Up, Around, Over, and Under: A Textual Case for Busting Through the Supposed Privity Barrier of CISG Article 4

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I. Introduction

Seller sells a shipment to distributor. Distributor sells a portion of that shipment to retailer. And, retailer then sells the product to the ultimate consumer. An all-too-common occurrence duplicated across countries and industries. But, what if that product was defective and the retailer could not sell the product, or must sell it for substantially less? What if the retailer (for a variety of reasons) wants to directly sue the upstream seller? And now, what if this was an *international commercial* sales transaction?

Typically, the United Nations Convention on Contracts for the International Sale of Goods (CISG) governs international commercial sale of goods transactions.[1] And traditionally, scholars, national courts, and arbitral tribunals have interpreted the CISG narrowly to require privity[2] between the parties for an action to proceed under the CISG.[3] But, given the erosion of the privity

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[1] United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG].

[2] The privity requirement, succinctly put, requires that "[t]he contracting parties are the sole parties able to claim damages on the basis of the contract." Riku Korpela, *Article 74 of the United States Convention on Contracts for the International Sale of Goods*, *in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 2004-2005 73, 88 (Pace Int'l L. Rev. ed., Eur. L. Publishers 2006).

[3] *See, e.g.*, Caterpillar, Inc. v. Usinor Industeel, 393 F. Supp. 2d 659, 674 (N.D. Ill. 2005) ("The plain text of the CISG limits its application to claims between buyers and sellers."); Henry Mather, *Choice of Law for International Sales Issues Not Resolved by the CISG*, 20 J.L. & COM. 155, 159 (2001) (arguing the language of the CISG

requirement across the international sales community, the text of the CISG, and the CISG's interpretive article,[4] a more compelling argument exists that a direct action against these upstream sellers[5] is already within the CISG's text.[6]

Scholars, national courts, and arbitral tribunals skirt the privity issue, deciding instead to find a host of ways up, around, over, and under this supposed privity barrier.[7] These scholars, courts, and tribunals have fought hard to offer a remedy to the aggrieved downstream party while assuming, without any discussion, that privity operates as a barrier to a direct action.[8] Simply put, this exercise is unnecessary and does not comport with the text, the international trend towards eroding the requirement of strict

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expressly covers only two parties: one buyer and one seller); Richard Speidel, *The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 NW. J. INT'L L. & BUS. 165, 173 (1995) ("CISG is not concerned with . . . the rights of third persons who are not parties to the contract . . . CISG is limited to two-party commercial contracts for sale."); Ingeborg Schwenzer & Mareike Schmidt, *Extending the CISG to Non-Privity Parties*, 13 VINDOBONA J. INT'L COM. L. & ARB. 109, 114-16 (2009) (asserting the CISG is concerned with two-party contracts, and arguing for non-CISG approaches to third-party liability); Korpela, *supra* note 2, at 91.

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

5 Use of the term *upstream seller* here and throughout this Article is purposeful. The common term *remote manufacturer/seller*, while frequently utilized, is a misnomer. Often, these manufacturers and sellers are not *remote* at all—they engage in direct advertising and marketing and other varying levels of control over the downstream process. *See generally* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 63-65 (3d ed., 1999) [hereinafter HONNOLD, UNIFORM LAW] (noting that some foreign manufacturers' places of business may be located in the same state as the seller).

6 *See id.* at 65 (asserting it would be "hasty to conclude that the 'buyer-seller' language of Article 4 will be an impassable barrier in cases where the supplier has participated substantially (although not formally) in the sale to the buyer"); *see also* Antonin I. Pribetic, *A New Canadian CISG Case, (Not)*, THE TRIAL WARRIOR BLOG (Jan. 18, 2011, 1:44 PM), http://thetrialwarrior.com/2011/01/18/a-new-canadian-cisg-case-not/ ("[T]he issue of imposing liability on non-privities under the CISG is not settled.").

7 *See infra* Part III.

8 *See* Schwenzer & Schmidt, *supra* note 3, at 113-16 ("[I]t is first necessary to consider whether the CISG deals with the question of the admissibility of contractual claims without privity of contract."). Schwenzer and Schmidt fail to discuss the possibility that the CISG already provides for third-party contractual liability. Instead, they skip this discussion in favor of a plethora of non-CISG remedies possibly appropriate for some third-parties. *See id.* at 113-15.

privity, or the CISG's interpretive commands.[9] A solution exists within the CISG's *seller* language to accomplish the same remedy without the multitude of inconsistently applied national remedies all reaching the same result: upstream sellers are liable for their harms.[10]

II. The Erosion of Privity

If one were to recount the history of the requirement of privity of contract, the plot would be drawn-out and constantly shifting. Despite the long legal history of the requirement of privity to enforce contractual obligations, many jurisdictions across the planet have slowly adapted to a changing world by altering the doctrine.[11] To address the current misapplication of privity to the CISG, it is necessary to first trace the history of the strict privity of contract doctrine from its modern origins in English common law, and then address the criticism that the requirement has received from judicial reformists, scholars, judges, and even nations as a whole.

The indefinite history of the strict requirement of privity of contract in the common law of England became definite in the mid-nineteenth century when the case of *Tweddle v. Atkinson*,[12] decided by the Court of the Queen's Bench, embedded the doctrine in English law for over a century.[13] The concept of "privity of contract" is extremely simple: "The relationship between the parties to a contract, allowing them to sue each other

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9 *See generally* Donald J. Smythe, *The Road to Nowhere: Caterpillar v. Usinor and CISG Claims by Downstream Buyers Against Remote Sellers*, 2 GEO. MASON J. INT'L & COM. L. 123, 150 (2011) ("If Article 4 of the CISG is defined narrowly, so as to require privity for CISG claims, then international sales law will remain underdeveloped and ill-suited to address contracting problems in the modern commercial world.").

10 *See infra* Part IV.

11 *See* Schwenzer & Schmidt, *supra* note 3, at 109. The idea that nearly every nation has developed its own particularities up, around, over, and under the privity barrier is hardly controversial. *See id.* at 110 ("In all legal systems, the sanctity of privity of contract has nowadays been attenuated and possibilities exist to extend contractual claims to persons who are not a party to the original contract.").

12 Tweddle v. Atkinson, (1861) 121 Eng. Rep. 762 (Q.B.) 764.

13 Rizvan Khawar, *Reinsurance and Privity in the Past, Present, and Future: Privity of Contract in Reinsurance and the Contracts (Rights of Third Parties) Act 1999*, 77 TUL. L. REV. 495, 499 (2002).

but preventing a third party from doing so."[14] This doctrine, as applied to commercial transactions, effectively operates to limit the liability of upstream sellers to downstream purchasers.[15] This doctrine of English common law was pivotal in the development of legal systems worldwide.[16]

In England, where the modern requirement of strict privity first blossomed, the doctrine remained rigorously in effect until the passage of the Contracts Act of 1999, which "allow[ed] a third party to enforce contracts that expressly provide for enforcement by a third party . . . [and] provide[d] for the enforcement of contracts whose terms purport to confer a benefit upon a third party."[17] The United Kingdom, however, was not the first to act in adapting its contract law to the demands of the modern global economy and era.

Article 2 of the Uniform Commercial Code (UCC) and the CISG are similar in a fundamental way: both sought to develop uniformity in the sale of goods and attempted to reflect modern commercial practice at the time they were adopted.[18] The National Conference of Commissioners for Uniform State Laws (NCCUSL) and the American Law Institute (ALI) develop the UCC.[19] Neither of these organizations actually has the power to create law; therefore, the UCC is ratified on a state by state basis.[20] Every

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14 BLACK'S LAW DICTIONARY 1320 (9th ed. 2009) (defining "privity of contract"); *see also id.* (defining "privity" as "[t]he connection or relationship between two parties, each having a legally recognized interest in the same subject matter."); Korpela, *supra* note 2, at 88 ("The contracting parties are the sole parties able to claim damages on the basis of the contract.").

15 *See* Korpela, *supra* note 2, at 89.

16 *See generally* Smythe, *supra* note 9, at 134-35 (citing Francis Dawson, *New Zealand Privity of Contract Bill*, 2 O.J.L.S. 448, 451, 453 (1982)); Michael Trebilcock, *The Doctrine of Privity of Contract: Judicial Activism in the Supreme Court of Canada*, 57 U. TORONTO L.J. 269 (2007) (noting that many other countries have what amount to privity requirements).

