

THE UNIFIED FIELD SOLUTION TO THE BATTLE OF THE
FORMS UNDER THE U.N. SALES CONVENTION

MICHAEL P. VAN ALSTINE*

TABLE OF CONTENTS

INTRODUCTION	215
I. THE U.N. SALES CONVENTION: A “MILESTONE IN LEGAL HISTORY”	220
<i>A. The Convention as Supreme Federal Law</i>	220
<i>B. Scope and Significance</i>	223
<i>C. The Convention’s Influence on International Trade.</i>	225
<i>D. Misplaced Faith in Choice-of-Law and Choice-of-Forum Clauses</i>	226
II. THE CONTROVERSY: DISSENSUS IN CONTRACT FORMATION . .	232
<i>A. Setting the Foundation: The CISG’s Basic Formation Scheme</i>	232
<i>B. The Law Confronts Lawyering: Contracting in the Shadow of Standard Business Terms.</i>	237
<i>C. The Opposing “Camps” in the Battle of the Forms.</i>	240
1. <i>The Last Shot Approach.</i>	241
2. <i>The Knock Out Approach</i>	243
III. THE UNNOTICED FOUNDATIONS FOR A NUANCED APPROACH.	246
<i>A. Acknowledging the Gravitational Pull of Uniformity</i> . . .	247
<i>B. The Fundamentally Different Approach to Determining Party Intent</i>	249
1. <i>The Hierarchy of Interpretation Under the CISG.</i>	249
<i>a. The Primacy of Actual Intent.</i>	251

* Francis King Carey Professor in Business Law, University of Maryland Carey School of Law. I thank Rachel Brocker for her excellent research assistance in the preparation of this Article.

<i>b. The Subsidiary Role of Objective Interpretation</i>	252
<i>c. The Required Consideration of Surrounding Circumstances</i>	253
2. <i>The Impressive Work of U.S. Courts</i>	254
C. <i>The Special Treatment of Standard Business Terms. . . .</i>	257
1. <i>Foreign Courts Take the Lead</i>	258
2. <i>U.S. Courts Recognize Insights and Advance Uniformity</i>	259
IV. THE UNIFIED FIELD SOLUTION TO THE BATTLE OF THE FORMS UNDER THE CISG	262
A. <i>The Convention's Flexible Formation Values</i>	263
1. <i>Recalling the Problem, Setting the Stage</i>	263
2. <i>Flexible Interpretive Norms Require a Flexible Solution.</i>	265
B. <i>The Inadequacy of the Existing Approaches.</i>	267
1. <i>The Last Shot Approach.</i>	267
2. <i>The Knock Out Approach.</i>	269
C. <i>A Flexible Solution for a Diverse Spectrum</i>	270
1. <i>No Forms, No Battle.</i>	271
2. <i>One Form, Express Acceptance</i>	273
3. <i>Last Shot's Domain: Implied Acceptance</i>	275
4. <i>The Need for Nuance and the Search for Actual Intent.</i>	278
5. <i>Knock Out's Domain: A Battle Truly Joined.</i>	281
CONCLUSION	285

INTRODUCTION

Ours is not an age of nuance. Simple and certain answers are the preferred course, the more so for complicated questions. But human affairs do not come in neat little boxes, and most forms of human interaction are messy, complicated, and idiosyncratic. The station of the law nonetheless is to distill commonalities, draw lines, and craft generally applicable norms of conduct. The problem is that as the subject of regulation grows in complexity and diversity, the ability of the law to make just generalizations decreases. And many fields of human activity reflect a true spectrum, such that certain rules and rigid categories cannot begin to capture the nuanced reality.

The challenges are even greater for relations and transactions that cross international borders. In this realm, differences in culture, language, practice, and jurisprudential perspective (among many others) make interjurisdictional generalizations exceedingly difficult. To make matters worse, each sovereign jurisdiction will have legal rules tailored to local values and customs. The resultant conflicts in national law can create existential uncertainties for international commercial (and other) transactions.

The first-order solution to this problem is an international treaty that creates a self-contained body of uniform law for all member states. Thankfully, such a treaty exists for the subject of our inquiry here: the international sale of goods. This treaty, the United Nations Convention on Contracts for the International Sale of Goods (the Convention or CISG),¹ both covers the most significant form of international commercial transactions and is itself the most successful effort in history to unify international commercial law.² Over ninety countries have ratified the treaty, including the United States in 1986.³ In this country, the CISG also functions as a “self-

1. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. NO. 98-9, 1489 U.N.T.S. 3 [hereinafter CISG].

2. See *infra* Part I.C.

3. For a full list of the states that have ratified or otherwise acceded to the Convention, see *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)*, U.N. COMM'N ON INT'L TRADE L. [hereinafter *Status: United Nations Convention*], https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status

executing treaty,” which takes immediate and direct effect as supreme federal law without further action by Congress.⁴

The CISG broadly regulates not only the substantive rights of buyers and sellers, but also how parties form international sale contracts in the first place.⁵ In practical terms, the latter subject is substantially more important, for in many—perhaps most—cases the process of contract formation is dispositive. The simple reason is that any enterprise of even modest sophistication will engage lawyers to prepare a set of comprehensive, one-sided standard business terms, and then will insist that those terms govern in all of its transactions.⁶ If, then, a legal system’s formation rules validate such an effort, the party can be assured of total victory. The problem is that the other party will have done the same and will have no desire to contract except on the basis of its own one-sided, all-inclusive terms.⁷ The common consequence is a “battle of the forms.”⁸

Unfortunately, in the charged political environment of the 1970s,⁹ the drafters of the CISG simply were unable to agree on the rules to govern this common situation.¹⁰ The result over the last three decades, not surprisingly, has been substantial judicial confusion and substantial scholarly controversy.¹¹ Indeed, because standard contract terms almost always contain a forum selection clause, courts commonly confront the argument that they do not even have the authority to hear a CISG dispute.¹² And as a practical matter, the answer to this question often is the entire game, for the cost and hassle of litigating in a distant and unfamiliar foreign court may

[<https://perma.cc/X9PX-ULTX>]. For more on this point, see *infra* Part I.C.

4. For more on this important point, see *infra* Part I.A.

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

6. See *infra* Part II.B.

7. See *infra* Part II.B.

8. See U.N. COMM’N ON INT’L TRADE L., UNCITRAL DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, art. 19, para. 6, at 98-99 (2016) [hereinafter UNCITRAL DIGEST], https://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf [<https://perma.cc/X29V-9A7H>].

9. See Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales Law*, 25 INT’L REV. L. & ECON. 446, 449-52 (2005).

10. See UNCITRAL DIGEST, *supra* note 8; *infra* notes 106-10 and accompanying text.

11. See *infra* Part II.C.

12. See, e.g., *Turfworthy, LLC v. Dr. Karl Wetekam & Co.*, 26 F. Supp. 3d 496, 500-01 (M.D.N.C. 2014).

mean that the fight is not worth the candle. This amply explains why by far the most common subject of U.S. court opinions on the CISG is the effect of forum selection clauses.¹³

The short of the matter is that the most important issue on the most important commercial law treaty is also subject to the most enduring controversy. The debate among courts and scholars generally has distilled into two opposing “camps”: one that prizes structural simplicity and results in total victory (the “last shot” rule) and one that prefers a simple division of rights (the “knock out” rule).¹⁴ More than two decades ago, I engaged in this debate through a lengthy law review article¹⁵ and a book in the German language.¹⁶

Some legal insights, however, require time for marinating, for essential truths to distill through clouds of complexity and uncertainty. I now return to take stock of intervening developments and indeed to refine my own thinking. Reasoned reflection, with the benefit of time and insights from judicial struggles, now reveals that the proper analysis requires substantially more nuance than is reflected in either of the traditional approaches to the battle of the forms.

This Article begins by explaining the significance of the project. Part I sets the foundation by describing the CISG’s broad influence on international trade as well as its special status in the United States as directly enforceable, supreme federal law. Part II then examines the CISG’s basic contract formation scheme, and how the drafters’ failure to address standard business terms left a structural flaw in the system. It then reviews the two leading approaches to

13. See, e.g., *Hellenic Petroleum LLC v. Elbow River Mktg. Ltd.*, No. 1:19-cv-00483-LJO-SKO, 2019 WL 6114892, at *2 (E.D. Cal. Nov. 18, 2019); *Allied Dynamics Corp. v. Kennametal, Inc.*, No. 12-CV-5904(JFB)(AKT), 2014 WL 3845244, at *11 (E.D.N.Y. Aug. 5, 2014); *Turfworthy*, 26 F. Supp. 3d at 503; *CSS Antenna, Inc. v. Amphenol-Tuchel Elecs., GmbH*, 764 F. Supp. 2d 745, 752-54 (D. Md. 2011). For further examples and a more detailed analysis of the subject, see *infra* Part I.D.

14. See UNCITRAL DIGEST, *supra* note 8, art. 19, para. 6, at 98-99; see also Kasper Steensgaard, *A Comparative View on ‘Battle of the Forms’ Under the CISG and in the German and US American Experiences*, 2015 NORDIC J. COM. L. 1, 3 (Den.).

15. Michael P. Van Alstine, *Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law*, 37 VA. J. INT’L L. 1, 76-90 (1996).

16. MICHAEL P. VAN ALSTINE, *FEHLENDER KONSENS BEIM VERTRAGSABSCHLUß NACH DEM EINHEITLICHEN UN-KAUFRECHT [ABSENCE OF AGREEMENT UPON CONTRACT FORMATION UNDER THE UNITED NATIONS CONVENTION ON INTERNATIONAL SALES LAW]* (1995).

this issue (last shot and knock out) that have coalesced over the thirty-plus years since the CISG entered into force in 1988.

Part III examines the truly impressive work of U.S. courts in analyzing the CISG's principles for determining party intent. Properly attracted by the "gravitational pull of uniformity,"¹⁷ these courts have recognized that—in marked contrast with traditional common law notions—the CISG requires a flexible, thoroughgoing search for a party's actual intent. Of equal consequence, they have seen that this has direct consequences for the treatment of standard business terms. I then explain that these twin developments provide an unnoticed foundation for a more sophisticated approach to the broader issue of the battle of the forms.

The analytical payoff comes in Part IV. The goal of this Part is no less than to provide a comprehensive, indeed definitive, solution to the enduring controversy over the battle of the forms under the CISG. To be sure, the CISG's express offer-acceptance provisions set the basic structure. But as I explain, two "formation values" provide the principles that unify the system.¹⁸ The first is that the parties' actual agreement takes priority even over the express provisions of the Convention ("party autonomy").¹⁹ The second is a directive that, as a primary goal, a court seek out and give effect to the parties' actual intent. Together, these formation values provide the flexible norms that permit courts to apply traditional modes of legal analysis across the full, diverse array of battle of the forms cases.

The flaw in the two leading approaches to this issue under the Convention, as Part IV next explains, is that they fail to accommodate the complicated reality of modern international contracting. It is not that the last shot and knock out views are misguided in all respects. Rather, the problem is that each proceeds from a stylized assumption about how parties express contractual assent, but then wrongly seeks to apply that assumption beyond its narrow terrain. Seen in this way, the two views in fact are not in competition (at least not fully); rather, they simply focus on different points—different subsets of cases—along the same range of factual circumstances. It is as if the two have not recognized that they are

17. *See infra* Part III.A.

18. *See infra* Part IV.A.

19. *See infra* notes 66-68 and accompanying text.

residents of the same country because they have been too busy surveying the features of its distant coasts.

A refined understanding of the battle of the forms instead begins with a recognition that the subject matter is not a phenomenon, but rather a spectrum. Like most forms of human affairs, the interactions of international buyers and sellers come in a diverse array of forms, types, and practices. At one end of the factual spectrum, a party's standard business terms may prevail by express agreement; at the other, no principled reason will exist to prefer the interests of one party over those of the other. For the vast range of cases in between, however, no rigid, one-size-fits-all rule can remotely capture the complex reality of actual business deals.

The proper solution instead is to be found in the core values that unify the Convention's contract formation scheme. These formation values permit, indeed require, a flexible approach that is comprehensive in scope, but individualized in application. With a nod to physics, I describe this approach as the "unified field solution"—for it incorporates the existing theories (each in its own domain), but also recognizes that a single set of principles applies across the full spectrum of agreement processes.²⁰ The final Section of Part IV then analyzes this unified field solution in action. It does so by applying the Convention's flexible formation values across an array of standard transaction types in modern battles of the forms. But as I emphasize there, these categories are merely an expedient for analysis, and should not divert attention from the essential concept of a spectrum.

* * *

The most fundamental principle of contract law is that the parties may define for themselves the scope of their contractual commitments. Unfortunately, the modern phenomenon of standard contract

20. Coined by Albert Einstein, the term "unified field theory" describes the attempt to "reconcile seemingly incompatible aspects" of existing theories under a single, comprehensive set of principles that can explain the full range of physical phenomena. Parashu Ram Poudel, *Unified Field Theory*, 4 HIMALAYAN PHYSICS 87, 87 (2013). In specific, it seeks to unify the broad theory of gravitation (as part of Einstein's theory of general relativity) with the Standard Model, which describes the nature of and relationships between the smallest scales of physics. *Id.* at 89-90. For an introduction to the concept, see generally *id.*

terms scrambles this principle in operation—for their very purpose is total victory without formal agreement. In practice, however, the dynamics of achieving agreement are varied, complicated, and often obscure. Nonetheless, in a system founded on fidelity to the parties' actual intent, the uncertainty driven by this diversity should not be wished away through simple suppositions. Rather, the solution is to apply flexible interpretive norms that are capable of accommodating the nuanced reality of actual contractual deals.

I. THE U.N. SALES CONVENTION: A “MILESTONE IN LEGAL HISTORY”

A. *The Convention as Supreme Federal Law*

The U.N. Sales Convention holds a particularly powerful place in the hierarchy of legal norms in the United States. In our federal system, matters of contract and commercial law generally fall within the lawmaking competence of the individual states.²¹ For international sales transactions, however, the Convention—also known, even internationally, by the initialism CISG—fundamentally changes this allocation of authority.

The CISG takes the legal form of an international treaty. Article II, Section 2, of the Constitution grants to the President, “by and with the Advice and Consent” of a supermajority of the Senate, the power to conclude binding treaties on behalf of the United States.²² This is precisely what occurred with the CISG. Representatives of the State Department negotiated the treaty in the 1970s under the auspices of the United Nations Commission on International Trade Law (UNCITRAL).²³ Upon completion, the Reagan administration

21. See, e.g., Amelia H. Boss, *The Future of the Uniform Commercial Code Process in an Increasingly International World*, 68 OHIO ST. L.J. 349, 376 (2007) (examining the implications of internationalization in areas of “traditional state competence ... such as ... commercial law”); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 220 (2000) (explaining that the private law of contract, property, and tort traditionally has fallen within the lawmaking authority of the states).

22. U.S. CONST. art. II, § 2 (providing that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”).

23. For a review of this history, see Peter Winship, *Congress and the 1980 International Sales Convention*, 16 GA. J. INT'L & COMP. L. 707, 710-16 (1986).

obtained the “advice and consent” of the Senate in October 1986,²⁴ and the President declared the treaty’s ratification in December of the same year.²⁵ The CISG then entered into force on January 1, 1988, after the ratifications of the United States, China, and Italy exceeded the defined threshold of ten member states.²⁶

Although law schools often fail to teach the point, the Supremacy Clause in Article VI of the Constitution declares that treaties made under the authority of the United States—just like statutes and the Constitution itself—are the “supreme Law of the Land.”²⁷ To clear away any doubt, the same provision obligates “the Judges in every State” to give effect to treaties notwithstanding “any Thing in the Constitution or Laws of any State to the Contrary.”²⁸ Like other forms of federal law, therefore, a treaty has the power to preempt state law (and even other, earlier-in-time federal statutes) for matters within its scope.²⁹

Indeed, the U.N. Sales Convention takes the most powerful form of an international treaty, for it is “self-executing.” As the Supreme Court declared in the landmark case of *Foster v. Neilson* nearly two centuries ago, a treaty of this type “operates of itself” and thus takes immediate and direct effect as binding federal law without further action by Congress.³⁰ And from their earliest engagements with the

24. *Id.* at 707.

25. See U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods: Official English Text, 52 Fed. Reg. 6262 (Mar. 2, 1987). On a purely terminological note, one might wish that courts would stop referring to the United States as a “signatory” to the CISG. See, e.g., *Jae Yeon Textile Inc. v. AKM Textile Inc.*, No. CV16-0534 19SJO (JEMx), 2017 WL 7156244, at *3 (C.D. Cal. Nov. 27, 2017); *Nucap Indus., Inc. v. Robert Bosch LLC*, 273 F. Supp. 3d 986, 1005 (N.D. Ill. 2017). This is both true and irrelevant regarding the legal force of the CISG. Under international law, the signing of a treaty simply signifies an agreement on the final text (subject to certain nuances). See Vienna Convention on the Law of Treaties art. 10, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). Under the Constitution, the United States becomes bound to a treaty not when the President signs it, but rather when the Senate gives its consent under Article II, Section 2, and the President then declares the formal ratification. U.S. CONST. art. II, § 2, cl. 2.

26. See CISG, *supra* note 1, art. 99(1); *Status: United Nations Convention*, *supra* note 3.

27. U.S. CONST. art. VI, cl. 2.

28. *Id.*

29. The Supreme Court has recognized this so-called later-in-time rule since the 1800s. See, e.g., *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (observing that when a self-executing treaty conflicts with a federal statute, “the one last in date will control”).

30. 27 U.S. (2 Pet.) 253, 314 (1829), *overruled on other grounds by* *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 52 (1833); see also *Medellin v. Texas*, 552 U.S. 491, 504-05

question, federal courts quite properly have recognized that the CISG is a “self-executing treaty with the preemptive force of federal law.”³¹

Moreover, the Convention creates a private right of action enforceable in courts in the United States.³² Such claims also “arise under” a treaty under Article III, Section 2, of the U.S. Constitution³³ and thus fall within the jurisdiction of federal courts under 28 U.S.C. § 1331.³⁴ Federal courts thus have not merely the power but the constitutional responsibility to enforce the substantive rights recognized in the CISG.³⁵ This responsibility is all the more

(2008) (describing self-executing treaties as ones that “automatically have effect as domestic law”); *Whitney*, 124 U.S. at 194 (holding that a self-executing treaty has the same “force and effect [as] a legislative enactment”). For a broader review of the history and controversies surrounding the self-execution doctrine, see Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 900-17 (2004); see also Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095, 2128-38 (1999); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2181-94 (1999); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2075-94 (1999).

31. *It’s Intoxicating, Inc. v. Maritim Hotelgesellschaft mbH*, No. 11-CV-2379, 2013 WL 3973975, at *16 (M.D. Pa. July 31, 2013) (quoting *Am. Mint LLC v. GOSoftware, Inc.*, No. 1:05-CV-650, 2005 WL 2021248, at *2 (M.D. Penn. Aug. 16, 2005)); see also, e.g., *Target Corp. v. JJS Devs. Ltd.*, No. 16-cv-1184 (JNE/TNL), 2018 WL 809587, at *3 (D. Minn. Feb. 9, 2018); *Honey Holdings I, Ltd. v. Alfred L. Wolff, Inc.*, 81 F. Supp. 3d 543, 551-52 (S.D. Tex. 2015); *Hanwha Corp. v. Cedar Petrochemicals, Inc.*, 760 F. Supp. 2d 426, 430 (S.D.N.Y. 2011). The progenitor of this line of authority is *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1027 n.1 (2d Cir. 1995).

32. See, e.g., *Zodiac Seats US LLC v. Synergy Aerospace Corp.*, No. 4:17-cv-00410-ALM-KPJ, 2019 WL 1776960, at *2 (E.D. Tex. Apr. 23, 2019); *D&G Grp., S.R.I. v. H.A. Import USA*, No. 14-CV-2850 (TPG), 2015 WL 694925, at *1 (S.D.N.Y. Feb. 18, 2015); *Honey Holdings*, 81 F. Supp. 3d at 551-52; *Citgo Petroleum Corp. v. Odfjell Seachem*, No. H-07-2950, 2013 WL 2289951, at *4 (S.D. Tex. May 23, 2013).

33. U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under ... Treaties made, or which shall be made, under [the authority of the United States].”).

34. 28 U.S.C. § 1331 (providing that district courts have original jurisdiction of actions “arising under ... treaties”). For a recent application of this point, see *Ningbo Yang Voyage Textiles Co. v. Sault Trading*, No. 18-CV-1961 (ARR) (ST), 2019 WL 5399973, at *2 (E.D.N.Y. Sept. 10, 2019).

35. I have elsewhere comprehensively examined the obligation of federal courts to enforce rights set forth in self-executing treaties. See Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1892-1902 (2005).

significant because, as an international treaty, the CISG represents sovereign obligations of the United States under international law.³⁶

The next three Sections explore why the status of the CISG as directly applicable, supreme federal law is so fundamentally important for the subject of our inquiry here. The first two (Sections B and C) briefly review the substantive scope of the CISG as well as its broad international influence.³⁷ The most important point, however, is found in the final Section and is worthy of distillation upfront: it is a commonly held vanity, even by parties with sophisticated legal teams, that a party can avoid application of the CISG by clever drafting of choice-of-law and choice-of-forum clauses. We will see in Section D, however, that because the CISG applies “by its own self-executing force,”³⁸ the CISG’s formation rules will determine whether a party’s preferred terms become part of a contract at all—and standard business terms, however cleverly drafted, cannot avoid that result.³⁹

B. Scope and Significance

The CISG’s sphere of application has been extensively analyzed in treatises⁴⁰ and court opinions⁴¹ and thus need not detain us long. Nonetheless, a brief review is necessary to set the foundation for the analysis to follow.

