-modal shipments that involved other forms of transportation necessary in a contract that also required ocean shipping.¹⁸¹ This is because applying differing legal regimes to the same contract would lead to the practical problem of needing to precisely determine when and where damage to the cargo occurred in order to apply the correct law.¹⁸²

Under COGSA, an ocean carrier is responsible for: 1) cargo shortages when the cargo is delivered at the destination; 2) exercising due diligence in loading, stowing, and unloading of the cargo; and 3) providing a seaworthy ship that is properly manned and equipped at the beginning of the voyage.¹⁸³ The seaworthiness of a ship is defined as whether the ship

¹⁷⁸ International Convention for the Unification of Certain Rules Relating to Bills of Lading and Protocol for Signature, Aug. 25, 1924, 51 Stat. 233, 120 L.T.N.S. 155 [hereinafter *Hague Rules*], implemented in the U.S. by the Carriage of Goods at Sea Act, Apr. 16, 1936, 49 Stat. 1207, 46 U.S.C. §§ 1300-1313 (1940).

¹⁷⁹ See *id.*; see also Marina Gaglias & Meaghan Argentieri, *US COGSA and The Harter Act: Where Do We Currently (and Contractually) Stand?* UKP&I (Mar. 11, 2021), <https://www.ukpandi.com/news-and-resources/articles/2021/us-cogsa-and-the-harter-act-where-do-we-currently-and-contractually-stand/> (explaining how the COGSA serves as the framework in the U.S. for implementing the Hague Rules).

¹⁸⁰ See *id.*

¹⁸¹ See SCHAFFER ET AL., *supra* note 59, at 161 (discussing how COGSA also applies to rail portions of multimodal ocean shipment) (citing *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 93 (2010)).

¹⁸² *Id.*

¹⁸³ See *id.* at 162 (indicating for example that discrepancies in the weight after shipping are the responsibility of the carrier); see also Carriage of Goods by Sea Act, 46 U.S.C. § 30701 Sec. 3(1)-(2) (2011).

or customary freight unit is worth more. To fail to do so can be a costly mistake.

In one such case, *Z.K. Marine, Inc. v. Archigetis*, the carrier was tasked with shipping five yachts from Taiwan to the U.S. During transit, “one yacht was lost and the other four were damaged.”¹⁹¹ The yachts were transported in cradles to facilitate their transport, but were not enclosed. Despite this, the court ruled that each yacht was a package unit.¹⁹² Unfortunately, the shipper did not declare the actual value of the yachts on the bill of lading when the shipper had the opportunity to do so.¹⁹³ Thus, the court limited the liability of the carrier to \$500 per yacht.¹⁹⁴

c. Teaching Notes

In this hypothetical, the carrier would not be liable for the destruction of the wine due to running aground. This is because bad weather which caused an error in navigation, is a defense to liability under COGSA.¹⁹⁵ On the other hand, the carrier would be liable for any loss caused by the delay in delivery of the wine due to losing its propeller,¹⁹⁶ unless the propeller problem was caused by a latent defect that could not have been discovered by the beginning of the voyage despite the carrier’s due diligence in making the ship seaworthy.¹⁹⁷ However, if the carrier was deemed liable, its liability would be limited to \$500 per package under COGSA—in this case likely each crate or box of wine—unless Doukas declared the wine’s value on the bill of lading. If he did not, then any loss greater than \$500 per package would be borne by the party who had the risk of loss. In this situation, the party bearing risk would be McCormick under the CPT INCOTERM, or a shipping insurer if shipping insurance was purchased and the policy covered this type of loss.

¹⁹¹ *Z.K. Marine, Inc. v. Archigetis*, 776 F. Supp. 1549, 1552 (S.D. Fla. 1991).

¹⁹² *Id.* at 1555.

¹⁹³ *Id.* at 1554.

¹⁹⁴ *Id.*

¹⁹⁵ 46 U.S.C. § 30701 Sec. 4(2)(a).

¹⁹⁶ *Id.* at Sec. 3(1)(a) (stating that the carrier is bound to ensure that the ship is seaworthy before and at the beginning of the voyage).

¹⁹⁷ *Id.* at Sec. 4(2)(p) (stating that the carrier should not be responsible for loss or damage caused by latent defects undiscoverable by due diligence).