17 Khawar, *supra* note 13, at 499; *see* Contracts (Rights of Third Parties) Act, 1999, c. 31 (Eng.).

18 U.C.C. § 1-103 (1977) (stating that a purpose of the UCC is "mak[ing] uniform the law among the various jurisdictions"); Smythe, *supra* note 9, at 124 (explaining the CISG's purpose as creating a uniform system governing international sales of goods).

19 *See Projects*, AM. L. INST., http://www.ali.org/index.cfm?fuseaction=about.instituteprojects (last visited Jan. 16, 2013).

20 *See* Jeffrey M. Dressler, *Good Faith Rejection of Goods in a Falling Market*, 42 CONN. L. REV. 611, 622 (2009).

state besides Louisiana has adopted the UCC, or something akin thereto.[21] The NCCUSL and the ALI revised Article 2 in 1999 and 2003; however, the 2003 revisions were withdrawn as it became clear that no states would adopt the revised code.[22] Importantly, the 1999 revisions to Article 2, which were the first of their kind since it was published in 1952,[23] are pivotal to understanding the adaptation of contract law to meet the needs of modern times.

Long before states began to adopt the revisions to Article 2, courts understood the need for relief from strict privity and found ways to afford protection to non-contracting parties.[24] Eventually, legislators followed suit by adopting the revised Article 2, which included new provisions loosening the requirement of privity in breach of warranty claims, allowing claims from downstream buyers and non-buyers.[25] As Professor Donald Smythe explains, "the modern trend in both American and foreign law has been towards the elimination or diminishment of the privity requirement."[26] Scholars consider the requirement "a vestige of an outmoded, narrowly doctrinal conception of contracts."[27]

Similarly, the United States is further representative of the international erosion of this ancient, inconsistently applied

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21 Anelize Slomp Aguiar, *The Law Applicable to International Trade Transactions with Brazilian Parties: A Comparative Study of the Brazilian Law, the CISG, and the American Law About Contract Formation*, 17 LAW & BUS. REV. AM. 487, 534 n.285 (2011) ("In 1974, the state of Louisiana adopted other parts of the UCC, but not Article 2, preferring to maintain its own civil law tradition on this issue.").

22 *See Permanent Editorial Board for the UCC*, AM. L. INST., http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=4 (last visited Jan. 13, 2013).

23 *See* Hannu Honka, *Harmonization of Contract Law Through International Trade: A Nordic Perspective*, 11 TUL. EUR. & CIV. L.F. 111, 157 (1996).

24 *See* Yates v. Pitman Mfg., Inc., 514 S.E.2d 605, 607-08 (Va. 1999) (finding, in a warranty context, that express contractual language was an "affirmation of fact," thus evading the privity barrier).

25 *See* U.C.C. §§ 2-408, 2-409 (1999).

26 Smythe, *supra* note 9, at 143; *see also* BLACK'S LAW DICTIONARY, *supra* note 14, at 1320 ("The requirement of privity has been relaxed under modern laws and doctrines of implied warranty and strict liability, which allow a third-party beneficiary or other foreseeable user to sue the seller of a defective product.").

27 Smythe, *supra* note 9, at 139; *see also* WILLIAM R. ANSON, PRINCIPLES OF THE LAW OF CONTRACT 335 (Arthur L. Corbin ed., 3d Am. ed. 1919) ("To many students and practitioners of the common law *privity of contract* became a fetish. As such, it operated to deprive many a claimant of a remedy in cases where according to the *mores* of the time the claim was just.").

requirement.[28] Before direct action (in the consumer arena), U.S. parties used the theory of negligence to subvert the privity barrier to suit without being a signatory to the direct contract.[29] Then came the idea of *res ipsa loquitor* ("the thing speaks for itself") to allow suit in lieu of a direct contract.[30] Then, contract warranties that extended to consumers were outside the scope of the direct contract.[31] Next came market share and enterprise liability: essentially, if you profit from the sale, why should you not be held liable for your portion of the problems with that sale, regardless of a direct contract with the aggrieved party?[32] Finally, today, complete privity is not required and a direct action exists from consumer to upstream seller.[33]

This change is representative of the international community, where downstream sellers typically seek indemnity from upstream sellers based on an implied warranty.[34] Or, by placing the goods on the market, upstream sellers expressly or impliedly represent that the goods are suitable and stand behind the goods.[35] The French use this concept in their *action directe*, and similar laws exist in Belgium and Luxembourg.[36]

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28 *See* Smythe, *supra* note 9, at 140 n.74 (citing Sjajna v. Gen. Motors Corp., 503 N.E.2d 760 (Ill. 1986)) ("In practice, privity of contract exists wherever courts say it exists.").

29 *See, e.g.*, Macpherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE: SALES 390 (Hornbook Series 4th ed.).

30 *See generally* WHITE & SUMMERS, *supra* note 29, at 390; WILLIAM LLOYD PROSSER, TORTS § 96 (3d ed. 1964) (discussing the causation requirement and suggesting that the injured party may rely on *res ipsa loquitur*).

31 *See* U.C.C. § 2-318 (presenting three alternative approaches).

32 *See generally* Sindell v. Abbott Labs., 607 P.2d 924, 936-37 (Cal. 1980) (discussing market share liability without a direct contract); Hall v. E. I. Du Pont De Nemours & Co., 345 F. Supp. 353, 372 (E.D.N.Y. 1972) (discussing enterprise liability without a direct contract).

33 *See generally* Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-12 (2006) (governing warranties on consumer products transactions promoting enforceability and consumer protection principles).

34 *See* Comment, *Manufacturers Liability to Remote Purchasers for "Economic Loss" Damages—Tort or Contract?*, 114 U. PA. L. REV. 539, 539 (1966) [hereinafter *Manufactures Liability*]; LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 4.04 (Matthew Bender Release No. 121, Sept. 2012); PROSSER, *supra* note 30, § 97.

35 *See Manufacturers Liability*, *supra* note 34, at 539-40.

36 Schwenzer & Schmidt, *supra* note 3, at 113 (citing Nicholas Carette, *Direct*

Rather than accept the unending struggle of different avenues to recover the same amount for the same harm from the same upstream seller, there was always a push to streamline this process, resulting in the direct action.[37] Despite this erosion—and many more national shifts[38] up, around, over, and under the doctrine of strict privity—scholars and courts unnecessarily continue to interpret the CISG's *buyer* and *seller* language as a requirement of strict privity.[39]

III. Up, Around, Over, and Under

The CISG states, "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract."[40] Based on this *buyer* and *seller* language of Article 4, most scholars and courts have found an express requirement of privity of contract, as if Article 4 actually read, "This Convention governs only the formation of the contract of sale and the rights and obligations of the [*immediate*] seller and the [*immediate*] buyer arising from such a contract."[41] These same commentators seemingly consider the inclusion of the

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Contractual Claims of the Sub-buyer and International Sale of Goods: Applicable Law and Applicability of the CISG, 4 EUR. REV. OF PRIVATE L. 583, 586ff (2008)); *see also* MARTIN KÖHLER, DIE HAFTUNG NACH UN KAUFRECHT IM SPANNUNGSVERHÄLTNIS ZWISCHEN VERTRAG UND DELIKT, 167 n.151 (Tubingen, Mohr Siebeck 2003); Smythe, *supra* note 9, at 143 (explaining the "modern trend in both American and foreign law" has been to relax the privity requirement).

37 *See* Smythe, *supra* note 9, at 139.

38 Schwenzer & Schmidt, *supra* note 3, at 112 ("Both Germanic and U.S.-American case law shows that from the beginnings of this development not only consumers but often also commercial buyers were able to claim damages for their commercial losses based on the concepts of manufacturers' guarantees or express warranties.") (citing, for example, Bundesgerichtshof [BGH] [Federal Court of Justice] June 24, 1981, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2248, 1981 (Ger.); Randy Knitwear, Inc. v. Am. Cyanamid Co., 181 N.E.2d 399, 403 (N.Y. 1962); Klein v. Asgrow Seed Co., 54 Cal. Rptr. 609 (Cal. Dist. Ct. App. 1966); B.B.P. Ass'n v. Cessna Aircraft Co., 420 P.2d 134, 138-39 (Idaho 1966)); *see also* P.S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 265 (3d ed. 1981) ("[T]here has been a constant tendency for contractual rights to be extended in their scope so as to affect more and more persons who cannot be regarded as parties to the transaction.").

