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Here Lions Roam: CISG as the Measure of a Claim's Value and Validity and a Debtor's Dischargeability

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HERE LIONS ROAM: CISG AS THE MEASURE OF A CLAIM'S VALUE AND VALIDITY AND A DEBTOR'S DISCHARGEABILITY

Amir Shachmurove[*]

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[*] Amir Shachmurove is an associate with Troutman Sanders LLP and has served as a law clerk to four federal judges. This Article is dedicated to the first judge that the author ever knew, the Honorable Norma L. Shapiro, whose wisdom and warmth hallows her memory and whose unfortunate absence has impoverished her court and city. As always, no word could have been written but for the beloved Lindsey L. Dunn, and all the views expressed and mistakes made herein are the author's own. This Article's title toys with (and hearkens to) a common misimpression: when denoting unknown territories on map, the classical phrase used by ancient Roman and Medieval cartographers was "*HIC SVNT LEONES*" (literally, "here are lions"), not "HC SVNT DRACONES," as many believe (defined as "here are dragons").

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"*I am tormented by an everlasting itch for things remote. I love to sail forbidden seas, and land on barbarous coasts*."[1]

INTRODUCTION

Fittingly enough, their history begins in the same decade, their creation borne forward by the same ideological currents and overseen by similarly conversant intellects.[2] In 1940, William A. Schnader,[3] with the concurrence of a more collectively[4] and poetically inclined Karl N. Llewellyn,[5] proposed the creation of a complete commercial code for adoption by every state.[6] Destined to become its era's "most ambitious codification" after years of effort "by literally hundreds of . . . lawyers and businessmen,"[7] Schnader's project aimed not just to achieve the coordination of the Uniform Sales Act, the Uniform Negotiable Instruments Law, the Uniform Bills of Lading Act, Uniform Warehouse Receipts Act, and all other such acts in the field of commercial law,[8]

[1] HERMAN MELVILLE, MOBY DICK: OR, THE WHALE 8 (Modern Library 1892) (1851). As Plutarch once observed, "geographers . . . crowd into the edges of their maps parts of the world which they do not know about, adding notes in the margin to the effect, that beyond this lies nothing but sandy deserts full of wild beasts, unapproachable bogs, Scythian ice, or a frozen sea . . . ." PLUTARCH, *Theseus*, *in* 2 PLUTARCH'S LIVES OF ILLUSTRIOUS MEN 1 (1880).

[2] *See* Larry A. DiMatteo, *The Curious Case of Transborder Sales Law: A Comparative Analysis of CESl, CISG, and the UCC*, *in* CISG VS. REGIONAL SALES LAW UNIFICATION: WITH A FOCUS ON THE NEW COMMON EUROPEAN SALES LAW 28–29 (Ulrich Magnus ed., Sellier European Law Publishers 2007).

[3] At the time, Schnader served as president of the National Conference of Commissioners on Uniform State Laws, an organization which agitated for and drafted uniform laws on commercial subjects in 1896, 1906, 1909, 1918, and 1933. Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541 n.1, 545–46 (2006).

[4] Allen R. Kamp, *Downtown Code: A History of the Uniform Commercial Code 1949–54*, 49 BUFF. L. REV. 359, 392 (2001).

[5] *Id.* at 277; *cf.* KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 11 (Steven Sheppard ed., Oxford Univ. Press 2008) (1930) ("The lawyer's slip in etiquette is the client's ruin. From this angle I say procedural regulations are the door, and the only door, to make real what is laid down by substantive law. Procedural regulations enter into and condition all substantive law's becoming actual when there is a dispute.").

[6] Maggs, *supra* note 3, at 541 n.1, 546; *see also, e.g.*, William A. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1, 1 (1967) (setting forth his role); Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 799–800 (1958) (retelling this same history).

[7] Soia Mentschikoff, *Highlights of the Uniform Commercial Code*, 27 MOD. L. REV. 167, 167 (1964). Soia Mentschikoff had married Llewellyn in 1946 and served as his assistant reporter. Braucher, *supra* note 6, at 800; Kamp, *supra* note 4, at 277–78. In 1964, she represented the United States at The Hague to push for the adoption of an international uniform sales law, thereby playing a role in CISG's own evolution. *See, e.g.*, E. Allan Farnsworth, *Soia Mentschikoff as Reformer*, 16 U. MIAMI INTER-AM. L. REV. 1, 2 (1964).

[8] By 1940, neither these laws nor their amendments had been enacted by every state. Schnader, *supra* note 6, at 2.

but also their modernization and extension to then-unregulated fields.[9] Nearly a decade later, Llewellyn, Schnader's chosen reporter,[10] and the peerless drafting crew that he assembled released a draft composed of nine integrated articles, with notes and comments appended.[11] In August 1953, after several minor amendments were proposed and ratified, the Uniform Commercial Code (UCC or U.C.C.) saw the day's light.[12] Meanwhile, touched by this same desire for predictability and uniformity in commercial matters,[13] Ernst Rabel, a German Jew destined to flee to the United States,[14] crafted the progenitor of the United Nations Convention on Contracts for the International Sale of Goods (CISG or C.I.S.G.),[15] its immediate predecessor—the Uniform Law on the Formation of Contracts for the International Sale of Goods and the Uniform Law on the International Sale of Goods—adopted in 1964,[16] and thereby gained unofficial

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[9] Walter D. Malcolm, *The Uniform Commercial Code in the United States*, 12 INT'L & COMP. L.Q. 226, 229 (1963); *see also* Schnader, *supra* note 6, at 2 (summarizing these laws' perceived problems, including "inconsistencies between the several acts themselves" and the fact "that . . . certain of the provisions of these acts had become, if not obsolete, at least not suitable to govern the business practices of the day"). Interestingly, despite its focus on uniformity, the UCC was proposed so as to undercut a movement for a federal sales law.

[10] Schnader, *supra* note 6, at 4.

[11] Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve The Good, The True, The Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1141 n.1 (1985). *See also* Schnader, *supra* note 6, at 5.

[12] Braucher, *supra* note 6, at 800–01; *see also* Schnader, *supra* note 6, at 6–8 (summarizing the process). Because the UCC's adoption proceeded state-by-state, it has no single effective date. However, by 1968, it had been ratified by every state except Louisiana, though many did so after making a bewildering array of alterations. *See* E. Hunter Taylor, Jr., *Uniformity of Commercial Law and State-by-State Enactment: A Confluence of Contradictions*, 30 HASTINGS L.J. 337, 337 (1978–79). Of course, the UCC's own ambiguous language did not help, *id.*, as Llewellyn seemingly once conceded, *see* Karl N. Llewellyn, *Why a Commercial Code?*, 22 TENN. L. REV. 779, 784 (1953) ("I am ashamed of . . . [the Code] in some ways; there are so many pieces that I could make a little better; there are so many beautiful ideas I tried to get in that would have been good for the law, but I was voted down.").

[13] Ingeborg Schwenzer & Pascal Hachem, *The CISG—Successes and Pitfalls*, 57 AM. J. COMP. L. 457, 459 (2009); *see also* Edita Ubartaite, *Application of the CISG in the United States*, 7 EUR. J. L. REFORM 277, 279 (2005).

[14] For more on this extraordinary man, *see* Max Rheinstein, *In Memory of Ernst Rabel*, 5 AM. J. COMP. L. 185 (1956).

[15] United Nations Convention on Contracts for the International Sale of Goods, art. 1(1)(a), Apr. 11, 1980, S. Treaty Doc. No. 98-9, 1489 U.N.T.S. 3 [hereinafter "CISG"]. Throughout this discussion, two administrative facts should be kept in mind. First, CISG has never been published in an official United States treaty source. Second, while the treaty itself was adopted on April 11, 1980, and transmitted to the Senate on September 21, 1983, the United States ratified it on December 11, 1986. Within the United States, it became effective on January 1, 1988. 15 U.S.C. App. at 332 (1998), *observed in* VLM Food Trading Int'l, Inc. v. Ill. Trading Co., No. 12 C 8154, 2013 U.S. Dist. LEXIS 29791, at *10 (N.D. Ill. Mar. 5, 2013).

[16] Schwenzer & Hachem, *supra* note 13, at 459–60. The International Institute for the Unification of Private Law ("UNIDROIT") produced other drafts in 1956, 1958, and 1963. Anthony S. Winer, *The CISG Convention and Thomas Franck's Theory of Legitimacy*, 19 NW. J. INT'L L. & BUS. 1, 6 (1998–99). In 1968, the United Nation Commission on International Trade Law ("UNICTRAL") was established. Schwenzer &

designation as this treaty's grandfather[17] and christened himself as its mastermind.[18] As this history suggests, each of these two protocols emerged from the minds of realists enamored of standardization.[19] In time, CISG ("arguably the most influential uniform law on transborder sales in the world today")[20] and the UCC (the controlling commercial code in forty-nine states[21] and so regnant as to be classified as federal common law by sundry courts[22] and to be implied into countless contracts)[23] became part of the fabric of U.S. law, equally binding within their fixed sphere.[24]

Enjoying an "uneasy coexistence," CISG and the UCC converge in some details even as they diverge in other particulars.[25] Philosophically, under either

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Hachem, *supra* note 13, at 460. It was UNICTRAL that produced the draft that became CISG in 1980 Vienna. *Id.*

[17] *See* Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT'L L. 1, 3 (1993); *see also* Michael B. Lopez, *Resurrecting the Public Good: Amending the Validity Exception in the United Nations Convention on Contracts for the International Sale of Goods for the 21st Century*, 10 J. BUS. & SEC. L. 133, 138 (2009–10).