10. Did either party breach the contract in this case? Describe in detail why or why not. What might each party argue? (This should be a substantially long and well-researched answer). If Doukas breached the contract, describe what remedies would be available to McCormick.

a. The Requirement of Conforming Goods

CISG, Chapter II enumerates the obligations of the seller in a CISG contract. Among these are the seller's obligation to hand the goods over to the first carrier for shipping to the buyer, or to the buyer directly, depending on the contract's requirements,¹⁹⁸ marking the goods and contractually arranging for their carriage if being shipped by carrier,¹⁹⁹ and delivery of the goods by the contract date specified, or by a reasonable date if the contract does not call for a delivery date.²⁰⁰ In addition, under CISG, Art. 35, "the seller must deliver goods which are of the quantity, quality and description required by the contract . . ."²⁰¹ Under CISG, Art. 35(2), goods are conforming if they: "(a) [a]re fit for the purposes for which goods of the same description would ordinarily be used; (b) [a]re fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract . . . ; (c) possess the qualities of goods which the seller had held out to the buyer as a sample or model."²⁰²

Although the CISG does not use the term "warranty," the requirements for conforming goods are similar to express and implied warranties under U.S. law. The Uniform Commercial Code (UCC) uses the term "warranty," and contains conforming goods language similar to that in CISG, Art. 35.²⁰³ With regard to "express warranties," the U.C.C. includes

¹⁹⁸ CISG, *supra* note 3 at art. 31.

¹⁹⁹ CISG, *supra* note 3 at art. 32.

²⁰⁰ CISG, *supra* note 3 at art. 33.

²⁰¹ CISG, *supra* note 3 at art. 35.

²⁰² CISG, *supra* note 3 at art. 35(2)(a)-(c).

²⁰³ Compare U.C.C. § 2-313(c) (AM. L. INST. & UNIF. L. COMM'N 1977) (stating "any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model"), with CISG, *supra* note

an express warranty of quality meeting the affirmations by the seller in the contract, similar to CISG Art. 35(1), and an express warranty of the conformance of the delivered goods to the seller's sample or model, similar to CISG, Art. 35(2)(c).²⁰⁴ The UCC also contains similar language in its implied warranties sections, regarding fitness for the ordinary purpose of the goods,²⁰⁵ and fitness for a particular purpose made known to the seller by the buyer.²⁰⁶

b. Evidence of the Meaning of Terms in a CISG contract

If the meaning of a term or terms in a CISG contract are disputed by the parties after the fact, the meaning of the terms in the contract can be later proven by any means, including witness testimony.²⁰⁷ This differs from U.S. law, which applies what is called the “parol evidence rule.”²⁰⁸ The parol evidence rule is a common law principle used to “to preserve the integrity of written contracts by refusing to allow the admission of [prior] oral statements or previous correspondence to contradict the written agreement.”²⁰⁹ For example, a written contract between two parties may be intended to be the final agreement, but nonetheless, not contain a complete statement of the parties' entire agreement. In such situations, the writing memorializing the agreement is said to be “partial[ly] integrat[ed].”²¹⁰ The analogous concept in the U.C.C. is where the writing is

3, at art. 35(2) (describing how goods are conforming if they “possess the quality of the goods which the seller held out to the buyer as a sample or model.”).

²⁰⁴ *Id.*

²⁰⁵ U.C.C. § 2-314 (AM. L. INST. & UNIF. L. COMM'N 1977).

²⁰⁶ *Id.* § 2-315.

²⁰⁷ CISG, *supra* note 3, at art. 11.

²⁰⁸ See Suteekshna Dubey, *Common Law Parol Evidence Rule in UCC and CISG*, JINDAL GLOB. L. SCH. (Dec. 28, 2022), <https://ssrn.com/abstract=4331671> (explaining the importance of the parol evidence rule in the U.S.).

²⁰⁹ See CISG Advisory Council Opinion No. 3: *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG*, 17 PACE INT'L L. Rev. 61, 63 (2005) (quoting LARRY A. DiMATTEO, LAW OF INTERNATIONAL CONTRACTING 212 (Springer Netherlands 2000)) [hereinafter *CISG Opinion No. 3*].