39 *See, e.g.*, Caterpillar, Inc. v. Usinor Industeel, 393 F. Supp. 2d 659, 674 (N.D. Ill. 2005).

40 CISG, *supra* note 1, art. 4.

41 *Id.*

article "the" within the language of Article 4 to mandate privity. Since courts have almost uniformly adopted this weak posture, those who realize that a CISG that requires strict privity of contract is simply outdated and obsolete in modern times[42] attempt to seek ways around the requirement. Namely, these same scholars jump to national law resolutions to hold upstream manufacturers liable or try to subvert an apparent privity requirement through alternative CISG articles.[43]

A. National Law Subversion

Unfortunately, despite the multitude of signatory nations,[44] the CISG's express thirst for developing a standard and uniformly applied code for international commercial sales transactions remains unquenched. This unfortunate result stems not from a weakness in drafting or international support, but rather a weakness in application. This weakness in application may be the product of a lack of an international system of precedent, a "homeward trend" bias demonstrated by many national courts,[45] or a variety of other reasons. Whatever the reason, however, it is clear that courts often use alternate domestic laws in order to avoid

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42 *See* Smythe, *supra* note 9, at 139-43.

43 *See infra* Part III.A, C.

44 Status 1980 - United Nations Convention on Contracts for the International Sale of Goods, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Jan. 13, 2013) [hereinafter UNCITRAL Status] (showing that, as of February 24, 2012, seventy-eight nations have adopted the CISG).

45 CISG commentary often references said "homeward trend" bias. *See, e.g.*, Smythe, *supra* note 9, at 131; *see also* LARRY DIMATTEO ET AL., INTERNATIONAL SALES LAW: A CRITICAL ANALYSIS OF CISG JURISPRUDENCE 2-3 (2005); JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES: THE STUDIES, DELIBERATIONS, AND DECISIONS THAT LED TO THE 1980 UNITED NATIONS CONVENTION WITH INTRODUCTIONS AND EXPLANATIONS I (1989); Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187, 200-04 (1998); United Nations Commission on International Trade Law (UNCITRAL), Commentary on the Draft Convention on Contracts for the International Sale of Goods 17, U.N. Doc. A/CONF.97/5 (Mar. 14, 1979), *available at* http://www.globalsaleslaw.org/index.cfm?pageID=644 ("[I]t is especially important to avoid differing constructions of the provisions of this Convention by national courts, each dependent upon the concepts used in the legal system of the country of the forum.").

applying the CISG.[46] In doing so, courts undermine the CISG's legitimacy, leaving the same void in international commercial sales transactions that the CISG and its signatory nations aimed to fill.[47]

National courts often avoid applying the CISG when faced with an international commercial sales transaction gone awry by quickly finding that "[t]he plain text of the CISG limits its application to claims between buyers and sellers," thereby requiring strict privity of contract.[48] This is a significant problem, as it severely limits the CISG's application in the modern world of international commercial sales. How often does an ultimate commercial purchaser actually purchase from the initial upstream seller itself? The answer to this question hardly requires any support or elaborate commentary. Therefore, in a world where the CISG is limited to parties standing in strict privity of contract, and where the ultimate commercial purchaser buys from an intermediary and not the initial upstream seller, the practice renders the CISG essentially obsolete in application.[49]

In finding that the CISG requires strict privity of contract, courts fail to realize that, at most, the text is silent regarding claims against upstream sellers, and international law commentators are quick to adopt this view.[50] However, the CISG text expressly allows such claims despite the lack of attention to this point by commentators.[51] Just as when courts and legislatures across the United States began creating loopholes to avoid the strict privity requirement imposed by the 1956 version of the UCC, and when other nations did the same with their domestic

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46 *See, e.g.*, Smythe, *supra* note 9, at 131 n.39 (providing a myriad of sources documenting the homeward trend bias).

47 *See* Smythe, *supra* note 9, at 131-34. The Pace Institute of International Commercial Law reports that only 158 CISG proceedings, both court and arbitral, have taken place in the United States. *See CISG Database Country Case Schedule*, PACE INST. INT'L COMM. L., http://www.cisg.law.pace.edu/cisg/text/casecit.html (last visited Jan. 16, 2013).

48 Caterpillar, Inc. v. Usinor Industeel, 393 F. Supp. 2d 659, 674 (N.D. Ill. 2005).

49 *See* Schwenzer & Schmidt, *supra* note 3, at 109-10 ("The developments of recent years—especially due to globalisation of trade—have made chains of contracts an important focus for consideration.").

50 *See id.* at 115; Smythe, *supra* note 9, at 129.

51 *See infra* Part IV.

laws,[52] CISG scholars periodically proposed ways around this *presumed* strict privity requirement or *presumed* silence on privity.[53] Since commentators and courts broaching the topic have *presumed* that the CISG either requires strict privity of contract for a party to have standing or have stated the CISG is silent as to privity, every proposal is a way to subvert this alleged, nonexistent requirement or silence, as opposed to the solution advanced herein: a logical, textual interpretation of the CISG to expressly allow downstream purchasers' claims against upstream sellers. The most frequently advanced propositions for avoiding this presumed strict privity requirement, thus undermining the legitimacy and goals of the CISG, have focused on principles of domestic law authorizing action by non-privity parties and Article 16 of the CISG.[54]

Professors Ingeborg Schwenzer and Mareike Schmidt authored the most significant article addressing the problem of strict privity within the CISG, in which they rapidly advance the theory that the CISG is silent on privity.[55] Next, they posit and analyze international chains of contract and detail national concepts allowing claims by parties lacking privity of contract.[56] In so doing, the authors give particular detail to the law governing admissibility of different categories of claims and the scope that should be given to a manufacturer's liability when faced with a particular category of non-privity claims.[57] Professors Schwenzer and Schmidt identify domestic (1) "claims arising out of an assignment or an assumption of debts";[58] (2) "[m]anufacturers' guarantees or express warranties";[59] and (3) "claims based on an *action directe*,[60] implied warrant[ies] or . . . contract[s] with

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52 *See supra* notes 44-49 and accompanying text.

53 *See, e.g.*, Smythe, *supra* note 9 (suggesting that courts should "construe the CISG to preempt all domestic contract claims and find a way of allowing downstream buyers to make claims against remote sellers under the CISG itself").

54 *See id.* at 143-49.

55 *See* Schwenzer & Schmidt, *supra* note 3, at 113-18.

56 *See id.*

57 *See id.* at 118-21.

58 *Id.* at 122.

59 *Id.*

60 *See* Thermo King v. Cigna Ins. Cour de Cassation [Cass.] [Supreme Court for Judicial Matters], Oct. 21, 1999, No. 96-19.992 (Fr.), *available at* http://cisgw3.law

protective effects."[61] These national concepts, they suggest, provide ways for a non-privity party to state a claim in an action to which the CISG otherwise applies.[62] Again, Professors Schwenzer and Schmidt only find ways to skirt a *presumed* problem, instead of attacking the problem head-on by relying on the express language of the CISG. These suggestions, while certainly explicit, thoughtful, and provoking, epitomize the nature of the problem: there are too many national responses and remedies to a problem with a simple, logical, and textual solution already available within the CISG.[63]

B. Caterpillar v. Usinor*: A Study In National Law Subversion*[64]

The United States Northern District of Illinois case of *Caterpillar v. Usinor*[65] perfectly highlights the confusion and insufficient national law approaches discussed above[66] and serves as evidence that national courts have completely undermined the CISG's application, goals, and purposes. In *Caterpillar*, Caterpillar and its Mexican subsidiary, Caterpillar Mexico (CMSA), contracted with a French steel company, Usinor Industeel (Usinor), and its U.S. subsidiary, Usinor Industeel, USA, for the delivery of a specific quality of steel so that CMSA could build truck bodies, which Caterpillar could then sell to

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.pace.edu/cases/990105f1.html.

61 *See* Schwenzer & Schmidt, *supra* note 3, at 122.

62 *See id.* at 110.

63 In fact, as Professors Schwenzer and Schmidt acknowledge, their article is strikingly similar to the hypothetical provided in the 16th Annual Willem C. Vis International Moot Court Competition held in 2008-2009. *Id.* at 109 n.3. In the problem, a commercial retailer received damaged cars and sought to sue the international manufacturer rather than the intermediate importer, which had become insolvent and had not directly caused the subject manufacturing defect. *Id.* The moot, which one of the authors of this Article participated in and argued, showcased the alleged lack of a direct action—only one team even advanced the direct action premise—and corresponding plethora of national law remedies (for example, apparent authority, intended beneficiary status, ratification, and many others).