[18] Bernard Grossfeld & Peter Winship, *The Law Professor Refugee*, 18 SYRACUSE J. INT'L L. & COMP. 3, 11 (1992); *see also* Ulrich Magnus, *The Vienna Sales Convention (CISG) Between Civil and Common Law-Best of All Worlds?*, 3 J. CIV. L. 67, 72–73, 73 n.22 (2010) (summarizing Rabel's role and citing Grossfeld & Winship, *supra* note 18, at 11).

[19] *See* Grossfeld & Winship, *supra* note 18, at 9–13; *see also, e.g.*, Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN ST. L. REV. 397, 410–16 (2004–05); Kamp, *supra* note 4, at 283, 286. Tantalizingly, from 1931 and 1940, Llewelyn and Rabel exchanged a number of letters regarding their ongoing projects. Grossfeld & Winship, *supra* note 18, at 13–17 (detailing the relationship between Llewellyn and Rabel from 1931 to 1940). Rabel, it seems, initially "believed he had a personal relationship with Llewellyn and that the latter held him in high esteem" and "expect[ed] the drafters of the Uniform Commercial Code to receive him with open arms." *Id.* at 15. He thus tried to persuade Llewellyn to coordinate his draft of the UCC with his 1935 draft, and Llewellyn at one point even "speculated that special rules for international trade may be inserted into the [Uniform Commercial] Code." *Id.* at 15, 17. For all its potential, these giants' collaboration proved brief, and no more letters were exchanged after January 1940. *Id.* at 13, 17.

[20] Carla Spivak, *Of Shrinking Sweatsuits and Poison Vine Wax: A Comparison of Basis for Excuse Under U.C.C. § 2-615 and CISG Article 79*, 27 U. PA. J. INT'L ECON. L. 757, 757 (2006); *see also* Magnus, *supra* note 18, at 71 ("[T]he Convention has become the most important legal basis of today's globalized trade.").

[21] *See, e.g.*, *In re* Doctors Hosp. of Hyde Park, Inc., 337 F.3d 951, 955 (7th Cir. 2003); A. Brooke Overby, *Modeling UCC Drafting*, 29 LOY. L.A. L. REV. 645, 653 (1995–96); Ellen A. Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 199 (1963).

[22] *See, e.g.*, Curtin v. United Airlines, Inc., 275 F.3d 88, 93 n.6 (D.C. Cir. 2001); O'Neill v. United States, 50 F.3d 677, 684 (9th Cir. 1995); United States v. Conrad Publ'g Co., 589 F.2d 949, 953 (8th Cir. 1978). Considering the UCC's dominance amongst the fifty states, this result follows from the usual axiom that "a federal court applying federal common law will often simply incorporate the law of the appropriate state if there is no relevant federal interest to justify a distinct federal rule." United States v. Fleet Bank (*In re* Calore Express Co.), 288 F.3d 22, 52 (1st Cir. 2002).

[23] *See* DiMatteo, *supra* note 2, at 30.

[24] *See* Winer, *supra* note 16, at 2.

[25] DiMatteo, *supra* note 2, at 30–31.

legal regime, the goods portion of a certain contract effectively dominates, and both codes contain analogous provisions for defining absent terms and afford decided recognition of party and industry customs and practices. Indeed, some of the same defects taint both, most especially their failure to account for the increasing use of computers in domestic and international sales. This frequent concord follows naturally, as Rabel saw the "English common law tradition"[26] from which the UCC grew as "best suited for . . . international unification."[27]

In spite of this congruence, however, their divergences are equally manifest. Focused purely on business interests and contract formation, CISG adopts subjective standards, requires neither writing (with some exceptions) nor consideration, and constructs a mottled remedial scheme in which specific performance is enthroned above all others. The UCC, in turn, places foremost emphasis on objective criteria, addressing contract formation and validity for businesses and consumers. Properly applied, CISG may allow for the creation of a contract that would otherwise not exist under the UCC or assess the value of a claim rather differently than the UCC would dare try. In other words, CISG promotes performance even in the presence of a breach—and punishes obdurate nonperformance accordingly. Regardless of their plethora of similarities, then, CISG and the UCC are not wholly alike in analytical methodology and practical effect.

Unfortunately, federal and state courts in the United States have only imperfectly and haphazardly heeded this basic verity, thereby spawning an amorphous body of law characterized by more glaring omissions and errata than nuanced analysis. With impressive consistency, federal and state courts invoke the UCC as a guide and proceed to utilize its provisions. Eliding distinctions, though subject to two exceptions, these tribunals either utilize an improper—and thus interpretively forbidden—methodology or reach a mistaken—and textually unjustifiable—conclusion regarding a contract's existence or an award's propriety. Even where CISG's writ is acknowledged, U.S. decisions on this seminal treaty evidence an erroneous tendency to look first to case law, then to the statute, on the part of even the most assiduous jurist. In short, domestic law interpreting CISG remains rather limited in its quantity and haphazard in its

[26] Perhaps unsurprisingly, however, Rabel misconstrued the true origins of modern contract law. "The common law was property-based," which is why Sir. William Blackstone, its great expositor, devoted little time to contracts or commercial law. Douglas G. Baird, *Llewellyn's Heirs*, 62 LA. L. REV. 1287, 1289 (2002). "[U]nderstanding that commercial law must be shaped by the world in which it operates and the forces at work there," Llewellyn constructed the UCC based on "the Law Merchant" and not English common law. *Id.* at 1290.

[27] Magnus, *supra* note 18, at 74.

reasoning, and difficulties thus confront any lawyer seeking to discover and cite cogent authority on a client's behalf.

Considering the preeminent role of contracts in the determination of a debtor's liabilities in cases filed under the Bankruptcy Code (the Code),[28] the defects so endemic in CISG's jurisprudence have already arisen within a handful of bankruptcy courts,[29] as too few have noticed.[30] In fact, as more global contracts are forged and as the Code internationalizes, these weaknesses may proliferate, tainting future liquidations or stymieing coming reorganizations in which more than purely domestic debts or actors are implicated. With "[t]he growing body of case law interpreting and using the CISG involv[ing] not only its direct application to creditors' rights, but the indirect guidance that the CISG might offer to provide meaning or context in resolving a range of disputes and ambiguities in seemingly unrelated American law,"[31] the time is nigh for bankruptcy's practitioners, scholars, and judges to attain a fundamental understanding of CISG's nuances and ambiguities and thereby avoid replicating the mistakes of their non-bankruptcy predecessors.

In four substantive parts, this Article provides a first scholarly look at CISG's intersection with bankruptcy law so as to address the impending crisis. Part I portrays one common scenario, derived from a recent New York case, in which CISG and the UCC clashed prior to a debtor's bankruptcy filing but without the cognizance of the relevant state court. Setting the stage for this Article's synthesis, Part II summarizes several bankruptcy provisions whose interpretation often requires reference to the UCC and, therefore, CISG, and Part III précises CISG's jurisdictional provisions and interpretive scheme. Finally, Part IV limns the kind of analysis compelled by CISG as to three areas—contract formation, breach, and damages—directly relevant to the adjudication of a creditor's claims. As this part shows, even where the Code reigns, CISG and the UCC often clash—and compel the adherence of court and party to an altered path. So long as such diligence is not observed, precedent will be defied, international obligations defiled, while too many estates will never dissolve in

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[28] The specific provisions of the Bankruptcy Code, set forth in 11 U.S.C. §§ 101–1532 inclusive, are referred to in this Article as "section _" or "§ _" unless otherwise noted.

[29] Unless otherwise noted, the term "court" in this Article is to a U.S. Bankruptcy Court. If capitalized but not the first word in a sentence, it refers to the Supreme Court of the United States.

[30] *See* Jonathan S. Hawkins & Jennifer L. Maffett-Nickelman, *The Rise of International Standards in the Sale of Goods*, AM. BANKR. INST. J., Apr. 2017, at 44.

[31] *Id.*

essential peace. Unlike the best of sailors, stranded on a becalmed sea, too few have sensed the faint stirrings of a distant storm.[32]

I. A COMEDY OF ERRORS[33]

In the fall of 2003, an American entrepreneur, Mr. Adams, created five corporations (individually, Corporation, and collectively Corporations) in accordance with New York law. With the support of a majority of each entity's shareholders, he ascended to the rank of managing director of every Corporation, assuming control of their collective but still inchoate foreign operations. As financial analysts will eventually discover, each Corporation was but a shell, and as a court would later decide, each shell was but an alter ego of Mr. Adams. In these heady early days, however, artful paperwork obscured these dear verities.

In time, Mr. Adams fabricated a connection between the Corporations and several foreign entities (collectively, the Parties). In 2004, Mr. Adams, acting on the formers' behalves, signed contracts for the production of concrete goods with a slew of manufacturers based in Hong Kong (Manufacturers). A single Hong Kong corporation (Trading Co. or Agent),[34] itself managed by one natural person, Ms. Ng (individually, Plaintiff, and collectively, Plaintiffs), negotiated these arrangements; Trading Co. was also charged with ensuring the goods produced conformed to explicit and painstakingly specified quality standards set by Mr. Adams from his offices in New York. For the first five years, no disputes arose, as the manufacturers produced, the Plaintiffs monitored, and the corporations sold. In the meantime, in a method commonly employed in certain industries, the Corporations' American representative sold the accounts receivable to various investors, using these accounts as collateral for larger and larger loans. Neither these purchasers' identities nor these secondary transfers were ever disclosed to any person but Mr. Adams, and he alone was privy to these dizzying exchanges' every detail. Vagaries aside, this tightening

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[32] *See* CARL SAGAN, PALE BLUE DOT: A VISION OF THE HUMAN FUTURE IN SPACE (1994).