²¹⁰ Alberto Luis Zuppi, *The Parol Evidence Rule: A Comparative Study of the Common Law, the Civil Law Tradition, and Lex Mercatoria*, 35 GA. J. INT'L & COMPAR. L. 233, 239 (2007).

intended to be the “final expression” of the parties’ agreement.²¹¹ In either case, the writing can be supplemented by outside evidence of an earlier oral agreement or writing, but only if the outside evidence is otherwise consistent with the writing(s).²¹² Evidence of a prior agreement inconsistent with the writing(s) is not admissible.²¹³

On the other hand, the principles of contract interpretation and evidence in an international contract governed by the CISG do not include the parol evidence rule—since the parol evidence rule is not incorporated into the CISG.²¹⁴ Should a dispute arise between the parties to a CISG contract, evidence used to show the intent of the parties includes not only the language contained in the written contract itself, but any other evidence produced either before or after the writing.²¹⁵ The CISG permits “all relevant circumstances to be considered in the course of contract interpretation,”²¹⁶ including subsequent conduct of the parties and widely known usages of international trade the parties knew or ought to have known.²¹⁷

c. Remedies for Breach of Contract by the Seller Under the CISG

The CISG contains a number of remedies available to the nonbreaching party in a claim of contract breach.²¹⁸ In cases where the buyer claims the seller has breached the contract by delivering nonconforming goods, the buyer may require the seller to provide substitute goods, but only if the nonconformance is a fundamental breach of the contract and buyer

²¹¹ U.C.C. § 2-202 (AM. L. INST. & UNIF. L. COMM’N 1977).

²¹² Zuppi, *supra* note 210, at 241.

²¹³ Colin Flora, *Contract Interpretation and the Parol Evidence Rule*, PAVLACK L. (Nov. 30, 2012), <https://www.pavlacklawfirm.com/blog/2012/11/contract-interpretation-and-the-parol-evidence-rule/> (outlining which outside writings may be integrated according to the parol evidence rule).

²¹⁴ CISG Opinion No. 3, *supra* note 209, at 61.

²¹⁵ *See* CISG, *supra* note 3, at art. 11 (detailing how a contract of sale “may be proved by any means”).

²¹⁶ *See* CISG Opinion No. 3, *supra* note 209, at 63.

²¹⁷ CISG, *supra* note 3, at art. 9(2).

²¹⁸ *See generally* CISG, *supra* note 3, at Section III (outlining a seller’s remedies for a breach of contract claim).

provides the seller timely notice.²¹⁹ CISG, Art. 25 provides that a breach “is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract . . .”²²⁰

In cases of a seller’s fundamental breach, the buyer also has the option to avoid the contract altogether if the seller refuses to provide substitute goods within a reasonable time set by the buyer.²²¹ However, avoidance under the CISG should not be lightly granted and is intended as a remedy of last resort.²²² It should not occur unless it would be unconscionable for the nonbreaching party to continue the contract.²²³ Where the buyer is entitled to avoidance, however, the buyer is released from their obligation to pay and may seek restitution of amounts previously paid to the seller, as well as additional monetary damages the seller may have incurred.²²⁴

Another option available to the buyer claiming a breach by the seller in delivering nonconforming goods is price reduction.²²⁵ This option is available in cases where the seller chooses to neither demand substitute goods, nor avoid the contract.²²⁶ It is also available after the buyer has paid for the goods by asking the seller to return the amount of the price reduction to the buyer.²²⁷ Regardless of the remedies available to a seller in cases of delivery of nonconforming goods, the buyer has the obligation to act in good faith to mitigate their own loss or face a reduction in any

²¹⁹ CISG, *supra* note 3, at art. 46(2).

²²⁰ CISG, *supra* note 3, at art. 25.

²²¹ CISG, *supra* note 3, at arts. 47(1), 49(2)(b)(iii).

²²² Ulrich Magnus, *The Remedy of Avoidance of Contract Under CISG—General Remarks and Special Cases*, 25 J. L. & COMM. 423, 424 (2005).

²²³ *Id.*

²²⁴ *Id.* at 431; CISG, *supra* note 3, at art. 81(1)-(2).

²²⁵ CISG, *supra* note 3, at art. 50.

²²⁶ Chang-Sop Shin, *Declaration of Price Reduction Under the CISG Article 50 Price Reduction Remedy*, 25 J. L. & COMM., 349 (2005) (describing price reduction as a remedy for certain contractual breaches).

²²⁷ *Id.* at 350.

damages claimed.²²⁸ Usually this involves the buyer seeking to purchase substitute goods to mitigate the loss.²²⁹

d. Teaching Notes: Was the Wine Nonconforming?

