

**The Road to Nowhere:
Caterpillar v. Usinor and CISG Claims by Downstream Buyers Against
Remote Sellers**

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Introduction

The first issue to resolve in any contract dispute is which body of contract law applies. The task is not as simple as it sounds or as it once was. In an international contract dispute the court must first apply private choice of law rules to determine which nation-state's laws govern. If the court determines that U.S. law applies it must then decide which body of U.S. law. There are a hundred and one different sets of contract rules that could apply to an international contract dispute under U.S. law alone. If the parties have places of business in different Contracting States and the contract is for goods for non-household uses then the UN Convention on Contracts for the International Sale of Goods ("CISG", "the Convention") applies under federal law.¹ If the parties do not have places of business in different contracting states and the contract is for non-household goods, or if the parties do have places of business in different Contracting States and the contract is for household goods, then some U.S. state's version of Article 2 of the Uniform Commercial Code (UCC) will apply.² If the contract is not for goods of any kind then some state's version of the common law will

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¹ See United Nations Convention on Contracts for the International Sale of Goods art. 1(a), Apr. 11, 1980, S. TREATY DOC. NO. 98-9 (1983), 1489 U.N.T.S. 3, available at <http://www.cisg.law.pace.edu/cisg/text/treaty.html> [hereinafter CISG]. The U.S. Senate ratified the CISG in 1986 giving it the force of federal law when the Convention came into effect on January 1, 1988. See also *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador (PetroEcuador)*, 332 F.3d 333, 336 (5th Cir. 2003) ("The CISG, ratified by the Senate in 1986, creates a private right of action in federal court."). As of January 20, 2010 a total of 74 nations have ratified the CISG and thus become "Contracting States." See Pace Law School Institute of International Commercial Law, CISG: participating countries (Jan. 22, 1998), <http://www.cisg.law.pace.edu/cisg/countries/cntries-United.html>.

² In some Contracting States the CISG might apply even if the parties do not have places of business in different Contracting States under CISG, Article 1(b). The U.S. has, however, declared a reservation to Article 1(b) as permitted by CISG, Article 95. Thus, Article 1(b) does not apply under U.S. law. See U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods, 52 Fed. Reg. 6262-02 (March 2, 1987) [hereinafter U.S. Ratification of CISG] ("United States ratification was coupled with a declaration that the United States would not be bound by Article 1(1)(b), which will have a narrowing effect on the sphere of application of the Convention.").

apply.³ Since there are fifty states this adds up to a hundred and one different sets of contract rules that could apply to the parties' dispute.

In the modern world, with its growing volume of transnational transactions this is too many rules. Indeed, the purpose of the CISG is to promote uniformity in international sales law and good faith in international trade.⁴ Although the CISG itself only seeks to bring uniformity to a limited set of international contracts, it was the product of larger forces to bring harmony and uniformity to international law and facilitate the expansion of international trade and commerce.⁵ It is important to remember that the CISG was the product of a bargain between representatives from many nations with a diverse range of legal systems. As a consequence, the CISG's rules are quite spare by comparison to U.S. law and they are stated in unfamiliar language that is devoid of many U.S. commercial law terms. The spare structure of the CISG's rules and the unfamiliar terms inevitably raise questions of interpretation. What are courts to do when they face questions that the CISG does not explicitly address, at least in terms with which they are familiar?

The CISG itself offers some guidance on this question: Under Article 7(1) courts are directed to interpret the CISG's provisions in a manner that promotes uniformity in its application and good faith in

³ In some cases it may be difficult to determine whether the contract is for goods or services. Both the CISG and U.S. case law apply a test for determining whether the contract should be treated as one for the sale of goods. The majority of courts in the U.S. apply the predominant factor test under domestic law. *BMC Industries, Inc. v. Barth Industries, Inc.*, 160 F.3d 1322, 1330 (11th Cir. 1998). This approach is similar to the test applied under the CISG, Article 3(2). See Explanatory Note by the UNCITRAL Secretariat on the Convention on the Limitation Period in the International Sale of Goods and the Protocol amending the Convention on the Limitation Period in the International Sale of Goods, ¶ 7, U.N. Doc. V.89-53886 (June 1989):

Since the Convention applies only in respect of international sales contracts, it clarifies whether contracts involving certain services are covered. A contract for the supply of goods to be manufactured or produced is considered to be a sales contract unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for their manufacture or production. Furthermore, when the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services, the Convention does not apply.

⁴ See CISG, *supra* note 1, preamble & art. 7(1).

⁵ See Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 445 (2000).

international trade.⁶ Article 7(2) indicates that when confronted with an apparent gap in the CISG, courts must first look to the general principles upon which the CISG is based and, if they fail to find any, then select the domestic legal rules applicable under private choice of law rules.⁷ Unfortunately, this invites controversy. It encourages parties to find gaps in the rules so that they may argue for the application of domestic laws that work to their advantage. To the extent that courts are susceptible to these arguments, the scope of the CISG is narrowed and diverse domestic laws displace uniform international laws in the adjudication of international sales disputes. The purpose of the CISG is thus undermined.

The problem is vividly illustrated by a recent U.S. federal district court case in the Northern District of Illinois: *Caterpillar v. Usinor*.⁸ *Caterpillar* addresses a fundamental contracting problem: whether a downstream buyer – a buyer who bought goods from a remote seller through some intermediary – can make a contract claim against a remote seller – a seller who sold goods to a downstream buyer through some intermediary. The court in *Caterpillar* thus had an opportunity to contribute to the development of a coherent body of international sales law and promote good faith in international trade. It did exactly the opposite. The court accepted an argument that the preemptive effect of the CISG was limited to contract claims by the seller's immediate buyer and construed the CISG to require privity. It also allowed the downstream buyer to make a domestic contract claim against the remote seller under the common law doctrine of promissory estoppel. Part I of this essay provides a Statement of the Case. Part II, the Analysis Section, argues that the court succumbed to an overwhelming “homeward trend bias” and rendered an opinion that undermines the CISG and confounds Illinois law. Part II further argues that the court could and should have reached the same outcome by developing a theory for allowing downstream buyers to make claims against remote sellers under the CISG.

⁶ 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.”).

⁷ *Id.* art. 7(2) (“Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.”).

⁸ *Caterpillar, Inc. v. Usinor Industeel*, 393 F. Supp. 2d 659 (N.D. Ill. 2005).

I. Statement of the Case

A. A Fork in the Road

The case arose from a set of transactions that Caterpillar undertook to supply its customers with mining trucks at various locations in the U.S.⁹ To that end, Caterpillar negotiated with Usinor Industeel (“Usinor”), a French steel company, and its own Mexican subsidiary, Caterpillar, Mexico (“CMSA”) for the supply of steel to CMSA so that CMSA could use the steel in the manufacture of the truck bodies.¹⁰ Usinor represented to Caterpillar and CMSA that its steel was of a new type called “Creusabro 8000” which was harder, stronger, welded better, and could be processed more cheaply than regular steel.¹¹ In fact, Usinor even supplied Caterpillar with a sample of the steel and indicated that the sample was representative of the steel they could provide in substantial quantities.¹² Caterpillar informed Usinor that the steel would be used for truck bodies and gave Usinor the design specifications.¹³

Based on these representations from Usinor, Caterpillar submitted proposals to its customers to manufacture dump trucks using the Creusabro steel.¹⁴ After contracting to supply trucks to many of its customers, Caterpillar contracted with CMSA for the supply of truck bodies and CMSA contracted with Usinor for the supply of Creusabro steel.¹⁵ Caterpillar subsequently delivered new trucks to its customers. There were apparently no problems with the trucks delivered in the first shipment, but the bodies in several of the trucks delivered in subsequent shipments cracked.¹⁶ The cracks and potential for cracking made the vast majority of the trucks that Caterpillar delivered to its customers inoperable.¹⁷ In

⁹ The transactions were actually initiated by Usinor Idusteel and its North American subsidiary, Usinor Industeel, USA, who were defendants in the case. They initially requested a meeting with Caterpillar to present a sales pitch for Usinor’s new “Creusabro” steel. *Caterpillar*, 393 F. Supp. 2d at 664–65.