[33] The scenario depicted here is based on *Lisa Ng v. Adler* (*In re* Adler), 494 B.R. 43 (Bankr. E.D.N.Y. 2013). But for the fact that the debtor's discharge would be denied pursuant to § 727, the problem detailed in this Article might have come to pass, making it a tragedy rather than a comedy.

[34] Factoring is the sale of receivables to a third party at a discount from their face value. J. LEACH & RONALD MELICHER, ENTREPRENEURIAL FINANCE 490 (2014). Under a typical factoring arrangement, receivables are sold outright from originators (e.g., manufacturers, distributors, or retail dealers) to the factor for cash at a discount. Barkley Clark, *Factoring: Key Issues under the UCC*, THE COMMERCIAL FACTOR: NEWSLETTER FOR THE FACTORING INDUSTRY, Spring 2004, at 1–2. As such, although Mr. Adams referred to Charming Trading as a "factor," this plaintiff would be more correctly termed "an agent," as its activities did not include the selling of accounts.

relationship and these funds' fluidity were not unusual occurrences in the world of international trade and finance.[35]

Thereafter, conflicts among the Asian manufacturers, the Plaintiffs, and the Corporations arose. The Corporations, it is later shown, had received goods without remitting a cent to the Plaintiffs. At the same time, the latter had made promises to the manufacturers of certain payment based on Mr. Adams's purported representations. Ultimately, with the apparent encouragement of Mr. Adams, the Plaintiffs, Trading Co. as a corporation and Ng as an individual, employed their own credit to purchase merchandise for the dithering Corporations and to cover the costs of shipping these goods to the United States. With the manufacturers still unpaid and the Corporations either unwilling or unable to pay in full for the merchandise already delivered, Trading Co. and then Ng eventually defaulted on their multimillion dollar obligations. Professedly besieged by escalating threats, Ng somehow fled to New York's Chinatown. There, financed by unknown sources, she sued the Corporations and Mr. Adams personally for numerous contract breaches, claiming millions in damages, in the Commercial Division of the New York Supreme Court for Kings County ("State Court"). Of the more than dozen counts in the original complaint, the seventh specifically sought to pierce the Corporations' veils and render Mr. Adams directly liable for the promises ostensibly made in their names.[36] Based on the Parties' filings—and without either Party's objection—the State Court turned to New York's variant of the UCC.

In the midst of pretrial maneuverings, the Code suddenly intruded. In December 2013, Mr. Adams quietly filed a voluntary individual chapter 7 petition, transforming himself into both a defendant in one state court and a debtor in a federal one. In response, the State Court severed Mr. Adams from its case and proceeded to adjudicate the remaining causes of action against the extant defendants: the Corporations that Mr. Adams effectively controlled. For reasons never acknowledged, the Corporations were now represented by no natural person and suddenly bereft of counsel, though Mr. Adams still regularly appeared, unmoving and uninvolved, as the State Court trial progressed. Meanwhile, in the Debtor's first and only bankruptcy case, the Plaintiffs submitted proofs of claim based on the same contracts on which it had sued in state court. Indeed, the bases of its proofs of claim against the Debtor were the

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[35] *See generally* David B. Tatge & Jeremy B. Tatge, *The Fundamentals of Factoring*, PRACTICAL LAW: THE JOURNAL, Sept. 2012.

[36] This pleading formulation follows naturally from New York law's amalgamation of the common law alter ego doctrine and veil-piercing into one "rule of corporate disregard." *In re* Adler, 494 B.R. at 56.

five causes of action already pleaded, each predicated on the Corporations' and Mr. Adams' alleged UCC violations. Simultaneously, the Plaintiffs initiated an adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7001[37] to bar the discharge of each alleged debt pursuant to § 523(a)(2)(A) and (B). For the next few years, the State Court case against the Corporations and the bankruptcy case involving Mr. Adams unspooled. Meanwhile, even as the Plaintiffs prosecuted their action against the Debtor in bankruptcy court, no Corporation filed a petition under the Code's eleventh chapter.

II. RELEVANT BANKRUPTCY LAW: THE CODE AND THE RULES

A. *Code and Rules*

As originally planned and as consistently construed, the Federal Rules of Bankruptcy Procedure ("Rules")[38] complement the Code's sections. As of October 1, 1979,[39] the Code has defined "the creation, alteration or elimination of substantive rights,"[40] while the Rules have "define[d] the process by which these privileges may be effected";[41] "nearly all procedural matters" having "left to the Rules . . . ."[42] Congress, moreover, "left significant statutory gaps that implicate various core bankruptcy policies, including fresh-start and distributive policies, thereby enabling the courts to set policy while engaging in case-by-case

[37] The essential features of an adversary proceeding, beyond the ten types listed in Rule 7001, is often unclear. *See* Amir Shachmurove, *Bankruptcy Rule 7004(h) after* Espinosa*: A Timely Distinction between Constitutional and Statutory Service*, NORTON BANKR. L. ADVISER, June 2014. Here, it was not.

[38] Throughout this Article, the terms "Rule" and "Rules" refer to the Federal Rules of Bankruptcy Procedure, and the terms "federal rule" and "federal rules" refer to all the rules adopted pursuant to the Rules Enabling Act. 28 U.S.C. §§ 2071–2075 (2012).

[39] The Code became effective on this day. *See* Maiorino v. Branford Sav. Bank, 691 F.2d 89, n.2 (2d Cir. 1982); *In re* Kutner, 656 F.2d 1107, 1111 (5th Cir. 1981), *cert. denied* 455 U.S. 945, 102 S. Ct. 1443, 71 L. Ed. 2d 658 (1982).

[40] Branchburg Plaza Assocs., L.P. v. Fesq (*In re* Fesq), 153 F.3d 113, 116 (3d Cir. 1998) (quoting Hanover Indus. Mach. Co. v. Am. Can Co. (*In re* Hanover Indus. Mach. Co.), 61 B.R. 551, 552 (Bankr. E.D. Pa. 1986)), *cert. denied*, 526 U.S. 1018 (1999); *see also, e.g.*, Asher v. Am. Mortg. Servicing Inc. (*In re* Asher), 488 B.R. 58, 70 (Bankr. E.D.N.Y. 2013) (quoting *In re* Fesq, 153 F.3d at 116); Parker v. Bain (*In re* Parker), 68 F.3d 1131, 1136 (9th Cir. 1995) (citing *In re* Hanover Indus. Mach. Co., 61 B.R. at 552).

[41] *In re* Fesq, 153 F.3d at 116; *see also, e.g.*, Marshall v. PNC Bank, N.A. (*In re* Marshall), 491 B.R. 217, (Bankr. S.D. Ohio 2012) (quoting SLW Capital, LLC v. Mansaray-Ruffin (*In re* Masaray-Ruffin), 530 F.3d 230, 237–38 (3d Cir. 2008) (citations omitted)); Phillips v. First City, Tx. (*In re* Phillips), 966 F.2d 926, 934 (5th Cir. 1992) (citing *In re* Hanover Indus. Mach. Co., 61 B.R. at 552); John J. Murphy, *The Essence of Bankruptcy Procedure*, 90 COM. L.J. 442, 443 (1985) ("The . . . Rules govern the procedure in bankruptcy . . . .").

[42] H.R. REP. NO. 95-595, at 449 (1977); *In re* Tallerico, 532 B.R. 774, 785–86, n.17 (Bankr. E.D. Cal. 2015); *In re* Searles, 70 B.R. 266, 271 (Bankr. D.R.I. 1987) (citing this history as support for the view "that the . . . Rules cannot limit the operation of the bankruptcy statutes").

dispute resolution."[43] Due to the Code's persistent ambiguities and the Rules' procedural, albeit cabined, primacy, these two sources must often be construed together as discrete parts of an interlocking and integrated legal framework.[44] However, "[w]hen in conflict, the . . . Code trumps the . . . Rules"[45] is the unmistakable mandate embodied in the Rules Enabling Act.[46] Still, with much effort, courts have striven to avoid such inconsistency by means of varied canons and presumptions.[47]

B. *Determination of a Claim's Validity and Value*

Operating concurrently, §§ 501 and 502 and the Rules govern the means by which creditors and equity security holders present their claims or interests to a bankruptcy court and set forth the guidelines according to which claims are to be allowed or disallowed.[48]

Section 501 and Rules 3001, 3002, 3003, 3004, 3005, and 3006 specify how and when a proof must or may be filed; these timeliness requirements are intended "to aid in the orderly and efficient administration of bankruptcy cases."[49] Per § 501(a), a creditor or indenture trustee "may file a proof of claim."[50] Per paragraphs (b) and (c), a party liable to a creditor with the debtor

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[43] Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 402 (2012); *cf.* Steven W. Rhodes, *Eight Statutory Causes of Delay and Expense in Chapter 11 Bankruptcy Cases*, 67 AM. BANKR. L.J. 287, 294 (1993).