36. *Id.* at 1900 (“Through the express inclusion of treaties within Article III, the Framers determined to confer on the federal courts the responsibility to ensure fidelity to the domestic-law incidents of the nation’s international treaty obligations.”).

37. *See infra* Parts I.B-C.

38. *Hanwha Corp. v. Cedar Petrochemicals, Inc.*, 760 F. Supp. 2d 426, 431 (S.D.N.Y. 2011).

39. *See infra* Part I.D.

40. *See, e.g.*, RALPH H. FOLSOM, MICHAEL WALLACE GORDON, MICHAEL P. VAN ALSTINE & MICHAEL D. RAMSAY, *PRINCIPLES OF INTERNATIONAL BUSINESS TRANSACTIONS* § 2.4, at 48-55 (4th ed. 2017); Ingeborg Schwenzer & Pascal Hachem, *Article 1*, in *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* 27 (Ingeborg Schwenzer ed., 4th ed. 2016).

41. For recent examples, see *Ningbo Yang Voyage Textiles Co. v. Sault Trading*, No. 18-CV-1961 (ARR) (ST), 2019 WL 5399973, at *2 (E.D.N.Y. Sept. 10, 2019); *Zodiac Seats US LLC v. Synergy Aerospace Corp.*, No. 4:17-cv-00410-ALM-KPJ, 2019 WL 1776960, at *2 (E.D. Tex. Apr. 23, 2019); *Target Corp. v. JJS Devs. Ltd.*, No. 16-cv-1184 (JNE/TNL), 2018 WL 809587, at *3 (D. Minn. Feb. 9, 2018).

Three elements define the substantive scope of the Convention. First, the subject of the transaction must be a “sale” of “goods.”⁴² Although the Convention does not define these terms, the accepted view is that they mean the transfer of ownership of a thing (that is, something with a physical existence) in return for the payment of a price (that is, money).⁴³ Second, and most important, the sale of goods transaction must be “international” as contemplated by CISG Article 1(1).⁴⁴ A transaction satisfies this core concept if the parties have their respective “places of business” in different states and if either (a) both of these states have ratified or otherwise acceded to the Convention (which the CISG, somewhat misleadingly, refers to as “Contracting States”⁴⁵), or (b) the conflict-of-law rules of the forum court—known by the civil law term “rules of private international law”—lead to the application of the law of just one Contracting State.⁴⁶ (The latter option does not apply in U.S. courts, however, because upon ratification the United States declared an allowed reservation to that effect.)⁴⁷ Finally, the parties must have concluded the contract at issue after the relevant state or states ratified the Convention.⁴⁸

The significant point here is that if a transaction satisfies this test, the CISG applies directly and of its own force.⁴⁹ In the United

42. See CISG, *supra* note 1, art. 1(1).

43. See FOLSOM ET AL., *supra* note 40, § 2.4, at 49-50; Schwenger & Hachem, *supra* note 40, at 30.

44. See CISG, *supra* note 1, art. 1(1). For a broader examination of this requirement, see FOLSOM ET AL., *supra* note 40, § 2.4, at 50-53; Loukas Mistelis, *Article 1, in UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)* 21, 33-38 (Stefan Kröll et al. eds., 2011).

45. See CISG, *supra* note 1, art. 1(1)(a) (using this term).

46. See CISG, *supra* note 1, art. 1(1); Mistelis, *supra* note 44, at 37-38; Schwenger & Hachem, *supra* note 40, at 38-42.

47. See CISG, *supra* note 1, art. 95 (“Any State may declare ... that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.”); S. TREATY DOC. NO. 98-9, at V-VI, 21-22 (1983); see also FOLSOM ET AL., *supra* note 40, § 2.4, at 54-55 (examining the significance of this reservation for the United States).

48. See CISG, *supra* note 1, art. 100. If the issue is one of formation, the relevant event in this regard is when the offeror made the proposal for concluding a contract. *Id.*

49. See, e.g., *Shantou Real Lingerie Mfg. Co. v. Native Grp. Int'l, Ltd.*, No. 14cv10246-FM, 2016 WL 4532911, at *2 (S.D.N.Y. Aug. 23, 2016) (observing that the CISG “automatically applies to international sales contracts between parties from different contracting states” (quoting *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co.*, No. 06 Civ. 3972 (LTS)(JCF), 2011 WL 4494602, at *3 (S.D.N.Y. Sept. 28, 2011))); *Weihai Textile Grp. Imp. & Exp. Co. v. Level 8 Apparel, LLC*, No. 11 Civ. 4405(ALC)(FM), 2014 WL 1494327, at *6

States, as we have seen, this follows from the Convention's status as a "self-executing treaty" under Article VI of the Constitution.⁵⁰ The result is that the CISG "supersedes state law,"⁵¹ and thus broadly preempts both state common law and the Uniform Commercial Code (UCC).⁵²

The adverb "broadly" here has bite, for the eighty-eight substantive articles of the Convention govern nearly all aspects of the relationship between a buyer and seller in international sales transactions within its scope. First, it defines nearly the entirety of the substantive rights and obligations of the parties to such transactions.⁵³ Moreover, and more important for present purposes, it provides the rules that govern contract formation in the first place.⁵⁴ Thus, courts must look to the rules in the Convention to determine whether the parties have formed a contract at all and, if so, what terms are in that contract.⁵⁵ This, as noted above and as explored in more detail below,⁵⁶ has profound implications for the now-pervasive practice of employing preformulated, standard business terms in contract negotiations.

C. *The Convention's Influence on International Trade*

The significance of the U.N. Sales Convention also is revealed by its influence on international trade. Although a bit peripheral to my

(S.D.N.Y. Mar. 28, 2014) (same); Zhejiang Shaoxing Yongli Printing & Dyeing Co. v. Microflock Textile Grp. Corp., No. 06-22608-CIV, 2008 WL 2098062, at *2 (S.D. Fla. May 19, 2008) (same).

50. See *supra* notes 21-31 and accompanying text.

51. VLM Food Trading Int'l, Inc. v. Ill. Trading Co., 748 F.3d 780, 787 (7th Cir. 2014).

52. See, e.g., Yosemite Auto (Shanghai) Co. v. JRS Metals, Inc., No. 4:15-CV-1641, 2016 WL 4441543, at *3 (S.D. Tex. Aug. 23, 2016); Am. Mint LLC v. GOSoftware, Inc., No. Civ. A. 1:05-CV-650, 2005 WL 2021248, at *2 (M.D. Pa. Aug. 16, 2005). By its own terms, the Convention does not apply, however, to certain defined categories of transactions (most importantly those with consumers). See CISG, *supra* note 1, art. 2.

53. See CISG, *supra* note 1, arts. 25-88. This is subject to certain express exclusions defined in the Convention itself. See, e.g., *id.* art. 4(a)-(b) (providing that the Convention does not govern "[t]he validity of the contract or of any of its provisions or of any usage" or property rights); *id.* art. 5 ("This Convention does not apply to the liability of the seller for death or personal injury caused by the goods.").

54. See CISG, *supra* note 1, arts. 14-24.

55. See *id.*

56. See *infra* Part I.D.

core purpose here, a few words on this background point will reinforce the value of the overall project.

As of 2020, ninety-three countries have ratified or otherwise acceded to the Convention.⁵⁷ These “Contracting States” represent all geographic regions, all political perspectives, and all stages of economic development, and include (nearly) all of the most important trading countries on earth (for example, the United States, China, Germany, Japan, France, and South Korea).⁵⁸

Collectively, the CISG’s member states account for over 80 percent of the global trade in goods⁵⁹ (according to the most recent statistics, more than \$18 trillion in total).⁶⁰ Moreover, the economies of these countries make up over 72 percent of world gross domestic product.⁶¹ And, as we have seen,⁶² the CISG can apply even if only one party has its place of business in a Contracting State.⁶³ These facts show that the CISG arguably is the most successful effort in history to unify international private law; they abundantly validate the statement by a German scholar in 1989 that the Convention’s entry into force represented a “milestone in legal history.”⁶⁴

D. Misplaced Faith in Choice-of-Law and Choice-of-Forum Clauses

From its very nature, the U.N. Sales Convention, like most other legal norms in the field of commercial law, represents a body of so-called default rules. That is, as I explain in more detail below, the

57. *See Status: United Nations Convention*, *supra* note 3.

58. The most notable exceptions are the United Kingdom, Ireland, Indonesia, and India. *See id.*

59. Ingeborg Schwenzer, *Introduction to COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)*, *supra* note 40, at 1, 1.

60. *Top Exporters and Importers 2018*, WORLD INTEGRATED TRADE SOL., <https://wits.worldbank.org/CountryProfile/en/Country/WLD/Year/2018/TradeFlow/EXPIMP/Partner/by-region> [<https://perma.cc/VL5A-8KD8>].

61. This is based on purchasing power parity statistics from the International Monetary Fund (data on file with Author).

62. *See supra* notes 45-47 and accompanying text.

63. As noted above, in U.S. courts the CISG applies only if both the buyer and the seller have their relevant places of business in a CISG Contracting State. *See supra* note 48 and accompanying text.

64. ROLAN LOEWE, INTERNATIONALES KAUFRECHT 5 (1989) (“*Markstein der Rechtsgeschichte*”).

CISG's provisions operate in the background of the parties' actual agreement and thus are subject to exclusion or modification at the will of the parties. Herein lies, however, a serious risk of misdirection. Indeed, there is perhaps no greater myth than the idea that a party may render the entirety of the CISG irrelevant simply by including a corresponding clause in its standard business terms.

Readers of this work hardly need to be schooled on the prevalence and significance of standard business terms in modern commerce.⁶⁵ These standard business terms are an expedient contracting vehicle in long-term relationships—such as structured “supply chain” arrangements—or where one party has a dominant bargaining position. But for all other deals, the formal rules of law (as found in the CISG for nearly all international sales) will determine whether and to what extent a party's proposed terms actually apply in a contractual relationship with another party.

To be sure, the CISG itself empowers the parties to an international sales transaction to “opt out” of its application.⁶⁶ Specifically, and as a reflection of the elemental principle of “party autonomy,”⁶⁷ CISG Article 6 provides that “[t]he parties may exclude the application of this Convention.”⁶⁸ Thus, the parties have the power to declare that the CISG will not govern their transaction at all and instead choose the law of a specific domestic legal system.⁶⁹ Indeed, the same provision empowers the parties more generally to “derogate from or vary the effect of any of its provisions.”⁷⁰ This is a direct statement that the very nature of the CISG is, as a set of default rules, subject to displacement by the agreement of the

65. For a more detailed examination of the force and effect of standard business terms, see *infra* Part II.B.

66. See, e.g., *Nucap Indus., Inc. v. Robert Bosch LLC*, 273 F. Supp. 3d 986, 1005 (N.D. Ill. 2017); *Orica Austl. Pty. Ltd. v. Aston Evaporative Servs., LLC*, No. 14-cv-0412-WJM-CBS, 2015 WL 4538534, at *4 (D. Colo. July 28, 2015); *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co.*, No. 06 Civ. 3972(LTS)(JCF), 2011 WL 4494602, at *3 (S.D.N.Y. Sept. 28, 2011).

67. See FOLSOM ET AL., *supra* note 40, § 2.5, at 57; Ingeborg Schwenzer & Pascal Hachem, *Article 6*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), *supra* note 40, at 101, 103-04.

68. CISG, *supra* note 1, art. 6.

69. See FOLSOM ET AL., *supra* note 40, § 2.5, at 55-57; Schwenzer & Hachem, *supra* note 40, at 111-13.

70. CISG, *supra* note 1, art. 6.

parties.⁷¹ In the words of one Belgian court, “the contract precedes the CISG in the hierarchy of rules.”⁷²

Unfortunately, this power of party autonomy in Article 6 has founded a quite prevalent myth that a party may exclude the Convention simply by including a choice-of-law clause in its standard business terms.⁷³ Indeed, for unclear reasons—perhaps simple ignorance or discomfort with the unknown—many U.S. companies reflexively include in their standard business terms a clause declaring an exclusion of the CISG.⁷⁴ They then bolster this with a choice-of-forum clause.⁷⁵ Generally endorsed in Supreme Court precedent,⁷⁶ the purpose of these latter clauses is to require that all future disputes are heard by familiar, local, and presumably more sympathetic courts.⁷⁷ It should thus not surprise that such clauses have played a prominent role in both U.S. and foreign courts in cases involving the contract formation rules of the CISG.⁷⁸ If a

71. See FOLSOM ET AL., *supra* note 40, § 2.5, at 55 (“The agreements of the parties ... take precedence over the provisions of the CISG.”); Loukas Mistelis, *Article 6, in UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)*, *supra* note 44, at 99, 101 (“The CISG has a dispositive character so that contracting parties may derogate from or exclude its application.” (footnotes omitted)).

72. Hof van Beroep [HvB] [Court of Appeal] Antwerpen, Apr. 24, 2006, 2002/AR/2087, *translation at* <http://cisgw3.law.pace.edu/cases/060424b1.html> [<https://perma.cc/Y86U-9LV2>].

73. The importance of the choice-of-law question is fundamentally different as between the domestic UCC and the CISG. Because the UCC is uniform throughout the United States (subject to small issues of interpretation), which state’s law applies rarely is of significance. See John F. Coyle, *The Role of the CISG in U.S. Contract Practice: An Empirical Study*, 38 U. PA. J. INT’L L. 195, 237 (2016). The CISG, in contrast, resulted from numerous compromises among divergent legal and political perspectives and thus may differ in fundamental respects from the domestic law of any particular country. See Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT’L L. 443, 450-52 (1989).

74. See Coyle, *supra* note 73, at 216-20.

75. See *infra* note 78 and accompanying text.

76. The Supreme Court declared this principle in *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 15 (1972) (holding that a forum selection clause is “prima facie valid” and “should control absent a strong showing that it should be set aside”). For recent examples, see *Azima v. RAK Inv. Auth.*, 926 F.3d 870, 874 (D.C. Cir. 2019); *Barnett v. DynCorp Int’l, L.L.C.*, 831 F.3d 296 (5th Cir. 2016).

77. See Coyle, *supra* note 73, at 237.

78. See, e.g., *Hellenic Petroleum LLC v. Elbow River Mktg. Ltd.*, No. 1:19-cv-00483-LJO-SKO, 2019 WL 6114892, at *1 (E.D. Cal. Nov. 18, 2019); *Allied Dynamics Corp. v. Kennametal, Inc.*, No. 12-CV-5904(JFB)(AKT), 2014 WL 3845244, at *11 (E.D.N.Y. Aug. 5, 2014); *Turfworthy, LLC v. Dr. Karl Wetekam & Co.*, 26 F. Supp. 3d 496, 503 (M.D.N.C. 2014); *CSS Antenna, Inc. v. Amphenol-Tuchel Elecs., GmbH*, 764 F. Supp. 2d 745, 751-54 (D. Md.

choice-of-forum clause is effective, so the (wishful) thinking goes, the court hearing the dispute does not have the authority even to determine whether the CISG applies in the first place.

To put the point politely, the faith in choice-of-law and choice-of-forum clauses is very much misplaced. First, the now-established (and correct) view in the courts is that an effective exclusion requires a clear and affirmative agreement that mentions the CISG by name; as a result, a mere choice of the law of a particular domestic jurisdiction does not suffice.⁷⁹ As the Fifth Circuit observed in a case involving an agreed choice of Ecuadorian law (a CISG member state), “[g]iven that the CISG *is* Ecuadorian law, a choice of law provision designating Ecuadorian law merely confirms that the treaty governs the transaction.”⁸⁰

More important, the premise for a unilateral exclusion of the CISG dissolves upon even brief scrutiny. We may begin simply by

2011); *Belcher-Robinson, L.L.C. v. Linamar Corp.*, 699 F. Supp. 2d 1329, 1336-38 (M.D. Ala. 2010); *Golden Valley Grape Juice & Wine, LLC v. Centrisys Corp.*, No. CV F 09-1424 LJO GSA, 2010 WL 347897, at *3-4 (E.D. Cal. Jan. 22, 2010); *BTC-USA Corp. v. Novacare*, No. 07-3998 ADM/JSM, 2008 WL 2465814, at *2-4 (D. Minn. June 16, 2008); *Solae, LLC v. Hershey Can., Inc.*, 557 F. Supp. 2d 452, 456-58 (D. Del. 2008). The same issue commonly arises in foreign courts. *See, e.g.*, Hanseatic Higher Regional Court [OLG], July 15, 2010, 13 U 54/10 (Ger.), *translation at* <http://cisgw3.law.pace.edu/cases/100715g1.html> [<https://perma.cc/K69P-6BVH>]; Trib., 24 agosto 2006, n. 1537/05 2006 (It.), *translation at* <http://cisgw3.law.pace.edu/cases/060824i3.html> [<https://perma.cc/9CMK-L3FG>].

79. *See, e.g.*, *Nucap Indus., Inc. v. Robert Bosch LLC*, 273 F. Supp. 3d 986, 1005 (N.D. Ill. 2017) (holding that if a clause merely chooses the law of a particular state, the analysis “would circle back to the CISG because ... the CISG preempts inconsistent state law on contract formation” (citing *Remy, Inc. v. Tecnomatic, S.p.A.*, No. 1:08-cv-1227-SEB-WGH, 2010 WL 4174594, at *1 (S.D. Ind. Oct. 18, 2010))); *Honey Holdings I, Ltd. v. Alfred L. Wolff, Inc.*, 81 F. Supp. 3d 543, 552 (S.D. Tex. 2015) (“To apply the domestic law of the United States rather than the CISG, the parties must ‘affirmatively opt-out of the CISG’ and show a ‘clear intent’ to do so. Merely designating a choice of law is insufficient, without more, to show a clear intent to opt-out.” (internal citation omitted) (quoting *BP Oil Int’l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333, 337 (5th Cir. 2003))); *It’s Intoxicating, Inc. v. Maritim Hotelgesellschaft mbH*, No. 11-CV-2379, 2013 WL 3973975, at *16 (M.D. Pa. July 31, 2013) (“[A] choice of law provision, to be effective, must not only select the law that will apply but affirmatively state that the CISG will not apply to the contract.” (citing *Am. Mint LLC v. GOSoftware, Inc.*, No. 1:05-CV-650, 2005 WL 2021248, at *3 (M.D. Pa. Aug. 16, 2005))); *Microgem Corp. v. Homecast Co.*, No. 10 Civ. 3330(RJS), 2012 WL 1608709, at *2-3 (S.D.N.Y. Apr. 27, 2012) (holding that a contract’s choice of New York law did not exclude the CISG because “[s]tat[ing] only that a contract will be governed by a particular jurisdiction’s laws is generally insufficient to opt-out of the CISG when the CISG has been incorporated into that jurisdiction’s laws”).

80. *Empresa Estatal Petroleos de Ecuador*, 332 F.3d at 337.

revisiting the text of CISG Article 6: the power to exclude the CISG recognized there is granted to “the parties” (in the plural).⁸¹ The common label of “party autonomy” thus is quite misleading. That is, whether in fact the parties have excluded application of the CISG requires a corresponding agreement between them.⁸² Thus, where a party’s standard business terms contain a clause seeking to exclude the CISG, a court must first determine whether that clause became part of the parties’ contract and this, in turn, requires application of a set of legal rules for identifying a contractual agreement.⁸³ That set of legal rules is found in the contract formation provisions of the CISG itself.

Foreign courts have neatly described this idea as the “autonomous” application of the CISG’s contract formation rules.⁸⁴ A recent decision of the Austrian Supreme Court provides a good example. The court there began by stating the basic principle that “an agreement on and effectiveness of an exclusion of the application of the CISG must be determined according to its contract formation rules.”⁸⁵ In addressing the effectiveness of a claimed exclusion through a party’s standard business terms, the court then distilled the essential point as follows:

If the CISG’s sphere of application rules apply and the CISG contains a rule for a particular issue, it displaces national law.... To this extent the Convention takes priority and an exclusion of it requires a substantive agreement between the parties, and whether such an agreement has been reached is determined by the autonomous contract formation rules of the Convention.⁸⁶

81. FOLSOM ET AL., *supra* note 40, § 2.5, at 55.

82. *See id.*

83. *See, e.g., Hanwha Corp. v. Cedar Petrochemicals, Inc.*, 760 F. Supp. 2d 426 (S.D.N.Y. 2011).

84. *See Oberster Gerichtshof [OGH] [Supreme Court] June 29, 2017, 8 Ob 104/16a*, [https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20170629_OGH0002_0080OB00104_16A0000_000.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20170629_OGH0002_0080OB00104_16A0000_000/JJT_20170629_OGH0002_0080OB00104_16A0000_000.pdf) [<https://perma.cc/TDQ5-8SVJ>] (Austria); LG Aachen [Regional Court], June 22, 2010, 41 O 94/09, para. 53, <https://openjur.de/u/146146.html> [<https://perma.cc/RZ98-6Z3X>] (Ger.) [translations by Author].