¹⁰ This explanation of the commercial dispute is a simplification. Caterpillar also contracted for truck bodies manufactured with the Creusabro steel from an independent company called Western Technology Services International, Inc. (Westech). The truck bodies manufactured by Westech had the same defects as those manufactured by CMSA.

Id.

¹¹ *Id.*

¹² *Id.* at 665.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Caterpillar*, 393 F. Supp. 2d at 665.

¹⁶ *Id.* at 666.

¹⁷ *Id.*

addition, the steel proved to be of low quality and more difficult to use than CMSA had been led to believe it would be so CMSA incurred higher than expected costs in manufacturing the truck bodies.¹⁸

B. The Road Taken

Caterpillar and CMSA filed a complaint against Usinor seeking damages for repairs to cracked truck bodies, increased production costs, and loss of goodwill.¹⁹ The complaint alleged breach of express and implied warranties under the CISG as well as the Illinois version of Article 2 of the UCC, in addition to a promissory estoppel claim under Illinois common law.²⁰ In its defense, Usinor claimed, among other things, that all of Caterpillar's and CMSA's UCC claims were preempted by the CISG, and that since the CISG states that it governs only the formation of the contract of sale and the rights and obligations of the seller and buyer, only CMSA had standing to assert any claims.²¹

The case thus raised a question about the preemptive effect of the CISG. Since the CISG is federal law, the court correctly observed that this was essentially a question about the CISG's scope.²² Under the Supremacy Clause of the U.S. Constitution the CISG clearly preempts any state law causes of action within its scope.²³ Caterpillar argued that the CISG could only preempt state law claims by CMSA.²⁴ The court did not directly address this issue. Instead, in a subtle but important way, the court shifted the framing of the question from one about the preemptive effect of the CISG to one about standing to bring claims under the CISG.²⁵ The court

¹⁸ *Id.*

¹⁹ The complaint also named Usinor's North American distributor, Leeco Steel Products, Inc. (Leeco) and its North American subsidiary Usinor Industeel, Inc. (Usinor USA). *Id.* at 667. The counts filed against Leeco and Usinor USA were in the alternative to the counts filed against Usinor in the event that Leeco and Usinor USA were found not to be Usinor's agents. Since the court did find that Leeco and Usinor USA were Usinor's agents these alternative counts were dismissed. *Id.* at 672.

²⁰ *Id.* at 667. There was also a claim under French law in the alternative to the application of U.S. law but the court dismissed that claim as well. *Id.* 669.

²¹ *Id.*; see CISG, *supra* note 1, art. 4 (stating that the CISG governs "only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such a contract.").

²² *Caterpillar*, 393 F. Supp. 2d at 667.

²³ *Id.*

²⁴ *Id.*

²⁵ See *id.* at 673–74. The court in *Caterpillar* interprets Article 4 of the CISG to limit claims to those by the buyer against the seller. *Id.* at 674. But Article 4 indicates that the CISG governs only the "rights and obligations of the seller and buyer." CISG, *supra* note 1,

noted that it was CMSA that bought the steel from Usinor, not Caterpillar, and that only CMSA could therefore assert claims against Usinor under the CISG.²⁶ Since Caterpillar was not a party to the contract between CMSA and Usinor, Caterpillar did not have standing to bring claims against Usinor under the CISG and the CISG did not therefore preempt Caterpillar from bringing state law claims against Usinor.²⁷ As the discussion below will elaborate, this was an unfortunate error in the court's logic.

Caterpillar made UCC claims against Usinor for breach of express and implied warranties as well as a promissory estoppel claim under Illinois common law.²⁸ Illinois law however, requires privity of contract for the recovery of economic damages under UCC express or implied warranty claims.²⁹ Caterpillar attempted to establish that certain exceptions to the privity requirement applied, but the court disagreed.³⁰ Caterpillar was thus left with only its promissory estoppel claim. Under Illinois law a plaintiff can assert a promissory estoppel claim by alleging that (i) an unambiguous promise was made, which was (ii) reasonably and justifiably relied upon by the promisee, that (iii) the reliance was expected and foreseeable by the promisor, and that (iv) the promisee relied to her detriment.³¹ Usinor argued that none of the statements it had made to Caterpillar constituted unambiguous promises since they were merely representations of fact and opinion, and that Caterpillar's promissory estoppel claim should therefore have been dismissed too.³² The court, however, again disagreed. The court therefore allowed CMSA to proceed with CISG claims against Usinor but not with any Illinois UCC or common law claims, and it disallowed Caterpillar from proceeding with any CISG claims or Illinois UCC claims but allowed it to proceed with an Illinois common law promissory estoppel claim. This confounded both the CISG and Illinois law.

art. 4. It does not state that the CISG limits claims to those by the immediate buyer against the seller or that it precludes claims by downstream buyers against upstream sellers. *Id.*

²⁶ *Caterpillar*, 393 F. Supp. 2d at 674. This conclusion presumes, of course, that under the CISG a seller can only have obligations to a party with which it is in privity of contract. That is not at all clear. See Ingeberg Schwenzer and Mareike Schmidt, *Extending the CISG to Non-Privity Parties*, 13 VINDOBONA J. OF INT'L COM. L. & ARB. 109, 114–15 (2009) (contending that just because the CISG is silent regarding third-party claims against sellers does not mean that it precludes such claims).

²⁷ *Caterpillar*, 393 F. Supp. 2d at 673–76.

²⁸ *Id.* at 667.

²⁹ *Id.* at 677–78.

³⁰ *Id.* at 678.

³¹ *Id.* at 679–80.

³² *Id.* at 680–81.

II. Analysis

This section argues that the *Caterpillar* court's opinion undermines efforts to unify international commercial law. It argues that the court should have interpreted the CISG to preempt any domestic contract laws, including the UCC and the doctrine of promissory estoppel. It argues that, by allowing domestic contract claims, the *Caterpillar* court failed to promote good faith in international trade or make any effort to apply the CISG in conformity with the general principles upon which it is based. Moreover, it argues that the court confounded both the CISG and Illinois law when it construed the CISG to require privity of contract for a breach of contract claim and allowed a domestic contract claim against the remote seller under the common law doctrine of promissory estoppel. If followed, *Caterpillar* will not only create disunity in international sales, impede good faith in international trade, and promote forum shopping, but it will also diminish the amount and value of information remote sellers provide about their goods and distort their decisions about their distribution systems. Finally, this section proposes an alternative approach: courts should instead 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. 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.

A. *This is the Road to Nowhere: Problems with the Caterpillar Decision*

To begin with, the *Caterpillar* court construed the scope of the CISG too narrowly. Indeed, the court misapplied Article 4 of the CISG when it construed the preemptive effect of the CISG to extend only so far as the CISG confers standing on a party to bring a cause of action. On the contrary, since the CISG is federal law its preemptive effect extends to any matters within its scope. Although Article 4 states that the CISG governs only the "formation of the contract" and the "rights and obligations of the seller and buyer," this should at the very least mean that the CISG governs all the contractual rights and obligations of the seller and buyer and that it therefore preempts any conflicting domestic contract laws that might otherwise apply.³³ As the court construed the case in *Caterpillar* there was a

³³ Article 4 also states that the CISG is "not concerned with: (a) the validity of the contract or of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold." CISG, *supra* note 1, art. 4(a). Neither of these limitations seems relevant to the scope of a seller's obligations.

contract between CMSA and Usinor for the supply of steel. This contract was clearly governed by the CISG. Thus, any contractual obligations that Usinor might have had towards a third party such as Caterpillar should have derived from the provisions of the CISG.³⁴ As the discussion below will elaborate, the court might have found such obligations elsewhere in the CISG if it had looked for them, but it did not.