64 This Article, for purposes of concision and ease of reading, provides a very simplified recitation and examination of *Caterpillar*, and does not purport in any way to address all parties and issues set forth in that decision.

65 Caterpillar, Inc. v. Usinor Industeel, 393 F. Supp. 2d 659 (N.D. Ill. 2005).

66 *See supra* Part III.A.

customers.[67] The party actually purchasing the steel from Usinor, and thus in direct privity of contract, was CMSA.[68] Usinor represented to Caterpillar and CMSA that the steel was of a certain quality.[69] Relying on those representations, Caterpillar contracted with customers to sell them specific trucks and contracted with CMSA to build such trucks.[70] CMSA contracted with Usinor to provide the steel for the trucks.[71] The quality of steel supplied by Usinor was subpar and resulted in the delivery of defective truck bodies to Caterpillar's customers; the steel ultimately cracked and made the trucks inoperable.[72] Ultimately, both Caterpillar and CMSA filed suit against Usinor under the CISG and the UCC, as adopted in Illinois.[73]

Usinor asserted two primary defenses to the actions under the CISG and the UCC: first, that all of Caterpillar's and CMSA's UCC claims were preempted by the CISG; and second, that Caterpillar did not have standing to bring any claim under the CISG, citing the *seller* language in CISG Article 4.[74] The *Caterpillar* court held that the CISG's *seller* language prevented Caterpillar from having standing to bring a claim against Usinor under the CISG, and since Caterpillar did not have standing under the CISG, its state law claims were not preempted.[75] Unfortunately for Caterpillar, the UCC as adopted in Illinois requires privity of contract in order to seek money damages in breach of warranty claims.[76] Caterpillar attempted to argue ways up, around, over, and under this privity requirement to no avail.[77] Caterpillar was therefore left with only a promissory estoppel claim and CMSA was left with only CISG claims.[78]

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67 *Caterpillar*, 393 F. Supp. 2d at 663.

68 *Id.* at 677.

69 *Id.* at 665.

70 *Id.*

71 *Id.* at 665-66.

72 *See id.* at 666-67.

73 *Caterpillar*, 393 F. Supp. 2d at 663.

74 *Id.* at 672-74.

75 *Id.* at 675-76.

76 *See id.* at 677-78.

77 *Id.* at 678-79.

78 *Id.* at 681-82.

The court in *Caterpillar* not only failed to provide the proper precedential value to a treaty entered into by the United States but also passed over the standing issue with such inattention that the court's desire to simply avoid applying the CISG in favor of domestic law was palpable.[79] Indeed, in an action where substantial international business interests were at stake, and the CISG's interest in promoting uniformity in international commercial sales transactions was definitely in play, the *Caterpillar* court provided a very strict interpretation of the CISG's *seller* language with minimal citation or analysis.[80] This decision reinforces the premise advanced by this Article that the interpretation of the CISG's *seller* language often provided by scholars, commentators, and courts ignores the express purposes and goals of the CISG and weakens the CISG such that it is often rendered useless. Nevertheless, a logical textual interpretation exists that promotes and advances those very purposes and goals.

C. Subversion Through the CISG

On the other hand, some scholars decide to tackle the nonexistent privity requirement through the CISG itself, and take the position that Articles 14(2) and 16(2)(b) of the CISG are the most appropriate vehicles to provide relief from strict privity.[81] Article 14(2) provides that "[a] proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, *unless the contrary is clearly indicated by the person making the proposal.*"[82] Thus, under the CISG, one may make an offer, at least in some situations, to unnamed persons or entities. Article 16(2) provides that "an offer cannot be revoked . . . if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer."[83] This provision reflects the doctrine of promissory estoppel, *sans* any requirement of foreseeability or detriment.[84] In

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79 *See* Smythe, *supra* note 9, at 136.

80 *See Caterpillar*, 393 F. Supp. 2d at 674-75.

81 *See, e.g.*, Smythe, *supra* note 9, at 145-46 ("Articles 14(2) and 16(2)(b) of the CISG offer an alternative approach to the privity problem that may therefore be even more appealing and might also prove to be more flexible in application.").

82 CISG, *supra* note 1, art. 14, ¶ 2 (emphasis added).

83 *Id.* art. 16, ¶ 2.

84 *See* Geneva Pharm. Tech. Corp. v. Barr Labs., Inc., 201 F. Supp. 2d 236, 286-88

another article addressing the problems presented by the CISG's presumed requirement of strict privity or its presumed silence regarding the same, the author proposed that Article 16 of the CISG is the most suitable way to reach a CISG that is, in effect, not so limited by the constraints imposed by a strict privity requirement.[85] The author's theory is quite simple: CISG "Article 14(2) provides that offers may be made to indefinite persons," and therefore Article 16(2)(b)'s more liberal version of promissory estoppel might come into play to provide a basis for holding upstream sellers accountable for claims made to unknown downstream buyers from representations made in distribution, promotion, and marketing of goods.[86] This theory, while novel and interesting, still finds a solution to a *presumed* problem by stretching the language and application of the CISG instead of interpreting the express language of the CISG and eliminating the problem at its core through an ideal interpretation of Article 4's *seller* language.

Indeed, the CISG's international character, the requirement to promote uniformity in its application, and the observance of good faith in international trade are not achieved through presuming silence on privity and finding national ways for non-privity parties to bring claims; nor are these interests advanced by presuming silence on privity and using Article 16 as a way for a non-privity party to assert a backdoor claim under the CISG. The strongest way to tackle the problem is through the overlooked textual response advanced herein—that Article 4's *seller* language is simply not as restrictive as courts, scholars, and commentators advance. Taken in light of the CISG's express language and interpretive article, as well as the underlying goals advanced through uniform international application of the CISG, courts should construe Article 4's *seller* language so as to expressly

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(S.D.N.Y. 2002); *see also* Henry Mather, *Firm Offers Under the UCC and the CISG*, 105 DICK. L. REV. 31, 48 (2000) ("Paragraph (2)(b) looks very much like American promissory estoppel doctrines, although it does not expressly require that the offeree's reliance must have been foreseeable to the offeror and does not expressly require that the offeree's reliance be detrimental.").

85 Smythe, *supra* note 9, at 129 ("The CISG can be construed to allow downstream buyers to make claims against remote sellers under Article 16(2)(b), a provision that is similar to the common law doctrine of promissory estoppel.").

86 *Id.* at 145-48.

allow claims by non-privity parties.

IV. A Textual Response

This Article defines and interprets Article 4's use of *seller*, and in such an analysis, the starting point must be the text.[87] *Seller* is not expressly defined in the text, but a common-sense definition—examining standard definitions of both buyer and seller—does not support excluding upstream sellers. Further, by utilizing a CISG-based definition, through the commands of the CISG interpretive article, Article 7, upstream sellers are included and subject to suit.

A. Standard Definitions Of Buyer And Seller Do Not Exclude Upstream Sellers

The CISG does not expressly define the terms buyer and seller.[88] Though courts and scholars frequently use the terms *immediate buyer* and *immediate seller* when discussing the CISG,[89] they are nowhere to be found within the text itself. This often-applied misnomer has created the misguided perception of a requirement, though clearly one is not in the text.

The term *seller* means nothing more than "one that offers for sale,"[90] or "[a] person who sells or contracts to sell goods."[91] The term *buyer* merely means "purchaser," which means "one that acquires property for a consideration,"[92] or "[o]ne who makes a purchase."[93] Thus, the CISG text and these standard definitions of "buyer" and "seller" do not expressly limit every transaction to *one* buyer and *one* seller. It is through interpretations of scholars, national courts, and arbitral panels (likely as a result of engrained domestic law notions of privity) that the word "immediate"—and

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87 *See* Schwenzer & Schmidt, *supra* note 3, at 113 ("[I]t is first necessary to consider whether the CISG deals with the question of the admissibility of contractual claims without privity of contract.").

88 *See* Smythe, *supra* note 9, at 143.

89 *See, e.g.*, Smythe, *supra* note 9, at 137 n.25.

90 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 2062 (1993) [hereinafter WEBSTER'S].