[44] This approach aligns with the courts' general treatment of procedural rules. *See, e.g.*, Amir Shachmurove, *Disruptions' Function: A Defense of (Some) Form Objections under the Federal Rules of Civil Procedure*, 12 SETON HALL CIR. REV. 161, 194–97 (Spring 2016).

[45] *In re* Logan Place Props, Ltd., 327 B.R. 811, 815 (Bankr. S.D. Tex. 2005) (collecting cases).

[46] 28 U.S.C. § 2075 (2014); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978); Amir Shachmurove, *Purchasing Claims and Changing Votes: Establishing "Cause" under Rule 3018(a)*, 89 AM. BANKR. L.J. 511, 538–41 (2015) [hereinafter Shachmurove, *Claims*].

[47] Shachmurove, *Claims*, *supra* note 46, at 528–31.

[48] 11 U.S.C. §§ 501, 502 (2014); FED. R. BANKR. P. 3001–3008; *In re* Tucker, 174 B.R. 732, 741 (Bankr. N.D. Ill. 1994) ("Whether a claim is eligible to be considered under § 502 depends first on whether the claim has been properly and timely filed. Only after a proper filing per § 501 and a timely filing per Rule 3002 (incorporated into § 501), may a claim be considered under § 502's standards regarding disallowance.").

[49] *In re* Macias, 195 B.R. 659, 662 (Bankr. W.D. Tex. 1996); *cf.* Leadbetter v. Snyder (*In re* Snyder), 544 B.R. 905, 910 (Bankr. M.D. Fla. 2016) (in seeking to resolve the apparent conflict between § 523(a)(3) and § 726(a)(2)(C), observing that many courts "start with the premise that the central purpose of the Bankruptcy Code is to allow the debtor to reorder his or her affairs and enjoy a fresh start").

[50] 11 U.S.C. § 501(a) (2012); *In re* Makwa Builders, LLC, No. 12-13664, 2016 Bankr. LEXIS 355, at *32 & n.15 (Bankr. D.N.M. Feb. 4, 2016); *see also, e.g.*, Hilton v. US Bank (*In re* Hilton), 544 B.R. 1, 16–17 (Bankr. N.D.N.Y. 2016) (explaining the claim allowance process for filing and disputing claim set forth in § 501 and § 502).

and the debtor itself, respectively, may file a proof if the claim holder does not do so in a timely manner.[51]

Not these Code sections, with their discretionary "may,"[52] but manifold rules offer more thorough guidance. If a debtor has scheduled a creditor's specific obligation, the amount stated on Schedule D, E, or F constitutes prima facie evidence of the claim's validity and amount unless it is scheduled as "disputed, contingent, or unliquidated."[53] The necessity of filing a proof of claim, "a written statement setting forth a creditor's claim" that "shall conform substantially to the appropriate official form," depends on the particular Code chapter.[54] In cases under chapters 7, 12, and 13, an unsecured creditor or an equity security holder must submit such a proof within 90 days after the first date set for the meeting of the creditors required by § 341(a) except for certain explicitly defined exceptions.[55] In a chapter 9 or a chapter 11 case, a proof need be filed only if either the claim is listed in the debtor's official schedules as disputed, contingent, or unliquidated, or the creditor disagrees with the amount of the claim listed in the debtor's schedules.[56] For all chapters, if a creditor fails to file a proof, a debtor or trustee may do so "within 30 days of the expiration of the time for filing such claims prescribed by Rule 3002(c) or 3003(c)";[57] in these circumstances, any entity liable or potentially liable to a creditor may file a proof on that creditor's behalf within the same timeframe.[58] Once a proof is filed, the

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[51] 11 U.S.C. §§ 501(b)–(c) (2012); *see, e.g.*, Matteson v. Bank of Am., N.A. (*In re* Matteson), 535 B.R. 156, 164 (B.A.P. 6th Cir. 2015) (citing § 501(c)); Denke v. PNC Bank, N.A. (*In re* Denke), 524 B.R. 644, 651 (Bankr. E.D. Va. 2015) (citing § 501(b)).

[52] *See, e.g.*, Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion."); Rastelli v. Warden, Metro. Corr. Ctr., 782 F.2d 17, 23 (2d Cir. 1986) ("The use of a permissive verb – 'may review' instead of 'shall review'—suggests a discretionary rather than mandatory review process.").

[53] FED. R. BANKR. P. 3003(a); Banco Latino Int'l v. Gomez-Lopez (*In re* Banco Latino Int'l), 310 B.R. 780, 786 n.9 (S.D. Fla. 2004) (distinguishing between Rule 3002, "the claims processing rule that applies to Chapter 7 and 13 cases," and Rule 3003, which applies to chapter 9 and 11 cases).

[54] FED. R. BANKR. P. 3001(a); Am. Express Bank, FSB v. Askenaizer (*In re* Plourde), 418 B.R. 495, 503–04 (B.A.P. 1st Cir. 2009) (citing Rule 3001(a) and adding that "the Federal Rules of Bankruptcy Procedure, which provide the procedural framework for the filing and allowance of claims, regulate the form, content, and attachments for proofs of claim").

[55] FED. R. BANKR. P. 3002(a), (c); *see In re* Gonzalez Aleman, 499 B.R. 236, 239–40 (Bankr. D.P.R. 2013) (discussing these paragraphs' interplay).

[56] FED. R. BANKR. P. 3003; Pioneer Invs. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 382–83 (1993). This distinction resembles the one made between "liability or amount" in § 303(b). 11 U.S.C. §§ 303(b)(1), (h)(1) (2012).

[57] FED. R. BANKR. P. 3004; McDermott v. Davis (*In re* Davis), 538 B.R. 368, 382 n.8 (Bankr. S.D. Ohio 2015).

[58] FED. R. BANKR. P. 3005(a); Morton v. Morton (*In re* Morton), 298 B.R. 301, 305 (B.A.P. 6th Cir. 2003).

value stated therein supersedes the amount scheduled by the debtor,[59] but if a proof is subsequently disallowed for lack of timeliness, the claim as scheduled will be reinstated for purposes of the estate's distribution.[60] A proof and thereby a claim may be withdrawn, though the holder's obligations vary depending on whether an objection has been lodged or an adversary proceeding has been inaugurated.[61] If a claimant follows the foregoing process, a claim is born.

Such a filing triggers the allowance and disallowance process specified in the Code and the Rules.[62] As with a claim actually scheduled,[63] a proof filed in conformity with the Rules constitutes prima facie evidence of the claim's "validity" and "amount."[64] The claim memorialized in such a proof is deemed allowed "unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects."[65] In making such a protestation, so as to rebut a proof's presumptive validity or amount, a debtor or trustee must produce sufficiently substantial evidence.[66] Once such evidence is presented, the burden shifts, and the claimant must now prove the claim's validity by a preponderance of the evidence.[67] Regardless of

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[59] FED. R. BANKR. P. 3003(c)(4); Bateman v. S. Dev. Corp. (*In re* Bateman), 435 B.R. 600, 611 (Bankr. E.D. Ark. 2010) (quoting Rule 3003(c)(4)).

[60] Pioneer Invs. Servs. Co., 507 U.S. at 382–83.

[61] FED. R. BANKR. P. 3006; Smith v. Dowden, 47 F.3d 940, 943 (8th Cir. 1995) ("[T]he successful withdrawal of a claim pursuant to Fed. R. Bankr. P. 3006 prior to the trustee's initiation of an adversarial proceeding renders the withdrawn claim a legal nullity and leaves the parties as if the claim had never been brought.").

[62] Filing also establishes the bankruptcy court's subject matter and personal jurisdiction over the dispute and the relevant parties. 28 U.S.C. § 157(b)(2)(B) (2012); Bankruptcy Servs. v. Ernst & Young (*In re* CBI Holding Co.), 529 F.3d 432, 459–60 (2d Cir. 2008); Arnold Print Works, Inc. v. Apkin (*In re* Arnold Print Works, Inc.), 815 F.2d 165, 167 (1987).

[63] FED. R. BANKR. P. 3003(a); Official Comm. of Asbestos Claimants v. G-I Holdings, Inc. (*In re* G-I Holdings, Inc.), 295 B.R. 211, 221 (D.N.J. 2003).

[64] FED. R. BANKR. P. 3001(f); *see also, e.g.*, *In re* S. Side House, LLC, 451 B.R. 248, 260 (Bankr. E.D.N.Y. 2011) (citing Rule 3001(f)); *In re* Euliano, 442 B.R. 177, 181 & n.9 (Bankr. D. Mass. 2010) (holding that the value of the claim is settled due to the debtor's failure to object). Claims not so filed are not entitled to this presumption. *See, e.g.*, Caplan v. B-Line, LLC (*In re* Kirkland), 572 F.3d 838, 840–41 (10th Cir. 2009), *cited with approval in* Brown v. Ameriquest Funding II, LLC (*In re* Brown), 431 B.R. 309, 310 & n.1 (Bankr. D. Mass. 2010).

[65] 11 U.S.C. § 502(a) (2012).

[66] *See, e.g.*, Creamer v. Motors Liquidation Co. GUC Trust (*In re* Motors Liquidation Co.), No. 12 Civ. 6074 (RJS), 2013 U.S. Dist. LEXIS 143957, at *13 (S.D.N.Y. Sept. 26, 2013); *In re* Oneida Ltd., 400 B.R. 384, 389 (Bankr. S.D.N.Y. 2009); *In re* Allegheny Int'l, Inc., 954 F.2d 167, 173–74 (3d Cir. 1992); Wright v. Holm (*In re* Holm), 931 F.2d 620, 623 (9th Cir. 1991).