Indeed, as the court construed the case there was a separate contract between Caterpillar and CMSA for the supply of truck bodies.³⁵ This contract was also clearly governed by the CISG, since Caterpillar and CMSA had places of business in different Contracting States.³⁶ The CISG should therefore have preempted any domestic contract laws that might otherwise have applied to their transaction, including the UCC as well as Illinois common law doctrines, such as promissory estoppel, which sound in contract rather than property or tort. Thus, all the contractual rights and obligations of both Caterpillar and CMSA should have derived from the provisions of the CISG. It may be difficult to imagine which provisions of the CISG may be construed to endow a buyer with rights against a third party, such as a remote seller, but even if the CISG does not endow the buyer with such rights, that does not justify the court in allowing the buyer to assert claims under domestic contract law.

³⁴ This is the way other federal courts have construed the preemptive effect of the CISG. See *Geneva Pharm. Tech. Corp. v. Barr Laboratories, Inc.*, 201 F. Supp. 2d 236, 285 (S.D.N.Y. 2002) (“This Court concurs that ‘the expressly stated goal of developing uniform international contract law to promote international trade indicates the intent of the parties to the treaty to have the treaty preempt state law causes of action.’”); *Asante Tech., Inc. v. PMC – Sierra, Inc.*, 164 F. Supp. 2d 1142, 1151 (N.D. Cal. 2001) (“The Court concludes that the expressly stated goal of developing uniform international contract law to promote international trade indicates the intent of the parties to the treaty to have the treaty preempt state law causes of action.”).

³⁵ *Caterpillar*, 393 F. Supp. 2d at 677. One of the puzzles in the case is why Caterpillar did not attempt to rely on principles of agency to contend that it was a party to the contract with Usinor for the supply of the steel. Perhaps the plaintiff’s strategy was to expand the scope of its claims. CMSA was clearly precluded from making domestic law claims and Caterpillar would have been too if it was a party to the contract for the supply of the steel. As a separate party contracting for the supply of the truck bodies, however, Caterpillar could plausibly attempt to make domestic law claims.

³⁶ See CISG, *supra* note 1, art. 1(a). Article 1(a) of the CISG states that it applies to contracts of sale between parties whose place of business are in different Contracting States. Since both the U.S. and Mexico had adopted the CISG before the contract was formed, they were both Contracting States. See Pace Law School Institute of International Commercial Law, Mexico (Jan. 22, 1998), <http://cisgw3.law.pace.edu/cisg/countries/cntries-Mexico.html>; Pace Law School Institute of International Commercial Law, United States (Jan. 22, 1998), <http://cisgw3.law.pace.edu/cisg/countries/cntries-United.html>.

The court in *Caterpillar* construed the question of whether a buyer under a CISG contract may have rights against a third party, such as a remote seller, as a matter not addressed by the CISG. This is a dubious construction of the CISG at best. Although Article 4 indicates that the CISG governs only the formation of the contract and the rights and obligations of the seller and buyer, this implies that once a contract has been formed under the CISG it should define all the contractual rights and obligations of the seller and buyer.³⁷ The CISG might not preempt claims under tort or property but it should preempt any claims under domestic contract law.³⁸

By allowing domestic contract claims against Usinor even though it held the CISG applied, the court in *Caterpillar* reflected the “homeward trend bias” that the drafters of the CISG clearly hoped to avoid.³⁹ By construing the preemptive effect of the CISG narrowly the court gave broader effect to non-uniform domestic laws in a case where doing so favored the domestic party. One of the problems in interpreting an international convention such as the CISG, of course, is that there is no international equivalent of the common law.⁴⁰ Nonetheless, excessive recourse to domestic law in the face of apparent gaps in the CISG only

³⁷ See CISG, *supra* note 1, art. 4 (“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.”); *Geneva Pharm.*, 201 F. Supp. 2d. at 285; *Asante Tech.*, 164 F. Supp. 2d at 1151.

³⁸ See CISG, *supra* note 1, art. 4.

³⁹ References to a homeward trend bias in CISG jurisprudence abound in the literature. See, e.g., 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 1 (1989); Harry M. Fletcher, *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). As the Guide to the CISG, Article 7 explains, “[I]t is especially important to avoid different 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.” United Nations Commission on International Trade Law [UNCITRAL], Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat, ¶ 17, UN Doc. A/CONF.97/5 (Mar. 14, 1979), available at <http://www.globalsaleslaw.org/index.cfm?pageID=644#Article%201>.

⁴⁰ JOHN FELEMEGAS, AN INTERNATIONAL APPROACH TO THE INTERPRETATION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980) AS UNIFORM SALES LAW 10 (2007).

frustrates the CISG's purpose of promoting uniformity and encourages forum shopping.⁴¹

Article 7(1) states that the CISG should be interpreted with "regard" to its "international character" and "the need to promote uniformity in its application and the observance of good faith in international trade." Several scholars have argued that this requires courts to take a liberal approach to interpreting its provisions as a body of international law, rather than as the laws of the Contracting States.⁴² Article 7(2) states that "questions concerning matters governed by [the CISG] . . . are to be settled in conformity with the general principles on which it is based". Commentators have argued that this suggests two interpretive methods: one involving an examination of the general principles on which the CISG is based, the other involving reasoning by analogy to other CISG provisions.⁴³ These are very broad tools, and even though the CISG may therefore appear to have many gaps, most commentators argue there is a mandate for national courts to fill the gaps and construct a body of international case law to support and supplement the provisions explicitly stated in the CISG.⁴⁴

Some foreign courts have recognized this mandate.⁴⁵ Thus, in a case involving a buyer that made repeated, though perhaps sporadic, purchases over a two year period, a Finish court held that the seller had a duty to continue supplying beyond the terms of any discrete transaction because the buyer's "operations cannot be based on a risk of an abrupt ending of a

⁴¹ *Id.* at 11.

⁴² See e.g., Michael Joachim Bonell, *General Provisions: Article 7*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 73 (C.M. Bianca & M.J. Bonell eds., 1987); Felemegas, *supra* note 40 at 11–12; Bruno Zeller, *The UN Convention on Contracts for the International Sale of Good – A Leap Forward towards Unified International Sales Laws*, 12 PACE INT'L L. REV. 79, 105–06 (2000).

⁴³ See e.g., Bonell, *supra* note 42, ¶ 2.3.2 ("The formula used in Article 7(2) is to be understood in a broad sense to cover not only recourse to, «general principles», but also reasoning from specific provisions by analogy. The two approaches should however not be confused, since they are complementary to each other and operate in a different manner."); JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 16–17 (4TH ED. 2009); Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 MINN. J. GLOBAL TRADE 105 (1997).

⁴⁴ See e.g., Bonell, *supra* note 42, ¶ 2.2.1 ("[T]he Convention . . . is intended to replace all rules in legal systems previously governing matters within its scope This means that in applying the Convention there is no valid reason to adopt a narrow interpretation.").

⁴⁵ See DIMATTEO ET AL., *supra* note 39, at 19–31 (discussing CISG methodology and jurisprudence).

contract.”⁴⁶ The court’s rationale was premised on interpreting the CISG to include a general “principle of loyalty” which requires the parties to “act in favor of a common goal” and “consider the interests of the other.”⁴⁷ In another case, an Austrian court held that the CISG authorized payment of interest as a part of the contract damages even though Article 74 of the CISG makes no mention of interest because of the general CISG principle that “full compensation” was required.⁴⁸ Here the court inferred the principle from other provisions of the CISG.⁴⁹ The point is not that the court in either case was necessarily correct, but that references to the general principles of the CISG and analogies to other CISG provisions have been used by courts in other Contracting States to fill gaps in the CISG.