85. OGH, June 29, 2017 [translation by Author].

86. *Id.* [translation by Author]; *see also Handelsgericht [Commercial Court] June 15, 2010, HG.2009.164*, http://ww2.gerichte.sg.ch/home/dienstleistungen/rechtsprechung/kantonsgericht/entscheide_2010/hg_2009_164.html [<https://perma.cc/Q9FC-3UE5>] (Switz.) (holding that the effectiveness of an attempted exclusion of the CISG through one party’s standard business terms must be determined “by applying the UN Sales Convention”) [translation by Author].

The CISG's status as a "self-executing" treaty gives this approach to an attempted exclusion through standard business terms a special significance in the United States. The Southern District of New York's opinion in *Hanwha Corp. v. Cedar Petrochemicals, Inc.* provides a good example.⁸⁷ There, the standard business terms of a New York-based seller and a South Korea-based buyer each included a clause designating its favored domestic law.⁸⁸ Noting that both the United States and South Korea have ratified the CISG, the court first addressed the question of "whether the CISG, some other law, or both, governs the question of contract formation."⁸⁹ The answer, the court properly concluded, is found in the CISG itself:

In this case, the parties each attempted to opt out of the CISG, but could not agree on the law to displace it, [the seller] preferring New York law and the UCC, and [the buyer] preferring Singapore law.... Here, the parties never agreed to a substantive law to displace the CISG, and their competing choices must fall away, leaving the CISG to fill the void by its own self-executing force.⁹⁰

Numerous U.S. courts have embraced this analysis as well.⁹¹ The short of the matter is that a one-sided attempt to exclude the CISG through standard business terms avails a party nothing.⁹² To be

87. 760 F. Supp. 2d 426 (S.D.N.Y. 2011).

88. *Id.* at 429.

89. *Id.* at 430.

90. *Id.* at 431.

91. *See, e.g.*, *Nucap Indus., Inc. v. Robert Bosch LLC*, 273 F. Supp. 3d 986, 1006 (N.D. Ill. 2017) (holding that the CISG's contract formation rules governed a dispute over whether one party's attempt to exclude the Convention through standard business terms was effective (citing *VLM Food Trading Int'l, Inc. v. Ill. Trading Co.*, 748 F.3d 780, 787 (7th Cir. 2014)); *Turfworthy, LLC v. Dr. Karl Wetekam & Co.*, 26 F. Supp. 3d 496, 503 (M.D.N.C. 2014) (observing that because the parties disputed which of their respective sets of standard business terms governed their relationship, "the CISG is applicable in determining whether these parties from applicable countries formed a contract that included one or both of these documents" (first citing *Belcher-Robinson, L.L.C. v. Linamar Corp.*, 699 F. Supp. 2d 1329, 1335 n.4 (M.D. Ala. 2010); and then citing *Zhejiang Shaoxing Yongli Printing & Dyeing Co., Ltd. v. Microflock Textile Grp. Corp.*, No. 06-22608-CIV, 2008 WL 2098062, at *2 (S.D. Fla. May 19, 2008))); *see also Hanwha Corp.*, 760 F. Supp. 2d at 431; *Belcher-Robinson*, 699 F. Supp. 2d at 1335 n.4 (citing *Zhejiang Shaoxing Yongli Printing & Dyeing Co.*, 2008 WL 2098062, at *2).

92. *See FOLSOM ET AL.*, *supra* note 40, § 2.5, at 55; Martin Schmidt-Kessel, *Introduction to Articles 14-24*, in COMMENTARY ON THE UN CONVENTION FOR THE INTERNATIONAL SALE OF

sure, the CISG permits the parties to an international sales transaction to exclude its application.⁹³ But the autonomous, self-executing contract formation rules of the CISG itself will determine whether a particular choice-of-law clause in fact is effective—and standard business terms, however cleverly drafted, cannot avoid that result.⁹⁴

All of this heightens the importance of the CISG's actual contract formation regime and in particular its rules for resolving conflicts between standard business terms. As noted in the Introduction, however, the CISG's approach to this issue is subject to considerable controversy. Before turning to the details of that controversy, we must first examine the Convention's basic, structural rules of contract formation.

II. THE CONTROVERSY: DISSENSUS IN CONTRACT FORMATION

A. *Setting the Foundation: The CISG's Basic Formation Scheme*

The basic principles of contract formation under the CISG are well-known and in large measure neither surprising nor controversial.⁹⁵ The structural elements are the familiar notions of “offer” (defined in Article 14) and “acceptance” (defined in Article 18).⁹⁶ An effective offer is one that is “sufficiently definite”⁹⁷ and “indicates the intention of the offeror to be bound in case of acceptance,”⁹⁸ provided it actually “reaches” the offeree.⁹⁹

GOODS (CISG), *supra* note 40, at 223, 238 (observing that “the prevailing opinion among commentators” is that a court must apply CISG Articles 14-24 to determine the effectiveness of an exclusion of the CISG).

93. FOLSOM ET AL., *supra* note 40, § 2.5, at 55.

94. *Id.* § 2.1, at 45.

95. For recent reviews of these basic rules by U.S. courts, see *VLM Food Trading Int'l*, 811 F.3d at 251-52; *Hanwha Corp.*, 760 F. Supp. 2d at 431-32.

96. CISG, *supra* note 1, arts. 14, 18. For recent applications in U.S. courts, see *Nucap Indus.*, 273 F. Supp. 3d at 1007; *VLM Food Trading Int'l*, 811 F.3d at 251.

97. CISG, *supra* note 1, art. 14(1). A proposal to conclude a contract satisfies this requirement “if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.” *Id.*

98. *Id.*; see also *Hanwha Corp.*, 760 F. Supp. 2d at 432 (holding that, although a buyer made a “sufficiently definite” offer, it lacked an intent to be bound without an agreement on certain issues raised in negotiations).

99. CISG, *supra* note 1, art. 15(1). Article 24 also provides more detail on when “an offer,

Under CISG Article 18(1), an effective acceptance is a “statement ... or other conduct” by an offeree “indicating assent to an offer.”¹⁰⁰ This reflects the unsurprising notion that an effective acceptance must express “the offeree’s assent to the offer, [i.e.,] an intention to be bound by it and its terms.”¹⁰¹ Such an acceptance then “becomes effective” (thus forming a contract)¹⁰² when it “reaches the offeror.”¹⁰³

So far so good. The problem is that in modern commerce contracting rarely occurs in such a stylized fashion. Instead of an offer and a single, timely, and unconditional acceptance, most deals involve rounds of negotiations with corresponding exchanges of contract forms.¹⁰⁴ To make any plausible claim of accommodating this complexity, therefore, a legal system must address the common situation of a “deviating acceptance,” that is, an acceptance that does not agree on all points proposed in the offer.¹⁰⁵

The drafters of the U.N. Sales Convention were well aware of this issue, but—in the tense atmosphere of the Cold War in the 1970s—chose to avoid it through a superficial compromise.¹⁰⁶ As I have explained elsewhere in detail,¹⁰⁷ at the time traditionalists wanted

declaration of acceptance or any other indication of intention ‘reaches’” another party. *Id.* art. 24.

100. *Id.* art. 18(1); see also *Orica Austl. Pty. Ltd. v. Aston Evaporative Servs., LLC*, No. 14-cv-0412-WJM-CBS, 2015 WL 4538534, at *6 (D. Colo. July 28, 2015) (holding that factual disputes over the subjective intent of an offeree in a reply email precluded summary judgment on the issue of contract formation).

101. Ulrich G. Schroeter, *Article 18*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), *supra* note 40, at 333. The same provision makes clear, however, that “[s]ilence or inactivity does not in itself amount to acceptance.” CISG, *supra* note 1, art. 18(1).

102. CISG, *supra* note 1, art. 23 (“A contract is concluded at the moment when an acceptance of an offer becomes effective.”).

103. *Id.* art. 18(2). This approach differs from the Anglo-American “mailbox rule.” See RESTATEMENT (SECOND) OF CONTRACTS § 63, cmt. a (AM. L. INST. 1981). Under the CISG, the acceptance must also reach the offeror within the time fixed in the offer or, failing that, within a reasonable time. CISG, *supra* note 1, art. 18(2). This arrival requirement does not apply, however, if, as a result of an agreement or an established practice between the parties, “the offeree may indicate assent by performing an act” (such as a seller sending ordered goods or a buyer setting up a requested letter of credit for payment). *Id.* art. 18(3). For a detailed analysis of these rules, see FOLSOM ET AL., *supra* note 40, § 2.16, at 90-92.

104. See Van Alstine, *supra* note 15, at 1-2.

105. See *id.* at 21.

106. See *id.*

107. See *id.* at 21-27, 82-83.

to leave the problem solely with a simple statement of the traditional “mirror image rule.”¹⁰⁸ Reformers in contrast desired a sophisticated, and ultimately more flexible, solution.¹⁰⁹ The result was a rule, set forth in CISG Article 19, that seems to endorse both approaches, but ultimately offers no solution at all.¹¹⁰

Article 19(1) begins with traditional notions: a reply to an offer that “purports to be an acceptance” in fact does not operate as one if it “contains additions, limitations or other modifications” as compared to the offer.¹¹¹ Instead, the reply “is a rejection of the offer and constitutes a counter-offer,”¹¹² which also effects a termination of the original offer.¹¹³ This result obtains even if the reply is styled as an acceptance and even if the offeree actually intended it to be one.¹¹⁴ Taken as a whole, CISG Article 19(1) reflects the age-old “mirror image rule” originally adopted in most legal systems.¹¹⁵

The reformers nonetheless (weakly) asserted themselves in the form of the second paragraph of Article 19. Under that provision, the rigid result of Article 19(1) does not apply if the additional or different terms in the reply “do not materially alter the terms of the offer.”¹¹⁶ In such a case, the reply operates as an acceptance (and thus forms a contract), unless the offeror timely objects.¹¹⁷

108. *Id.* at 23-24.

109. *See id.*

110. *Id.* at 25.

111. CISG, *supra* note 1, art. 19(1).

112. *Id.*

113. *Id.* art. 17.

114. *Id.* art. 19(1) (stating that the rule applies even if the reply “purports to be an acceptance”).

115. *See* Ulrich G. Schroeter, *Article 19*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), *supra* note 40, at 350, 351. Regarding domestic law, see, for example, CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1118(3) (Fr.), *translation at* http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf [<https://perma.cc/84T4-CFC2>] (“An acceptance which does not conform to the offer has no effect, apart from constituting a new offer.”); BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 150, para. 2, https://www.gesetze-im-internet.de/bgb/_150.html [<https://perma.cc/T5VK-SA3V>] (Ger.) (“An acceptance subject to additions, limitations or other deviations operates as a rejection coupled with a new offer.”) [translation by Author]; RESTATEMENT (SECOND) OF CONTRACTS § 59 (AM. L. INST. 1981) (“A reply to an offer which purports to accept it but is conditional on the offeror’s assent to terms additional to or different from those offered is not an acceptance but is a counter-offer.”).

116. CISG, *supra* note 1, art. 19(2).

117. *Id.* (stating that in such a case the reply “constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect”).

The drafters' timid compromise then is revealed in Article 19(3), for that provision dissolves the flexibility promised in Article 19(2). This is because Article 19(3) broadly defines "material" to mean not only the expected subjects of price and payment, but also all terms "relating ... to the ... quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes."¹¹⁸ Even this list is not exhaustive, for the stated terms are only "among other things" that may be "considered to alter the terms of the offer materially."¹¹⁹

Distilled to its practical essence, Article 19(3) renders Article 19(2) irrelevant. As I have described the point elsewhere, "[w]hat the second paragraph giveth ... the third paragraph taketh away."¹²⁰ With only a moment's thought, it becomes clear that Article 19(3) includes within the concept of "material" effectively every term that parties could care about in modern commerce.¹²¹ Examples of a term that is not material as contemplated by Article 19 are exceptionally rare.¹²² Therefore, in the absence of a deal carefully negotiated in advance, any reply by an offeree other than an unconditional surrender will result in a rejection of the original offer and a counteroffer.¹²³

Well, what next? That is, what rule obtains if the parties proceed to perform the deal, and thus ultimately manifest a contractual

In absence of such an objection, the contract so formed includes the terms in the offer as well as the nonmaterial modifications in the acceptance. *Id.*

118. *Id.* art. 19(3).

119. *Id.*; see also Schroeter, *supra* note 115, at 358-59 (stating that the list of material terms in Article 19(3) is "clearly non-exhaustive").

120. Van Alstine, *supra* note 15, at 22.

121. JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 245 (Harry M. Flechtner ed., 4th ed. 2009) ("Under paragraph (3) the modifications that are considered ... 'material' cover most of the aspects of the contract."); Van Alstine, *supra* note 15, at 25-26 (observing that the list in Article 19(3) "embrace[s] ... effectively all subjects that would be of significance in the typical sales transaction").

122. See, e.g., Oberlandesgericht Koblenz [OLG] [Appellate Court], Mar. 1, 2010, 2 U 816/09 (Ger.), translation at <http://cisgw3.law.pace.edu/cases/100301g1.html> [<https://perma.cc/YY55-NB8W>] (regarding a minor change to a technical specification); Oberlandesgericht Koblenz [OLG] [Appellate Court], Oct. 4, 2002, 8 U 1909/01 (Ger.), translation at <http://cisgw3.law.pace.edu/cases/021004g1.html> [<https://perma.cc/9BP6-FGFD>] (regarding a change to which party would bear the cost of transportation).

123. See Franco Ferrari, *Article 19*, in UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG), *supra* note 44, at 279, 287-88; Schroeter, *supra* note 115, at 363-64.

agreement, even though their prior, formal declarations did not? I have referred to this common situation as a “partial dissensus” to capture the idea of an agreement on the essential aspects of a sales contract, but a continuing lack of agreement on other issues.¹²⁴ The short answer to this fundamental question is that we do not know. As noted, the drafters simply could not find a consensus answer and chose to avoid the issue so as not to scuttle the entire project.¹²⁵ What they left, however, were the seeds of the controversy that has raged among courts and scholars for over three decades.

Part IV will explain in detail the proper resolution to this controversy. Nonetheless, we may clear away two matters now. The first is that, although the Convention does not provide a clear answer, the resolution of the problem of a “partial dissensus” must be found in the Convention itself. In formal terms, this is a “[q]uestion[] concerning matters governed by this Convention” as declared in CISG Article 7(2).¹²⁶ Thus, domestic law is irrelevant here.¹²⁷ The debate over the settlement of the battle of the forms under the CISG instead must take place exclusively within the arena of the CISG, including with reference to the “general principles on which it is based.”¹²⁸ The second point is that, whatever the proper solution, the CISG’s approach to the battle of the forms, as U.S. courts have correctly recognized, bears no resemblance to that adopted in the domestic UCC.¹²⁹

124. See Van Alstine, *supra* note 15, at 3.

125. For a brief review of the drafting history on this decision, see Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 771 n.348 (1998).

126. CISG, *supra* note 1, art. 7(2).

127. See FOLSOM ET AL., *supra* note 40, § 2.17, at 94; Ferrari, *supra* note 123, at 287-89; Schroeter, *supra* note 115, at 364-65. One commentator has asserted that a “uniform” solution is to apply the UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS for contracts governed by the CISG. See Andrea Fejös, *Battle of Forms Under the Convention on Contracts for the International Sale of Goods (CISG): A Uniform Solution?*, 11 VINDOBONA J. INT’L COM. L. & ARB. 113, 124 (2007). Because there is no gap in the CISG, this is clearly not an appropriate solution.

128. CISG, *supra* note 1, 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.”). For a comprehensive examination of the implications of this directive, see Van Alstine, *supra* note 125, at 731-91.

129. See *VLM Food Trading Int’l, Inc. v. Ill. Trading Co.*, 748 F.3d 780, 786 (7th Cir. 2014) (“[T]he Convention’s battle-of-the-forms provision, Article 19, is significantly different from § 2-207.”); *Roser Techs., Inc. v. Carl Schreiber GmbH*, No. 11cv302 ERIE, 2013 WL 4852314, at *5 (W.D. Pa. Sept. 10, 2013) (“[N]o provision of the [CISG] creates such diametrical

B. The Law Confronts Lawyering: Contracting in the Shadow of Standard Business Terms

Before we turn to the specifics of the controversy over a “partial dissensus,” our understanding of the problem will benefit from a brief reminder of why it is so common and so difficult to resolve. The proper place to begin is with a reminder that in commercial transactions the formal rules of law function only in the background. Ultimately, they serve as a set of “off-the-rack” default rules for the making of deals.¹³⁰ But the actual agreement of the parties takes priority, for (as we have seen) CISG Article 6 expressly empowers the parties to “derogate from or vary ... any of its provisions.”¹³¹

The parties of course may express such an agreement through a formal, final contract document. The challenge is that in the hustle of modern transactions, they have neither the time nor inclination to negotiate over every aspect of their deal, and they cannot contemplate every issue that may arise in the future.¹³² This is all the more difficult for international deals, where distance, culture, language, and even time zones make formal negotiations impractical for all but the largest transactions.¹³³

It is tempting to believe that a combination of lawyers and computers can provide a solution. First, effectively every enterprise, large and small, engages clever lawyers to prepare a set of contract

opposition to the [UCC] rule as does Article 19.” (quoting 1 RONALD A. BRAND, *FUNDAMENTALS OF INTERNATIONAL BUSINESS TRANSACTIONS* 75 (2013)) (alterations in original)); *Mia. Valley Paper, LLC v. Lebbing Eng’g & Consulting GmbH*, No. 1:05-CV-00702, 2009 WL 818618, at *4 (S.D. Ohio Mar. 26, 2009) (“There are several critical differences between the law governing contract formation under the CISG and the more familiar principles of the Uniform Commercial Code.”).

130. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 87, 91 (1989) (describing default rules as “off-the-rack” rules that “fill the gaps in incomplete contracts” and “govern unless the parties contract around them”); Erik Encarnacion, *Contract as Commodified Promise*, 71 *VAND. L. REV.* 61, 68 (2018) (“Because contracts cannot account for every possible contingency, contract law supplies a wide variety of ... default contractual terms that apply absent express agreement to the contrary.”).

131. CISG, *supra* note 1, art. 6; see *supra* notes 66-72 and accompanying text. As CISG Article 9 declares, the parties’ agreement extends beyond the express terms of their contract to include “any usage to which they have agreed and ... any practices which they have established between themselves.” CISG, *supra* note 1, art. 9(1).

132. See Van Alstine, *supra* note 15, at 2-3.

133. See FOLSOM ET AL., *supra* note 40, § 1.1, at 2-3.

terms ready-made for all future transactions.¹³⁴ With such a mandate, the lawyers address every conceivable issue and circumstance through a provision that favors their client's interests in full. Management then instructs all responsible parties in the enterprise to insist on these standard business terms in all future transactions. But of course the counterparty will have pursued the same policy and thus devised its own package of one-sided standard contract terms. Moreover, sellers will have instructed their lawyers to craft contract terms that (of course) favor the interests of sellers, and buyers will have terms that favor those of buyers.

This subject has bedeviled lawmakers since the advent of modern means of reproduction of text and modern forms of communication. In the United States, the drafters of section 2-207 of the Uniform Commercial Code sought to introduce a flexible approach tailored more closely to business realities.¹³⁵ The confused result, however, was only a "statutory disaster"¹³⁶ with "ramifications ... so broad as to be called the nuclear accident of Article 2."¹³⁷

As noted, the drafters of the CISG likewise were aware of this modern challenge to the traditional rules of contract law but simply could not agree on a solution.¹³⁸ As the official *Digest of Case Law* on the CISG thus observes, "[t]he Convention does not have special rules to address the issues raised when a potential seller and buyer both use standard contract terms prepared in advance for general and repeated use (the so-called 'battle of the forms')."¹³⁹

In fact, the empty compromise in Article 19 has made matters worse—for it frustrates contract formation, but provides no guidance on what happens next. The reason lies in the interaction of CISG Article 19 and lawyer-drafted, one-sided standard business terms. Recall that any reply to an offer that contains a material alteration operates as a rejection, and that Article 19(3) defines as

134. For an examination of these practices, see E. Allan Farnsworth, *Review of Standard Forms or Terms Under the Vienna Convention*, 21 CORNELL INT'L L.J. 439, 447 (1988); Steensgaard, *supra* note 14, at 4-5; Van Alstine, *supra* note 15, at 28-33.

135. Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1221-22 (1982).

136. *Id.* at 1224.

137. John E. Murray, Jr., *A Proposed Revision of Section 2-207 of the Uniform Commercial Code*, 6 J.L. & COM. 337, 344 (1986).