[67] *See, e.g.*, *In re* Motors Liquidation Co., No. 12 Civ. 6074 (RJS), 2013 U.S. Dist. LEXIS 143957, at *12–13; *In re* Oneida Ltd., 400 B.R. at 389; *In re* Allegheny Int'l, Inc., 954 F.2d at 173–74; *In re* Holm, 931 F.2d at 623.

who must adduce sufficient proof, however, the claimant always bears the burden of persuasion.[68]

Section 502(b) sets forth the grounds for a claim's disallowance and thus the process for proving—or disproving—its legal validity.[69] In accordance with this Code subsection,[70] when determining whether to disallow a proof, applicable nonbankruptcy law establishes the validity of a creditor's bankruptcy claim. Pursuant to § 502(b)(1) in particular, a claim may be disallowed if "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or matured."[71] Because "[a] claim [only] arises for purposes of bankruptcy when the relationship between the debtor and the creditor contained all of the elements necessary to give rise to a legal obligation . . . under the relevant non-bankruptcy law,"[72] a court must first look to the law that gave rise to the specific claim.[73] Necessarily, that court must consider any potential dispositive defenses available under this applicable nonbankruptcy law.[74] For this very reason, in spite of Congress' constitutional preeminence over "the subject of Bankruptcies,"[75] external legal strictures still often comprise "the

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[68] *E.g.*, United States v. Braunstein (*In re* Pan), 209 B.R. 152, 155–56 (D. Mass. 1997); Juniper Dev. Grp. v. Kahn (*In re* Hemingway Transp., Inc.), 993 F.2d 915, 925 (1st Cir. 1993).

[69] *In re* MacFarland, 462 B.R. 857, 879–80 (Bankr. S.D. Fla. 2011); *see also* H.R. REP. NO. 95-595, at 352 (1977) ("Subsection (b) prescribes the grounds on which a claim may be disallowed."), quoted in *In re* Interco, Inc., 137 B.R. 1003, 1005 (Bankr. E.D. Mo. 1992).

[70] Most, but not all, courts have held that only one of the nine statutory reasons enumerated in § 502(b) may be invoked. *See In re* MacFarland, 462 B.R. 857, 880 (Bankr. S.D. Fla. 2011) ("[T]he growing majority of courts and appellate courts have 28 U.S.C. § 2075 and 11 U.S.C. §502(b) as giving no discretion to disallow a claim for any reason other than those stated in § 502."); Frontier Ins. Co. v. Westport Ins. Corp. (*In re* Black), 460 B.R. 407, 416 (Bankr. M.D. Pa. 2011) (same); Dove-Nation v. eCast Settlement Corp. (*In re* Dove-Nation), 318 B.R. 147, 152 (B.A.P. 8th Cir. 2004) (same).

[71] 11 U.S.C. § 502(b)(1) (2012).

[72] Goldman, Sachs & Co. v. Esso Virgin Is., Inc. (*In re* Duplan Corp.), 212 F.3d 144, 151 (2d Cir. 2000) (quoting LTV Steel Co. v. Shalala (*In re* Chateaugay Corp.), 53 F.3d 478, 497 (2d Cir. 1995) (internal quotation marks omitted), *cert. denied*, 516 U.S. 913 (1995)). An interesting counterexample to this dominant approach arises in the area of mass tort bankruptcies.

[73] B-Real, LLC v. Melillo (*In re* Melillo), 392 B.R. 1, 5–6 (B.A.P. 1st Cir. 2008).

[74] Travelers Cas. & Sur. Co. of America v. Pac. Gas & Elec. Co., 549 U.S. 443, 450 (2007) ("This provision is most naturally understood to provide that, with limited exceptions, any defense to a claim that is available outside of the bankruptcy context is also available in bankruptcy."); *accord* Glatzer v. Enron Corp., No. 04 Civ. 4897 (DAB), 2008 U.S. Dist. LEXIS 78696, at * 12–13 (S.D.N.Y. Sept. 29, 2008) (citing *Travelers*, 549 U.S. at 450).

[75] U.S. CONST. art. I, § 8, cl. 4; *see also, e.g.*, Lawrence Ponoroff, *Constitutional Limitations on State-Enacted Bankruptcy Exemption Legislation and the Long Overdue Case for Uniformity*, 88 AM. BANKR. L.J. 353, 355–61 (2014); Randolph J. Haines, *The Uniformity Power: Why Bankruptcy Is Different*, 77 AM. BANKR. L.J. 129, 197 (2003).

appropriate law for determining the *validity* of an underlying claim" under the Code.[76]

Just as a court must turn to non-Code law to ascertain a claim's validity, it must rely on this same law to ascertain its value. Assuming the prerequisites specified in 28 U.S.C. §§ 157(c) and (e) are met,[77] § 502(c) allows a court to estimate any contingent or unliquidated claim for purposes of allowance if either the fixing or liquidation of such claim would "unduly delay the administration of the case" or the creditor's right to payment arises from "a right to an equitable remedy for breach of performance."[78] In contract actions specifically, for an accurate estimate of a claim's value to be made, a court must weigh both the governing instrument's precise language and the controlling statutory scheme,[79] as both sources delimitate the maximum damages permitted upon a contract's breach. As with an analysis of validity pursuant to § 502(b)(1), a court is "bound by the substantive law that governs the ultimate value of the claim."[80]

C. *Temporary Valuation Pursuant to Rule 3018(a)*

If a court wishes to avoid prematurely invalidating "problematical or non-existent" claims[81] or from delaying a chapter 11 case by invoking the cumbersome estimation procedures mandated by §§ 501 and 502,[82] Rule 3018(a) offers a temporary solution. In effect, despite the close logical (and

[76] First City Beaumont v. Durkay (*In re* Ford), 967 F.2d 1047, 1053 n.6 (5th Cir. 1992) (emphasis added) (citing, among others, Butner v. United States, 440 U.S. 48, 55 (1979), and Prudence Realization Corp. v. Greist, 316 U.S. 89, 95 (1942)); *see also, e.g.*, Fairchild Dornier GmbH v. Official Comm. of Unsecured Creditors (*In re* Dornier Aviation (N. Am.), Inc.), 453 F.3d 225, 232 (11th Cir. 2006) ("Disallowance of a claim under § 502(b) is only appropriate when the claimant has *no* rights vis-a-vis the bankrupt, *i.e.*, when there is 'no basis in fact or law' for *any* recovery from the debtor." (emphasis in original) (quoting Diasonics, Inc. v. Ingalls, 121 B.R. 626, 631 (Bankr. N.D. Fla. 1990); *In re* Shelter Enters., 98 B.R. 224, 229 (Bankr. W.D. Pa. 1989) ("Although the judgment notes appear both valid on their faces and enforceable by Owoc under applicable state law, it is the duty of this Court to look behind those judgments to the validity of the underlying claims . . . . State substantive law determines the existence of a claim." (citation omitted)).

[77] 28 U.S.C. § 157(c), (e) (2012).

[78] 11 U.S.C. § 502(c)(1)–(2) (2012).

[79] *In re* Dow Corning Corp., 211 B.R. 545, 560–61 (Bankr. E.D. Mich. 1997).

[80] *In re* Texans CUSO Ins. Grp., LLC, 426 B.R. 194, 204 (Bankr. N.D. Tex. 2010) (relying in part on Bittner v. Borne Chem. Co. Inc., 691 F.2d 134, 135 (3d Cir. 1982)); Official Comm. of Asbestos Claimants v. Asbestos Prop. Damage Comm. (*In re* Federal-Mogul Global Inc.), 330 B.R. 133, 155 (Bankr. D. Del. 2005) (citing for support Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20 (2000)).

[81] *In re* Dow Corning Corp., 194 B.R. 121, 145 (Bankr. E.D. Mich. 1996); *see also In re* Miami Trucolor Offset Serv. Co., 187 B.R. 767, 768 (Bankr. S.D. Fla. 1995) (describing § 1126(a), § 502, and Rule 3018(a) as part of the same statutory framework).

[82] *See infra* Part II.B.

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statutory) link between Rule 3018(a) and § 502(c),[83] the former allows a claim to be temporarily allowed, its validity assumed, "[n]otwithstanding objection to a claim or interest."[84]

Although estimation pursuant to Rule 3018(a) lies within the trial court's "sound discretion,"[85] at least two constraints on its invocation can be mined from its explicit text and scattered precedent. First, while "a temporary allowance order only arises if there is an objection to a claim,"[86] the claim temporarily allowed must be, at worst, the subject of an "*unresolved* objection" under § 502.[87] Second, the "amount" pegged must be that "which the court deems proper for the purpose of accepting or rejecting a plan"[88] as determined by utilizing "the method best suited to the circumstances of the case."[89] Regardless of what a purely economic analysis would indicate, estimation under Rule 3018(a) must respect the "obvious and dominating purposes" of the Code's reorganization chapters—a debtor's timely reorganization and deserving creditors' prompt pro rata repayment[90]—and the rationale posited for this particular safety valve: "[T]o prevent possible abuse by plan proponents who might ensure acceptance of a plan by filing last minute objections to the claims of dissenting creditor."[91] Inevitably, as elsewhere, courts consult the pertinent substantive law.[92]

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[83] *See, e.g.*, Goldsmith v. LBM Fin. LLC (*In re* Loucheschi LLC), No. 11-42578-MSH, 2013 Bankr. LEXIS 4811, at *38–39 (Bankr. D. Mass. Nov. 13, 2013).