The implication is that the CISG is much broader than its rather spare structure of rules and provisions would suggest, and its preemptive effect on any adopting nation’s domestic laws should be correspondingly greater. Indeed, at least some foreign tribunals have apparently heeded the admonishment in Article 7(2) to interpret the CISG in conformity with the general principles upon which it is based.⁵⁰ American courts should do the same. The court in *Caterpillar*, however, concluded that simply because the CISG did not explicitly address the question of whether a downstream third party has contract rights against a remote seller it was a matter to be decided under domestic law. The court thus not only misconstrued the preemptive effect of the CISG on the parties’ contract rights, it also failed to make any effort to apply the CISG in conformity with the general principles upon which it is based. This was hardly in concert with Article 7(1)’s directive to interpret the CISG with regard to its international character and the need to promote uniformity and good faith in international trade.

In fact, the decision in *Caterpillar* undermined principles of uniformity and good faith in international trade even more directly. The court’s decision implies that a remote seller under a CISG contract may

⁴⁶ See *Plastic carpets case*, Helsingin hovioikeus [Helsinki Court of Appeals], Oct. 26, 2000, S 00/82 (Fin.), available at <http://cisgw3.law.pace.edu/cases/001026f5.html>; see also DIMATTEO, *supra* note 39, at 24–25 (stating that the Helsinki Court of Appeals held that a two-year business relationship justifies a duty of loyalty).

⁴⁷ *Id.*

⁴⁸ See *Rolled Metal Sheets (Austria v. F.R.G.)*, Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft [Arbitral Trib. - Vienna] June 15, 1994, SCH-4318 (Austria), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940615a4.html>.

⁴⁹ DIMATTEO ET AL., *supra* note 39, at 26–27.

⁵⁰ See *id.* at 19–31 (discussing CISG methodology and jurisprudence).

have contractual obligations to downstream third parties under domestic contract law. Usinor was found potentially liable to Caterpillar for a promissory estoppel claim.⁵¹ In fact, if Illinois law did not have privity requirements for express and implied warranty claims under the UCC, Usinor would also potentially have been liable for breaches of UCC warranties. Many states do not have such privity requirements.⁵² In those states the consequences of the court's narrow interpretation of the CISG would have exposed Usinor to an even wider range of domestic contract claims. The court's decision implies that the legal obligations of a seller in a CISG contract depend on whether the seller's buyer contracts with a third party in the U.S. and which state's laws apply to the contract. *Caterpillar* thus hardly promotes uniformity in international trade – even across states within the U.S.

Indeed, the domestic laws of some other Contracting states under the CISG also have privity requirements (or their equivalent) for at least some contract claims.⁵³ Thus, if courts in those nations follow *Caterpillar* and interpret the preemptive effect of the CISG narrowly, any contract breach of warranty claims under their domestic laws will be barred by the privity requirement. Moreover, many Contracting states do not allow actions for promissory estoppel or any equivalent foreign doctrine.⁵⁴ Thus, third parties

⁵¹ One could debate, of course, whether the doctrine of promissory estoppel properly belongs in contract, but it at least arguably creates contract-like obligations. U.S. courts have generally agreed. *See Geneva Pharm.*, 201 F. Supp. at 286 (“Breach of contract and promissory estoppel are ‘two sides of the same coin, and that coin is a cause of action for breach of contract.’”) (citing *Qatar Nat'l Navigation & Transp. Co. v. Citibank*, No. 89 Civ. 464 (CSH), 1998 WL 516117, at *6–7 (S.D.N.Y. Aug. 20, 1998) (“Promissory estoppel is an equitable remedy, the asserted effect of which . . . is to estop [Citibank] from denying the existence of the contract pleaded.”); *Pitak v. Bell Atl. Network Servs.* 928 F. Supp. 1354, 1367 (D.N.J. 1996) (“Promissory estoppel is a cause of action related to breach of contract.”)).

⁵² *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 406 (5th ed. 2000) (“[T]he law permits a non-privity buyer to recover for direct economic loss if the remote seller has breached an express warranty. Where the buyer cannot show reliance on express representations by the remote seller, however, the case law is in conflict.”).

⁵³ Privity is a common law doctrine and so vestiges of the requirement remain in many common law nations. *See, e.g.*, Francis Dawson, *New Zealand Privity of Contract Bill*, 2 OXFORD J. LEGAL STUD. 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, 269–70 (2007).

⁵⁴ European courts in civil law systems, for instance, do not recognize the doctrine of promissory estoppel and generally do not allow as many gratuitous promises to be enforced as U.S. courts. *See, e.g.*, HEIN KOTZ & AXEL FLESNER, EUROPEAN CONTRACT LAW 76–77 (Tony Weir trans., 1997).

like Caterpillar might have no recourse under their domestic contract laws against a remote seller like Usinor. If followed, *Caterpillar* could thus establish a system under which American third parties such as Caterpillar might be able to make domestic contract claims against CISG sellers like Usinor (depending on which state's laws applied), but similarly situated third parties in foreign Contracting States might not. This would undermine a basic principle of reciprocity and equal treatment.⁵⁵ *Caterpillar* is thus antithetical to good faith in international trade.

It may also promote forum shopping. There is a well-known homeward trend in the application of choice of law rules under private international law.⁵⁶ Suppose that Alpha, with place of business in Contracting State A, contracted for the sale of goods to an intermediary, Beta, with place of business in Contracting State B, who then contracted for the resale of the goods to Gamma, with place of business in Contracting State C. Suppose that State A's domestic laws included a privity requirement but State C's domestic laws did not. Suppose that Gamma wished to bring an action for breach of warranty against Alpha. Suppose there was enough flexibility in the choice of law rules to allow a court to apply its domestic laws and suppose courts were inclined to exhibit a homeward trend. Under *Caterpillar* Gamma would obviously prefer to file an action against Alpha in State C rather than in State A. Given the homeward trend in the application of choice of law rules, this would probably allow Gamma domestic actions against Alpha under the laws of State C that would be unavailable under the CISG or the laws of State A. Such forum-shopping would only exacerbate *Caterpillar's* tendency to promote disharmony in the application of the laws governing international sales.

⁵⁵ The U.S. implied the need for reciprocity in the application of the CISG by declaring a reservation under CISG, Article 95 excluding the application of CISG, Article 1(b). See U.S. Ratification of CISG, *supra* note 2. By declaring a reservation against Article 1(b) the U.S. ensured that the CISG will not apply to parties with places of business in the U.S. unless it would also apply to the parties with places of business in the foreign states when parties with place of business in the U.S. are contracting with parties with places of business in the foreign states. See *id.*

⁵⁶ See, e.g., RICHARD FENTIMAN, FOREIGN LAW IN ENGLISH COURTS: PLEADING, PROOF, AND CHOICE OF LAW 29–30 (1998); OTTO KAHN-FREUND, GENERAL PROBLEMS OF PRIVATE INTERNATIONAL LAW 467 (1976); PETER MACHIN NORTH, ESSAYS IN PRIVATE INTERNATIONAL LAW 69 (1993); JUHA RATIO, THE PRINCIPLE OF LEGAL CERTAINTY IN EC LAW 114 (Francisco Laporta ed. 2003).

Caterpillar not only impedes the development of international sales law, it also potentially confounds Illinois state law. As the court notes, Illinois has a privity requirement for both breach of express warranty claims and breach of implied warranty claims seeking economic damages under the UCC.⁵⁷ *Caterpillar* was in fact barred from making any UCC claims whatsoever. The court nonetheless held that *Caterpillar* should be allowed to assert a claim under Illinois law using the doctrine of promissory estoppel. Privity of contract is obviously not required for a promissory estoppel claim in Illinois or elsewhere, but the court's decision to allow the claim raises questions about the meaningfulness of the privity requirement for UCC warranty claims. Did the court allow *Caterpillar* to do an end run around the Illinois privity requirement using the doctrine of promissory estoppel?