138. See *supra* notes 105-10 and accompanying text.

139. UNCITRAL DIGEST, *supra* note 8, art. 19, para. 6, at 98-99.

material effectively all subjects of interest in international sales transactions.¹⁴⁰ Most often, this comes in the form of a seller's "order acknowledgement" form sent in response to a buyer's original "purchase order" form.¹⁴¹ The rub is that even lawyers of modest competence will have drafted their client's standard terms to include many, often all, and in any event at least one, of the matters identified in Article 19(3).¹⁴² Thus, if the offeree includes its standard business terms in a reply, in the great run of cases under the CISG this will not conclude a contract.¹⁴³

Nonetheless, businesspeople care about, well, the business aspects of their deal (price, specifications for and quantity of the goods, performance time). In actual dealmaking, therefore, the parties' carefully crafted standard business terms play a considerably less important role than intended by the lawyers.¹⁴⁴ One or both of the involved purchasing and sales managers may dutifully send the terms with the offer and acceptance documents, but they do not view any technical differences as an impediment to concluding a contract.¹⁴⁵ The parties thus proceed to perform the transaction—the seller ships the goods and the buyer makes payment—and it is only if a dispute later arises that they will pull out and actually read their respective standard "contract" terms.¹⁴⁶

Once the parties have proceeded to perform the deal, it is clear that they have concluded a contract under the principle of party autonomy in CISG Article 6.¹⁴⁷ The significant, unresolved issue is the *legal* process by which that contract came into being. Regarding the essential terms of a sales contract, the parties' performance clearly manifests mutual assent (because the seller has shipped

140. See *supra* notes 120-23 and accompanying text.

141. See FOLSOM ET AL., *supra* note 40, § 2.17, at 92-93; HONNOLD, *supra* note 121, at 241.

142. FOLSOM ET AL., *supra* note 40, § 2.17, at 92-93.

143. See *id.*

144. See *id.*

145. See *id.*

146. See *id.*

147. See *id.* at 93; see also HONNOLD, *supra* note 121, at 250; CISG ADVISORY COUNCIL, OPINION NO. 13: INCLUSION OF STANDARD TERMS UNDER THE CISG 3 (2013), https://www.cisgac.com/file/repository/CISG_Advisory_Council_Opinion_No_13.pdf [<https://perma.cc/7P UA-T7NG>] (declaring that when the parties perform the deal, "a contract is concluded on the basis of the negotiated terms and of any standard terms which are common in substance" absent objection by either party).

specific goods and the buyer has paid a specific price).¹⁴⁸ The unresolved issue is what *other* terms, especially standard business terms, also become part of the contract.¹⁴⁹

This is the point at which the traditional “camps” on the battle of the forms under the CISG diverge. As a foundation for the analysis to follow, the next Subsection examines the reasoning underlying each of those two proposed solutions to this most enduring controversy under the U.N. Sales Convention.

C. The Opposing “Camps” in the Battle of the Forms

It has become an established convention to divide the views on the battle of the forms (a partial dissensus) into two “opposing” camps: “last shot” and “knock out.”¹⁵⁰ The former is satisfied with the simple structural elements of CISG Articles 18 and 19; the latter prefers a deeper examination of values elsewhere in the Convention.¹⁵¹ The literature on the subject is vast. Indeed, one can hardly capture the relevant citations in a reasonable footnote.¹⁵² In

148. This agreement on the goods and the price will satisfy the “definiteness” requirements of CISG Article 14. *See* CISG, *supra* note 1, art. 14(1) (“A proposal for concluding a contract ... is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.”).

149. FOLSOM ET AL., *supra* note 40, § 2.17, at 93.

150. *See, e.g.*, Ferrari, *supra* note 123, at 289-90; Ulrich Magnus, *Last Shot vs. Knock Out—Still Battle over the Battle of Forms Under the CISG*, in *COMMERCIAL LAW CHALLENGES IN THE 21ST CENTURY*; JAN HELLNER IN MEMORIAM 185 (Ross Cranston et al. eds., 2007); Schroeter, *supra* note 115, at 365-67.

151. *See* FOLSOM ET AL., *supra* note 40, § 2.17, at 93-94.

152. For an introduction to the vast literature on the knock out approach, *see* Ferrari, *supra* note 123, at 289 & n.79; Schroeter, *supra* note 101, at 366 & n.139; *see also* HONNOLD, *supra* note 121, at 252-53; Van Alstine, *supra* note 15, at 92. For an introduction to scholarly commentary supportive of the last shot approach, *see* Ferrari, *supra* note 123, at 290 & n.82; Schroeter, *supra* note 101, at 365 & n.136; Van Alstine, *supra* note 15, at 67-68; *see also* E. Allan Farnsworth, *Article 19*, in *COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION* 175, 179 (C. Massimo Bianca & Michael J. Bonell eds., 1987); J. Clark Kelso, Note, *The United Nations Convention on Contracts for the International Sale of Goods: Contract Formation and the Battle of Forms*, 21 *COLUM. J. TRANSNAT'L L.* 529, 554 (1983); Rob Schultz, Note, *Rolling Contract Formation Under the UN Convention on Contracts for the International Sale of Goods*, 35 *CORNELL INT'L L.J.* 263, 282 (2002); Charles Sukurs, Note, *Harmonizing the Battle of the Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods*, 34 *VAND. J. TRANSNAT'L L.* 1481, 1499 (2001).

this Part, I explain the foundations of the two views; a more detailed, critical analysis will follow in Part IV.

1. *The Last Shot Approach*

There is a simplistic, almost self-evident quality to the so-called last shot approach for the battle of the forms under the CISG. Its premise is that the express provisions of the CISG already resolve the issue.¹⁵³ There is, in other words, no need for interpretation of the CISG on this score because the solution is embedded in the structure of CISG Articles 19, 18, and 17.¹⁵⁴

The argument has only two simple steps. First, supporters correctly observe that Article 19 provides a clear rule where a reply contains terms that differ from those of the offer: if those terms are “material,” the reply operates not as an acceptance, but instead as a rejection and a counteroffer.¹⁵⁵ A further effect is that the original offer is “terminated,” and thus is no longer available for acceptance.¹⁵⁶ If the expansive definition of “material” in Article 19(3) means that this result obtains for the great bulk of replies in international sales transactions, so be it.

If, then, the parties perform the contemplated deal, the final step in the analysis is the self-evident one: with the original offer terminated, the only remaining foundation for forming a contract is the counteroffer constructed for the parties under CISG Article 19(1).¹⁵⁷ All that then remains is the implied acceptance rule in Article 18(1): the performance of the contract by the new counter-offeree (the original offeror) reflects “conduct ... indicating assent to” the counteroffer.¹⁵⁸ In the final analysis, this approach gives total

153. FOLSOM ET AL., *supra* note 40, § 2.17, at 94.

154. *See id.*

155. *See, e.g.*, Farnsworth, *supra* note 152, at 179; Ferrari, *supra* note 123, at 289; *see also supra* notes 111-23 and accompanying text.

156. CISG, *supra* note 1, art. 17.

157. *See id.* art. 19(1).

158. *See id.* art. 18(1); *see also* Ferrari, *supra* note 123, at 289-90 (asserting that if the parties proceed to perform following conflicts in their standard business terms, “one must assume that the (original) offeror has accepted” the standard business terms last proposed by the offeree); Burghard Piltz, *Standard Terms in UN-Contracts of Sale*, 8 VINDOBONA J. INT’L COM. L. & ARB. 233, 242 (2004) (“[T]here is no reason to depart from the last-shot-rule of Art. 19, para. 1 CISG if the later conduct of one party ... shows its consent with the offer of the

victory to the party who happens to send the last form prior to performance. The “last shot” truly wins.

This approach to the battle of the forms under the CISG has found some support in the scholarly literature.¹⁵⁹ Most supporters see it as a self-evident extension of the mirror image rule.¹⁶⁰ Others claim that the approach advances interests of certainty.¹⁶¹ One has simply surrendered and declared that “agreement on a uniform last-shot rule is preferable to the current confusion.”¹⁶²

A few courts in the United States also seem to have accepted the last shot rule for the Convention, although with little formal analysis. Three have stated the point explicitly,¹⁶³ and it may be implied from the discussion of a few others.¹⁶⁴ Some foreign courts

other party to apply its standard terms.”); Kevin C. Stemp, *A Comparative Analysis of the “Battle of the Forms,”* 15 *TRANSNAT’L L. & CONTEMP. PROBS.* 243, 261 (2005).

159. See Farnsworth, *supra* note 152, at 179; Ferrari, *supra* note 123, at 289-90; Henry D. Gabriel, *The Battle of the Forms: A Comparison of the United Nations Convention for the International Sale of Goods and the Uniform Commercial Code: The Common Law and the Uniform Commercial Code*, 49 *BUS. LAW.* 1053, 1057-58 (1994); Piltz, *supra* note 158, at 242; Giesela Rühl, *The Battle of the Forms: Comparative and Economic Observations*, 24 *U. PA. J. INT’L ECON. L.* 189, 196-98 (2003); Stemp, *supra* note 158, at 261.

160. See Gabriel, *supra* note 159, at 1053 (asserting that the last shot rule “is the logical result of the ‘mirror image rule’”); see also Ferrari, *supra* note 123, at 289-90; Burte A. Leete, *Contract Formation Under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code: Pitfalls for the Unwary*, 6 *TEMP. INT’L & COMP. L.J.* 193, 214 (1992) (“With regard to the battle of forms issue, it seems clear that the party sending the last form will be the one whose terms prevail.”); Piltz, *supra* note 158, at 240-42.

161. See Sarah Howard Jenkins, *Contract Resurrected! Contract Formation: Common Law ~ UCC ~ CISG*, 40 *N.C. J. INT’L L. & COM. REG.* 245, 290 (2014) (claiming that “the conservative ‘last shot rule’ of the CISG provides greater certainty for determining the terms of the contract than” the malleable approach of the UCC); Maria del Pilar Perales Viscasillas, *“Battle of the Forms” Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles*, 10 *PACE U. SCH. L. INT’L L. REV.* 97, 148 (1998) (“[T]he mirror image and last-shot rule provide a certainty and legal security for the parties.”).

162. See Steensgaard, *supra* note 14, at 35.

163. *VLM Food Trading Int’l, Inc. v. Ill. Trading Co.*, 811 F.3d 247, 251 (7th Cir. 2016) (“[U]nder the [Convention] ... [t]he terms of the contract are those embodied in the last offer (or counteroffer) made prior to a contract being formed.” (second alteration in original) (quoting *Roser Techs., Inc. v. Carl Schreiber GmbH*, No. 11cv302 ERIE, 2013 WL 4852314, at *5 (W.D. Pa. Sept. 10, 2013))); *Arsape S.A. v. JDS Uniphase Corp.*, No. C 03-04535 JW, 2006 WL 8442164, at *4 (N.D. Cal. June 15, 2006) (“[T]he CISG provides for a ‘last-shot’ rule.”).

164. See *Norfolk S. Ry. Co. v. Power Source Supply, Inc.*, No. 06-58 J, 2008 WL 2884102, at *6-7 (W.D. Pa. July 25, 2008) (giving effect to the last form exchanged between the parties

have indicated support for this approach as well, although driven by the particular facts at issue.¹⁶⁵

2. *The Knock Out Approach*

The second leading theory for resolving the battle of the forms has come to be known as the “knock out rule.”¹⁶⁶ This approach is not satisfied with a mechanical application of the Convention’s structural provisions; instead, it seeks a solution in two deeper, inter-related values at the foundation of its contract formation scheme.

The first is the principle of party autonomy. Recall that CISG Article 6 empowers the parties to “derogate from or vary the effect of any of [the Convention’s] provisions.”¹⁶⁷ The distilled essence of this principle is that the parties’ agreement takes priority over the express provisions of the CISG, and even its contract formation rules in Articles 14, 18, and 19.¹⁶⁸

The knock out approach proceeds on the premise that the parties may form a contract without regard to the lock-step “offer-acceptance scheme.”¹⁶⁹ To be sure, as we have seen, the mirror image rule of CISG Article 19(1) means that, in the great run of cases, a reply to an offer will operate as a rejection and counteroffer.¹⁷⁰ Nonetheless, if the parties proceed to perform the contemplated transaction, their conduct will reflect an agreement on the essential terms necessary to form a sales contract.¹⁷¹

The knock out approach then turns to the second core value of contract formation under the CISG, its rules for determining party intent. CISG Article 8 provides these rules, and I will have much

before performance). *Golden Valley Grape Juice & Wine, LLC v. Centrisys Corp.*, No. CV F 09-1424 LJO GSA, 2010 WL 347897 (E.D. Cal. Jan. 22, 2010), seems to support the same view, but it only involved an offer that a buyer accepted without objection, *id.* at *4-5.

165. See Oberlandesgericht [OLG] [Appellate Court] Mar. 23, 2005, 6 R 200/04f (Austria), translation at <http://cisgw3.law.pace.edu/cases/050323a3.html> [<https://perma.cc/2PYP-T32A>]; Oberlandesgericht Koblenz [OLG] [Appellate Court], Oct. 4, 2002, 8 U 1909/01 (Ger.), translation at <http://cisgw3.law.pace.edu/cases/021004g1.html> [<https://perma.cc/4QGZ-EUMT>].

166. See Magnus, *supra* note 150, at 192; Schroeter, *supra* note 115, at 366.

167. CISG, *supra* note 1, art. 6; see also *supra* notes 70-72 and accompanying text.

168. See FOLSOM ET AL., *supra* note 40, § 2.17, at 95; Schmidt-Kessel, *supra* note 92, at 247.

169. See FOLSOM ET AL., *supra* note 40, § 2.17, at 95; HONNOLD, *supra* note 121, at 250; Schroeter, *supra* note 115, at 368-69; Van Alstine, *supra* note 15, at 83-84.

170. See *supra* notes 120-23 and accompanying text.

171. See *supra* notes 147-48 and accompanying text.

more to say about them below.¹⁷² For now, it will suffice to observe that a party's *actual* intent will prevail where the other party at least "could not have been unaware" of that intent.¹⁷³ And in a blunt rejection of Anglo-American notions, Article 8(3) obligates a court to consider in this inquiry "all relevant circumstances of the case."¹⁷⁴ As a result, the analysis of whether and to what extent a party has agreed to standard business terms proposed by the other must begin with an examination of the party's actual intent under the circumstances.

At this point the knock out approach fundamentally diverges from the last shot view. Without more, supporters assert, the simple fact of performance does not reflect the unqualified assent of the original offeror to the entirety of the counteroffer constructed by Article 19(1).¹⁷⁵ Instead, where the parties have not otherwise clarified the content of their deal, the contract consists only of the matters on which their respective standard business terms are in substantive agreement.¹⁷⁶ All other proposed terms do not become part of the contract.¹⁷⁷ The background rules of the Convention then fill the gaps in the parties' deal.¹⁷⁸

The German Federal Court of Justice (*Bundesgerichtshof*) has been the foremost proponent of the knock out rule under the CISG.¹⁷⁹ Indeed, its opinion in the so-called *Powdered Milk Case* has become the model for later courts in Germany and elsewhere.¹⁸⁰ In that case, a Germany-based seller offered to sell milk products "exclusively" on the basis of its standard business terms; the Netherlands-based buyer declared its acceptance, but in the process also insisted on the application of its standard business terms.¹⁸¹ As

172. See *infra* Part III.B.

173. CISG, *supra* note 1, art. 8(1).

174. *Id.* art. 8(3). For more on this essential point, see *infra* Part III.B.1.c.

175. See, e.g., FOLSOM ET AL., *supra* note 40, § 2.17, at 95; Schroeter, *supra* note 115, at 368-69.

176. FOLSOM ET AL., *supra* note 40, § 2.17, at 95; Schroeter, *supra* note 115, at 371-72.

177. See Schroeter, *supra* note 115, at 371-72.

178. *Id.*; Van Alstine, *supra* note 15, at 91.

179. See FOLSOM ET AL., *supra* note 40, § 2.17, at 97.

180. See *id.* at 95-98.

181. See Bundesgerichtshof [BGH] [Federal Court of Justice], Jan. 9, 2002, VIII ZR 304/00 (Ger.), translation at <http://cisgw3.law.pace.edu/cases/020109g1.html> [<https://perma.cc/THU2-N8YC>].

is common, neither party paid attention to the conflict, and both performed the contemplated transaction.¹⁸² When a dispute arose over the quality of the powdered milk, the seller nonetheless sought to rely on limitation of liability provisions in its standard business terms and in the standard business terms of the buyer.¹⁸³

The court first agreed that the parties formed a contract notwithstanding the clear conflict between their contract declarations.¹⁸⁴ In specific, the court held—in conformance with the principle of party autonomy in CISG Article 6—that the parties’ conduct manifested mutual assent to a contract notwithstanding the formal rules in CISG Article 19:

The appellate court correctly concluded that the partial conflicts between the respective standard business terms of the plaintiff and defendant did not lead to a failure of contract formation in the sense of Art. 19, para. 1 and para. 3 CISG due to an absence of mutual assent (*dissensus*). Its factual conclusion that, through the performance of the contract, the parties made clear that they did not view the absence of agreement between their respective standard business terms as material in the sense of Art. 19 CISG is legally correct.¹⁸⁵

The more important aspect of the opinion, however, addressed the *content* of the resulting contract. Where both parties refer to standard business terms without a clear agreement on their effect, the court reasoned, all such terms are excluded from the contract except to the extent that they are in substantive agreement.¹⁸⁶ “According to what is most likely the prevailing view,” it declared, “standard business terms that partially differ from each other become part of the contract (only) to the extent that they do not conflict; otherwise, the default legal rules apply.”¹⁸⁷

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* [translation by Author].

186. *Id.*

187. *Id.* [translation by Author].

Other foreign courts have adopted this reasoning as well.¹⁸⁸ It also finds support in a majority of legal commentators,¹⁸⁹ as well as from the CISG Advisory Council.¹⁹⁰

On the surface, it would appear that the last shot and knock out approaches stand in an insoluble conflict. Careful examination reveals otherwise. I explain this point in detail in Part IV below. But before doing so, the next Part examines the impressive work of U.S. courts on the related subjects of interpretation and the requirements for an effective reference to standard business terms in the contracting process.

III. THE UNNOTICED FOUNDATIONS FOR A NUANCED APPROACH

As noted above, a nascent trend in U.S. courts assumes, without analysis, that the CISG adopts the rigid last shot approach to the battle of the forms.¹⁹¹ This is the traditional approach of the common

188. See, e.g., Cour de cassation [Cass.] [Supreme Court] 1e civ., July 16, 1998, J 96-11.984 (Fr.), translation at <http://cisgw3.law.pace.edu/cases/980716f1.html> [<https://perma.cc/YAX7-L5X5>] (refusing to enforce conflicting forum selection clauses in the parties' respective standard business terms); Oberlandesgericht Köln [OLGK] [Higher Regional Court of Cologne], May 24, 2006, 16 W 25/06 (Ger.), https://www.justiz.nrw.de/nrwe/olgs/koeln/j2006/16_W__25_06beschluss20060524.html [<https://perma.cc/Q8WX-MJH8>] (declaring in a case governed by the CISG that "in the case of conflicting terms the contract is to be interpreted to the effect that there is at least an agreement on the overlapping terms") [translation by Author]; Oberlandesgericht Düsseldorf [OLG] [Provincial Appellate Court], July 25, 2003, 17 U 22/03 (Ger.), translation at <http://cisgw3.law.pace.edu/cases/030725g1.html> [<https://perma.cc/LV6C-K4ES>] ("According to the prevailing view ... the respective standard business terms of the parties only become part of the contract to the extent that they do not conflict.") [translation by Author]; Rb. Overijssel 3 December 2014, C-07-198594-HZ ZA 12-139 (Neth.), <http://www.cisg-online.ch/content/api/cisg/urteile/2568.pdf> [<https://perma.cc/9HWX-BKYY>] (expressly adopting the knock out rule).

189. See, e.g., JÖRG SCHULTHEIß, ALLGEMEINE GESCHÄFTSBEDINGUNGEN IM UNKAUFRECHT: EINE VERGLEICHENDE ANALYSE DES EINHEITSRECHTS MIT DEM RECHT DEUTSCHLANDS, ÖSTERREICHS, DER SCHWEIZ, FRANKREICHS UND DER USA 173-77 (2004); Stefan Kröll & Rudolf Hennecke, *Kollidierende Allgemeine Geschäftsbedingungen in internationalen Kaufverträgen*, 47 RECHT DER INTERNATIONALEN WIRTSCHAFT 736, 742-43 (2001); Schroeter, *supra* note 115, at 367-72; Van Alstine, *supra* note 15, at 81-92.

190. See CISG ADVISORY COUNCIL, *supra* note 147, at 3 ("Where both parties seek to incorporate standard terms and reach agreement except on those terms, a contract is concluded on the basis of the negotiated terms and of any standard terms which are common in substance."). The CISG Advisory Council is a private body of legal scholars that periodically offers formal opinions on the CISG. See *Welcome to the CISG Advisory Council (CISG-AC)*, CISG ADVISORY COUNCIL, <https://www.cisgac.com/> [<https://perma.cc/TCS6-ARFK>].

191. See *supra* notes 167-68 and accompanying text.

law and thus holds an allure for those who prefer simple, traditional solutions. On a separate track, however, numerous U.S. courts have seen that the CISG embraces flexible norms for the interpretation of party intent and that this has direct implications for the incorporation of standard business terms.

Although thus far unnoticed, these related developments lay the groundwork for a more sophisticated, nuanced approach to the enduring controversy over the battle of the forms under the CISG. To set the foundation, Section A first explains that in their modern jurisprudence U.S. courts quite properly have followed the lead of foreign courts in developing uniform solutions for international treaty obligations reflected in the U.N. Sales Convention.

A. Acknowledging the Gravitational Pull of Uniformity

The U.N. Sales Convention, as we have noted, holds a special place in the U.S. legal system, for it is an international treaty ratified by the United States under Article II of the Constitution.¹⁹² As a general proposition, the Supreme Court has long emphasized that in the interpretation of a treaty the opinions of other member states' courts are entitled to "considerable weight."¹⁹³

The CISG nonetheless affirms the point explicitly: Article 7(1) declares that in the interpretation of the Convention's provisions, courts must have regard for "its international character" as well as "the need to promote uniformity in its application."¹⁹⁴ As I have explained in detail elsewhere, respect for the Convention's "international character" requires "an 'autonomous' interpretation" of its provisions, one that is "free from the influence of national legal concepts and terminology."¹⁹⁵ The second point is equally important. The direction "to promote uniformity" in application reflects a mandate that domestic courts give deference to interpretive decisions by courts of other Convention member states.¹⁹⁶ This,

192. See *supra* Part I.A.

193. *Abbott v. Abbott*, 560 U.S. 1, 16 (2010) (quoting *El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999)); *Air Fr. v. Saks*, 470 U.S. 392, 404 (1985) (quoting *Benjamins v. Brit. Eur. Airways*, 572 F.2d 913, 919 (2d Cir. 1978)).