In a CISG contract, the answer to whether a seller has delivered non-conforming goods to a buyer requires an analysis of the express promises made in the contract and the conforming goods requirements of CISG, Art. 35. At first glance in the hypothetical, the answer may appear obvious, i.e., that Doukas sent non-conforming wine to McCormick because it contained some amount of alcohol. However, a more detailed analysis of the facts in the hypothetical is needed. What did Doukas actually warrant that he would deliver?

In their preliminary negotiations, McCormick used the term “alcohol-free” in her initial discussion with Doukas on July 1.²³⁰ Doukas, on the other hand, used the term “non-alcoholic” in his July 10 phone call, and then proposed producing “high-quality non-alcoholic Greek-style red and white wine” in his July 22 offer email.²³¹ McCormick’s July 25 acknowledgment email to Doukas accepting his proposal did not object to the term “non-alcoholic wine” used by Doukas in his offer.²³² Thus, it appears that McCormick may have accepted the term or at least understood “non-alcoholic” to be “alcohol-free.”

In arguing that Doukas breached the contract, McCormick would likely be allowed to testify that despite the use of the term “non-alcoholic” in Doukas’s proposal, based on their July 1 conversation, Doukas reasonably understood that McCormick’s use of the term “alcohol-free” meant

²²⁸ Peter Riznik, *Some Aspects Of Loss Mitigation In International Sale of Goods*, 14 VINDOBONA J. INT’L COMM. L. & ARB., 267, 269 (2010).

²²⁹ *Id.* at 273.

²³⁰ See Hypothetical *supra* Section I (B) p. 184.

²³¹ *Id.* at 5.

²³² *Id.* at 6.

wine that was completely free of alcohol.²³³ McCormick would likely also argue that under U.S. law, the term “alcohol-free” when describing a product is only used “when the product contains no detectable alcohol.”²³⁴ Therefore, Doukas breached the contract in sending wine that contained some alcohol. Nonetheless, there are potential weaknesses with these arguments.

Doukas would likely argue that his use of the term “non-alcoholic” in his proposal document expressly indicated the contract’s requirements and that McCormick accepted the use of the term without objection.²³⁵ The term is also consistent with U.S. legal requirements, which allowed non-alcoholic wine to contain up to 0.5% alcohol.²³⁶ According to the Food and Drug Administration’s (FDA) guidance on dealcoholized wine, the term “dealcoholized” or “alcohol-removed” should appear on the wine bottle label before the word “wine” or its more detailed identity,²³⁷ and in this case, it did. The term “non-alcoholic” is also permissible on the label.²³⁸ The FDA considers wine labeled “dealcoholized,” “alcohol-removed,” and/or “non-alcoholic” to contain less than 0.5% alcohol by volume, but not necessarily be alcohol-free.²³⁹

Secondly, Doukas could argue that he delivered conforming goods because they possessed the quality of the goods which the seller held out to the buyer as a sample or model.²⁴⁰ Doukas delivered sample wines to McCormick on Aug. 15, and she selected the wines from samples and approved them for production. Moreover, the use of the term “non-alcoholic” with regard to beverages is a usage in international trade that the parties ought to have known meant that beverages could contain up to 0.5% alcohol, and the usage applied to their contract under CISG, Art.

²³³ CISG, *supra* note 3, at art. 11 (stating that a contract of sale may be proved by means other than writing).

²³⁴ See U.S. FOOD & DRUG ADMIN., OFF. OF REGUL. AFFAIRS, MANUAL OF COMPLIANCE POL’Y GUIDES: CPG SEC. 510.400 DEALCOHOLIZED WINE AND MALT BEVERAGES - LABELING (2005) [hereinafter *CPG Sec. 510.400*].

²³⁵ See Hypothetical *supra* Section I (B) p. 184.

²³⁶ CPG Sec. 510.400, *supra*, note 234.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ CISG, *supra* note 3, at art. 35(2)(c).