Under the circumstances of the case, Usinor clearly made affirmations of fact and other claims directly to *Caterpillar* that *Caterpillar* apparently relied on to its detriment in contracting to supply trucks to its customers. These circumstances, however, are close if not equivalent to those in which a party creates an express warranty under the UCC. Under the currently enacted version of the UCC in Illinois (and all other states), a seller creates an express warranty under UCC § 2-313(1)(a) by making affirmations of fact or promises that relate to the goods and become part of the "basis of the bargain."⁵⁸ As UCC § 2-313(1)(a) has been applied by most courts, the buyer's reliance on the seller's affirmations is essential to whether the affirmations become part of the basis of the bargain.⁵⁹ Nonetheless, as the official comments point out, no particular reliance needs to be shown "in order to weave [the affirmations] into the fabric of the agreement."⁶⁰ Once made the affirmations are presumed to become part of the basis of the bargain unless the seller can adduce facts sufficient to take them out of the agreement.⁶¹

The court in *Caterpillar* thus allowed a promissory estoppel claim in circumstances in which the plaintiff might otherwise have made a breach of express warranty claim but for the privity requirement. As the opinion made clear, there were direct communications between Usinor and *Caterpillar* which encouraged *Caterpillar* to rely on Usinor's affirmations, and other

⁵⁷ *Caterpillar*, 393 F. Supp. 2d at 677, 678.

⁵⁸ *Id.*

⁵⁹ Donald J. Smythe, *The Scope of a Bargain and the Value of a Promise*, 60 S.C. L. REV. 203, 215 (2008).

⁶⁰ U.C.C. § 2-313 cmt. 3 (2002).

⁶¹ *Id.*

courts might limit the case to similar circumstances in which the defendant communicated to the plaintiff directly. Of course, there is no logical reason why the case should be interpreted so narrowly. A downstream third party can rely on affirmations or promises that are made in advertisements or on the labels of products every bit as much as it can on those that are made through direct communications. If other courts are persuaded by *Caterpillar* and interpret it broadly then the privity requirement for breach of express warranty claims in Illinois becomes largely moot. Illinois plaintiffs will simply assert promissory estoppel claims instead. Thus, in addition to undermining the uniformity of international sales law and good faith in international trade, *Caterpillar* also confounds Illinois law.

B. We Have to Get Out of this Place

There are alternative approaches to the privity problem in international sales that are much more firmly grounded in the principles of the CISG than the decision in *Caterpillar*. The most obvious alternative would simply be for courts to construe the CISG more broadly so as to preempt downstream buyers from making any domestic law claims against remote sellers. Without more, this would restrict downstream buyers in circumstances like *Caterpillar*'s to suing their immediate sellers. Their immediate sellers, of course, might then file actions against the remote sellers. Indirectly, then the remote sellers could still be made liable for damages to downstream buyers.

Of course, one problem with this alternative is that the downstream buyer might not always have a cause of action against its immediate seller. The remote seller would then evade all liabilities. And even if the downstream buyer did have a cause of action against its immediate seller it is possible that the immediate seller might not have a cause of action against the remote seller. This would allow the downstream buyer damages but it would also allow the remote seller to evade any liabilities.

Nonetheless, even if downstream buyers had no recourse this would not necessarily leave them completely vulnerable to being misled by remote sellers. If downstream buyers were precluded from filing actions against remote sellers they would probably be more likely to request that their immediate sellers reiterate any affirmations or promises made by the remote seller. This would then ensure that they had a cause of action against someone. If their immediate sellers were unwilling to reiterate the affirmations or promises then the downstream buyers would probably choose not to rely on the affirmations. Of course, this presumes that the

downstream buyers in these circumstances would have a sufficient understanding of the legal rules and enough rationality to avoid mistakenly relying on the remote sellers' promises. However, since the CISG only applies to contracts for the sale of non-household goods, it will typically only apply to parties that arguably should have at least some modicum of business sophistication.⁶²

The great advantage of this approach is that it would achieve uniformity in the application of the CISG and promote good faith in international trade. Whether a third party had a cause of action to remedy a defect in a product would only depend on the application of the CISG, not on any Contracting State's domestic law. Courts would not be able to construe the preemptive effect of the CISG narrowly so as to apply their domestic laws to the advantage of either party. Of course, they might still exhibit a homeward trend in their application of the CISG, but this is a more general problem with international law and it is doubtful that it would create as many problems as *Caterpillar*.⁶³ In theory at least, courts should construe the CISG taking into account decisions of courts in other Contracting States.⁶⁴ If they follow this mandate then any homeward trend in the application of the CISG should get resolved through further developments in the case law.

Unfortunately, this approach to the problem might affect the decisions that remote sellers make about their distribution chains. For example, assume that the domestic law in Contracting State C would allow an action by a downstream buyer, Gamma, directly against a remote seller, Alpha, in Contracting State A. Under such an approach, a remote seller like Alpha would have an incentive to distribute goods in State C through an intermediary in another Contracting State – say State B – rather than directly to buyers in State C itself or through an intermediary in State C. Of course, if Alpha sold the goods directly to buyers in State C those buyers would not be downstream and they could file actions against Gamma under the CISG. Likewise, if Alpha sold the goods through an intermediary in State C the downstream buyers might be able to file claims directly against

⁶² See CISG, *supra* note 1, art. 2(a) (stating that CISG does not apply to sales of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use).

⁶³ See the discussion *supra* note 39.

⁶⁴ This approach to construing the CISG would be in accordance with the direction in Article 7(1)(a) to interpret the CISG to promote uniformity in its application and good faith in international trade.

Alpha under the domestic laws of State C. On the other hand, if Alpha sold the goods to buyers in State C through an intermediary in Contracting State B – say Beta – then the CISG would apply to the contract between Beta and Gamma and this would preclude Gamma from filing claims directly against Alpha.

Of course, Alpha might still be liable to Gamma indirectly. If Gamma sued Beta under the CISG for a breach of a warranty that Beta had made based on warranties that Alpha had made to Beta, then Beta could sue Alpha under the CISG for any consequential damages.⁶⁵

However, even if Alpha could be held accountable in such a manner this approach would hardly promote judicial economy. If Gamma was able to file an action directly against Alpha then there would only be a need for one lawsuit instead of two. Of course, Beta might be named as a defendant in that suit as well as Alpha, but even so Beta would only have to defend itself against one suit rather than defend itself in one suit and prosecute a second suit for consequential damages. In this respect, Beta's expected legal costs would generally be greater and it would probably pass those costs on to Alpha. It is unlikely, however, that these costs would be so high as to make some other distributional arrangement more profitable for Alpha.⁶⁶ From a social perspective, however, the extra legal costs incurred as a result of the indirect liability of a remote seller to a downstream buyer would be inefficient nonetheless. Moreover, these costs would likely be incurred through similar distributional arrangements in the international sale of many other goods as well. The total social costs could be quite significant.

Perhaps the greatest deficiency in this solution to the problem, however, is that it acquiesces to the privity requirement. The privity requirement is a vestige of an outmoded, narrowly doctrinal conception of

⁶⁵ The CISG's damages provisions are quite liberal and allow claims for what would be considered consequential damages under the UCC. *See* CISG, *supra* note 1, art. 74 ("Damages for a breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach.").