194. CISG, *supra* note 1, art. 7(1).

195. See *Van Alstine*, *supra* note 125, at 731-32.

196. See *id.* at 787-91 (examining this point in greater detail).

then, is bolstered by a further instruction in the same provision that courts advance “good faith in international trade,”¹⁹⁷ which is a refined reflection of the core principle of international law that states must fulfill their treaty commitments in good faith.¹⁹⁸

In the United States, the Convention’s status as directly applicable, supreme federal law makes these interpretive directives binding on our courts as well.¹⁹⁹ Taken together, they compel the courts, first, to approach the Convention as a distinct, entirely separate body of international law.²⁰⁰ This includes a basic recognition that the Convention’s approaches even to familiar issues may diverge in fundamental respects from traditional views in the United States. As thorny interpretive issues arise, the directives also oblige domestic courts to give due deference to prior opinions by courts of other member states.²⁰¹ Properly understood, this carries the direct implication that as a consensus view emerges on a particular issue, the interests of uniformity should exert a strong gravitational pull on courts in the United States.

For over thirty years now, it has been the responsibility of U.S. courts to apply the CISG in cases and controversies properly before them. Easily their most impressive work in fulfilling this responsibility has been on two subjects of fundamental significance for our purposes here. First, as Section B explains, they have recognized that the CISG’s rules for interpreting party intent differ markedly from the standard approaches under U.S. domestic law.²⁰² Second, as Section C describes, they have given deference to the emerging consensus in foreign courts on the special treatment of standard business terms in the contract formation process.²⁰³

197. CISG, *supra* note 1, art. 7(1).

198. *See* Vienna Convention on the Law of Treaties, *supra* note 25, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

199. *See supra* Part I.A.

200. *See* CISG, *supra* note 1, art. 7.

201. *See id.* The Convention also embraces a distinctly European, “dynamic” approach to issues of gap-filling: under CISG Article 7(2), issues left unresolved by the express provisions of the Convention “are to be settled in conformity with the general principles on which it is based.” *Id.* art. 7(2). For a detailed examination of the significance of this approach, see Van Alstine, *supra* note 125, at 738-91.

202. *See infra* Part III.B.

203. *See infra* Part III.C.

B. The Fundamentally Different Approach to Determining Party Intent

Because private parties may become bound to contractual obligations only through their consent, any reasonably sophisticated body of contract law requires rules for interpreting party intent. For the CISG, these are set forth in a deceptively simple provision (Article 8).²⁰⁴ The rules in Article 8 have been the subject of extensive scholarly analysis.²⁰⁵ Nonetheless, they are essential for our purposes here and thus require a thorough review as a foundation for the analysis to follow.

1. The Hierarchy of Interpretation Under the CISG

The CISG's rules for determining party intent diverge in fundamental respects from the traditional approach under U.S. domestic law. Under the law of most U.S. states, a strict "objective theory" governs issues of contract formation and interpretation.²⁰⁶ As one state supreme court recently observed, "[t]he intent of the parties can only be ascertained by an objective not subjective approach in contract situations. The subjective intent of the parties is ordinarily irrelevant."²⁰⁷ Under this view, if a court determines that the objective meaning of disputed words or conduct is clear, "[t]he circumstances surrounding the making of the contract, the purposes which the parties sought to accomplish and their motives cannot

204. CISG, *supra* note 1, art. 8.

205. *See, e.g.*, Martin Schmidt-Kessel, *Article 8*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), *supra* note 40, at 143; Alberto Zuppi, *Article 8*, in UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG), *supra* note 44, at 142. For a detailed analysis of the role of Article 8's interpretive rules specifically in the contract formation process, see Van Alstine, *supra* note 15, at 42-46.

206. *See, e.g.*, *Hunter v. Reece*, 253 P.3d 497, 501 (Wyo. 2011).

207. *Id.* (quoting *Shrum v. Zeltwanger*, 559 P.2d 1384, 1387 (Wyo. 1977)); *see also* *S. Healthcare Servs., Inc. v. Lloyd's of London*, 110 So.3d 735, 744 (Miss. 2013) ("The most basic principle of contract law is that contracts must be interpreted by objective, not subjective standards. A court must effect a determination of the meaning of the language used, not the ascertainment of some possible but unexpressed intent of the parties." (quoting *Simmons v. Bank of Miss.*, 593 So.2d 40, 42-43 (Miss. 1992))); *URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 757 (Tex. 2018) (observing that in interpreting a written contract, "[o]bjective, not subjective, intent controls" (quoting *Matagorda Cnty. Hosp. Dist. v. Burwell*, 189 S.W.3d 738, 740 (Tex. 2006))).

prove an intent” that is contrary to that clear meaning.²⁰⁸ Closely related to this objective, “plain meaning” approach is the parol evidence rule. This substantive rule of contract law requires a court to disregard evidence that is extrinsic to a final writing,²⁰⁹ and especially prior negotiations between the parties, if the evidence “might add to, vary, or contradict the writing.”²¹⁰

The CISG rejects this approach in favor of a thoroughgoing search for actual, not merely “objective,” intent. Under the influence of continental European systems,²¹¹ CISG Article 8 adopts as the first rule of interpretation that a court seek out and give effect to a party’s subjective intent.²¹²

208. See *Retrofit Partners I, L.P. v. Lucas Indus., Inc.*, 201 F.3d 155, 161 (2d Cir. 2000) (quoting *Levine v. Massey*, 654 A.2d 737, 741 (Conn. 1995)); see also *RECP IV WG Land Invs. LLC v. Capital One Bank (USA), N.A.*, 811 S.E.2d 817, 825 (Va. 2018) (“When the terms in a contract are clear and unambiguous, the contract is construed according to its plain meaning.”). Some U.S. jurisdictions, however, follow a more flexible interpretive approach that is closer to continental European systems. The best example is New Jersey. See, e.g., *Manahawkin Convalescent v. O’Neill*, 85 A.3d 947, 959 (N.J. 2014) (“Even in the interpretation of an unambiguous contract, we may consider ‘all of the relevant evidence that will assist in determining [its] intent and meaning.’” (alteration in original) (quoting *Conway v. 287 Corp. Ctr. Assocs.*, 901 A.2d 341, 346 (N.J. 2006))); see also *People v. Shelton*, 125 P.3d 290, 294 (Cal. 2006) (recognizing the propriety of considering extrinsic evidence to determine a party’s intent (citing *Morey v. Vannucci*, 75 Cal. Rptr. 2d 573, 578 (Cal. Ct. App. 1998))).

209. The Restatement refers to such a final writing as an “integrated agreement.” See *RESTATEMENT (SECOND) OF CONTRACTS* § 209 (AM. L. INST. 1981).

210. *Williams v. Spitzer Autoworld Canton, L.L.C.*, 913 N.E.2d 410, 418 (Ohio 2009) (quoting *Bellman v. Am. Int’l Grp.*, 865 N.E.2d 853, 856-57 (Ohio 2007)); see also, e.g., *Schron v. Troutman Sanders LLP*, 986 N.E.2d 430, 433 (N.Y. 2013) (“As a general rule, extrinsic evidence is inadmissible to alter or add a provision to a written agreement. This rule gives ‘stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses ... infirmity of memory ... [and] the fear that the jury will improperly evaluate the extrinsic evidence.’” (alteration in original) (quoting *W.W.W. Assocs. v. Giancontieri*, 566 N.E.2d 639, 642 (N.Y. 1990))).

211. See, e.g., *ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGG] [CIVIL CODE]* § 914, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622> [<https://perma.cc/6E9T-CXZT>] (“In interpreting contracts, the intent of the parties is to be determined rather than adhering to the literal meaning of its text.”) (Austria); *BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE]* § 133 (“In interpreting a declaration of intent, the actual intent is to be determined rather than adhering to the literal meaning of the declaration.”) (Ger.) [translations by Author].

212. See CISG, *supra* note 1, art. 8.

a. The Primacy of Actual Intent

The primary principle of interpretation is set forth in the first paragraph of Article 8. Under that provision, the statements and conduct of a party “are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.”²¹³ In a clear rejection of classical Anglo-American contract law, the interpretive process thus begins with a search for a party’s actual intent. Of course, subjective intent is not relevant “unless it is manifested in some fashion.”²¹⁴ But if such external evidence exists, the parties’ actual intent must prevail even if, as one German court has explained, it deviates from the “objective meaning” of their declarations.²¹⁵

The primacy of actual intent extends beyond the interpretation of a formal, written contract signed by both parties. It also broadly governs the meaning of all “statements made by and other conduct of a party.”²¹⁶ Note the use of the singular here. The message is that the required search for actual intent also applies to the questions of whether and—more important for present purposes—the extent to which a party has manifested its assent to contractual obligations. Thus, even if it is clear that the parties have formed a contract, a court must search for actual intent in determining whether a party has agreed to specific contractual provisions proposed by the other.²¹⁷

Because it will commonly be difficult to prove what the other party “knew,” the practically more important language of CISG Article 8(1) is found in the words, “could not have been unaware.”²¹⁸ The point of this language is that the other party may not hide

213. *Id.* art. 8(1). Because the negotiating process for the CISG occurred in the 1970s, it should not surprise that the drafters used only male pronouns.

214. See UNCITRAL DIGEST, *supra* note 8, art. 8, para. 8, at 54. Nonetheless, even silence or inactivity “may constitute a clear indication” of a party’s subjective intent based on past practices between the parties. See Zuppi, *supra* note 205, at 147.

215. Oberlandesgericht Hamm [OLG] [Provincial Appellate Court], Nov. 12, 2001, 13 U 102/01 (Ger.), *translation at* <http://cisgw3.law.pace.edu/cases/011112g1.html> [<https://perma.cc/6788-VGAG>].

216. CISG, *supra* note 1, art. 8(1).

217. As I explain below, some U.S. courts have been especially insightful on this point. See *infra* notes 354-62 and accompanying text.

218. See CISG, *supra* note 1, art. 8(1).

behind formal ignorance where, from past communications, prior dealings, or other surrounding circumstances, it could not have been in doubt about the actual intent of its contract partner. And indeed, Article 8(3)—about which more immediately below²¹⁹—requires a court to consider all of the relevant circumstances, including prior statements and conduct, in determining whether the other party “could not have been unaware” of that actual intent.²²⁰ This of course has special implications for the subject of our inquiry here: one party’s purported agreement to foreign standard business terms. As a blunt example—to provide a taste of the analysis to come²²¹—where a party has expressly insisted on its own standard business terms as a condition to contracting, the mere performance of the contemplated transaction can hardly leave the other party “unaware” regarding the acceptance of its own, one-sided standard business terms.

b. The Subsidiary Role of Objective Interpretation

The second paragraph of Article 8 then turns to the familiar objective approach to interpretation. Under Article 8(2), the statements and conduct of a party are to be interpreted “according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.”²²² As every first-year law student learns, the reference to a “reasonable person” is the formal way to express an “objective” approach to interpretation.²²³ To be sure, in practical terms the objective test of Article 8(2) will play the key role of interpretation in many cases.²²⁴

219. See *infra* Part III.B.1.c.

220. See CISG, *supra* note 1, art. 8.

221. See *infra* Part IV.A.

222. CISG, *supra* note 1, art. 8(2).

223. See Schmidt-Kessel, *supra* note 205, at 153; Zuppi, *supra* note 205, at 148-50.

224. Schmidt-Kessel, *supra* note 205, at 153. This commentator takes this factual point too far, however. He wrongly asserts that “practically speaking Article 8(2) contains the principal concept of interpretation” under the CISG. *Id.* Indeed, the commentator, principally in reliance on interpretive norms of the domestic law of Germany, suggests that resort to Article 8(1) “is only necessary if the intent of the party ... does not correspond to the interpretation under Article 8(2).” *Id.* at 152. This mysterious assertion directly contradicts the express hierarchy in Article 8. See Zuppi, *supra* note 205, at 149.

Nonetheless, as the provision itself reminds,²²⁵ the reasonable person approach only applies when the interpretation of the actual intent of a party under Article 8(1) “is not possible.”²²⁶

Thus, as courts in the United States have quite impressively recognized, a court must first must examine all evidence of a party’s actual, subjective intent before it may retreat to objective means of interpretation.²²⁷ UNCITRAL’s official *Digest of Case Law* declares the point directly: “Paragraphs 1 and 2 of article 8 set forth two sets of criteria and a hierarchy for those criteria: the ones set forth in article 8 (1) have to be resorted to primarily, before resorting to those contained in article 8 (2).”²²⁸

c. The Required Consideration of Surrounding Circumstances

For the Anglo-American contract mind, the third paragraph of Article 8 is perhaps the most jarring.²²⁹ This provision reinforces the required search for actual intent by mandating consideration of all relevant evidence.²³⁰ Thus, in an unmistakable rejection of the parol evidence rule, Article 8(3) declares that in all interpretive inquiries a court must consider “all relevant circumstances of the case.”²³¹

To avoid any doubt, the provision expressly provides a list of the possible “relevant circumstances.”²³² Included here are “the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.”²³³ And, significantly, this list is merely illustrative, not exhaustive, as the language “all relevant circumstances” alone makes clear.²³⁴

225. See CISG, *supra* note 1, art. 8(2) (declaring that the reasonable person approach applies only “[i]f the preceding paragraph is not applicable”).

226. Zuppi, *supra* note 205, at 149.

227. See *infra* Part III.B.2.

228. UNCITRAL DIGEST, *supra* note 8, art. 8, para. 6, at 54.

229. Again, some jurisdictions are more flexible on this score, none more so than New Jersey. See, e.g., *Conway v. 287 Corp. Ctr. Assocs.*, 901 A.2d 341, 346-47 (N.J. 2006) (“We consider all of the relevant evidence that will assist in determining the intent and meaning of the contract.... ‘This is so even when the contract on its face is free from ambiguity.’” (quoting *Atl. N. Airlines v. Schwimmer*, 96 A.2d 652, 656 (N.J. 1953))).

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

231. *Id.*

232. *Id.*

233. *Id.*

234. See also UNCITRAL DIGEST, *supra* note 8, art. 8, paras. 22-30, at 56-57 (citing

Thus, as a Swiss court has observed, the relevant evidence of intent also may be found in “the interests of the parties, the purpose of the contract, and the circumstances at the time of the conclusion of the contract.”²³⁵

As I have explained elsewhere, the deliberations over this language during the drafting of the CISG “reveal a clear policy decision to promote a flexible analysis of all circumstances that would reflect on the intent of the parties,” and this includes, as “perhaps the most indicative factor,” the precontractual statements of and other negotiations between the parties.²³⁶ This of course carries a special message for the subject of our analysis here: a claimed agreement on the incorporation of standard business terms. As Part III.C will examine in detail, numerous U.S. courts that have analyzed this issue properly have placed a particular emphasis on whether the parties discussed the terms during their contract negotiations.²³⁷

2. *The Impressive Work of U.S. Courts*

The U.N. Sales Convention, as a multilateral international treaty, resulted from a multitude of compromises among countries with vastly different legal, economic, and political perspectives.²³⁸ It thus should little surprise that the Convention contains legal constructs and concepts that may be quite unfamiliar to a common-law lawyer. As we have just seen, there is perhaps no clearer example of this than the CISG’s rules on the interpretation of party intent. Nonetheless, on this score U.S. courts have ample ground for pride, for

numerous court opinions).

235. Handelsgericht Aargau [HGer] [Commercial Court], Nov. 26, 2008, HOR.2006.79/AC/tv, (Switz.), *translation at* <http://cisgw3.law.pace.edu/cases/081126s1.html> [<https://perma.cc/JZ93-AFSQ>] [alternative translation by Author].

236. See Van Alstine, *supra* note 15, at 45-46.

237. See VLM Food Trading Int’l, Inc. v. Ill. Trading Co., 811 F.3d 247, 253 (7th Cir. 2016) (emphasizing that a disputed term “was never mentioned during any negotiations”); Roser Techs., Inc. v. Carl Schreiber GmbH, No. 11cv302 ERIE, 2013 WL 4852314, at *9 (W.D. Pa. Sept. 10, 2013) (holding that standard terms were not incorporated into a contract in part because there was “no evidence that the parties had discussed incorporation of the standard conditions during contract negotiations”); CSS Antenna, Inc. v. Amphenol-Tuchel Elecs., GmbH, 764 F. Supp. 2d 745, 754 (D. Md. 2011) (also so holding in part because the standard terms “were never discussed during [the parties’] negotiations”).

238. See *supra* note 73.

they have engaged in quite sophisticated analyses of the unfamiliar rules of interpretation in CISG Article 8.

The first major case to confront the subject, *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova d'Agostino, S.p.A.*, also has become the model.²³⁹ The dispute there involved a form document signed by the buyer that included, on the reverse side, the seller's standard business terms.²⁴⁰ The buyer claimed, however, "that the parties subjectively intended not to be bound by the terms on the reverse of that form."²⁴¹ The district court nonetheless granted summary judgment in favor of the seller, reasoning that a clause on the front of the form expressly incorporated the terms on the back.²⁴²

The Eleventh Circuit reversed, expressly on the foundation that CISG Article 8(1) diverges from the strict objective approach in domestic law.²⁴³ In language that since has become a model formulation of the point, the court declared:

Contrary to what is familiar practice in United States courts, the CISG appears to permit a substantial inquiry into the parties' subjective intent, even if the parties did not engage in any objectively ascertainable means of registering this intent. Article 8(1) of the CISG instructs courts to interpret the "statements ... and other conduct of a party ... according to his intent" as long as the other party "knew or could not have been unaware" of that intent. The plain language of the Convention, therefore, requires an inquiry into a party's subjective intent as long as the other party to the contract was aware of that intent.²⁴⁴

Subsequent courts have fallen in line such that one now can speak of a clear consensus on the matter. Indeed, over fifteen opinions have relied expressly on *MCC-Marble's* careful analysis to conclude that the CISG requires a court, as a primary rule of interpretation, to seek out and give effect to a party's subjective intent in contract formation.²⁴⁵ In the words of a New York federal

239. 144 F.3d 1384 (11th Cir. 1998).

240. *Id.* at 1385-86.

241. *Id.* at 1386.

242. *See id.* at 1385-86.

243. *Id.* at 1387, 1392-93.

244. *Id.* at 1387 (alteration in original) (footnote omitted).

245. For the most recent examples see *Nucap Indus., Inc. v. Robert Bosch LLC*, 273 F.

court, CISG Article 8(1) “expresses a preference that ... intent be considered subjectively.”²⁴⁶

U.S. courts have been equally impressive in recognizing the Convention’s divergent approach to the consideration of surrounding circumstances. For one thing, it is now well established that CISG Article 8(3) rejects the parol evidence rule in the interpretation even of final contractual writings.²⁴⁷ Courts also have correctly recognized that prior statements, conduct, and negotiations may play a significant role in interpreting a party’s intent more generally. As an Illinois federal court recently observed, “courts in this district and around the country have determined that Article 8 of the ‘CISG ... clearly instructs the court to admit and consider probative parol evidence regarding the parties’ negotiations inasmuch as that evidence reveals the subjective intent of the parties.”²⁴⁸

In sum, U.S. courts have recognized in subtle and sophisticated ways that the U.N. Sales Convention adopts a quite flexible approach to determining party intent. In specific, it rejects rigid notions of “objective intent” as well as restrictive approaches to the relevant evidence in interpretive inquiries. But what is perhaps most impressive is that the courts have also seen that their analysis of party intent has direct implications for the inclusion of standard

Supp. 3d 986, 1007-08 (N.D. Ill. 2017); *Orica Austl. Pty. Ltd. v. Aston Evaporative Servs., LLC*, No. 14-cv-0412-WJM-CBS, 2015 WL 4538534, at *6 (D. Colo. July 28, 2015); *Urica, Inc. v. Pharmaplast S.A.E.*, No. CV 11-02476 MMM (RZx), 2014 WL 3893372, at *11 (C.D. Cal. Aug. 8, 2014); *Allied Dynamics Corp. v. Kennametal, Inc.*, No. 12-CV-5904 (JFB)(AKT), 2014 WL 3845244, at *10 (E.D.N.Y. Aug. 5, 2014).

246. *Hanwha Corp. v. Cedar Petrochemicals, Inc.*, 760 F. Supp. 2d 426, 432 (S.D.N.Y. 2011); see also *Roser Techs., Inc. v. Carl Schreiber GmbH*, No. 11cv302 ERIE, 2013 WL 4852314, at *8 (W.D. Pa. Sept. 10, 2013).

247. See, e.g., *Nucap Indus.*, 273 F. Supp. 3d at 1007-08; *Kor. Trade Ins. Corp. v. Oved Apparel Corp.*, No. 13-CV-07918 (DAB), 2015 WL 1345812, at *2 (S.D.N.Y. Mar. 23, 2015); *Urica*, 2014 WL 3893372, at *11; *Weihai Textile Grp. Imp. & Exp. Co. v. Level 8 Apparel, LLC*, No. 11 Civ. 4405(ALC)(FM), 2014 WL 1494327, at *6 (S.D.N.Y. Mar. 28, 2014). One court recognized this point only a few years after the CISG entered into force. See *Filanto, S.p.A. v. Chilewich Int’l Corp.*, 789 F. Supp. 1229, 1238 n.7 (S.D.N.Y. 1992) (“[T]he Convention essentially rejects ... the parol evidence rule.”).