91 BLACK'S LAW DICTIONARY, *supra* note 14, at 1483 (citing U.C.C. § 2-103(1)(d) (1999)).

92 WEBSTER'S, *supra* note 90, at 306, 1845.

93 BLACK'S LAW DICTIONARY, *supra* note 14, at 228; *see also id.* at 1355 ("One who obtains property for money or other valuable consideration; a buyer.").

the idea that there can be only one buyer and one seller—has been implanted into the CISG.[94] Additionally, the reality of the modern international sales transaction—a multi-partied transaction that is large and complex[95]—does not support the idea of a single-buyer-single-seller transaction.

Therefore, a common-sense, standard definition neither caters to any antiquated privity doctrine nor excludes the idea of more than one entity fitting the *seller* role. Simply, the CISG does not limit the possibility that *seller* includes upstream sellers. Further, including upstream sellers comports with the interpretational requirements of Article 7(1) and 7(2).

B. Article 7(1) Demands This Interpretation

When interpreting the text of the CISG, Article 7(1) requires an acknowledgment of the CISG's international character, the need to promote uniformity in the CISG's application, and the observance of good faith.[96] This interpretive requirement and Article 7(2)'s gap-filling provisions counsel in favor of broader CISG application, with less reliance on national standards and law.[97] A strictly textual approach to the definition of the word *seller*—a somehow overlooked concept and idea—comports with these principles and should be the welcomed route through the increasingly weak, underutilized, and unnecessary privity requirement (and its attendant loopholes, exceptions, and exclusions).[98]

Interpreting the word *seller* in Article 4 to include upstream sellers promotes the uniformity of the CISG and adds to its international character. This interpretation removes the unnecessary use of multiple, convoluted avenues, which all accomplish the same goal, in favor of a standard, easy-to-apply

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94 *See, e.g.*, Speidel, *supra* note 3, at 173 ("CISG is limited to two-party commercial contracts for sale . . . .").

95 *See* Schwenzer & Schmidt, *supra* note 3, at 108-09 (discussing the realities of modern international sales); Smythe, *supra* note 9, at 124.

96 CISG, *supra* note 1, art. 7, ¶ 1 ("In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.").

97 *See* Smythe, *supra* note 9, at 133-34.

98 *See supra* Part II (discussing the erosion of privity); *supra* Part III (discussing avenues up, around, over, and under privity).

approach. A similar approach in the consumer sales arena provides an excellent example.[99] Additionally, this interpretation promotes good faith and would not create or expand current liability.[100]

1. This Approach Adds to the CISG's International Character and Promotes Uniformity

a. The Consumer Arena as an Example

Affording a direct action against an upstream seller is not something new or novel, and there has been a recognized shift internationally to utilize this approach[101]—especially in the consumer arena. The CISG does not deal with consumer transactions because consumers were already protected and covered under national sales laws, and for the most part, consumers were not engaged in international transactions.[102] The shift affording a direct action for consumers came about as a result of multiple, convoluted avenues being scrapped for a better, more efficient and straight-forward approach.[103]

Importantly, for purposes of this Article, this direct approach can be seen in the international commercial arena as well. The United States, for example, has utilized this approach in its commercial law—streamlining the process by affording commercial entities a direct action.[104] Moreover, the Scottish Law Commission has decided to promote this streamlined approach for smaller commercial entities, affording them a direct action, as well.[105] And, as Professors Schwenzer and Schmidt note, "As with

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99 *See infra* Part IV.B.1.

100 *See id.*

101 HONNOLD, UNIFORM LAW, *supra* note 5, at 65 (citing Millard H. Ruud, *Manufacturers' Liability for Representations Made by Their Sales Engineers to Subpurchasers*, 8 UCLA L. REV. 251, 255 (1961)).

102 *See infra* Part IV.B.3.

103 *See supra* Part III.

104 *See supra* Part II (discussing the U.S. U.C.C.).

105 *See Unfair Terms in Contracts: A Joint Consultation Paper*, Scottish Law Commission Discussion Paper No. 119, Law Commission Consultation Paper No. 166 (Aug. 2002), *available at* www.scotlawcom.gov.uk/download_file/view/121/; *see also supra* Part II. (discussing fairness and the policy of protecting parties within the

manufacturers' guarantees and express warranties, the scope of application of these theories is not confined to consumers."[106]

b. Applying the Consumer Arena Approach to the CISG Requirements of Uniformity and International Character

Multiple national law approaches confound the explicit interpretive requirements of uniformity and international character.[107] With hundreds of ways up, around, over, and under[108] the privity barrier, it is time to streamline and create uniformity. Scholars do not doubt the use of various national legal remedies to secure judgment against upstream sellers;[109] they dispute which remedies are effective means to impose liability, and when and how those remedies are applied.[110] However, these disputes generally lead to the same result—a *uniform, international* result whereby upstream sellers can (and should) be sued, and through which upstream sellers can (and should) be liable for their portion of harm ultimately caused to a downstream buyer.[111]

Using seventy-eight[112] national law regimes as a means to accomplish the same result subverts internationalism and uniformity. It dilutes the international spirit of the CISG to focus unnecessarily on the national law of so many countries and it undermines uniformity to constantly question (and provide varying answers): *seller's law, buyer's law, which seller or buyer, law of potential debtor's country, law of initial contract, law of*

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distribution chain as reasons for the recommendation to allow a direct action).

106 Schwenzer & Schmidt, *supra* note 3, at 111.

107 *See* Smythe, *supra* note 9, at 131-32 ("[E]xcessive recourse to domestic law in the face of apparent gaps in the CISG only frustrates the CISG's purpose of promoting uniformity and encourages forum shopping.").

108 *See supra* Part III (discussing the methods up, around, over, and under the CISG language).

109 *See generally* Schwenzer & Schmidt, *supra* note 3 (devoting an entire article to various national avenues to liability).

110 *See id.* at 111-13 (discussing the propriety of various avenues around direct liability).

111 *See, e.g., id.* at 118-21 (determining that, generally speaking, upstream sellers will be ultimately liable); Smythe, *supra* note 9, at 136-37.

112 As of October 11, 2012, seventy-eight countries are a part of the CISG. *See* UNCITRAL Status, *supra* note 44.

final contract, lex fori, and more.[113]

2. *The Correct Definition is a Good Faith Interpretation*

While there is no explicit duty of good faith conduct within the CISG, there is a requirement to interpret the CISG in good faith.[114] An interpretation which holds upstream sellers liable for the wrongs they cause advances good faith; one that allows upstream sellers to subvert or shirk liability, or one that unnecessarily expends more judicial and arbitral resources, does not. Therefore, the current misinterpretation of *seller* does not comport with the explicit good faith interpretation requirement.

Where one party causes harm, that party should be held responsible. It defies good faith and logic to assert otherwise. Indeed, universally, laws seek to hold responsible parties liable for their actions. Therefore, courts and arbitral panels should interpret the CISG to ensure this fundamental goal of compensation.[115] Why, then, does an international convention—explicitly interpreted through a good faith lens[116]—currently enhance the ability for those liable to avoid responsibility? It is only reasonable, and in good faith, to implement the simplest, most efficient means by which to accomplish this goal of compensation: include upstream sellers within the definition of *seller.*

Further, it defies good faith to allow an upstream seller to rely on the convoluted structure and uncertain path to liability that the current system creates.[117] Indeed, such a reliance allows an upstream seller to bet on the assumption that as a result of such convolution and uncertainty, a party with a legitimate claim will

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113 *See* Schwenzer & Schmidt, *supra* note 3, at 115-17 (discussing potential problems and questions regarding which law applies).

114 *See* CISG, *supra* note 1, art. 7, ¶ 1 ("In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.").

115 *See* CISG-AC Opinion No. 6, Calculation of Damages Under CISG Article 74, Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA [hereinafter CISG-AC Op. 6], *available at* www.cisg.law.pace.edu/cisg/CISG-AC-op6.html ("Article 74 reflects the general principle of full compensation.").

116 *See* CISG, *supra* note 1, art.7, ¶ 1 ("In the interpretation of the Convention, regard is to be had to . . . the observance of good faith in international trade.").