[84] FED. R. BANKR. 3018(a). For a detailed discussion of this oft-mangled rule, *see* Shachmurove, *Claims*, *supra* note 46.

[85] *In re* Lichtin/Wade LLC, No. 12-00845-8-RDD, 2013 Bankr. LEXIS 1719, at *7 (Bankr. E.D.N.C. Apr. 26, 2013); *accord In re* Mangia Pizza Invs. LP, 480 B.R. 669, 679 (Bankr. W.D. Tex. 2012).

[86] Armstrong v. Rushton (*In re* Armstrong), 294 B.R. 344, 354 (B.A.P. 10th Cir. 2003), *aff'd*, 97 F. App'x 295 (10th Cir. 2004).

[87] *In re* Pulp Finish 1 Co., No. 12-13775 (SMB), 2014 Bankr. LEXIS 189, at *7 n.1 (Bankr. S.D.N.Y. Jan. 16, 2014) (emphasis in original); *accord* Jacksonville Airport Inc. v. Michkeldel, Inc., 434 F.3d 729, 732 (4th Cir. 2006); *see also In re* Motel Assocs. of Cincinnati, 50 B.R. 196, 199 (Bankr. S.D.N.Y. 1985).

[88] FED. R. BANKR. 3018(a).

[89] *In re* Ralph Lauren Womenswear, Inc., 197 B.R. 771, 775 (Bankr. S.D.N.Y. 1996).

[90] *In re* A.H. Robins Co., 88 B.R. 742 (E.D. Va. 1988), *aff'd,* 880 F.2d 694 (4th Cir. 1989).

[91] *In re* Armstrong, 294 B.R. at 354; *see also, e.g.*, Pension Benefit Guar. Corp. v. Enron Corp., No. 04 Civ. 5499 (HB), 2004 U.S. Dist. LEXIS 21810, at *21 (S.D.N.Y. Nov. 1, 2004) (affirming bankruptcy court opinion, as it prevented a single creditor from "improperly control[ing] the vote and confirmation of the reorganization plan to the detriment of other creditors").

[92] *See In re* Bellucci, 119 B.R. 763, 777 (Bankr. E.D. Va. 1990) (in denying a motion for reconsideration of a sua sponte order to abstain, emphasizing that "[t]he fact of bankruptcy does not change the substantive law that applies to the merits of a claim" and justifying deferral to state appellate court as the relevant "objection to [a] claim relate[d] entirely to the underlying state law dispute, no federal question is presented").

D. Nondischargeability of Claims under § 523(a)(2)

With equal sureness, applicable non-bankruptcy law impacts the adjudication of the discharge exceptions encoded in § 523(a)(2). Both subsections prohibit a discharge pursuant to §§ 727,[93] 1141,[94] 1228(b),[95] and 1328(b)[96] "for money property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by" one of two delineated misdeeds.[97] The two subsections, "[i]t is well-established," are mutually exclusive,[98] though they share a purpose: both "retributive *and* protective,"[99] "to prevent the dishonest debtor's attempt to use the law's protections to shield his or her wrongdoing,"[100] a hoary notion embedded in the very fabric of American bankruptcy law.[101] Per Rule 7001, "a proceeding to determine the dischargeability of a debt" under § 523(a)(2) is "[a]n adversary proceeding,"[102] in which the creditor bears the burden of proof[103] by a preponderance of the evidence.[104]

1. Section 523(a)(2)(A)

Pursuant to § 523(a)(2)(A), a debtor will not be discharged from any debt traceable to "false pretenses, a false representation, or actual fraud, other than a

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93 11 U.S.C. § 727 (2012).

94 *Id.* § 1141.

95 *Id.* § 1228(b).

96 *Id.* § 1328(c).

97 *Id.* § 523(a)(2); *see, e.g.*, Gertsch v. Johnson & Johnson (*In re* Gertsch), 237 B.R. 160, 167 (B.A.P. 9th Cir. 1999); Siriani v. Nw. Nat'l Ins. Co. (*In re* Siriani), 967 F.2d 302, 304 n.1 (9th Cir. 1992).

98 McCrary v. Barrack (*In re* Barrack), 217 B.R. 598, 605 (B.A.P. 9th Cir. 1998); *accord, e.g.*, Land Inv. Club, Inc. v. Lauer (*In re* Lauer), 371 F.3d 406, 413 (8th Cir. 2004); Eugene Parks Law Corp. Defined Benefit Pension Plan v. Kirsh (*In re* Kirsh), 973 F.2d 1454, 1457 (9th Cir. 1992).

99 Century 21 Balfour Real Estate v. Menna (*In re* Menna), 16 F.3d 7, 10 (1st Cir. 1994) (emphasis in original).

100 *In re* Gans, 75 B.R. 474, 481 (Bankr. S.D.N.Y. 1987) (internal quotation marks omitted) (citing *In re* Newmark, 20 B.R. 842, 852 (Bankr. S.D.N.Y. 1982)); *accord, e.g.*, Apte v. Japra (*In re* Apte), 96 F.3d 1319, 1322 (9th Cir. 1996) ("A central purpose of the Bankruptcy Code is to allow an honest but unfortunate debtor to get a fresh start. . . . A dishonest debtor, on the other hand, will not benefit from his wrongdoing." (citations omitted) (citing Grogan v. Garner, 498 U.S. 279, 286–87 (1991), and Citibank (S.D.), N.A. v. Eashai (*In re* Eashai), 87 F.3d 1082, 1086 (9th Cir. 1996)); *In re* Union Bank, 127 B.R. 514, 517 (E.D.N.Y. 1991) (quoting *In re* Gans, 75 B.R. at 481).

101 Marrama v. Citizens Bank, 549 U.S. 365, 374–75 (2007); Neal v. Clark, 95 U.S. 704, 706 (1877); THE FEDERALIST NO. 42 (James Madison) ("The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will *prevent so many frauds* where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question." (emphasis added)).

102 FED. R. BANKR. P. 7001(6); Greene v. U.S. Dep't of Educ., 770 F.3d 667, 669 (7th Cir. 2014).

103 FED. R. BANKR. P. 4005; Hathaway v. OSB Mfg., Inc. (*In re* Hathaway), 364 B.R. 220, 231 (Bankr. E.D. Va. 2007).

104 Grogan v. Garner, 498 U.S. 279, 291 (1991).

statement respecting the debtor's or an insider's financial condition."[105] Whether the misdeed alleged is deemed a pretense, a misrepresentation, or a fraud,[106] courts typically require proof of the same four elements: (1) the debtor made a representation; (2) this representation was false and the debtor knew of its falsity at the time of its making; (3) the creditor actually and justifiably relied upon the debtor's representation; and (4) the creditor sustained a loss or was proximately damaged as a result of that representation.[107] In four distinct ways, this standard, unmistakably lodged within the Code's statutory corpus, incorporates non-bankruptcy law.

First, while affirmative misrepresentations are often involved in actions under § 523(a)(2)(A), a debt may also be deemed nondischargeable under this subsection on the basis of a debtor's "concealment or fraudulent omission of a material fact."[108] It is, indeed, widely accepted "that silence, or concealment of a material fact, can be the basis of a false impression which creates a misrepresentation actionable under § 523(a)(2)(A)."[109] When omissions are at issue, the crucial question is whether "the debtor was under a duty to disclose and possessed an intent to deceive."[110] Such a duty to disclose "facts basic to the transaction," in turn, arises if the debtor "knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts."[111] Simply put, "customs of trade" and "other objective circumstances," both external sources of legal guidance as to a concrete duty's delineation, may play a critical role in defining a legal duty's existence and thereby the debtor's liability for his or her silent breach under § 523(a)(2)(B).[112] To divine either, non-bankruptcy law must be consulted.

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[105] 11 U.S.C. § 523(a)(2)(A) (2012).

[106] Though phrased in the disjunctive, many have seen the terms "false pretenses" and "false representation" as equivalent to "actual fraud," the former two therefore not amounting to separate grounds for a debt's nondischaregability. *E.g.*, Mandalay Resort Grp. v. Miller (*In re* Miller), 310 B.R. 185, 188–189 (Bankr. C.D. Cal. 2004) (so characterizing Ninth Circuit law). Purely as a matter of statutory interpretation, this choice remains a dubious one.

[107] George H. Singer, *Section 523 of the Bankruptcy Code: The Fundamentals of Nondischargeability in Consumer Bankruptcy*, 71 AM. BANKR. L. J. 325, 332–33 (1997).

[108] Huskey v. Tolman (*In re* Tolman), 491 B.R. 138, 151 (Bankr. D. Idaho 2013).

[109] Stennis v. Davis (*In re* Davis), 486 B.R. 182, 191 (B.A.P. 9th Cir. 2013).

[110] Apte v. Japra (*In re* Apte), 96 F.3d 1319, 1322 (9th Cir. 1996).

[111] *Id.* at 1324 (citing RESTATEMENT (SECOND) OF TORTS § 537 (1976)). Tellingly, in *Field v. Mans*, the Supreme Court turned to this same section of the Restatement to define the reliance required under § 523(a)(2)(A). *Id.* ("The Supreme Court in *Field* looked to the Restatement (Second) of Torts (1976) as 'the most widely accepted distillation of the common law of torts' at the relevant time.").