248. *Nucap Indus.*, 273 F. Supp. 3d at 1007 (quoting *Mitchell Aircraft Spares, Inc. v. Eur. Aircraft Serv. AB*, 23 F. Supp. 2d 915, 920 (N.D. Ill. 1998)); see also *Ningbo Yang Voyage Textiles Co. v. Sault Trading*, No. 18-CV-1961 (ARR)(ST), 2019 WL 5399973, at *4 (E.D.N.Y. Oct. 18, 2019) (observing that “unlike American contract law, the CISG ... ‘allows all relevant information into evidence even if it contradicts the written documentation’” (quoting *TeeVee Toons, Inc. v. Gerhard Schubert GmbH*, No. 00-CV-5189 (RCC), 2006 WL 2463537, at *7 (S.D.N.Y. Aug. 23, 2006))).

business terms in the contract formation process. The next Section examines those implications.

C. The Special Treatment of Standard Business Terms

The “gravitational pull of uniformity” imposed by CISG Article 7(1) applies with particular force for subjects within the scope of, but not expressly resolved in, the Convention.²⁴⁹ Like the battle of the forms more generally,²⁵⁰ the incorporation of standard business terms is one such subject.²⁵¹ Indeed, foreign courts early on recognized that they must develop rules governing the incorporation of standard business terms based on the principles in the CISG itself, and in particular the interpretive norms in CISG Article 8.²⁵² In formal terms, this again is a “[q]uestion[] concerning matters governed by this Convention,”²⁵³ such that domestic law approaches are irrelevant.²⁵⁴ Recognizing the interests of uniformity, U.S. courts impressively now have followed the lead of foreign courts and have adopted special rules for determining whether a party effectively has made reference to its standard business terms in the course of contract formation under the CISG.²⁵⁵

249. See *supra* Part III.A.

250. See *supra* notes 125-29 and accompanying text.

251. See Ferrari, *supra* note 123, at 287-89; Schroeter, *supra* note 115, at 364-65.

252. See, e.g., Oberlandesgericht [OLG] [Court of Appeals], Mar. 23, 2005, 6 R 200/04f (Austria), translation at <http://cisgw3.law.pace.edu/cases/050323a3.html> [<https://perma.cc/739H-544V>]; Oberlandesgericht Düsseldorf [OLG] [Provincial Appellate Court], July 25, 2003, 17 U 22/03 (Ger.), translation at <http://cisgw3.law.pace.edu/cases/030725g1.html> [<https://perma.cc/8XEP-3TQD>]; Rb. Utrecht 21 januari 2009, HA ZA 08-1624 (GmbH/Quote Foodproducts BV) (Neth.), translation at <http://cisgw3.law.pace.edu/cases/090121n1.html> [<https://perma.cc/XH58-VJKT>].

253. CISG, *supra* note 1, art. 7(2). One must distinguish here the incorporation of standard business terms for purposes of contract formation from the question of their validity. See CISG, *supra* note 1, art. 4(a) (providing that the CISG governs contract formation but “is not concerned with ... [t]he validity of the contract or of any of its provisions”); see also UNCITRAL DIGEST, *supra* note 8, pt. 2, para. 11, at 80 (citing cases).

254. See CISG ADVISORY COUNCIL, *supra* note 147, at 6 (“The inclusion of standard terms under the CISG is determined according to the rules for the formation and interpretation of contracts.”).

255. See *infra* Part III.C.2.

1. *Foreign Courts Take the Lead*

Foreign courts began developing sophisticated approaches to the incorporation of standard business terms under the CISG nearly two decades ago. Once again, the courts of Germany and Austria took the lead. The progenitor of modern doctrine on this score is a 2001 judgment of the German Federal Court of Justice (*Bundesgerichtshof*).²⁵⁶ Observing that the CISG has no special provisions on how a party effectively may make reference to its standard business terms in the contracting process, the court there first determined that the issue “must be determined through interpretation according to Art. 8 CISG.”²⁵⁷ It then made clear that the proponent of such terms must meet a high standard of clarity:

An effective incorporation of standard business terms first requires that the recipient of the offer is able to recognize the intent of the offeror to incorporate his terms into the contract.... The party proposing contract terms—which commonly run in his favor—easily can attach the standard business terms to its offer. Therefore, it would contradict the principle of good faith in international trade (Art. 7(1) CISG) as well as the parties’ general obligations of cooperation and disclosure to impose on a contract partner a duty of investigation with respect to terms not sent to him and to burden him with the risks and disadvantages of unknown standard business terms of the other side.²⁵⁸

Thus, the court concluded, in order for a party to effectively include standard business terms as part of its offer or proposed acceptance, the other party “must have the possibility to take note of them in a reasonable way.”²⁵⁹ The Austrian Supreme Court has stated the point even more forcefully. “It is in the interests of both parties and corresponds to the diligence of a faithful merchant as

256. BGH, Oct. 31, 2001, VIII ZR 60/01, <https://openjur.de/u/62229.html> [<https://perma.cc/A2QP-NTY9>].

257. *Id.* para. 20 [translation by Author].

258. *Id.* para. 21 (citations omitted) [translation by Author]; *see also* Oberlandesgericht [OLG] [Provincial Appellate Court], July 15, 2010, 13 U 54/10 (Ger.), *translation at* <http://cisgw3.law.pace.edu/cases/100715g1.html> [<https://perma.cc/J6MX-LG8J>]; Oberlandesgericht Düsseldorf [OLG] [Provincial Appellate Court], July 25, 2003, 17 U 22/03 (Ger.), *translation at* <http://cisgw3.law.pace.edu/cases/030725g1.html> [<https://perma.cc/8XEP-3TQD>].

259. BGH, Oct. 31, 2001, VIII ZR 60/02 para. 21 [translation by Author].

well as the principle of good faith in business transactions,” the court has declared, “that a party express itself to the other clearly and precisely in order to avoid misunderstandings.”²⁶⁰ If, therefore, a party desires to contract on the basis of standard terms that differ in material respects from the otherwise-applicable law, “it is under an obligation to state those terms clearly and in a way that makes it possible for the other party to gain direct knowledge of their content.”²⁶¹

Other foreign courts have followed suit. In accordance with the views of German and Austrian courts just described, it is now widely agreed that an attempted incorporation of standard business terms in a contract declaration “must be sufficient to put a reasonable person of the same kind as the other party in a position to understand the reference and to gain knowledge of the[m].”²⁶²

2. U.S. Courts Recognize Insights and Advance Uniformity

Courts in the United States likewise have deferred to the interests of uniformity on the need for a special treatment of standard business terms under the CISG. The court’s analysis in *Roser Technologies, Inc. v. Carl Schreiber GmbH* is particularly

260. Oberster Gerichtshof [OGH] [Supreme Court] June 29, 2017, 8 Ob 104/16a (Austria), https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=f78e91a1-3906-4c7a-97d6-d1adba7023a3&Position=1&Abfrage=Justiz&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&AenderungenSeit=Undefined&SucheNachRechtssatz=False&SucheNachText=True&GZ=8Ob104%2f16a&VonDatum=&BisDatum=11.12.2017&Norm=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=&Dokumentnummer=JJT_20170629_OGH002_00800B00104_16A0000_000 [https://perma.cc/S7VN-QJFA] [translation by Author].

261. *Id.* [translation by Author]; see also Oberster Gerichtshof [OGH] [Supreme Court] Dec. 17, 2003, 7 Ob 275/03x (Austria), translation at <http://cisgw3.law.pace.edu/cases/031217a3.html> [https://perma.cc/KBJ2-K348] (“[S]tandard terms, in order to be applicable to a contract, must be included in the proposal of the party relying on them as intended to govern the contract in a way that the other party under the given circumstances knew or could not have been reasonably unaware of this intent.”).

262. UNCITRAL DIGEST, *supra* note 8, art. 8, para. 32, at 57 (citing numerous other cases); see also Trib., 21 novembre 2007, n. 914/06 (It.), translation at <http://cisgw3.law.pace.edu/cases/071121i3.html> [https://perma.cc/C8BK-ZPZ]; Ulrich G. Schroeter, *Article 14, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)*, *supra* note 40, at 268, at 294-303 (examining the clear majority view that the proponent of standard business terms must “send their text or make it otherwise available” to the other party in a reasonable way).

impressive.²⁶³ There, the court began by expressly acknowledging the requirement that a court give due consideration to prior interpretations by foreign courts.²⁶⁴ The *Roser* court quoted in full the now-accepted formulation of the relevant test in the 2001 judgment of the German Federal Court of Justice stated above.²⁶⁵ Following that lead, the court in *Roser* declared that “standard conditions are only incorporated if one party attempts to incorporate the standard conditions and the other party had reasonable notice of this attempted incorporation.”²⁶⁶ It also quoted with approval a similar formulation by the Austrian Supreme Court to the effect that a party intending to rely on standard business terms must include them with its contract proposal “in a way that the other party under the given circumstances knew or could not have been reasonably unaware of this intent.”²⁶⁷

Other U.S. courts have adopted this view as well. Indeed, one now can comfortably speak of a consensus on the point, including with particular reference to the determinative role of the interpretive principles in CISG Article 8.²⁶⁸ The courts have identified a variety of relevant factors on this score.²⁶⁹ But the essential point is that—

263. No. 11cv302 ERIE, 2013 WL 4852314 (W.D. Pa. Sept. 10, 2013).

264. *Id.* at *4 (“When [American Courts] interpret treaties, [they] consider the interpretations of the courts of other nations.” (alteration in original) (quoting *Negusie v. Holder*, 555 U.S. 511, 537 (2009) (Stevens, J., concurring in part and dissenting in part))).

265. *See id.* at *6; *supra* note 259 and accompanying text.

266. *Id.*

267. *Id.* at * 8.

268. *See Allied Dynamics Corp. v. Kennametal, Inc.*, No. 12-CV-5904 (JFB)(AKT), 2014 WL 3845244, at *10 (E.D.N.Y. Aug. 5, 2014) (citing CISG Article 8 and declaring that “[u]nder the CISG, ‘standard conditions are only incorporated if one party attempts to incorporate the standard conditions and the other party had reasonable notice of this attempted incorporation.’” (quoting *Roser Techs.*, 2013 WL 4852314, at *6)); *Roser Techs.*, 2013 WL 4852314, at *8 n.8 (citing Article 8 for the same purpose); *CSS Antenna, Inc. v. Amphenol-Tuchel Elecs., GmbH*, 764 F. Supp. 2d 745, 753 (D. Md. 2011) (same); *TeeVee Toons, Inc. v. Gerhard Schubert GmbH*, No. 00-Civ.-5189(RCC), 2006 WL 2463537, at *7 (S.D.N.Y. Aug. 23, 2006) (same).

269. These include the clarity of the language purporting to incorporate the standard terms; the extent of evidence that the other party had actual knowledge of the attempted inclusion; the extent of the evidence that the parties discussed the terms during negotiations; whether the other party actually received the terms; and whether the other party actually signed or initialed the document attempting to incorporate the terms. *See Allied Dynamics*, 2014 WL 3845244, at *11; *Roser Techs.*, 2013 WL 4852314, at *9; *CSS Antenna, Inc.*, 764 F. Supp. 2d at 753-54.

in contrast to the domestic common law—a formulaic reference to standard business terms alone will not suffice.²⁷⁰

The district court’s careful analysis in *CSS Antenna* provides a model. There, a German seller expressly referred to its standard business terms in response to various offers by a Maryland-based buyer.²⁷¹ The court nonetheless made clear that whether those references were effective in the contract formation process must be determined under the interpretive standards of CISG Article 8.²⁷² In application of those standards, the court found that there was insufficient evidence of an intent to include the standard terms because the relevant language was “ambiguous at best,” the terms “were never discussed” during the parties’ negotiations, and there was no proof that the buyer “had actual knowledge” of them.²⁷³

Some U.S. courts, however, have wrongly left the impression that the question of proposing standard business terms also solves the broader issue of the battle of the forms.²⁷⁴ It does not. The analysis of German and Austrian courts noted above, which U.S. courts purport to follow, addresses the narrow question of whether a party has effectively made reference to standard business terms in its contract declaration (whether offer, acceptance, or counteroffer).²⁷⁵ This is a fundamentally different question from whether the *other* party has agreed to their inclusion in the parties’ contract.

To be sure, the CISG’s flexible interpretive rules in Article 8 govern both issues. The subject of the two, however, is different: the first focuses on the intent of the party proposing standard business terms, the second on the intent of the other party to accept them.

270. *Roser Techs.*, 2013 WL 4852314, at *8 (holding that a seller’s standard terms were not incorporated notwithstanding an express reference to them and a link to them on the seller’s website); *CSS Antenna*, 764 F. Supp. 2d at 754 (same); see also *Nucap Indus., Inc. v. Robert Bosch LLC*, 273 F. Supp. 3d 986, 1006-09 (N.D. Ill. 2017) (denying summary judgment on the incorporation of a seller’s standard business terms even though the buyer accepted numerous offers that included an express reference to them and a link to a web page containing them).

271. *CSS Antenna*, 764 F. Supp. 2d at 747-48, 752.

272. See *id.* at 753.

273. *Id.* at 754. For similar analyses, see *Roser Techs.*, 2013 WL 4852314, at *8; *TeeVee Toons*, 2006 WL 2463537, at *7-8.

274. Even the *Roser* court curiously stated, in the course of analyzing standard business terms, that the CISG adopts the last shot rule. 2013 WL 4852314, at *5.

275. See *supra* notes 247-52 and accompanying text.

The latter issue is where the enduring dispute over the battle of the forms is joined.

IV. THE UNIFIED FIELD SOLUTION TO THE BATTLE OF THE FORMS UNDER THE CISG

The courts' careful analysis of the CISG's flexible interpretive rules in the treatment of standard business terms examined above provides a valuable foundation and context for our core purpose here. Most important, it highlights the fact that conflicts over standard business terms come in a broad array of types and circumstances: some may involve no real "battle" at all, for neither party has made an effective reference to its standard business terms; others, in contrast, will involve direct, irreconcilable conflicts where both parties have insisted on the application of their respective standard business terms. The rest are arrayed along a factual spectrum, such that the resolution of the parties' dispute will turn decisively on the facts of each individual case.

This insight provides a foundation for a recognition that the problem of the battle of the forms under the CISG requires a nuanced approach, one that captures the full diversity of its subject matter. It is precisely here that the Convention's flexible principles on contract formation play their essential role.

Section A below thus begins with an examination of those flexible "formation values." A careful appreciation of these flexible norms, as Section B explains, makes clear that the proper solution to the battle of the forms under the U.N. Sales Convention cannot be found in any single rule. It is not that the prevailing last shot and knock out rules are wrong in all respects; the problem, rather, is that each is patently incomplete. The payoff comes in Section C. There, I explain how the CISG's flexible values permit, indeed require, a nuanced approach that is comprehensive in scope, but individualized in application.

A. *The Convention's Flexible Formation Values*

1. *Recalling the Problem, Setting the Stage*

Contractual obligations arise from consent—in traditional idioms, from a mutual manifestation of assent by two willing parties. The same is true under the CISG: Articles 14 and 18 are premised on the traditional vehicles of offer and acceptance, and embedded in both is a requirement of assent.²⁷⁶

Unfortunately, the modern phenomenon of standard business terms scrambles these concepts in operation.²⁷⁷ The parties may of course negotiate directly and reduce the entirety of their agreement to a single, final document. The goal of preformulated, standard terms, however, is precisely to circumvent negotiation and permit one party to impose its contractual will without the formal agreement of the other.²⁷⁸ The parties nonetheless commonly do not view such terms as an impediment to the conclusion of a deal. If their writings agree on the business aspects (price, goods, performance time), they simply perform the contemplated transaction (the seller ships, the buyer pays).

In the absence of standard business terms, the CISG's basic offer-acceptance formation scheme will accurately capture the parties' shared intent in the great run of cases. Thus, if an offer²⁷⁹ proposes only terms specifically prepared for an individual transaction and the offeree simply accepts,²⁸⁰ no serious question of shared intent is likely to arise. If the offeree raised no objection to terms specifically tailored to the transaction at issue, there should be little room for an argument that its unqualified conduct does not manifest agreement to a contract on that basis.²⁸¹ The same is true if the individually prepared terms in a reply materially differ from those in the

276. See CISG, *supra* note 1, arts. 14(1), 18(1) (providing in Article 14(1) that an offer must "indicate[] the intention of the offeror to be bound in case of acceptance" and requiring in Article 18(1) that a valid acceptance "indicat[e] assent to [the] offer").

277. See *supra* Part II.B.

278. See *supra* Part II.B.

279. See CISG, *supra* note 1, art. 14(1).

280. See *id.* art 18(1).

281. For a more detailed analysis of this point, see *infra* Part IV.C.3.

offer,²⁸² and the original offeror (the new counterofferee) then simply accepts the resulting counteroffer (whether expressly or by unqualified performance).

The challenge arises when one or both of the parties effectively propose standard terms. Of their very nature, such terms are drafted in advance for repeat use, have no reference to any specific transaction, and do not result from individualized negotiation. The *UNIDROIT Principles of International Commercial Contracts*—a form of international “restatement” of the law governing such contracts—thus valuably defines such terms as ones that are “prepared in advance for general and repeated use by one party and which are actually used without negotiation.”²⁸³ Where the parties refer to such terms as a matter of routine, their intent in any specific transaction becomes murky, in particular if the parties nonetheless perform the contemplated deal without further discussion.

The problem, as we have seen, is that the CISG does not have an express rule that governs the formation process in such a situation. As Part III.B above examined in detail, the CISG rejects the rigid interpretive rules of Anglo-American common law in favor of a flexible and thoroughgoing search for a party’s actual intent. The courts, as Part III.C then explained, have properly recognized that these flexible norms also govern whether a party has included standard business terms in its contract declaration (offer or purported acceptance)—that is, whether a party has effectively *proposed* standard business terms. The next stage in sophistication is to recognize that these rules also determine whether the parties have *agreed* to those terms.

Appeals to the “structural” elements of contract formation cannot advance the analysis on this score. The concepts of offer and acceptance tell us only *how* parties may form a contract, not *whether* they have done so in a particular case or what the terms of that contract are. The answer instead lies in the deeper values that animate the contract formation process.

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

283. UNIDROIT INT’L INST. FOR THE UNIFICATION OF PRIV. L., UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, art. 2.1.19(2), at 67 (2016), <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016> [<https://perma.cc/4X8C-PRPP>].

2. *Flexible Interpretive Norms Require a Flexible Solution*

For the U.N. Sales Convention, those values are found in two fundamental principles. First, Article 6 declares the primacy of “party autonomy,” that is, that the agreement of the parties takes precedence, even over the express provisions of the Convention.²⁸⁴ The second is more important, for it controls the operation of the first: CISG Article 8 sets forth flexible standards for interpreting party intent, that is, for determining precisely what that agreement is.²⁸⁵ Part III.B analyzed these flexible standards in general terms; the next step is to recognize their decisive role in resolving battles of the forms.²⁸⁶

The flexible values at the foundation of the CISG’s contract formation scheme alone permit a statement of a fundamental principle: there is no one-size-fits-all solution to the battle of the forms under the CISG. Whether the parties have agreed on the incorporation of standard business terms in their contract will turn on the facts of each specific case. This may cause frustration for some courts, for it makes their job more cumbersome (especially in the civil jury system of the United States). The flexible interpretive principles of Article 8 nonetheless preclude generalizations, and indeed reject the notion that the resolution of the battle of the forms could be found in a single, rigid rule at all.²⁸⁷

Of course, business considerations may compel a party to agree to the standard terms proposed by the other.²⁸⁸ In the absence of an express agreement, however, the primary principle of interpretation in CISG Article 8(1), as we have seen, is a subjective one.²⁸⁹ Thus, a party’s actual intent with respect to foreign standard terms must prevail if the proposing party “knew or could not have been unaware” of that intent.²⁹⁰ And in answering this question, the

284. See *supra* notes 67-73 and accompanying text.

285. See *supra* Part III.B.

286. As a subsidiary norm, CISG Article 11 reinforces the mandate of flexibility by rejecting all formal or evidentiary requirements for concluding a contract. See CISG, *supra* note 1, art. 11 (“A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.”).

287. See *id.* art. 8.

288. See *infra* Part IV.C.2.

289. See *supra* Part III.B.1.

290. See CISG, *supra* note 1, art. 8(1).

flexible interpretive norms of the CISG require the court to consider all relevant circumstances of the case.²⁹¹ Specifically, as we have seen, Article 8(3) mandates that a court examine “all relevant circumstances,” including in particular the prior negotiations, any established practices, and even subsequent conduct of the parties involved in each specific transaction.²⁹² A myopic focus on conduct as the sole source of interpretive evidence has no place here.