⁶⁶ If the costs were so high as to make some other distributional arrangement more profitable, of course, the point would be moot. It is highly unlikely, however, that the expected legal costs would be so great as to outweigh the benefits of distributing through an international intermediary in every case. Thus, some unnecessary social costs would almost inevitably be incurred.

contracts.⁶⁷ It is essentially a mechanism for ensuring that any plaintiff that proceeds with an action in contract was indeed a party to a bargain with the defendant.⁶⁸ Even in the late nineteenth and early twentieth century context in which the bargain theory of contract achieved ascendancy, however, the privity requirement made little sense.⁶⁹ The cases in which it applied then, as now, were inevitably ones similar to *Caterpillar* in which a remote seller sold goods to an intermediary who then resold them to a downstream buyer. The downstream buyer was, of course, only a third party to the contract between the remote seller and its distributor. With no privity of contract, the downstream buyer was initially precluded from bringing any actions in contract against the remote seller for damages caused by defects in the product.⁷⁰ Many of the suits, of course, were for damages arising from personal injuries caused by the defects.⁷¹ Modern products liability law evolved out of these cases and the privity requirement was eliminated for actions in tort.⁷² But some of the suits involved plaintiffs seeking only economic damages for defects in the product. These cases remained a matter for contracts and it is here that the privity requirement continues to play a confounding role, at least in the U.S. and other common law countries.⁷³

The problem is not with the privity requirement itself, so much as the way in which it applies. Privity has typically been applied by courts in circumstances in which the court determined there were insufficient contacts between the parties to create contractual obligations.⁷⁴ Modern

⁶⁷ See Smythe, *supra* note 59 (discussing the trend of courts increasingly looking to the doctrines of promissory estoppel and quasi-contract to enforce seller's promises on express warranty grounds without consideration and increasingly rejecting privity defenses).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See, e.g., *Winterbottom v. Wright*, (1842) 152 Eng. Rep. 402 (Exch. Of Pleas).

⁷¹ *Id.*

⁷² See, e.g., *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

⁷³ As Gillette and Walt observe, "Where economic loss alone is involved, courts have been more restrictive. Where economic loss affects the value of the product itself . . . courts tend to permit actions against a distant seller. Where the economic loss is essentially consequential . . . courts have been more divided, with several continuing to require privity before permitting recovery from distant sellers." CLAYTON GILLETTE & STEVEN WALT, *SALES LAW: DOMESTIC AND INTERNATIONAL* 308 (2d ed. 2002).

⁷⁴ The concept of privity is slippery. Black's Law Dictionary defines privity of contract as "[t]hat connection or relationship which exists between two or more contracting parties." BLACK'S LAW DICTIONARY 1199 (6th ed. 1990). In practice, privity of contract exists wherever courts say it exists. See, e.g., *Sjajna v. General Motors Corp.*, 503 N.E.2d 760, 769 (Ill. 1986) (finding that for practical purposes privity is established when the manufacturer provides a written warranty under the Magnuson-Moss Warranty Act).

contract law revolves, of course, around the doctrine of consideration and the theory that a contract requires a bargain.⁷⁵ A promise does not create a contractual obligation unless it is truly bargained for.⁷⁶ In applying the privity requirement, therefore, courts have impliedly helped to define the scope of a bargain as it is construed under modern contract law. It makes perfect sense for courts to define and delimit the scope of a bargain. It would be absurd, for instance, for courts to allow parties to make contract claims against complete strangers. Modern tort law has developed causes of actions for parties to make against complete strangers for a variety of general legal wrongs. Indeed, the ultimate rationale for allowing tort actions is that parties cannot reasonably be expected to coordinate all of their interdependent behaviors by agreement and thus reduce all private legal actions to ones in property and contract.⁷⁷

The problem with the privity requirement is not that it restricts standing to bring actions in contract to parties involved in a bargain but that the conception of a bargain under the privity requirement has been unduly narrow. In modern commercial contexts manufacturers commonly distribute goods for the mass market through a variety of intermediaries. They also commonly advertise to promote their sales and they may thus make many affirmations and promises about the quality and characteristics of their products that the ultimate buyers will see, read, or hear even though they buy the goods from intermediaries.⁷⁸ The manufacturers may also make affirmations or promises about their goods on the packaging in which the goods are sold or on labels on the goods themselves or perhaps even in writings sold with the goods.⁷⁹ American courts have struggled with the question of whether affirmations of fact or promises made in these ways create express warranties to the end consumers.⁸⁰ Many courts have held

⁷⁵ See generally Roy Kreitner, *Calculating Promises: The Emergence of Modern American Contract Doctrine* 15–22 (2007).

⁷⁶ The doctrine of consideration is thus inextricably connected with the bargain theory of contracts. *Id.* at 22.

⁷⁷ This is one of the most interesting implications of the Coase Theorem, as elaborated by Calabresi and Melamed. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). In a world of zero transactions costs all parties would negotiate over all interdependent behaviors in advance. See *id.* at 1094–95. There would be no need for torts because every possible private legal wrong would be covered by contract. See *id.* Of course, in the real world where transaction costs preclude such extensive contracting, tort actions are necessary to regulate many interdependent behaviors. See *id.* at 1108–09.

⁷⁸ See generally Smythe, *supra* note 59, at 217–24.

⁷⁹ *Id.*

⁸⁰ *Id.*

that they do, although a majority may require that the buyers actually do see, read, or hear the communications for the affirmations or promises to become part of the basis of the bargain.⁸¹ In states where privity is required for a breach of an express warranty claim, of course, the question is moot. If the law requires privity for a breach of express warranty claim, and courts hold that privity cannot be established between a downstream buyer and a remote seller, then it cannot matter whether the buyer relied on the remote seller's promises. The privity requirement has barred contract claims by effectively restricting the scope of enforceable contractual bargains even when the downstream buyer did clearly rely on the remote seller's promises.

The problem, of course, is that even manufacturers that distribute goods through intermediaries are ultimately targeting downstream buyers. The use of intermediaries may help to insulate manufacturers from contract claims, but intermediaries are rarely, if ever, significant end users of the manufacturers' goods. Indeed, the reason manufacturers engage in advertising and place product information on packaging and labels is because they want to promote sales to the end buyers. It may have made sense to confine the scope of a bargain and standing to make contract claims to buyers and their immediate sellers prior to the transportation revolution in the nineteenth century that initiated the rise of mass-scale production by making the distribution of goods across vast distances and legal jurisdictions profitable,⁸² and it may even have made sense immediately after the transportation revolution simply for reasons of judicial economy and expedience,⁸³ but it hardly makes sense in the modern era of cheap transportation and electronic communications.⁸⁴ If the manufacturers of mass-produced goods advertise or promote them through their packaging or labels then they can and should be considered to have contracted with anyone who might reasonably rely on the affirmations or promises contained therein.⁸⁵

As a general matter, both economic efficiency and social ethics are best served by holding sellers to strict legal obligations for any affirmations

⁸¹ *Id.*

⁸² See generally Alfred D. Chandler, Jr., *The Visible Hand: The Managerial Revolution in American Business* (1977) (providing a historical overview of commercial production and distribution in the U.S.).

⁸³ *Id.*

⁸⁴ GILLETTE & WALT, *supra* note 73, at 308.

⁸⁵ *Id.*

or promises they make about their goods.⁸⁶ To the extent that sellers are able to use the privity requirement to evade those obligations, the requirement only undermines economic efficiency and impedes the development of sound business ethics.⁸⁷ It is perhaps not surprising, therefore, that the modern trend in both American and foreign law has been towards the elimination or diminishment of the privity requirement.⁸⁸ The argument that the privity requirement is an obsolete vestige of the pre-modern world that undermines economic efficiency and sound business ethics has no less force in international sales law than in the domestic laws of nation states.

C. There is a Way to Get from Here to There: The Article 16(2)(b) Approach

The difficult question, perhaps, is can the privity requirement be eliminated from international sales transactions without undermining the integrity of the CISG? The short answer to the question is, “yes.” The wording of Article 4 limits the scope of the treaty to the rights and obligations of the seller and buyer, but the CISG does not define the term “seller” or “buyer” and the only way it offers of inferring the definition of a contract is from the provisions in Articles 12 through 23 on the formation of a contract. Given the invitation to courts to fill in the gaps in the CISG by reference to its underlying principles and to interpret its provisions in a manner that promotes good faith in international trade, this leaves open the possibility that such terms could be construed quite broadly. In fact, there are at least two possible approaches to resolving the privity problem under the CISG. One approach is to define the scope of a seller’s obligations under Article 4 broadly enough to bind a remote seller to obligations for any promises made to downstream buyers. Another approach is to interpret Article 16(2)(b) to encompass the doctrine of promissory estoppel -- or

⁸⁶ Smythe, *supra* note 59, at 208–12, argues that sellers make promises in order to distinguish the quality of their products from others on the market and thus avoid the so-called “lemons problem.” Relieving sellers from liabilities for their promises only undermines their efforts, reduces the information available to buyers, and diminishes the economic efficiency of markets.