[112] *See* Cutcliff v. Reuter (*In re* Reuter), 427 B.R. 727, 744 (Bankr. W.D. Mo. 2010).

Second, so as to establish the requisite "intent to deceive" under § 523(a)(2)(A), courts look towards those omnipresent "badges of fraud," a type of circumstantial evidence often needed due to the rarity of a debtor admitting to the possession of a fraudulent motive.[113] Among the plethora of such indicia recognized by sundry courts,[114] "[f]or purposes of § 523(a)(2)(A), a common badge of fraud concerns whether a defendant made any effort to perform their obligation."[115] Furthermore, "the greater the extent of a debtor's performance, the less likely it will be that they possessed an intent to defraud."[116] Naturally and logically, then, the source of a debtor's obligation will not be the Code but the contract that the debtor signed—and the operative law applicable to such contracts and transactions, most especially any obligations and duties that it thrust as a matter of course on the prepetition debtor. As such, federal or state common and statutory law must be consulted for a party's contractual duties to be precisely denoted and, if a violation thereby be found, a pivotal badge be established.[117]

Third, demarcating the outer boundaries of justifiable reliance may occasionally, albeit not invariably, require dissection of such non-bankruptcy law. Unlike § 523(a)(2)(B), § 523(a)(2)(A) specifies no standard, and due to this presumptively intentional exclusion of such language in the latter, the Court has imputed a "justifiable reliance" requirement to § 523(a)(2)(A).[118] "Justification," the Court noted, "is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case."[119] Nonetheless, if the relevant facts should have been discerned by the creditor—"a person cannot purport to rely on preposterous representations or close his eyes

[113] Caspers v. Van Horne (*In re* Van Horne), 823 F.2d 1285, 1287 (8th Cir. 1987).

[114] *See* Lisa Ng v. Adler (*In re* Adler), 494 B.R. 43, 65–66 (Bankr. E.D.N.Y. 2014) (enumerating six for purposes of § 727(a)(2)(A)).

[115] Bartson v. Marroquin (*In re* Marroquin), 441 B.R. 586, 593 (Bankr. N.D. Ohio 2010).

[116] Ewing v. Bissonette (*In re* Bissonette), 398 B.R. 189, 194 (Bankr. N.D. Ohio 2008).

[117] *See, e.g.*, Miree v. DeKalb County, 433 U.S. 25, 28 (1977) (holding that when a federal statute governs, "[t]he necessity of uniformity of decision demands that federal common law, rather than state law, control the contract's interpretation"); Visteon Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 777 F.3d 415, 418 (7th Cir. 2015) (citing Indiana's uniform-contract-interpretation approach, "which applies the law of a *single* state to the whole contract even though [the contract] covers multiple risks in multiple states" (internal quotation marks omitted)).

[118] Field v. Mans, 516 U.S. 59, 61 (1995).

[119] *Id.* at 71 (internal quotation marks omitted) (citing RESTATEMENT (SECOND) OF TORTS § 537 (1976)); *see also, e.g.*, Vermont Plastics v. Brine, Inc., 79 F.3d 272, 277–78 (2d Cir. 1996).

to avoid discovery of the truth"[120]—blind reliance will not be justifiable reliance.[121]

This understanding of "justifiable reliance" is rooted in "the common law of torts"; to this external law, courts have repeatedly turned to establish the limits of justifiability.[122] Based on this substantial precedent, the extent to which an allegedly wronged party's reliance was justifiable will frequently depend on the nature of the parties' contractual agreement and the applicable non-bankruptcy law which governs its interpretation.[123] Reflecting a tendency that further justifies this approach, courts have not hesitated to rely on state common and statutory law in applying § 523(a)(2) to a particular debtor,[124] as they have often done in regards to any substantive legal issue not expressly and fully settled by the Code's positive text.[125] In sum, however unintentional the result, nonbankruptcy law, as written and interpreted, must often inform any analysis of justifiable reliance.[126] Logic compels no less, as only from its substantive content can the outer bounds which no person of the same age, experience, sophistication, education, and capacity as the alleged creditor can claim to have rightly crossed can be espied.

Finally, any calculation of damages demands an analysis identical to that necessary to estimate a claim. By necessity, if a creditor prevails on a § 523(a)(2)(A) action, a court must estimate the claim's size.[127] To make that

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[120] Romesh Japa, M.D., F.A.C.C., Inc. v. Apte (*In re* Apte), 180 B.R. 223, 229 (B.A.P. 9th Cir. 1995) (internal quotation marks omitted) (citing Eugene Parks Law Corp. Defined Benefit Pension Plan v. Kirsh (*In re* Kirsh), 973 F.2d 1454, 1459 (9th Cir. 1992)), *cited with approval*, Citibank (S.D.) N.A. v. Eashai (*In re* Eashai), 87 F.3d 1082, 1086 (9th Cir. 1996).

[121] Am. Express Centurion Bank v. Owens (*In re* Owens), No. 12-19125-B-7, 2013 Bankr. LEXIS 5146, at *17 (Bankr. E.D. Cal. Dec. 4, 2013) (summarizing precedent and collecting cases).

[122] Huskey v. Tolman (*In re* Tolman), 491 B.R. 138, 152 (Bankr. D. Idaho 2013).

[123] *See, e.g.*, Walid v. Yolanda for Irene Couture, 40 A.3d 85, 91 (N.J. Super. Ct. App. Div. 2012); Butler v. Yusem, 44 So. 3d 102, 105 (Fla. 2010); Toy v. Metro Life Ins., Co., 928 A.2d 186, 207–08 (Pa. 2007); Moore v. Daw, No. CT 95-20, 1996 Ohio App. LEXIS 3763, at *13 (Ohio Ct. App. Aug. 20, 1996); Koral Indus. v. Sec. Conn. Life Ins., Co., 802 S.W.2d 650, 651 (Tex. 1990); Keywell Corp. v. Weinstein, 33 F.3d 159, 164 (2d Cir. 1994); Smith v. Ethell, 494 N.E.2d 864, 867 (Ill App. Ct. 1986); Hartong v. Partak, Inc., 266 Cal. App. 2d 942, 964–65 (Cal. Ct. App. 1968).

[124] *See, e.g.*, Bancboston Mortg. Corp. v. Ledford, 127 B.R. 175, 184–85 (Bankr. M.D. Tenn. 1991) (relying on Tennessee law regarding when fraud may be imputed to a partner and collecting similar cases).

[125] Daniel A. Austin, *The Bankruptcy Clause and the Eleventh Amendment: An Uncertain Boundary Between Federalism and State Sovereignty*, 42 U.S.F. L. REV. 383, 395 (2007).

[126] *Cf.* INGEBORG SCHWENZER, PASCAL IACHEM & CHRISTOPHER KEE, GLOBAL SALES AND CONTRACT LAW 396 (2012).

[127] *E.g.*, Baker Dev. Corp. v. Mulder (*In re* Mulder), 307 B.R. 637, 641 n.5 (Bankr. C.D. Ill. 2004) ("A bankruptcy court can enter a money judgment in a nondischargeability action."); Cowen v. Kennedy (*In re* Kennedy), 108 F.3d 1015, 1018 (9th Cir. 1997) (holding that "the bankruptcy court acted within its jurisdiction in entering a monetary judgment against . . . [the debtor] in conjunction with a finding that the debt was non-

accurate determination, especially if punitive damages may be claimed as a matter of law, courts have long looked to the non-bankruptcy law governing the relevant transaction that begot the debt already found non-dischargeable per § 523(a)(2)(A).[128]

2. *Section 523(a)(2)(B)*

Seen simultaneously as an amendment and a codification of existing law,[129] § 523(a)(2)(B)[130] forecloses the discharge of a debt upon the establishment of seven elements: (1) "use of a statement in writing" that was (2) "material" and (3) "false," (4) "respecting a debtor's or an insider's financial condition," (5) "on which the creditor to whom the debtor is liable . . . reasonably relied," (6) "that the debtor caused to be made or published with intent to deceive,"[131] and (7) that proximately caused damages to the complaining creditor.[132] As a federal statute, non-bankruptcy law may affect this section's interpretation in three ways.

First, and maybe most clearly, "[r]easonable reliance is an objective test requiring conduct consistent with the standard of a reasonable man,"[133] the term effectively "connot[ing] the use of the standard of ordinary and average person."[134] Logically, if a controlling law or a written agreement forecloses the possibility of reliance during a specified class of transactions, "a community standard of conduct"[135] such as that encoded in § 523(a)(2)(B) would automatically categorize such reliance as unreasonable, making proof of nondischargeability impossible. Similarly, if a contract defines the outer bounds

dischargeable" under § 523(a)(2)(A)); N.I.S. Corp. v. Hallahan (*In re* Hallahan), 936 F.2d 1496, 1508 (7th Cir. 1991) ("We think it preferable to allow bankruptcy courts ruling on the dischargeability of a debt to adjudicate the issues of liability and damages also."). If the case involved a denial of discharge predicated on § 727, no need to compute damages would exist. *See* Genesee Reg'l Bank v. Rinaudo (*In re* Rinaudo), 418 B.R. 42, 47 (Bankr. W.D.N.Y. 2009).