Nuance and flexibility are required even under the subsidiary, objective “reasonable person” test in Article 8(2). This standard will apply when the search for actual intent does not yield sufficient evidence such that the other party “could not have been unaware” of that intent.²⁹³ But here as well, the CISG rejects rigid assumptions about a party’s intent with respect to terms proposed by the other. Indeed, recall that Article 8(3) expressly provides that for the subsidiary “reasonable person” test of Article 8(2) as well, a court must consider “all relevant circumstances of the case,” and this (again) includes the parties’ prior dealings and respective interests, the purpose of the transaction, and the specific circumstances surrounding the conclusion of the contract.²⁹⁴

The distilled message is that whether a party has agreed to proposed standard business terms under the CISG is an intensely factual inquiry, one that will depend decisively on the facts of each individual case. And to state an obvious point, the idiosyncrasies of human interaction will mean a wide array of expectations, intentions, and perspectives in responding to standard business terms. The proper way to conceive of the resolution of the battle of the forms under the CISG, therefore, is as a spectrum arrayed by differences of factual degree, not of legal category. Section C below will examine this spectrum in detail. Before doing so, however, I first will explain more fully why the leading approaches to the battle of the forms fail, each in its own way, to capture the nuance required by the CISG’s flexible formation values.

291. *See supra* Part III.B.1.c.

292. *See supra* CISG, *supra* note 1, art. 8(3) (“In determining the intent of a party ... due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.”).

293. *Id.* art. 8(1).

294. *See supra* Part III.B.1.c.

B. The Inadequacy of the Existing Approaches

Both the last shot and the knock out approaches to the battle of the forms under the CISG claim fidelity to its contract formation scheme: the former simply relies on its formal, structural provisions (Articles 14, 18, and 19),²⁹⁵ the latter on deeper values of party autonomy and the primacy of actual intent (Articles 6 and 8).²⁹⁶ Careful analysis reveals, however, that these two “competing” approaches in fact are not in conflict. Rather, they simply focus on different points—different subsets of cases—along the same factual spectrum.

More generally, neither approach is capable of providing a comprehensive solution to the battle of the forms. The fundamental problem is that each proceeds from a stylized assumption about how parties express contractual agreement. Such assumptions are highly suspect even for a single jurisdiction (such as the United States) with shared cultural and legal traditions. They approach the absurd when applied to a multilateral treaty such as the CISG, which governs cultural, linguistic, political, and legal communities as diverse as Argentina, Bulgaria, Congo, Russia, China, and the United States.²⁹⁷

1. The Last Shot Approach

The last shot rule is particularly problematic in this respect. To be sure, in practical application, CISG Article 19 embraces the traditional mirror image rule.²⁹⁸ The latter rule is not the same as the former, however, and nothing leads inexorably from one to the other. Unfortunately, some courts have nonetheless conflated the two. The Seventh Circuit in *VLM Food Trading International, Inc. v. Illinois Trading Co.* thus stated that “the Convention ... us[es] the common-law ‘mirror image’ rule (sometimes called the ‘last shot’ rule) to resolve ‘battles of the forms.’”²⁹⁹ The basic statement here

295. See *supra* Part II.C.1.

296. See *supra* Part II.C.2.

297. See *Status: United Nations Convention*, *supra* note 3.

298. See *supra* notes 111-17 and accompanying text.

299. 811 F.3d 247, 251 (7th Cir. 2016) (quoting *VLM Food Trading Int’l, Inc. v. Ill. Trading Co.*, 748 F.3d 780, 785-86 (7th Cir. 2014)). As noted above, see notes 163-65 and accompanying

is correct; the parenthetical and the overarching point decidedly are not.

The fundamental flaw of the last shot approach is that it is indifferent to, or even actively disregards, the actual intent of the parties.³⁰⁰ With an appeal to supposed certainty, it simply imposes a result whenever the parties proceed to perform: the last shot wins entirely. It is of course entirely possible that a party may expressly accept an offer or counteroffer (including standard business terms) or that subsequent conduct will reflect a party's implied agreement to the same effect. When this happens, the result, descriptively, is that the last shot wins, and to that extent, the last shot approach accurately captures a subset of cases.

When stated as a "rule," however, it wildly overclaims. To be sure, conduct subsequent to a counteroffer—typically, when the seller delivers and the buyer pays—indeed will reflect an agreement on the formation of a contract.³⁰¹ But whether that conduct "indicat[es] assent"³⁰² *beyond* the essential terms reflected in that conduct, including with respect to foreign standard business terms, must be determined under the flexible interpretive rules of CISG Article 8.³⁰³ And this, again, will depend on "all relevant circumstances" of each case,³⁰⁴ including especially the prior statements and dealings of the

text, a few other courts, with little or no analysis, have claimed that the CISG adopts a last shot rule. *See* *Arsape S.A. v. JDS Uniphase Corp.*, No. C 03-04535 JW, 2006 WL 8442164, at *4 (N.D. Cal. June 15, 2006) ("[T]he CISG provides for a 'last-shot' rule."); *see also* *Roser Techs., Inc. v. Carl Schreiber GmbH*, No. 11cv302 ERIE, 2013 WL 4852314, at *5 (W.D. Pa. Sept. 10, 2013) ("Commentators have noted that Article 19 is an embodiment of the mirror image rule.... Thus ... [t]he terms of the contract are those embodied in the last offer (or counteroffer) made prior to a contract being formed.").

300. This too is at the foundation of the flawed statements that the CISG embraces the last shot "rule." *E.g.*, *VLM Food Trading*, 811 F.3d at 251 (stating that under the CISG "[t]he terms of the contract are those embodied in the last offer (or counteroffer) made prior to a contract being formed" (emphasis added) (quoting *Roser Techs.*, 2013 WL 4852314, at *5)). Because the last shot rule imposes a result irrespective of actual intent, I long ago referred to it as the "fictional assent" rule. *See* Van Alstine, *supra* note 15, at 67-72.

301. *See infra* Part IV.C.3.

302. *See* CISG, *supra* note 1, art. 18(1).

303. *See* UNCITRAL DIGEST, *supra* note 8, art. 18, para. 5, at 94 (declaring that Article 19 determines whether a reply to an offer constitutes a counteroffer, but that "[w]hether a counter-offer is accepted is then determined by article 18"); *id.* para. 3, at 94 (stating that whether the statement or conduct of a party indicates assent to an offer "is subject to interpretation in accordance with the rules of paragraphs (1) and (2) of article 8").

304. *See* CISG, *supra* note 1, art. 8(3); *supra* Part III.B.1.c.

parties. In this respect, the last shot rule collapses under the weight of its own rigidity.

There is perhaps no better example of this error than *Allied Dynamics Corp. v. Kennametal, Inc.*³⁰⁵ The court in that case cited the interpretive principles in CISG Article 8, but then inexplicably found, with no analysis, that a buyer accepted a seller's standard business terms simply because "it did not object to them within fifteen days" as required by the terms themselves.³⁰⁶ For one thing, this reasoning directly conflicts with the specific rule governing an acceptance in CISG Article 18(1).³⁰⁷ What is more important for present purposes is that it disregards the general mandate in CISG Article 8 that the court seek out and give effect to the parties' actual intent under the circumstances.³⁰⁸

2. *The Knock Out Approach*

The knock out approach to the battle of the forms suffers from a different malady, but fails for a similar reason. Although often billed as the "competing" view to the last shot rule, it formally applies only to the narrow subset of "true" battles of the forms (this describes a situation in which *both* parties effectively propose standard business terms, but carry out the contemplated transaction despite the conflict between the two sets of terms).³⁰⁹ As described in Part II.C above, the knock out view reasons that in such a case each party (at least impliedly) has objected to the terms proposed by the other. The result is that the contract consists only of the terms that are in substantive agreement.³¹⁰

Again, to this extent, the knock out rule may well capture a subset of cases. When stated as a "rule," however, it has a quite narrow scope. For one thing, it has little to say about the numerous

305. No. 12-CV-5904 (JFB)(AKT), 2014 WL 3845244 (E.D.N.Y. Aug. 5, 2014).

306. *Id.* at *11-12. *Norfolk Southern Railway Co. v. Power Source Supply, Inc.*, No. 06-58 J, 2008 WL 2884102 (W.D. Pa. July 25, 2008), is similarly flawed. There, the court applied what was in effect a last shot rule without any analysis of—indeed, without any reference to—the flexible interpretive principles required by CISG Article 8. *See id.* at *7.

307. CISG Article 18(1) expressly provides that "[s]ilence or inactivity does not in itself amount to acceptance." CISG, *supra* note 1, art. 18(1).

308. *See id.* art. 8.

309. *See supra* Part II.C.2.

310. *See supra* Part II.C.2.

cases in which only *one* party effectively incorporates standard business terms in its contract declaration (whether offer or acceptance). It likewise does not account for situations in which one party previously had agreed to some or all of the standard business terms proposed by the other. Instead, it seems to impose a result without regard to the parties' actual shared or individual intent.

C. A Flexible Solution for a Diverse Spectrum

At this point, it should be abundantly clear that the proper way to conceive of the enduring controversy over the battle of the forms under the CISG is as a spectrum of factual cases whose resolution must be found in the distinct facts of each individual dispute and not in the rigid application of an all-purpose rule. The proper solution instead begins with a recognition that the flexible formation values examined in Section A above apply across the full spectrum of agreement processes in modern international contracting. The distilled essence of these values is that courts must undertake an active search for the parties' actual intent and must consider all surrounding circumstances in doing so. This alone precludes stylized assumptions based on notions of last shot or mutual knock out.

These two leading approaches to the battle of the forms nonetheless have a role to play. Indeed, each may well be correct, as a descriptive matter, for a subset of factual cases. The problem is that neither is sufficient on its own, for neither captures the full complexity of the battle of the forms in modern commercial transactions.

The proper solution thus incorporates the positive aspects of these approaches, but recognizes the existence of the broader and substantially more diverse spectrum. In this final Section, I examine this "unified field solution" to the battle of the forms under the CISG. As I explain below, the CISG's flexible formation values provide the uniform principles that apply across the full spectrum of cases. Though comprehensive in scope, however, the values are individualized in application—that is, they permit, indeed require, a case-specific analysis of whether, and if so to what extent, the

parties in fact have agreed to contracting terms proposed in the course of their negotiations.

For ease of exposition, the analysis will proceed on the basis of five standard transaction types arrayed along the factual spectrum, from those involving no real dispute to those that present true battles between conflicting forms. The types, however, are merely an expedient for analysis, and should not divert attention from the overarching concept of a spectrum. That is, although we may profitably group cases based on factual commonalities, it is important to emphasize from the outset that the types do not represent rigid categories. Rather, the factual boundaries of each will flow into those of its neighbors.

1. No Forms, No Battle

Some cases on the spectrum involve no battle over standard business terms at all. This arises where the parties in fact never reach a contractual agreement or, if they do, neither party's standard terms become part of the contract. In the great run of these situations, the CISG's simple offer-acceptance scheme will adequately capture the contracting process.

At one extreme, conflicts over standard business terms will prevent the formation of a contract in the first place. *Hanwha Corp. v. Cedar Petrochemicals, Inc.* provides an example.³¹¹ There, the parties had an active dispute over the choice-of-law clauses in their respective standard terms.³¹² This dispute derailed their negotiations entirely, and they did not perform the contemplated deal (even though they had done so in twenty previous transactions).³¹³ Applying the mirror image rule of CISG Article 19, the court found that, even under the flexible interpretive principles in Article 8, neither party had an intent to be bound in the absence of an agreement on the applicable body of law.³¹⁴ Ultimately, no battle arose over which set of terms took precedence, because the parties'

311. 760 F. Supp. 2d 426 (S.D.N.Y. 2011).

312. *Id.* at 428.

313. *Id.* at 429.

314. *Id.* at 432-33.

dispute on the subject served as an obstacle to the formation of any contract at all.³¹⁵

Standard business terms also do not create a battle of the forms if they are first introduced after the parties form a contract. Thus, for example, in *Chateau des Charmes Wines Ltd. v. Sabaté USA Inc.*,³¹⁶ a seller forwarded its standard business terms after the parties had already concluded an oral contract for the sale of wine corks, but the buyer later performed its side of the deal.³¹⁷ The court held that the seller's action at best could be an attempt to modify the contract under CISG Article 29.³¹⁸ It declared, however, that “[n]othing in the Convention suggests that the failure to object to a party's unilateral attempt to alter materially the terms of an otherwise valid agreement is an ‘agreement.’”³¹⁹ Numerous other courts, both domestic and foreign, have held likewise.³²⁰

A similar factual circumstance can exist even when standard business terms are in play prior to contract formation. It is here that the courts' sophisticated analysis of the incorporation of such terms, as examined in Part III.C above, assumes its essential role. Recall that, following the lead of their German and Austrian counterparts, U.S. courts have held that a party effectively includes such preformulated terms of business in its contract declaration (whether offer or acceptance) only if the other party had “reasonable notice” of this intent.³²¹ The result of that analysis may well be that

315. *Id.*; see also *Orica Austl. Pty. Ltd. v. Aston Evaporative Servs., LLC*, No. 14-cv-0412-WJM-CBS, 2015 WL 4538534, at *6 (D. Colo. July 28, 2015) (concluding that a dispute over standard business terms precluded summary judgment on whether the parties had an intent to be bound to contractual obligations).

316. 328 F.3d 528 (9th Cir. 2003).

317. *Id.* at 529-31.

318. *Id.* at 531.

319. *Id.*

320. *VLM Food Trading Int'l, Inc. v. Ill. Trading Co.*, 811 F.3d 247, 253-54 (7th Cir. 2016); *Solae, LLC v. Hershey Can., Inc.*, 557 F. Supp. 2d 452, 457-58 (D. Del. 2008); Hof van Beroep [HvB] [Court of Appeal] Gent, Nov. 8, 2004, 2001/AR/1982 (Belg.), translation at <http://cisgw3.law.pace.edu/cases/041108b1.html> [<https://perma.cc/UY2H-KB5B>]; Rechtbank van Koophandel [Kh.] [Commerce Tribunal] Tongeren, Jan. 25, 2005, A.R. A/04/01960 (Belg.), translation at <http://cisgw3.law.pace.edu/cases/050125b1.html> [<https://perma.cc/2L6J-27MY>]; *Chateau des Charmes Wines Ltd., v. Sabaté, USA, Inc.*, 2005 CanLII 39869 (Can. Ont. S.C.); Hof's-Hertogenbosch 29 mei 2007, C051069/HE (Neth.), translation at <http://cisgw3.law.pace.edu/cases/070529n1.html> [<https://perma.cc/75JM-FBSN>].

321. See *supra* Part III.C.2.

neither party effectively makes reference to its standard business terms during the negotiation process.

Roser Technologies, Inc. v. Carl Schreiber GmbH—a leading authority on the subject in U.S. courts—itself provides a good example.³²² There, the court found that the buyer did not effectively refer to any standard terms in its offer and that, in application of the “reasonable notice” test, the seller likewise did not do so in its purported acceptance.³²³ The result was that standard business terms ultimately were not relevant to the analysis of the contract formation process under the CISG.³²⁴ What nonetheless remained was the seller’s counteroffer based on a payment term that “was in regular print on the front” side of its order confirmations.³²⁵ The court thus found that the buyer impliedly accepted that express term by subsequently performing the contemplated transaction without objection.³²⁶

In all of the cases at this end of our factual spectrum, no battle of the forms ultimately arises. Without that complication, the CISG’s standard provisions on offer and acceptance, including the mirror image rule of Article 19, should apply with little controversy. Thus, where a party expressly and clearly includes terms in the formal text of its offer or counteroffer document—as was the case in *Roser*—a court may well conclude that subsequent performance by the other party without objection reflects an acceptance under CISG Article 18(1).

2. *One Form, Express Acceptance*

Moving along the factual spectrum, we begin to confront cases that raise the potential for an actual battle over standard business terms. The first zone here, however, is entirely unproblematic, for

322. No. 11cv302 ERIE, 2013 WL 4852314 (W.D. Pa. Sept. 10, 2013).

323. *Id.* at *9.

324. *Id.* at *9-11. To the same effect is *CSS Antenna, Inc. v. Amphenol-Tuchel Electronics, GmbH*, 764 F. Supp. 2d 745, 754 (D. Md. 2011); *see also* *Nucap Indus., Inc. v. Robert Bosch LLC*, 273 F. Supp. 3d 986, 1006-09 (N.D. Ill. 2017) (denying a motion for summary judgment due to factual disputes over whether a party effectively included its standard business terms in a contract declaration); *TeeVee Toons, Inc. v. Gerhard Schubert GmbH*, No. 00-Civ.-5189 (RCC), 2006 WL 2463537, at *7-8 (S.D.N.Y. Aug. 23, 2006) (same).

325. *Roser Techs.*, 2013 WL 4852314, at *9-11.

326. *Id.*

it involves one party's express acceptance of standard business terms proposed by the other. An opinion by an Italian court illustrates the point.³²⁷ There, a seller's order confirmation included standard business terms that materially altered the terms of the buyer's order and thus reflected a counteroffer under CISG Article 19.³²⁸ Then, however, an authorized representative of the buyer signed and returned a copy of the seller's standard business terms.³²⁹ The court unsurprisingly found that the buyer's act of signing without objection reflected an express agreement to the seller's terms.³³⁰ Courts in the United States have found likewise when one party signed or initialed foreign business terms as part of its agreement to an offer or counteroffer,³³¹ and when there was no credible evidence of an intent to reject some or all of those business terms.³³²

Cases in this zone of our spectrum may even involve an actual battle of the forms, that is, a situation in which each party effectively refers to its standard business terms during the contract formation process. If one party then expressly accepts the standard terms of the other for inclusion in the contract, the legal analysis under the CISG is straightforward: although the battle is joined, one party agrees to settle the dispute by express agreement.

327. See Tribunale di Rovereto, 21 Novembre 2007, n. 914/06 (It.), translation at <http://cisgw3.law.pace.edu/cases/071121i3.html> [<https://perma.cc/TN7W-AV4U>].

328. *Id.*

329. *Id.*

330. *Id.* (holding that even if the buyer had effectively referred to its own standard business terms as part of its offer, the result would have been the same).

331. See *BTC-USA Corp. v. Novacare*, Civil No. 07-3998 ABM/JSM, 2008 WL 2465814, at *3-4 (D. Minn. June 16, 2008) (holding that a buyer became bound to the seller's standard business terms when an authorized representative initialed them, even though the parties had previously concluded an oral contract); *Tyco Valves & Controls Distrib. GmbH v. Tippins, Inc.*, No. CIV A 04-1626, 2006 WL 2924814, at *5-6 (W.D. Pa. Oct. 10, 2006) (holding that a seller accepted the buyer's standard business terms when an authorized representative signed each page).

332. In contrast, careful analysis of the background facts may reveal an understanding that the act of signing did not reflect an intent to agree to certain terms. Thus, for example, in *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova d'Agostino, S.p.A.*, 144 F.3d 1384, 1385-86 (11th Cir. 1998), a buyer signed a form containing the seller's standard business terms. The Eleventh Circuit nonetheless reversed a grant of summary judgment because the district court had failed to consider the prior negotiations of the parties to determine whether the buyer in fact had agreed to all of those terms. *Id.* at 1391-92. For more on this point, see *infra* Part IV.C.4.

3. *Last Shot's Domain: Implied Acceptance*

The last shot approach has a role to play under the CISG. That role, however, is decidedly not as a “rule” imposed on the parties; rather, it is a factual description of how, in some deals, the parties agree to resolve a battle of the forms. This factual zone in our spectrum involves an effective reference to standard business terms by one—in some cases even both—of the parties to an international sale of goods transaction. The careful, comprehensive examination of party intent required by CISG Article 8 nonetheless reveals that one party has impliedly agreed to accept the terms proposed by the other.³³³

These are cases in which a party fails to manifest its intent to reject foreign standard business terms. Recall that the primary rule of interpretation under CISG Article 8(1) is that a party’s actual intent prevails “where the other party knew or could not have been unaware” of that intent.³³⁴ However, this inquiry requires sufficient evidence of a party’s subjective intent to put the other party on at least constructive notice of what that intent was.³³⁵ Failing that, the subsidiary objective approach to interpretation in CISG Article 8(2) will protect the reasonable understandings of the other party in the contract formation process.³³⁶

This may arise when a party proceeds to perform a transaction in the face of standard business terms actively proposed by the other (whether as part of an original offer or a counteroffer under CISG Article 19). In any such case, if the party fails, in a sufficient way, to insist on the application of its own contracting terms, to object to those proposed by the other, or to otherwise make known what its actual intent was, the reasonable interpretation of its conduct in performing the deal may well be that it has accepted those foreign business terms. To be sure, Article 8(3) requires consideration of all surrounding circumstances, including the prior negotiations of the

333. See *supra* Part III.B.

334. See CISG, *supra* note 1, art. 8(1); *supra* Part III.B.1.a.

335. See UNCITRAL DIGEST, *supra* note 8, art. 8, para. 8, at 54 (observing that a party’s subjective intent must be “manifested in some fashion” (citing cases)).

336. See Schmidt-Kessel, *supra* note 205, at 153-54 (advocating aggressively for such a perspective).

parties,³³⁷ but in this zone along our factual spectrum, the last shot approach may well accurately describe the reasonable interpretation of party intent in the formation of a contract under the CISG.