⁸⁷ See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATIONS* 19 (1981) (articulating a moral obligation to keep promises regardless of whether consideration is present).

⁸⁸ See JOHN O. HONNOLD & CURTIS R. REITZ, *SALES TRANSACTIONS: DOMESTIC AND INTERNATIONAL LAW* 272, 291–92 (3d ed. 2006); JOHN O. HONNOLD, *UNIFORM LAW OF INTERNATIONAL SALES* § 63 (3d ed. 1999); JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 11-7 (5th ed. 2002).

something very much like it. Both of these approaches would arguably be consistent with the CISG's underlying principles.

One distinguished commentator, John Honnold, has argued that Article 4 may be interpreted to extend the obligations of a remote seller under the CISG to encompass promises or guarantees that it makes to downstream buyers.⁸⁹ On this view, the promises or guarantees made by the remote seller to the downstream buyer are a part of a larger commercial contract in which the downstream buyer's immediate seller is merely an intermediary.⁹⁰ Technically, the remote seller need not be construed as the downstream buyer's "seller" but the transaction between the remote seller and downstream buyer can still be construed as a "contract of sale."⁹¹ This approach is more compelling the more the remote seller does to encourage the downstream buyer to make the purchase. Promises or guarantees made by the remote seller itself are more likely to create a unilateral contract than promises or guarantees that are impliedly made by the remote seller through its controls over an intermediary dealer under the terms of a franchise agreement.⁹² As Honnold cautions, however, if the downstream buyer and the remote seller's dealer have places of business in the same Contracting State the CISG would not apply to the contract.⁹³

One potential problem with this approach is that it might logically imply that the remote seller is also liable for other claims under Article 35 – claims that resemble implied warranties in U.S. law. If the remote seller's

⁸⁹ HONNOLD, *supra* note 43, at 76. Honnold acknowledges that this is a change in position on the issue from the one he had taken in earlier editions of the book, in which he had opined that the language of Article 4 limited the seller's obligations to the immediate buyer. *Id.* Honnold, in fact, observes that the court in *Asante*, 164 F. Supp. 2d 1142 (N.D. Cal. 2001), did allow a U.S. buyer to make claims against a remote Canadian manufacturer, although the court appeared to be "blithely unaware of any issues raised by the fact that the claim was against a party who had not sold the goods directly to the buyer." *Id.* at 78. Honnold nonetheless concludes that "it is unlikely that the Convention in the foreseeable future will play a large role in claims by buyers against manufacturers and similar remote suppliers." *Id.* at 77.

⁹⁰ *Id.* at 76.

⁹¹ *Id.* at 77.

⁹² *Id.*

⁹³ *Id.* at 77. Of course, in the case where the downstream buyer and the remote seller's dealer have places of business in the same Contracting State the contract between the remote buyer and the dealer would be governed by the domestic law of the buyer's and dealer's locations. In the U.S. this would mean some state's version of Article 2 of the UCC would be the applicable law. In many states privity is not required for an express warranty claim and so the manufacturer might well be liable under domestic law. GILLETTE & WALT, *supra* note 73, at 308.

promises or statements are construed to make the larger transaction between the remote seller and downstream buyer a contract of sale under the CISG then all the other provisions of the CISG would arguably apply, including the implied warranty-like provisions in Article 35.⁹⁴ This could be problematic. Article 35 expressly authorizes the parties to contract around these implied warranty-like provisions.⁹⁵ The CISG arguably also authorizes the parties to contract around the damages provisions, including the provision in Article 74 for consequential damages.⁹⁶ Sophisticated sellers often do seek to limit or exclude their exposure to implied warranties and consequential damages. It is difficult to imagine how a remote seller in a foreign Contracting State could limit or exclude implied warranties and consequential damages in a contract of sale that is implied rather than bargained-for with a downstream buyer.

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. Article 14(2) provides that offers may be made to indefinite persons;⁹⁷ Article 16(2)(b) states a provision that to those trained in the common law seems redolent of the doctrine of promissory estoppel, even though it is not stated in those

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[T]he goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used; (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment.

CISG, *supra* note 1, art. 35(2)(a).

⁹⁵ *See id.* art. 35(2). Article 35(2) begins with the qualification, "Except where the parties have agreed otherwise . . ." Thus, it reiterates that the parties may exercise the autonomy to contract around the implied-warranty-like provisions otherwise granted more generally in Article 6. Article 6 states: "The parties may exclude the application of this Convention or, subject to Article 12, derogate or vary the effect of any of its provisions."

⁹⁶ *Id.* art. 74 ("Damages for breach of contract consist of a sum equal to the loss, including loss of profit, suffered as a consequence of the breach."). Article 6 presumably implies that the parties can derogate or vary the effect of this provision, including the part relating to consequential damages. *See id.* art. 6 ("The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.").

⁹⁷ *Id.* art. 14(2) ("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.").

terms.⁹⁸ However, it is important to remember that the CISG was a compromise between representatives from diverse legal systems and the drafters had to accommodate both common and civil law traditions.⁹⁹ Although Corbin speculated that it would be unnecessary for civil law countries to develop a theory of enforcement based on reliance because they could simply make enforceable every promise upon which it would be reasonable to rely, in general European legal systems have not provided much protection to promisees who rely on promises.¹⁰⁰ Article 16(2)(b) in some sense may split the difference. Although it is strongly redolent of the common law doctrine of promissory estoppel it established a reliance based theory for enforcing offers without using the concept of estoppel. In principle, this means that Article 16(2)(b) could be used as a “sword” and not just a “shield” – in other words, it could be used by downstream buyers to make claims against remote sellers under circumstances like those in *Caterpillar*.¹⁰¹

Indeed, Henry Mather has noted the resemblances between Article 16(2)(b) and the doctrine of promissory estoppel under U.S. law.¹⁰² There are, however, also some important differences: Article 16(2)(b) does not require that the offeree’s reliance must have been foreseeable to the offeror or that the offeree’s reliance be detrimental to the offeree.¹⁰³ Nonetheless, Mather has predicted that “many tribunals will apply [Article 16(2)(b)] in much the same fashion as American courts have used promissory

⁹⁸ *Id.* art. 16(2) (“However an offer cannot be revoked: (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable, or (b) 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.”). As Mather writes, “[Article 16 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.” Henry Mather, *Firm Offers Under the UCC and the CISG*, 105 DICK. L. REV. 31, 48 (Fall 2000).

⁹⁹ Andrea Vincze, *Revocability of offer: Remarks on whether and the extent to which the UNIDROIT Principles may be used to help interpret Article 16 of the CISG*, in FELEMEGAS, *supra* note 40, at 85 (observing that CISG, Article 16(2)(a) was included to incorporate the civil law concept of irrevocable offers and CISG, Article 16(2)(b), which is very similar to the doctrine of promissory estoppel, was included to accommodate the common law).

¹⁰⁰ JAMES GORDLEY, *THE ENFORCEABILITY OF PROMISES IN EUROPEAN CONTRACT LAW* 343 (2001).

¹⁰¹ Historically, the doctrine of promissory estoppel arose as a defense to an action brought by another rather than as a basis for a cause of action itself. *Id.* at 58, 62.

¹⁰² See, e.g., Mather, *supra* note 97; Vincze, *supra* note 98.