9(2).²⁴¹ In support, Doukas could cite evidence of what the term “non-alcoholic” meant by referring to widely known and regularly observed industry definitions of “non-alcoholic” wine.²⁴²

11. Assume McCormick files a breach of contract lawsuit in the federal district court in Denver. Would the district court have subject matter and personal jurisdiction in this case? Explain. What do you think the court would decide to do in this case?

a. Subject Matter Jurisdiction in Federal Courts

Subject matter jurisdiction is the power of a court to hear and determine cases involving the general subject involved in a dispute.²⁴³ Under the U.S. Constitution, federal courts have limited subject matter jurisdiction.²⁴⁴ Congress has provided that some types of federal courts have exclusive subject matter jurisdiction over certain subjects. These include subject matter jurisdiction over such subjects as bankruptcy, admiralty, and customs and international trade.²⁴⁵ For example, the U.S. Court of International Trade has exclusive subject matter jurisdiction over civil actions against the U.S. government arising out of import transactions.²⁴⁶

In contrast, Federal district courts are courts of general jurisdiction²⁴⁷ and have subject matter jurisdiction over civil cases involving

²⁴¹ See Alex O. Okaru & Dirk W. Lachenmeier, *Defining No and Low (NoLo) Alcohol Products*, 14 NUTRIENTS 1, 2-3 (Sept. 19, 2022) (discussing that most European and the U.S. define non-alcohol beverages as containing less than .5% by volume); see also CISG, *supra* note 3, at art. 9(2) (stating that parties are considered to have impliedly agreed to regularly observed international trade usage).

²⁴² CISG, *supra* note 3, at art. 9(2).

²⁴³ See *Subject Matter Jurisdiction*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/subject_matter_jurisdiction (defining subject matter jurisdiction generally).

²⁴⁴ U.S. CONST. art. III, § 2.

²⁴⁵ *Id.*

²⁴⁶ See *Overview of the Judiciary*, https://www.uscourts.gov/sites/default/files/overview_of_the_judiciary_fy_2021_0.pdf (last visited Jan. 7, 2023).

²⁴⁷ *Id.*

questions of federal law, as well as those cases above a value of \$75,000 where the parties to the dispute are from two different states, a citizen of a state and a citizen of a foreign country, or where the plaintiff is a foreign government.²⁴⁸

b. Personal Jurisdiction in Federal Courts

In addition to subject matter jurisdiction, federal courts must have personal jurisdiction over the defendant in a lawsuit.²⁴⁹ Although issues involving a federal court's ability to exercise personal jurisdiction can be quite complex, in general the U.S. Constitution requires that the defendant have "minimum contacts" with the forum, where the court is located.²⁵⁰ Among the ways federal courts have determined that minimum contacts exist is whether a defendant has "purposefully availed" itself of the forum marketplace, to include soliciting business in the forum state or distributing its products in that state.²⁵¹

c. Enforceability of Arbitration Clauses in International Contracts

About 25 percent of international contracts contain arbitration clauses.²⁵² Arbitration is a common form of alternative dispute resolution that has some advantages over litigation. These can include the ability of the parties to select a more neutral tribunal, cheaper cost, and faster resolution.²⁵³ In the U.S, the Federal Arbitration Act, passed in 1925,²⁵⁴

²⁴⁸ 28 U.S.C. § 1332(a).

²⁴⁹ See *Personal Jurisdiction*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/personal_jurisdiction#:~:text=Personal%20jurisdiction%20refers%20to%20the,in%20which%20the%20court%20sits (defining personal jurisdiction generally).

²⁵⁰ *Id.* (citing the landmark Supreme Court case *Int'l Shoe v. State of Washington*, 326 U.S. 310 (1945)).

²⁵¹ See, e.g., *Asahi Metal Ind. Co. v. Superior Court*, 480 U.S. 102, 122 (1987) (noting that a finding of purposeful availment requires an analysis of a defendant's full course of dealings within a forum state, not just the particular tort or issue raised by a plaintiff's claim).

²⁵² Julian Nyarko, *We'll See You in . . . Court! The Lack of Arbitration Clauses in International Commercial Contracts*, 58 INTL. REV. L. & ECON. 1, 3 (2018).

²⁵³ See SCHAFFER ET AL., *supra* note 59, at 58–59.