117 *See* Smythe, *supra* note 9, at 134-35 (discussing potential that domestic law regimes would provide *no* recourse to aggrieved downstream buyers).

refuse to proceed accordingly. With the tremendous uncertainty created by the lack of a consistent, known, and fully enforceable[118] direct path of liability, this strategy may be a good bet for an upstream seller. Unfortunately, it inhibits international trade.[119] It fosters an environment of poor dealings, eluding responsibility, and betting on the inability (or inefficiency) of actual suit. Conversely, direct action would cultivate international trade through avoiding uncertainty.[120] Upstream sellers, knowing the efficient path available to the ones they harm, will produce and distribute better, safer, and more economical products. Further, upstream sellers, knowing the added ease of award enforcement, would do the same. Purchasers will be granted security in knowing they can directly, efficiently, and reliably recover from the responsible party; thus, they will purchase more. Consequently, good faith in international trade wins.

3. *The Idea that a Direct Path will Increase Current Liability is Misplaced*

As upstream sellers are already ultimately liable for faulty, defective products or other problems they cause,[121] no new liability will result. The CISG already protects sellers from unfettered liability through a host of articles regarding causation, knowledge, international, and commercial requirements.[122] And parties to CISG contracts are able to vary, or even exclude, the CISG's

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118 While there is a convention covering international enforcement of foreign arbitral awards, the same cannot be said for foreign judgments. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 7, 1959, 330 U.N.T.S. 38 [hereinafter N.Y. Conv.]. As is quite often the case in international sales contracts, the parties opt for arbitration rather than suit in a national court—increasing the ease of enforceability.

119 *See generally* Smythe, *supra* note 9, at 129 (finding that confounding the general principles of the CISG will create disunity and undermine good faith in international trade).

120 *See generally* JEFFREY L. HARRISON, LAW & ECONOMICS: CASES, MATERIALS & BEHAVIORAL PERSPECTIVES (2002) (discussing, generally, the idea of transaction costs and certainty).

121 *See* Schwenzer & Schmidt, *supra* note 3, at 115 ("The determining factor is that the manufacturer's financial outcome remains the same; be it by way of recourse within the respective contract relationships ultimately attributing the loss to the manufacturer or by way of a direct claim."); *see also supra* Part II (discussing the erosion of privity).

122 *See generally* CISG, *supra* note 1 (containing articles on indicated topics).

application in favor of other law if they so choose.[123] With these safeguards already in place, unfettered or unexpected liability will not result.

The attendant causation requirements included in the CISG ensure that only those sellers (upstream or not) that *actually cause* resulting consequences are liable.[124] For example, Article 74 explicitly requires any loss be "a *consequence* of the breach."[125] Liability is further limited by the requirement that the seller knew or should have known before liability attaches.[126] Most significantly, Article 25 requires that one *foresee* or should have foreseen the result and detriment.[127] Finally, Article 74 also requires that one foresee or ought to have foreseen the loss at the conclusion of the contract before damages can be awarded.[128]

The CISG is also limited to international, commercial sales transactions.[129] These limitations further restrict liability under the CISG, as the CISG only governs those sellers and buyers with an international, commercial relationship.[130] These two axiomatic principles of the CISG curtail unlimited liability. Excluding consumers and intra-national sales transactions ensures that only international merchants—whether upstream or not—are responsible for conforming their conduct to CISG standards and guidelines.

Finally, the CISG is essentially permissive.[131] The CISG

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123 *See id.* art. 6.

124 *See, e.g., id.* art. 57, ¶ 1 (limiting all sellers' responsibility for increases in costs related to moving locations to situations where seller *causes* the move to occur); *id.* art. 80 (limiting all sellers' right to recover when seller *causes* the other's failure to perform).

125 *Id.* art. 74 (emphasis added).

126 *See, e.g., id.* art. 2 (requiring that all sellers *know* or should have known the goods were not for personal or household use); *id.* art. 8, ¶ 1 (requiring that the other party *know* or should have known the subjective intent of a party before it can be used to interpret conduct and actions); *id.* art. 9, ¶ 2 (restricting international trade usages to those the parties *knew* or should have known about); *id.* art. 35, ¶ 2(b) (requiring that all sellers *know* or should have known of the buyer's specific purpose for the goods); *id.* art. 68 (requiring that all sellers *know* or should have known the goods were damaged before liability attaches).

127 *See id.* art. 25.

128 *See* CISG, *supra* note 1, art. 74.

129 *See id.* art. 1 (mandating the parties be from different contracting states).

130 *See id.*

131 *See id.* art. 6 (allowing parties to exclude application of the agreement).

counsels all sellers and buyers that governance under the CISG may be excluded entirely or modified by agreement.[132] Moreover, the text repeatedly advises that "unless otherwise agreed," the CISG provisions apply as written.[133] This leaves the ultimate choices of when, how, and to what extent upstream sellers may incur liability completely within the hands of sophisticated, international merchants.[134]

Consequently, liability safeguards are already in place. This direct path interpretation will not increase the potential for liability and leaves ultimate responsibility where it should be. The combination of causation, internationalism, knowledge, and party autonomy ensures that those international, commercial sellers, whom are ultimately responsible and contract for liability, maintain it. Further, this combination ensures that unlimited or expanded liability does not occur.

Accordingly, the definition of the term *seller* does not exclude upstream sellers. The CISG's international character and principles of uniformity and good faith favor an interpretation that includes these entities. As protections exist within the CISG framework to ensure that unfettered, unlimited liability does not result,[135] upstream sellers can be, and are, included within the term *seller*.

C. Article 7(2) Demands This Textual Interpretation

"Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based . . . ."[136] Courts

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132 *See id.*

133 *See, e.g., id.* art. 9, ¶ 2 (permitting parties to agree that specific trade usages will not apply); *id.* art. 35, ¶ 2 (permitting parties to agree that a good will meet an ordinary or particular purpose).

134 *See also* Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 9, 2002, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1651, 2002 (Ger.), translated in Federal Supreme Court (Bundesgericht), Civil Panel, VIII, CISG Case Presentation (William M. Baron & Burgit Kurtz eds., Alston & Bird LLP trans., 2002), [hereinafter *The Powdered Milk Case*], *avaliable at* http://www.cisg.law.pace.edu/cases/020109g1.html (discussing the obligation of parties to contract for, and around, certain liabilities); Schwenzer & Schmidt, *supra* note 3, at 119 n.50 (highlighting contract clause utilized to limit liability and define the extent of the CISG's application).

135 *See* Schwenzer & Schmidt, *supra* note 3, at 119 n.50.

136 CISG, *supra* note 1, art. 7, ¶ 2. It is only after one gets through article 7, ¶ 1 and

and arbitral panels should read the text of the CISG to define *seller* as all *sellers* through Article 7(1). The question of who is a *seller* is necessarily governed by the CISG, and is settled through interpretation by Article 7(1).[137] However, even assuming arguendo that *seller* cannot be interpreted that way, the CISG—at a minimum—governs this issue, but it may be silent as to its resolution.[138] If so, Article 7(2) must be utilized and the general principles on which the CISG is based must be addressed. These general principles only bolster the conclusion that direct action and upstream sellers are part of the CISG regime.

1. The CISG Governs Who is a Seller

The CISG, explicitly through Article 4, governs sales transactions in an international context and the attendant rights and obligations of buyer and seller thereunder.[139] By explicitly governing the rights of the undefined *buyer* and *seller* the CISG at least governs the issue of who is a buyer or seller. While there are those who disagree,[140] the CISG at least governs the rights and obligations of those considered buyer and seller.[141] Thus, the question of whether *seller* includes *upstream seller* is certainly governed, but may not be expressly settled, by the CISG. Therefore, the first part of Article 7(2)—general principles on

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this part of article 7, ¶ 2 that one can begin addressing application of national sales law. *See id.* ("[O]r, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."). Professor Smythe aptly counsels, "excessive recourse to domestic law in the face of apparent gaps in the CISG only frustrates the CISG's purpose of promoting uniformity and encourages forum shopping." Smythe, *supra* note 9, at 131-32.

137 *See* CISG, *supra* note 1, art. 7, ¶ 1 (requiring that regard be given to the international nature of the agreement and recognizing the need for uniformity and the observance of good faith in its application).

138 Schwenzer & Schmidt, *supra* note 3, at 114 ("The CISG itself is silent on the admissibility of direct contractual claims by non-privity parties.").

139 *See* CISG, *supra* note 1, art. 4.

140 *See* Schwenzer & Schmidt, *supra* note 3, at 114-15 ("Certainly, no positive answer concerning the general question of admissibility of a contractual claim without privity can be derived from the CISG. . . . [But], this question is entirely outside the scope of the Convention."). *But see id.* at 114 ("The CISG itself is silent on the admissibility of direct contractual claims by non-privity parties.").