¹⁰³ Mather, *supra* note 97, at 48.

estoppel.”¹⁰⁴ Indeed, the federal district court for the Southern District of New York has agreed with this interpretation of Article 16(2)(b) in *Geneva Pharmaceuticals Technology Corp v. Barr Laboratories, Inc.*¹⁰⁵ As the court explained, Article 16(2)(b) “establishes a modified version of promissory estoppel that does not appear to require foreseeability or detriment, and to apply an American . . . version of promissory estoppel.”¹⁰⁶ The court therefore concluded that domestic promissory estoppel claims could be preempted by the CISG.¹⁰⁷

Article 16(2)(b) thus appears to provide a basis for holding remote sellers like Usinor to claims by downstream buyers like Caterpillar for any promises they make in the marketing and distribution of their goods. Hypothetically, if the court in *Caterpillar* had followed the court in *Geneva Pharmaceuticals* the same logic that it had used to apply the doctrine of promissory estoppel under Illinois law could have been applied to allow Caterpillar to make a CISG claim against Usinor under Article 16(2)(b). Apparently, however, Caterpillar neglected to state a claim against Usinor under Article 16(2)(b) and so this is only a conjecture. The facts in *Caterpillar* are, however, quite specific: Caterpillar alleged that Usinor made representations about its steel directly to Caterpillar prior to contracting with CMSA. Caterpillar also alleged that it relied on those representations to its detriment. Under those facts, the court applied promissory estoppel. It is not clear, however, whether the court would have applied promissory estoppel if Usinor had not made the representations directly to Caterpillar. What if Usinor had made the same statements of fact about its steel in advertisements or brochures or other promotional materials rather than directly to Caterpillar?

In other words, does Article 16(2)(b) provide a basis under the CISG for downstream buyers to make claims against remote sellers for statements or representations the remote sellers make about their products that would be sufficient to create warranties under Article 35 to their immediate buyers? Logic suggests it does. Indeed, since Article 16(2)(b) suggests there are no foreseeability or detriment requirements for promissory estoppel-like claims under the CISG it would appear to be sufficient for the downstream buyer to read, see, or hear the remote seller’s statements or representations about the product before purchasing the remote seller’s goods from its immediate seller for the downstream buyer to hold the remote seller liable.

¹⁰⁴ *Id.*

¹⁰⁵ *Geneva Pharm.*, 201 F. Supp. 2d 236 at 236.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

Article 16(2)(b) thus could provide a basis under the CISG for holding remote sellers liable for statements sufficient to create the CISG equivalent of express warranties under Article 35(1).

The question is whether courts will take up the opportunity. They should. The privity requirement for express warranty claims makes little sense in the modern commercial world where sellers place their goods in the stream of commerce with the knowledge that they will often be resold in foreign nations. Construing the CISG to require privity of contract simply protects remote sellers from liabilities for claims they make in their advertisements and promotional materials that are clearly intended to increase their sales to downstream buyers. It thus undermines the reliability and value of the information in those advertisements and promotional materials.¹⁰⁸ It may therefore undermine the incentives for sellers to provide such information altogether and thus reduce the amount of information available to buyers overall.¹⁰⁹ Since this kind of information is an antidote to the “lemons problem,” inhibiting sellers from providing it or diminishing its value to buyers is likely to cause an economic inefficiency.¹¹⁰

It is also likely to impede good faith in international trade. One of the bedrock propositions of Kantian moral theory is that it is wrong for a person to make a promise without intending to keep it.¹¹¹ It is true that the CISG is an international treaty between nation states with diverse legal systems and perhaps equally diverse mores and social values, but most cultures place great moral value on the keeping of promises and would likely adhere to this Kantian precept.¹¹² Most would probably agree, therefore, that a seller that made statements about its good in advertisements or other promotional material without intending to keep them would be acting in bad faith. Courts could thus promote good faith in international trade by holding sellers liable for the statements they make in their advertising and promotional materials, regardless of whether the sellers are in privity of contract with the buyers who make the claims. Such an approach would be faithful to the mandate in Article 7(1).

¹⁰⁸ The argument is analogous to the one provided by Smythe against the reliance test that courts commonly apply to determine whether express warranties have been made under UCC § 2-313(1)(a). Smythe, *supra* note 59, at 216–236.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See Sharon Byrd & Joachim Hruschka, *Kant on Why I Must Keep My Promise*, 81 CHI.-KENT L. REV. 47 (2006) (discussing Kant’s ethics concerning promises and the legal implications of those ethics).

¹¹² See generally P.S. Attiyah, *the Rise and Fall of Contract* 41–60 (1979).

Finally, holding remote sellers liable for the statements they make, directly or indirectly, to downstream buyers would also help to promote uniformity in the application of the CISG as also required under Article 7(1). Since some courts, such as the court in *Caterpillar*, may be tempted to allow downstream buyers to make domestic legal claims against remote sellers if the CISG is construed to preclude similar CISG claims, non-uniform domestic rules governing privity requirements may control. Indeed, these non-uniform rules could encourage not only forum-shopping but also distort the decisions that remote sellers make about their distribution systems and the locations of their distributors.¹¹³ By allowing downstream buyers to make claims under the CISG instead, courts would not only promote uniformity in international sales law, they would also advance international justice and encourage economic efficiency.

Conclusion

The CISG was intended to facilitate and promote international trade by improving the governance and legal certainty of international sales contracts. Unfortunately, it offers a set of rules that are rather sparse in comparison with those of the UCC and presumably also the domestic laws of other Contracting States. This invites parties to a CISG dispute to claim that important questions fall within its gaps and thus argue for the application of a favorable domestic legal rule to fill the gap. Courts have frequently accepted these claims and thus applied domestic rules in disputes under the CISG. This obviously confounds the purpose of the CISG and will only impede the expansion of international trade and commerce. One important matter that courts will inevitably have to address is whether downstream buyers can make any CISG claims against remote sellers, and, if not, whether they can then make any domestic legal claims.

The manner in which the U.S. federal district court for the Northern District of Illinois addressed the issue in *Caterpillar v. Usinor* illustrates the magnitude of the problem. The court in *Caterpillar* limited the preemptive effect of the CISG to domestic contract claims by the remote seller's immediate buyer. The court held the downstream buyer could make any domestic contract claims against the remote seller that would be viable under state law. Illinois has privity requirements for UCC breach of warranty claims so these were not viable. The court nonetheless allowed the downstream buyer to make a promissory estoppel claim under Illinois

¹¹³ See *supra* discussion in Part II.A.

common law. The case thus not only confounds the purpose of the CISG, it also confounds Illinois state law. It provides yet another example of the homeward trend bias that threatens to undermine efforts to unify international commercial law.

The best antidote to the problem is to encourage courts to construe the preemptive effect of the CISG broadly to define all the rights and obligations of the seller and buyer. Of course, this creates another dilemma: because the CISG's rules are sparse courts will either have to define the rights and obligations of the seller and buyer very narrowly or find expansive ways of construing the CISG's terms and principles. Claims by downstream buyers against remote sellers are a case in point. 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. It is possible, however, to define Article 4 more broadly and to find ways of allowing downstream buyers to make claims against remote sellers for any statements or promises the remote sellers make about their goods that would be sufficient to create obligations to their immediate buyers under Article 35.

One possibility is to construe the downstream buyer and remote seller as parties to a contract of sale. This approach could be problematic since it might also make remote sellers liable for other obligations to their downstream buyers under the CISG -- obligations that they might choose to limit or modify if they were actually able to bargain. There is, however, a better alternative. Article 16(2)(b) has been construed by both commentators and courts to resemble the common law doctrine of promissory estoppel. In principle, therefore, courts should be able to construe Article 16(2)(b) to allow downstream buyers to make claims against remote sellers in exactly the same circumstances as those that presented themselves in *Caterpillar v. Usinor*. In fact, this essay has argued that Article 16(2)(b) can be construed to allow downstream buyers to make claims against remote seller for any statements or promises the remote sellers have made in advertisements or other promotional materials whenever the downstream buyers purchased the goods after seeing, reading, or hearing them. The irony is that some reflection upon the court's holding in *Caterpillar* suggests a solution to a much larger problem: how to eliminate the privity requirement from international sales transactions without undermining the integrity of the CISG.