²⁵⁴ 9 U.S.C. §§ 1-16 (1925); 9 U.S.C. §§ 201-208 (1925); 9 U.S.C. §§ 301–307 (1925).

provides that written arbitration clauses in interstate and foreign commerce are considered valid, irrevocable, and enforceable.²⁵⁵ Over the years, litigants have attempted to bypass such clauses in their contracts and seek litigation in court. However, the U.S. Supreme Court has made clear that arbitration clauses in contracts involving foreign commerce will be enforced.²⁵⁶

In *Scherk v. Alberto-Culver Co.*, the court noted that a “forum clause should control absent a strong showing that it should be set aside” and that a forum acceptable to both parties is an “indispensable element in international trade, commerce, and contracting.”²⁵⁷ The only exception to this general rule is where a court finds a “compelling and countervailing reason” that creates a “strong showing that [the arbitration clause] be set aside.”²⁵⁸ This requires that the party seeking to set aside an arbitration clause shows that its enforcement would be “unreasonable or unjust” or otherwise be invalid because of fraud or other similar factor.²⁵⁹

d. Teaching Notes

From the hypothetical, the federal district court would have subject matter jurisdiction since McCormick is from Colorado and Doukas is from Greece, so long as the amount claimed in damages by McCormick exceeded \$75,000. This would depend on McCormick’s ability to find substitute goods to mitigate her claimed loss.²⁶⁰ If she were able to do so, and

²⁵⁵ See *Federal Arbitration Act (FAA)*, THOMSON REUTERS PRACTICAL L., [https://content.next.westlaw.com/practical-law/document/Ibb0a1216ef0511e28578f7ccc38dcbee/Federal-Arbitration-Act-FAA?viewType=FullText&transitionType=Default&contextData=\(sc.Default\)](https://content.next.westlaw.com/practical-law/document/Ibb0a1216ef0511e28578f7ccc38dcbee/Federal-Arbitration-Act-FAA?viewType=FullText&transitionType=Default&contextData=(sc.Default)) (last visited Jan. 7, 2024).

²⁵⁶ See *The Bremen v. Zapata Off-Shore Co.*, 407 U. S. 1, 15 (1972).

²⁵⁷ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 (1974) (quoting *Zapata Off-Shore Co.*, 407 U. S. at 13-15).

²⁵⁸ *Zapata Off-Shore Co.*, 407 U.S. at 12.

²⁵⁹ *Id.* at 15 (presenting the idea that unjust enforcement includes overreaching, which is synonymous with undue influence and overweening bargaining power).

²⁶⁰ See Hypothetical *supra* Section I(B) p. 184.

her remaining damage claim was over \$75,000, the court would have subject matter jurisdiction. The court would also have personal jurisdiction over Doukas, since he availed himself of the Colorado market by selling wines to a customer there. Accordingly, the court would have jurisdiction over the case.

The second determination by the court would be whether it could go forward with adjudication of the case. Here, the court would need to look at the validity of the arbitration clause in the contract. In this case, the clause was contained in Doukas's offer proposal, where he stated in the terms and conditions document that in the event of a dispute, it would be adjudicated by arbitration in Athens using Greek law. McCormick's acknowledgment with the conditions of sale document attached, did not object to arbitration in Athens, only that Colorado commercial law would apply.²⁶¹

As such, the district court would likely order the enforcement of the arbitration clause and dismiss the case in the absence of evidence of fraud, undue influence, or other factor that would make enforcement of the clause unreasonable or unjust.²⁶² As previously discussed, the applicable law would be the CISG for matters pertaining to it,²⁶³ but the applicable law for any issues that might arise not governed by the CISG would need to be determined by the arbitrator since Doukas's proposal to apply Greek law to the contract was objected to by McCormick based on her reference to the use of Colorado commercial law in acknowledgment of Doukas's offer.²⁶⁴

CONCLUSION

The hypothetical and discussion of the associated international business principles raised by the hypothetical case study in this paper are intended to provide international business educators a case study

²⁶¹ *Id.*

²⁶² *Zapata Off-Shore Co.*, 407 U.S. at 12-14 (discounting claims of fraud and undue influence in a forum selection clause because such clauses are "indispensable element[s] of international trade" and "it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.").

²⁶³ *See* Applicable Law Section III(B)(1)(a) p. 191.

²⁶⁴ *See* Teaching Notes Section III(B)(1)(b) p. 193.

framework as a project assignment for students to analyze and apply a wide array of principles related to the international sale of goods. The facts in the hypothetical are easily adaptable for other types of goods, different parties, varying monetary amounts, or other factual alterations or additions. Additionally, questions can be modified in many different ways should the instructor wish to emphasize other legal or substantive areas related to the international sale of goods related to contract formation, issues regarding its execution, dispute resolution, or ethical matters related to the transaction.