141 *See* Smythe, *supra* note 9, at 131 (explaining that construing "whether a buyer under a CISG may have rights against a third party, such as a remote seller, as a matter not addressed by the CISG" is "a dubious construction of the CISG at best").

which the CISG is based—must be considered.

2. *The General Principles on Which the CISG is Based Support Including Upstream Sellers*

The "general principles on which [the CISG] is based"[142] is an open concept that scholars often debate. However, the ideas of international character, uniformity, and good faith (from Article 7(1)) are generally accepted principles.[143] In addition, appropriate parties bearing the risk of loss,[144] "full compensation,"[145] parties working out differences before going to court,[146] and freedom of contract and party autonomy[147] are also general principles on which the CISG is based.

a. *Uniformity, International Character, and Good Faith*

As discussed above[148] an interpretation which holds upstream sellers liable for the wrongs they cause advances good faith, while the current interpretation, which allows upstream manufacturers to subvert or shirk liability and to strain judicial economy, does not advance good faith. Expanded liability is not a consideration against this good faith principle, as safeguards against unlimited,

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142 CISG, *supra* note 1, art. 7, ¶ 2.

143 JOSEPH F. MORRISSEY & JACK M. GRAVES, INTERNATIONAL SALES LAW AND ARBITRATION 57 (2008); CISG-AC Op. 6, *supra* note 115.

144 *See, e.g.*, CISG, *supra* note 1, art. 18, ¶ 2 (placing the risk of loss of international mail acceptances with the buyer—the party better able to bear any confusion of the international mails); *id.* art. 40 (removing the two-year time limit on claims where the seller knew of an existing problem); *id.* art. 67 (mandating that risk of loss only pass when the seller, who has the goods or was in last possession of them, notifies the seller or clearly identifies the goods); *id.* art. 68 (placing risk of loss during in-transit contracts on the seller—the party better able to guard against any loss prior to contracting); *id.* art. 69, ¶ 1 (allocating risk of loss to seller, until delay becomes a breach, because the goods remain with seller at seller's location).

145 CISG-AC Op. 6, *supra* note 115 ("Article 74 reflects the general principle of full compensation."); *see also* CISG, *supra* note 1, art. 74 (applying a broad definition of recoverable damages).

146 *See generally* MORRISSEY & GRAVES, *supra* note 143, at 57 (citing notice and cure provisions under articles 19, 21, 39, 47, 48, and more).

147 *Id.*

148 *See supra* Part IV.B.2 (discussing good faith in interpretation under article 7(1)).

unfettered, new liability currently exist.[149] Good faith requires that where a party causes harm, that party is held responsible.[150] Good faith provides the simplest, most efficient, enforceable[151] means by which to accomplish this: including upstream sellers within the definition of *seller*. Further, the principles of international character and uniformity counsel in favor of this interpretation.[152] With the multitude of ways up, around, over, and under the privity barrier,[153] this interpretation streamlines the process and provides a uniform result of liability for harms through one regime;[154] rather than the inconsistent, non-uniform, piece-meal structure that currently focuses on the national law of seventy-eight different countries to achieve the same result.[155] Therefore, to the extent that there is a gap and an Article 7(2) analysis is necessary, this interpretation aligns with the general principles of good faith, international character, and uniformity.

b. Appropriate Parties Bearing the Risk of Loss

The CISG drafters discussed the issue of which party is in a better position to bear the risk of loss.[156] By using risk of loss as a lens to determine the correct rule, application, or interpretation, the CISG strikes an appropriate balance of who is ultimately responsible, and it places the risks and rewards of contracting with the appropriate party.[157] The textual approach to include upstream sellers furthers this interest.

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149 *See supra* Part IV.B.3 (discussing the myth of expanded liability).

150 *See supra* Part IV.B.2 (discussing good faith in interpretation under article 7(1)).

151 While there is a convention covering international enforcement of foreign arbitral awards, the same cannot be said for foreign judgments. *See* N.Y. Conv., *supra* note 118. And, as is quite often the case in international sales contracts, the parties opt for arbitration rather than suit in a national court—increasing the ease of enforceability.

152 *See supra* Part IV.B.1 (discussing internationalism and uniformity sections).

153 *See supra* Part II (detailing the erosion of privity); *supra* Part III (detailing the various avenues to maneuver up, around, over, and under the CISG).

154 *But see generally* Schwenzer & Schmidt, *supra* note 3 (devoting an entire article to subversion of a direct route).

155 *See* UNCITRAL Status, *supra* note 44.

156 *See, e.g.*, Peter Schlechtriem, *Uniform Sales Law in the Decisions of the Bundesgerichtshof* (Todd Fox trans., 2001), http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem3.html (last visited Jan. 16, 2013).

157 *See id.*

This balance can be seen throughout the CISG.[158] The CISG drafters chose not to adopt the common law mailbox rule, as international mail systems would likely be less known and reliable than their national counterparts; therefore, it would be appropriate to make acceptances valid upon receipt, not posting.[159] Additionally, the CISG drafters recognized this idea in Article 79(1) and (2)—holding sellers responsible for those within their own supply chain, absent exceptional circumstances.[160] And, as a final example, the CISG includes numerous notice requirements and exemptions based on which party knew what and when.[161]

Including upstream sellers furthers this balance. First, an upstream seller is better able to bear and distribute the risk of loss than the buyer.[162] Second, a sophisticated, international seller (upstream or otherwise) is in a better position to know its own downstream market and distribution scheme than a purchaser. The upstream seller, therefore, has the ability to create, control, and monitor the situation; it is thus in the better position to control and bear any risk of loss. The purchaser did not create the distribution scheme and has little, if any, control over how the good ultimately gets to it. Finally, the CISG places more obligations on the

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158 *See supra* note 144 and accompanying text.

159 *See id.* art. 18(2); *see also Guide to CISG Article 18, Secretariat Commentary*, Albert H. Kritzer CISG Database, PACE INST. INT'L COM. L., http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-18.html (last visited Jan. 16, 2013).

160 *See* CISG, *supra* note 1, art. 79(1)-(2); *see also* CISG Advisory Council Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG (adopted Oct. 12, 2007), *available at* http://www.cisgac.com/default.php?ipkCat=128&ifkCat=148&sid=169; Peter Schlectriem, FED. SUP. CT. (BUNDESGERICHTSHOF), CIV. PANEL VII, No. VIII ZR 121/98 (Todd Fox & Sonja Corterier trans., 1999), *available at* http://cisgw3.law.pace.edu/cases/990324g1.html#cc (emphasizing that if a seller "cannot bear [the risk of loss of his suppliers], or does not want to, he must contractually limit it or exclude it"); Schwenzer & Schmidt, *supra* note 3, at 119 n.50.

161 *See, e.g.*, CISG, *supra* note 1, art. 20 (requiring notice for avoidance, ensuring that the party who seeks to avoid a contract notifies the other); *id.* art. 39 (requiring that the buyer, who now has the goods and is in the best position to determine if there is a problem, provide notice of those problems to the seller); *id.* art. 40 (removing the two-year time limit on claims where the seller knew of an existing problem); *id.* art. 67 (mandating that risk of loss only pass when the seller, who has the goods or was in last possession of them, notifies the seller or clearly identifies the goods).

162 *Manufacturers Liability, supra* note 34, at 539 (citing Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring)).

seller,[163] which is understandable given the seller is the party that ultimately controls the good and can control the risk associated with that good. Therefore, to the extent there is a gap, and an Article 7(2) analysis is necessary, this interpretation aligns with the general principle risk of loss allocation. Continuing this principle by including upstream sellers comports with the risk of loss allocations provided for in the CISG.

c. Full Compensation

The CISG expresses the principle of full compensation,[164] and Article 74 embodies that principle by allowing for a broad damages calculation.[165] In addition, the remedies afforded under the CISG are cumulative,[166] thus ensuring full compensation. This principle of full compensation is upheld by an interpretation which grants buyers a remedy under the CISG when an upstream seller is the cause of damages. However, the principle is confounded when an aggrieved buyer must suffer the uncertainty, potential unenforceability, and maze of national laws[167] to hold a responsible upstream seller liable for damages. The principle of full compensation is also not furthered when buyers are left without efficient, certain recourse to hold the responsible party liable. Therefore, to the extent there is a gap and an Article 7(2)

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163 *Compare* CISG, *supra* note 1, arts. 30-44 (covering the seller's obligations, such as the manufacture, production or distribution of the good, delivery or handing over, and conformity), *with* CISG, *supra* note 1, arts. 53-60 (covering the two obligations of the buyer: to pay and take delivery).