Indeed, even the Supreme Court of Austria has recognized this point. In a 2005 opinion, the court found that a seller had agreed to the buyer's standard business terms by accepting the related purchase order without objection.³³⁸ Two facts were of particular significance for the court: first, in the specific transaction at issue "the [buyer] provided its standard business terms before the beginning of negotiations [and] expressly referred to them not only in a written confirmation of oral negotiations but in a written amendment"; and second, thereafter "the [seller] accepted the order in writing without objecting to the [buyer's] standard business terms or referring to its own terms" even though it "continuously" had referred to its own terms in *prior* transactions.³³⁹ Thus, the court found that the seller simply had accepted the buyer's order, including the standard business terms, under CISG Article 18(1).³⁴⁰ Courts in the United States have held likewise where one party insisted on the application of its standard business terms and the other proceeded to perform the deal without objection.³⁴¹

The same result may obtain even where *both* parties effectively refer to their respective standard business terms in a specific transaction. An opinion by an Austrian appellate court provides a valuable illustration.³⁴² There, a buyer incorporated its standard business terms (SBT) into its initial offer in the specific transaction at issue, but then did not refer to them at all in later correspondence

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

338. Oberster Gerichtshof [OGH] [Supreme Court] Nov. 29, 2005, 4 Ob 205/05h (Austria), translation at <http://cisgw3.law.pace.edu/cases/051129a3.html> [<https://perma.cc/E53B-6HVH>].

339. *Id.* [translation by Author].

340. *Id.*

341. Allied Dynamics Corp. v. Kennametal, Inc., No. 12-CV-5904 (JFB)(AKT), 2014 WL 3845244, at *12 (E.D.N.Y. Aug. 5, 2014) (finding, although with little analysis, that a buyer accepted a seller's standard business terms by not timely objecting to them before performance); Golden Valley Grape Juice & Wine, LLC v. Centrisys Corp., No. CV F 09-1424 LJO GSA, 2010 WL 347897, at *1, *3-5 (E.D. Cal. Jan. 22, 2010) (holding that a U.S. buyer accepted the standard business terms of an Australian seller where it received the full text of the terms by email and then performed the contemplated transaction without objection).

342. Oberlandesgericht [OLG] [Court of Appeals] Mar. 23, 2005, 6 R 200/04f (Austria), translation at <http://cisgw3.law.pace.edu/cases/050323a3.html> [<https://perma.cc/3EM8-U7DA>].

with the seller.³⁴³ In contrast, the seller “referred to the application of its SBT in all further writings,” including in the formal reply to the buyer’s offer, and also “expressly objected to the application of the SBT of the [buyer] in all respects.”³⁴⁴ This, the court correctly found, constituted a counteroffer under CISG Article 19(1).³⁴⁵ Noting that the buyer thereafter performed the contemplated deal without objection, and without ever again referring to its own standard business terms, the court concluded—in application of the interpretive rules in CISG Article 8—that the buyer “impliedly accepted the counteroffer of the [seller] which included its SBT.”³⁴⁶

A last shot approach may have special validity when a disputed contract term is highlighted in the core contracting terms of an offer or reply, and thus is not buried in preprinted, standard business terms. Indeed, even the German Federal Court of Justice—the foremost proponent of the knock out approach under the CISG—emphasized this point in a 2015 opinion.³⁴⁷ That case involved a German seller that had included an express choice-of-forum clause on the front of an offer to a Cypress-based buyer.³⁴⁸ Although it formally accepted the offer, the buyer argued that the parties’ actual intent was reflected in the fact that prior transactions between the parties did not include any agreement on the subject.³⁴⁹ The court rejected that argument, reasoning that the choice-of-forum clause

343. *Id.* para. 6.2.

344. *Id.* [translation by Author].

345. *Id.* para. 4.2.

346. *Id.* para. 6.2 [translation by Author]; *see also* Oberlandesgericht Frankfurt [OLG] [Provincial Appellate Court], June 26, 2006, 26 Sch 28/05 (Ger.), *translation at* <http://cisgw3.law.pace.edu/cases/060626g1.html> [<https://perma.cc/VX8P-7LJH>] (giving effect to the standard terms of one party because it had declared that it would contract “exclusively” on the basis of those terms and the other party then performed the deal without objection); *cf.* Handelsgericht [Commercial Court] June 15, 2010, HG.2009.164 (Switz.), http://ww2.gerichte.sg.ch/home/dienstleistungen/rechtsprechung/kantonsgericht/entscheide_2010/hg_2009_164.html [<https://perma.cc/Q9FC-3UE5>] (holding, without further analysis, that a buyer accepted a counteroffer of a seller, including the incorporated standard business terms, when it opened a contemplated letter of credit without objection).

347. Bundesgerichtshof [BGH] [Federal Court of Justice], Mar. 25, 2015, VIII ZR 125/14 (Ger.), <http://www.cisg-online.ch/content/api/cisg/urteile/2588.pdf> [<https://perma.cc/7JZD-3C72>].

348. *Id.*

349. *Id.*

“was conspicuously set forth on the front side of [the offer’s] ‘specifications’ and within the core terms of the offer.”³⁵⁰

As a descriptive matter, in each of these examples the party that sent the last form prevailed. In each, however, the court arrived at its conclusion only after a careful examination of party intent under the surrounding circumstances. This is precisely what is required by the CISG’s flexible interpretive norms.³⁵¹

4. *The Need for Nuance and the Search for Actual Intent*

Moving along our factual spectrum, we enter a zone that thus far has almost entirely escaped the attention of scholars and courts alike. At issue here are situations in which a party has accepted a formal offer or counteroffer (whether expressly or impliedly) that includes foreign standard business terms, but argues that it did not have an intent to accept some or all of those terms. Although drowned out by the clashes over last shot and knock out, this factual zone may actually be the most common and significant in battle of the forms disputes.

It is in this zone that the search for actual party intent required by CISG Article 8 plays its most significant role. But it is also the zone that presents the greatest challenge for an unthinking common law judge. Under the common law, notions of “mirror image” and “last shot” flow naturally from a stylized conception of an acceptance as an all-or-nothing proposition. Once a contract is thus formed, exaggerated versions of objective interpretation and the parol evidence rule then severely constrain any attempt to identify actual intent.

The CISG, in contrast, obligates a court to undertake an active search for actual intent, even in the case of a “last shot” containing standard business terms.³⁵² Even here, the required active search

350. *Id.* para. 40 [translation by Author].

351. Although rare, a party also may impliedly agree to standard business terms through a trade usage or established party practice under CISG Article 9(1). Oberster Gerichtshof [OGH] [Supreme Court] Aug. 31, 2005, 7 Ob 175/05v (Austria), *translation at* <http://cisgw3.law.pace.edu/cases/050831a3.html> [<https://perma.cc/E4ZD-EP85>] (holding that a seller was bound by a buyer’s standard business terms through an established practice under CISG Article 9(1) after it agreed to them in four previous transactions).

352. *See supra* Part III.B.1.

for actual intent may reveal that the other party did not accept, whether in whole or in part, those proffered standard business terms. And in this undertaking, CISG Article 8(3) requires the court to consider “all relevant circumstances of the case,” including the dealings, negotiations, and other interactions between the parties prior to the conclusion of the contract.³⁵³

Although little noticed, some U.S. courts have taken these principles to heart and engaged in a quite sophisticated analysis of whether a party in fact accepted standard business terms proposed by another. An excellent example is *TeeVee Toons, Inc. v. Gerhard Schubert GmbH*.³⁵⁴ The *TeeVee Toons* court confronted a situation in which a German seller and a U.S. buyer entered into a written contract that attached the seller’s standard business terms.³⁵⁵ When a dispute later arose over the quality of the sold goods, the seller sought to invoke certain warranty disclaimers set forth in its standard business terms.³⁵⁶ Although the buyer had formally accepted the related offer, it claimed that the parties had extensive discussions both before and after the contract was formed to the effect that some or all of the seller’s standard terms would not have effect.³⁵⁷

After carefully analyzing CISG Article 8’s rules of interpretation, the court highlighted its obligation to seek out the buyer’s subjective intent under the circumstances.³⁵⁸ Thus, it declared,

Under the CISG ... any statements made between [the parties] that contradict the written “Terms and Conditions,” or that indicate that the “Terms and Conditions” section as a whole is not part of the final agreement between the parties, must be considered in deciding what is part of the [final] Contract.³⁵⁹

On this basis, the court refused to grant summary judgment in favor of the seller even though, again, its standard business terms were a formal part of the offer accepted by the buyer.³⁶⁰

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

354. No. 00 Civ. 5189(RCC), 2006 WL 2463537 (S.D.N.Y. Aug. 23, 2006).

355. *Id.* at *1, *4, *6.

356. *Id.* at *6.

357. *Id.* at *6-7.

358. *Id.* at *7-8.

359. *Id.* at *7.

360. *See id.* at *9.

The required search for active intent may even reveal that a party did not agree to a *specific* term in standard business terms otherwise incorporated in a contract. Thus, for example, the court in *Nucap Industries, Inc. v. Robert Bosch LLC* refused to grant summary judgment based on substantial evidence that a seller did not agree to a specific provision in over eight thousand purchase orders sent by a buyer.³⁶¹ The essential issue, the court emphasized, was whether the buyer “knew or could not have been unaware” of the seller’s intent not to agree to that provision.³⁶²

A specific standard business term may be excluded from a contract in this way even under the subsidiary, “objective” standard of interpretation of CISG Article 8(2). A 2008 opinion of a German court illustrates the point.³⁶³ There, a German buyer and an Italian seller had an express agreement on a specific location for the performance of a sales contract, but the seller later sent and the buyer signed standard business terms that stipulated a different location.³⁶⁴ In such a clear case, the court dispensed with an examination of subjective intent and turned directly to the buyer’s reasonable expectations under the circumstances.³⁶⁵ The relevant standard for the inclusion of a specific standard term under CISG Article 8(2), the court concluded, is one of unreasonable surprise, that is, “whether the term so clearly diverges from the expectations of the other party that it could not reasonably have expected that the term would be included” in the contract through the foreign standard business terms.³⁶⁶ Because that was the case with the standard term at issue there, the court enforced the parties’ prior express agreement.³⁶⁷

This opinion provides an apt capstone to our analysis of this zone in the spectrum. The CISG’s flexible interpretive principles require an active search for intent under the specific circumstances

361. 273 F. Supp. 3d 986, 1007-09 (N.D. Ill. 2017).

362. *Id.* at 1008.

363. Landgericht Landshut [LG] [District Court], June 12, 2008, 43 O 1748/07 (Ger.), *translation at* <http://cisgw3.law.pace.edu/cases/080612g2.html> [<https://perma.cc/XF9K-N8XY>].

364. *Id.*

365. *See id.*

366. *Id.* [translation by Author].

367. *Id.*; *see also* UNCITRAL DIGEST, *supra* note 8, art. 8, para. 31, at 57 (stating the same standard).

surrounding the parties' deal. This active search may reveal that the other party "knew or could not have been unaware" of an intent not to accept foreign business terms or even that a reasonable person would have recognized such an intent. The same applies when the foreign business terms were included in the "last shot" that led to the formation of a contract.

5. Knock Out's Domain: A Battle Truly Joined

The far end of our factual spectrum involves cases in which a battle of the forms is well and truly joined. In this zone, each party effectively incorporates standard business terms in its contract declaration (whether offer or acceptance) as discussed above³⁶⁸ and continues to insist on their application prior to contract formation. In such a situation, there is no principled reason to give preference to the terms of either party, and certainly not based solely on the fortuity of which sends its form last.

The place to begin the analysis here is with a reminder: because commercial parties routinely refer to their respective standard business terms, the result in the great run of cases, as we have seen, is that their exchange of forms will not create a contract under CISG Article 19.³⁶⁹ Notwithstanding this formal legal result, the parties commonly proceed to perform the contemplated deal, oblivious to—or in knowing disregard of—the conflicts between their respective standard terms.

It is precisely here that the fundamental formation values of the CISG play their essential role. After the parties have performed the essential elements of a sales transaction, they clearly have manifested an agreement on the existence of a contractual relationship, and the principle of party autonomy in Article 6 will give effect to that agreement.³⁷⁰ The only question is the content of such a contract. As we have noted, the parties' conduct will demonstrate an agreement on those matters reflected in the performance (most important, identification of the goods and performance time through

368. See *supra* Part III.C.

369. See *supra* notes 121-23 and accompanying text.

370. See *supra* note 147 and accompanying text.

shipment and acceptance, and of the price through payment).³⁷¹ The remainder of the contract, including with reference to the proposed standard business terms, then raises a core issue of party intent. And this, of course, requires application of the flexible interpretive rules in CISG Article 8.³⁷²

As Part III.B explained in detail, the primary principle of interpretation in CISG Article 8(1) is a subjective one.³⁷³ Thus, a party's actual intent with respect to foreign standard terms must prevail if the proposing party "knew or could not have been unaware" of that intent.³⁷⁴ Where *both* parties refer to their respective standard business terms in the contracting process and then continue to insist on their application prior to performance, this interpretive inquiry in very large measure will answer itself. As a simple business matter, a party has every reason *not* to accept a comprehensive set of one-sided, generally quite unfavorable standard terms proposed by the other. And there can be little room for doubt on this score where the party separately has insisted on the application of its *own* standard terms. In such a case, the other party must know, or at a minimum will have ample grounds to be aware of, the actual intent of its contract partner not to accept foreign standard business terms. Of course, in the case of a true battle of the forms, the reverse is true as well.

A review of the circumstances of such a case thus commonly will reveal that *neither* party could be "unaware" of the intent of the other under the primary, subjective rule of interpretation in CISG Article 8(1). But the outcome will commonly be the same under the subsidiary, "reasonable person" test of CISG Article 8(2) as well.³⁷⁵ Where a party has insisted on its own standard terms, a reasonable person under the circumstances could hardly conclude—based solely on narrow performance of shipment or payment—that the party

371. See CISG, *supra* note 1, art. 14(1) (providing that an offer is "sufficiently definite" if it indicates the goods and at a minimum makes provision for determining the quantity and the price); *id.* art. 23 (providing that a contract is formed when acceptance of the offer becomes effective).

372. See *supra* Part III.B.

373. In particular, see *supra* Part III.B.1.a.

374. CISG, *supra* note 1, art. 8(1).

375. See *supra* Part III.B.1.b.

nonetheless has an intent to accept the one-sided terms proposed by the other.

Such cases are the domain for the knock out rule. Where both parties have demanded application of their respective terms, an examination of the facts will commonly demonstrate that neither had an intent to accept the standard terms of the other. The content of the contract that results solely from the parties' conduct, then, can only be constructed on the basis of the actual agreement between them. Beyond the essential terms revealed by actual performance of the deal, this includes the terms on which their respective forms overlap in substance (likely quite limited) as well as any usages or practices otherwise agreed upon by the parties.³⁷⁶ It is only to this extent that the parties have agreed to "derogate from or vary the effect of" the CISG under the principle of party autonomy declared in Article 6.³⁷⁷ The background provisions in the CISG will apply to define the remainder of the parties' contractual rights and obligations.³⁷⁸

As I have noted above, the German Federal Court of Justice has been the leading proponent of this knock out approach to true battle of the forms cases.³⁷⁹ In its *Powdered Milk* opinion noted above, the Court addressed a situation in which a buyer and a seller both referred to their respective standard business terms, but the parties performed the deal without further discussion.³⁸⁰ The Federal Court of Justice found that through their conduct the parties nonetheless formed a contract based on the party autonomy principle in CISG Article 6.³⁸¹

The more enduring facet of the court's opinion, however, was on the *content* of that contract, and on this the Federal Court of Justice

376. See HONNOLD, *supra* note 121, at 252; Schroeter, *supra* note 115, at 369; Van Alstine, *supra* note 15, at 90; see also CISG, *supra* note 1, art. 9(1) ("The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.").

377. CISG, *supra* note 1, art. 6.

378. See HONNOLD, *supra* note 121, at 252; Schroeter, *supra* note 115, at 372; Van Alstine, *supra* note 15, at 91.

379. See *supra* notes 179-80 and accompanying text.

380. See Bundesgerichtshof [BGH] [Federal Supreme Court], Jan. 9, 2002, VIII ZR 304/00 (*Powdered Milk Case*) (Ger.), translation at <http://cisgw3.law.pace.edu/cases/020109g1.html> [<https://perma.cc/THU2-N8YC>].

381. *Id.*

provided the now-classic statement of the knock out rule: “standard business terms that partially differ from each other become part of the contract (only) to the extent that they do not conflict; otherwise, the default legal rules apply.”³⁸² As noted, this formulation has since found support in other foreign courts and a clear majority of legal commentators.³⁸³

Courts in the United States have not yet had an occasion to address a case that squarely falls in this final zone of our spectrum. Nonetheless, one can find in some opinions promising seeds of the sophistication necessary to recognize the propriety of the knock out approach in true battle of the forms situations. *Nucap Industries*, briefly noted above,³⁸⁴ is particularly impressive in this respect. That case involved a claim by a buyer (Bosch) that a seller of brake components (Nucap) had agreed to its standard business terms, including a provision that transferred certain intellectual property rights of the seller.³⁸⁵

The court founded its analysis of the parties’ deal squarely on the flexible interpretive rules in CISG Article 8.³⁸⁶ In specific, it declared that Articles 8(1) and 8(3) “permit[] consideration of evidence of the parties’ negotiations and subsequent conduct to determine whether they mutually ... intended to incorporate a term when the contract was formed.”³⁸⁷ The essential issue, the court held, was whether Bosch “knew or could not have been unaware” of Nucap’s intent not to agree to the intellectual property provision in Bosch’s standard business terms.³⁸⁸ Citing evidence of the prior negotiations of the parties, the court refused to grant summary judgment on the enforceability of that provision.³⁸⁹

382. *Id.* [translation by Author].

383. *See supra* notes 188-90 and accompanying text.

384. *See supra* notes 361-62 and accompanying text.

385. *Nucap Indus., Inc. v. Robert Bosch LLC*, 273 F. Supp. 3d 986, 993 (N.D. Ill. 2017).

386. *See id.* at 1007-08.

387. *Id.* (citing *VLM Food Trading Int’l, Inc. v. Ill. Trading Co.*, 811 F.3d 247, 253 (7th Cir. 2016)).

388. *Id.* at 1008.

389. *Id.* at 1008-09; *cf. Mia. Valley Paper, LLC v. Lebbing Eng’g & Consulting GmbH*, No. 1:05-CV-00702, 2009 WL 818618, at *7 (S.D. Ohio Mar. 26, 2009) (declaring in a dispute over the quality of the sold goods that “[u]nder Articles 8 and 11 of the CISG, witness testimony may be considered to determine the terms of the contract and this consideration presents issues of fact which must be determined at trial”).

*MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova d'Agostino, S.p.A.*³⁹⁰—the progenitor of much of the sophisticated analysis by U.S. courts of party intent under the CISG³⁹¹—contains similar promising insights. At issue there was the enforceability of a seller's standard business terms printed on the reverse side of a document actually signed by the buyer.³⁹² The court nonetheless declared that "Article 8(1) of the CISG requires a court to consider ... evidence of the parties' subjective intent" in interpretive inquiries.³⁹³ After an extensive analysis of CISG Article 8(3), the court then reversed a grant of summary judgment because the district court had failed to consider the prior negotiations of the parties in determining whether the buyer in fact had agreed to those terms.³⁹⁴ Other U.S. courts likewise have recognized the primacy of subjective intent in analyzing whether a party has agreed to standard business terms in the contract formation process.³⁹⁵

It is but a small step from these insights to a recognition that a court must examine the parties' respective subjective intent in "true" battle of the forms situations. Where each party has insisted on the application of its standard business terms, neither can claim to be "unaware" of the other's actual intent not to accept conflicting terms. When, then, the parties nonetheless proceed to perform their contemplated deal, the content of the resultant contract exists only in the expressive content of their conduct and the actual agreement between their respective forms (as supplemented by the background rules of the Convention).

CONCLUSION

A system of contract law reveals its essential values in the norms governing how contractual obligations come into being in the first

390. 144 F.3d 1384 (11th Cir. 1998).

391. See *supra* notes 239-46 and accompanying text.

392. See *MCC-Marble*, 144 F.3d at 1387-88.

393. *Id.* at 1388.

394. *Id.* at 1388-92.

395. See, e.g., *CSS Antenna, Inc. v. Amphenol-Tuchel Elecs., GmbH*, 764 F. Supp. 2d 745, 753-54 (D. Md. 2011) (denying a motion to dismiss based on a forum selection clause in a party's standard business terms because of factual issues over whether the other party actually agreed to that specific clause).

place. For the U.N. Sales Convention, those values are reflected in the twin principles that the parties' agreement comes first ("party autonomy") and that a court must undertake a thoroughgoing search to determine what the parties' actual agreement is.³⁹⁶ Taken together, these flexible formation values provide all of the tools necessary for a comprehensive resolution to the enduring controversy over the "battle of the forms" under the CISG.

I have explained here that the proper way to conceive of the battle of the forms is as a spectrum of diverse, particularized relationships. Seen in this way, there can be no single "right" answer. Rather, the solution requires an individualized application of the flexible formation values that unify the Convention's contract formation scheme. I have described this comprehensive approach as the "unified field solution" to capture the notion that a single set of principles applies across the full spectrum of agreement processes.

In recent years, courts in the United States have recognized, in quite sophisticated ways, the significance of the Convention's flexible rules for determining party intent. In specific, they have recognized that the required search for actual intent governs whether a party effectively has *proposed* standard business terms. Although thus far unnoticed, this development also sets the foundation for a more thoughtful analysis of the core question in the battle of the forms: whether, and to what extent, the parties in fact have *agreed* to those terms. This final stage of sophistication is achieved by recognizing that the U.N. Sales Convention both enables and requires a flexible interpretive approach that accommodates the diverse, nuanced reality of modern international contracting.

396. CISG, *supra* note 1, arts. 6, 8.