164 CISG-AC Opinion No. 6, *supra* note 115 ("Article 74 reflects the general principle of full compensation.").

165 CISG, *supra* note 1, art. 74 (mandating that damages "consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach").

166 *See id.* art. 45(2) (preserving buyer's right to damages even if buyer exercises other remedies); *id.* art. 61(2) (preserving seller's right to damages even if seller exercises other remedies); *see also* CISG-AC Opinion No. 6, *supra* note 115, cmt. 1 ("Article 74 reflects the general principle of full compensation."); CISG Advisory Council Opinion No. 8, Calculation of Damages Under CISG Articles 75 and 76, Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA (adopted Nov. 15, 2008), *available at* http://www.cisgac.com/default.php?ipkCat=128&ifkCat=148&sid=184 (explaining that the remedies afforded under Articles 75 and 76 are cumulative).

167 *See* Schwenzer & Schmidt, *supra* note 3, at 115-17 (describing the complexities of determining what national law applies).

analysis is necessary, this interpretation aligns with the general principle of full compensation, ensuring that buyers fully recover for any losses.

d. Preserving Contracts and Using Litigation and Arbitration as a Last Resort

The general principle of preserving contracts—that is, using courts and arbitral panels as a last resort and urging parties to work out issues on their own—can be seen throughout the CISG.[168] This idea is especially important given the current economic situation. All parties must be cognizant of transaction, litigation, and arbitration costs, while seeking the most efficient, economical ways to handle issues that arise under international sales contracts. The CISG recognizes this need through the plethora of notice[169] and cure provisions.[170] The general principle of preserving contracts and resources is furthered by the high burden of fundamental breach before avoidance.[171] Thus, the CISG supports the goal of efficiency and the doctrine *pacta sunt servanda* (i.e., agreements must be kept).[172]

Under current CISG interpretations, a buyer may sue its direct seller, which may then sue its direct seller, which may then sue its direct seller . . . to continue ad nauseam.[173] Yet, the end result remains the same; the ultimately responsible party still bears the final burden. But, the time, effort, and expense to reach this end increases with each step in the process. And, there is always the potential that a kink in this litigation or arbitration chain could prevent suit all the way to the liable upstream seller.[174] As

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168 *See supra* note 146 and accompanying text.

169 *See, e.g.*, CISG, *supra* note 1, art. 26 (requiring notice to avoid a contract); *id.* art. 39 (requiring buyer to notify seller of lack of conformity); *id.* art. 71(3) (requiring a party seeking to suspend performance and give notice "immediately").

170 *See, e.g.*, *id.* art. 37 (allowing seller to cure if it has delivered before the delivery date); *id.* art. 48 (allowing seller to cure even after the delivery date).

171 *See generally id.* art. 25 (mandating that a party be *substantially deprived* of what it was entitled to expect before avoidance is possible).

172 *See* BLACK'S LAW DICTIONARY, *supra* note 14, at 957 (defining *pacta sunt servanda*, which is Latin for "agreements must be kept," as "the rule that agreements and stipulations, esp. those contained in treaties, must be observed").

173 *See supra* note 38 and accompanying text.

174 *See* Smythe, *supra* note 9, at 137.

litigation and arbitration of complex, international sales transactions are already costly due to the inherent nature of an international sales agreement, adding the costs of multiple arbitrations or court dates to reach the same result is inefficient and uneconomical.

Similarly, if the upstream sellers have indemnification agreements, the multiplicity of suits and/or arbitrations continues the time, effort, and costs for each seller and buyer. Or, where the entities in the chain of arbitrations and/or suits are left with the uncertainty of remedy, result, or enforceability under a variety of legal regimes, efficiency is again decreased.[175] Therefore, as Professor Schwenzer explains "the direct claim may be overall more beneficial to the manufacturer because in this way fewer transaction costs accrue."[176]

Finally, interpreting the CISG to allow a direct action increases efficiency by way of judicial and arbitral economy. With courts and tribunals already burdened with overcrowded dockets, adding unnecessary cases hinders the ability for parties to be heard. Therefore, this definition complies with the CISG principle of using litigation as a last resort and keeping contracts alive, while ensuring the most efficient and economical result if litigation or arbitration is necessary.[177]

e. Party Autonomy

Parties can, and do, contract around and for specific limitations, rights, and responsibilities;[178] and, the CISG is based on the general principles of party autonomy and choice.[179] A sophisticated, international seller or buyer (upstream or otherwise)

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175 The idea of certainty is a transaction cost, which law and economic scholars consider in determining the most efficient and economical result. *See generally* HARRISON, *supra* note 120 (discussing, generally, the idea of transaction costs and certainty).

176 Schwenzer & Schmidt, *supra* note 3, at 115.

177 *See supra* notes 169-73 and accompanying text.

178 *See, e.g.*, *The Powdered Milk Case*, *supra* note 134 (describing the contract for sale of powdered milk).

179 *See* CISG, *supra* note 1, art. 6 (allowing parties to exclude application of the CISG or modify its application); *see also id.* art. 9(2) (permitting parties to agree that specific trade usages will not apply); *id.* art. 35(2) (permitting parties to agree a good will meet an ordinary or particular purpose).

has the responsibility to pay for the harm it causes; but, at the same time, may contract for and around anything it does not want.[180] In general, the CISG applies to arms-length transactions between sophisticated business entities capable of discussing and negotiating aspects of their relationship, including liability and remedies.[181] Therefore, there is nothing in including upstream sellers that would detract from this general principle.

Accordingly, if one reaches the requirement of utilizing the general principles of the CISG to form an interpretation, those general principles counsel in favor of including upstream sellers. This interpretation promotes the general principles of (i) international character, uniformity, and good faith; (ii) appropriate parties bearing the risk of loss; (iii) full compensation; (iv) party autonomy; and (v) parties working out matters first before going to court or arbitration.

V. Conclusion

The regime governing international sales contracts provided for by the CISG does not cater to privity: "an obsolete vestige of the pre-modern world that undermines economic efficiency and sound business ethics."[182] Rather, the CISG should include upstream sellers within Article 4's *seller* language. The current text provides for this definition and interpretation.[183] The national doctrine of privity has been eroded away,[184] and does not deserve to remain in a modern, international sales convention, where the text and interpretive requirements conflict with this ancient doctrine.

As the CISG governs the relationship between buyer and seller,[185] the question of who is a seller certainly arises. The term

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180 *See The Powdered Milk Case*, *supra* note 134 (discussing the obligation of parties to contract for, and around, certain liabilities); Schwenzer & Schmidt, *supra* note 3, at 119 n.50 (highlighting contract clause utilized to limit liability and define the extent of the CISG's application).

181 *See* CISG, *supra* note 1, art. 7(1) (requiring international, merchant parties involved in commercial trade); Smythe, *supra* note 9, at 138 n.62.

182 Smythe, *supra* note 9, at 143.

183 *See supra* Part IV (explaining how the CISG text supports including upstream sellers).

184 *See supra* Part II.

185 CISG, *supra* note 1, art. 4.

seller is not expressly defined, but Article 7(1)'s mandate to use uniformity, the CISG's international character, and good faith to make this interpretation counsels in favor of upstream sellers being included. Adequate safeguards are in place to quell any suggestion of increased or unfettered liability. Moreover, assuming the CISG governs—but does not decide—the issue of who is a seller, Article 7(2)'s mandate to utilize general principles upon which the CISG is based also counsels in favor of this interpretation. The general principles of international character, uniformity, and good faith, as well as appropriate parties bearing the risk of loss, full compensation, parties working out matters first before going to court or arbitration, and party autonomy support an interpretation which includes upstream sellers.

In sum, while many prefer to jump to the privity conclusion and seek a national law remedy, an examination of the text does not provide for this approach. An examination of the text, through the lens of the CISG interpretive article, favors an interpretation placing upstream sellers within Article 4's use of the term *seller*. Simply—and textually—stated, there is no need to travel up, around, over, or under the privity doctrine to achieve the same liability. The text provides that upstream sellers are *sellers* within Article 4 of the CISG.