[128] *See, e.g.*, Klaus v. Thompson (*In re* Klaus), 181 B.R. 487, 492 (Bankr. C.D. Cal. 1995) (looking to California law regarding the awarding of punitive damages).

[129] H.R. REP. NO. 95-595, at 130 (1977) ("Current law provides a nearly identical exception to discharge. The differences are that current law does not cover a debt for services, and requires only reliance, not reasonable reliance, by the creditor on the statement.").

[130] For ease, this section first discusses paragraph (B) rather than (A).

[131] 11 U.S.C. § 523(a)(2)(B)(i)–(iv) (2012).

[132] Candland v. Ins. Co. of N. Am. (*In re* Candland), 90 F.3d 1466, 1469 (9th Cir. 1996) (rewording 11 U.S.C. § 523(a)(2)(B) and citing Siriani v. Nw. Nat'l Ins. Co. (*In re* Siriani), 967 F.2d 302, 304 (9th Cir. 1992)).

[133] Res GA Two, LLC v. Hiett (*In re* Hiett), No. 12-80560-DHW, 2014 Bankr. LEXIS 4179, at *22 (Bankr. M.D. Ala. Sept. 30, 2014).

[134] City Bank & Trust Co. v. Vann (*In re* Vann), 67 F.3d 277, 280 (11th Cir. 1995).

[135] Field v. Mans, 516 U.S. 59, 71 (1995) (quoting RESTATEMENT OF TORTS, § 545A, Comment b (2nd 1979)).

of reliance by assigning the relevant burden to the objecting creditor or by either stating or importing a very narrow definition from an external legal scheme, "the ordinary and average person" would not be able to maintain the reasonableness of their reliance on a debtor's representations.

Second, because "[t]he concept of 'materiality' . . . includes objective and subjective components,"[136] whether a financial statement is "materially false," meaning "that [it] paints a substantially untruthful picture of the debtor's financial condition . . . [*i.e.*,] a significant understatement of liabilities or exaggeration of assets,"[137] may often depend on what non-bankruptcy law allows a contracting party to assume to be true or obliges the debtor to verify or vouchsafe. If so, then a debtor's reckless representation regarding his or her financial ability to satisfy such elements may readily satisfy § 523(a)(2)(B)'s materiality requirement.

Finally, damages must always "be proven with specificity and cannot be speculative or conjectural."[138] Accordingly, as with estimation under § 502 or Rule 3018(a),[139] once a claim is found to be non-dischargeable per § 523(a)(2)(B), a court must turn to the relevant contract or controlling law to peg an appropriate amount. For these four reasons, non-bankruptcy strictures once more play a pivotal role in a discharge subsection's construal in a specific case or proceeding.[140]

E. Caveat: Multiplying Universes

Of course, the foregoing points to only a handful of those instances in which external law governs substantive decisions otherwise bounded by the Code's explicit provisions. Others, in fact, can be found, including, for example, § 503(b)(9). More importantly, even where no such explicit referral appears, the underlying principles behind such non-bankruptcy provisions can (and often do) influence a court's interpretive approach, impelling subtle methodological variations, in a protean host of unpredictable cases. To wit, sometime, even when no definite answer can be gleaned from the relevant compendium, the law's spirit gives some direction and excludes certain possibilities by implication. As

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[136] Fairfax State Sav. Bank v. McCleary (*In re* McCleary), 284 B.R. 876, 885 (Bankr. N.D. Iowa 2002) (citing Ramsey Nat'l Bank & Trust Co. v. Dammen (*In re* Dammen), 167 B.R. 545, 551 (Bankr. D.N.D. 1994)).

[137] Guaranty Residential Lending, Inc. v. Koep (*In re* Koep), 334 B.R. 364, 373 (Bankr. D. Md. 2005).

[138] Huskey v. Tolman (*In re* Tolman), 491 B.R. 138, 156 n.43 (Bankr. D. Idaho 2013); *cf.* Jill Stuart (Asia) LLC v. Sanei Int'l Co., 566 F. App'x 29, 32 (2d Cir. 2014) (discussing contract damages under New York law).

[139] *See supra* Part III.A.1–2.

[140] *Cf.* Steven W. Rhodes, *Eight Statutory Causes of Delay and Expense in Chapter 11 Bankruptcy Cases*, 67 AM. BANKR. L.J. 287, 294 (1993).

shown below, CISG, a treaty shockingly opaque as to certain issues but surprisingly exhaustive as to others, may have precisely such an effect.[141]

III. CONSTRUCTION OF TREATIES GENERALLY AND CISG PARTICULARLY

A. General Rules

As with a statute[142] and a rule,[143] a treaty's interpretation begins with its language.[144] "[C]lear treaty language" and hence plain and unambiguous meaning[145] is dispositive "absent extraordinarily strong contrary evidence."[146] Subject to this generally applicable paradigm, treaty interpretation initially makes use of numerous semantic and syntactic precepts, including the *expressio unius est exclusio alterius*,[147] *noscitur a sociis*,[148] *ejusdem generis*,[149] and absurdity[150] canons and the last antecedent[151] and series qualifier[152] rules, and

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141 *See* Hawkins & Maffett-Nickelman, *supra* note 30, at 45.

142 Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 235, 243, 245–46 (2010); United States v. Ron Pair Enters., 489 U.S. 235, 241 (1989).

143 Shachmurove, *Claims*, *supra* note 46, at 527–31.

144 Medellin v. Texas, 552 U.S. 491 (2008).

145 The definitional differences between the terms "plain" and "unambiguous" often relies on an assiduous attentiveness to the distinction between denotation and connotation. Amir Shachmurove, *Sherlock's Admonition: Vindicatory Contempts as Criminal Actions for Purposes of Bankruptcy Code § 362*, 13 DEPAUL BUS. & COM. L.J. 67, 77–78 (2014) [hereinafter Shachmurove, *Sherlock*].

146 Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 185 (1982) ("When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation."); *accord* Forestal Guarani S.A. v. Daros Int'l, Inc., 613 F.3d 395, 398 (3d Cir. 2010).

147 POM Wonderful LLC v. Coca-Cola Co., 134 S. Ct. 2228, 2238 (2014) (citing Setser v. United States, 566 U.S. 231, 461–62 (explaining the canon, which stands for the proposition that when one or more things of a class are expressly mentioned others of the same class are excluded)).

148 United States v. Williams, 553 U. S. 285, 294 (2008) (narrowing the range of permissible means by use of "the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated").

149 CSX Transp., Inc. v. Ala. Dep't of Revenue, 562 U.S. 277, 294 (2011) (defining the canon of *ejusdem generis*, "which limits general terms [that] follow specific ones to matters similar to those specified" (alteration in original) (internal quotation marks omitted)).

150 Kolon Indus. v. E.I. Dupont de Nemours & Co., 748 F.3d 160, 180 n.2 (4th Cir. 2014) (Shedd, J., dissenting) ("The absurdity canon allows courts to disregard the statutory text when adhering to the text 'would result in a disposition that no reasonable person could approve'." (marks in original) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 234 (2012))).

151 United States v. Kerley, 416 F.3d 176, 180 (2d Cir. 2005) ("Under the last antecedent rule, a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows." (internal quotation marks omitted)).

152 United States v. Laraneta, 700 F.3d 983, 989 (7th Cir. 2012) ("[T]he series-qualifier canon, contradicts the last-antecedent canon; it provides that a modifier at the beginning or end of a series of terms modifies all the terms." (internal quotation marks omitted)), *cert. denied*, 134 S. Ct. 235 (2013).

the familiar contextual canons, such as the prefatory materials,[153] *in pari materia*,[154] and general/specific[155] canons, the presumption of consistent usage,[156] and the rule against redundancy,[157] so important in the most anodyne exercises of statutory construction.[158]

Broadly viewed, this multipart exegesis focuses on the relevant phrase's standard denotation and connotation, the relevant text's grammatical structure, comparison with similar terms used throughout the particular treaty, and the instrument's more general context, including any evidence of intent such as its known and obvious purposes.[159] To the extent a treaty's language is plain and unambiguous, distinct if often amalgamated facets,[160] as ascertained by use of

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153 Wiggins Bros., Inc. v. Dep't of Energy, 667 F.2d 77, 88 (Temp. Emerg. Ct. App. 1981) ("In the construction of the Constitution of the United States, statutes and regulations, the federal rule permits and requires consideration of preambles in appropriate cases.").

154 Ala. Educ. Ass'n v. State Superintendent of Educ., 746 F.3d 1135, 1158 (11th Cir. 2014) (noting that, as a general rule, statutes *in pari materia* should be construed together to ascertain the meaning and intent of each).

155 RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012) ("The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one.").

156 United States v. Castleman, 134 S. Ct. 1405, 1417 (2014) (Scalia, J., concurring) (defining the presumption as "the rule of thumb that a term generally means the same thing each time it is used").

157 Orlando Food Corp. v. United States, 423 F.3d 1318, 1324 (Fed. Cir. 2005) ("[S]tatutes should be construed to avoid holding language to be redundant.").

158 Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 709 (1998).

159 Abbott v. Abbott, 560 U.S. 1, 10, 20 (2010) (consulting the "text and structure" of the Hague Convention on the Civil Aspects of International Child Abduction to define the phrase "righ[t] of custody" and further reinforcing its interpretation based on this treaty's "objects and purposes"); *see also* Maximov v. United States, 373 U.S. 49, 54 (1963) ("[I]t is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty between this Nation and a foreign sovereign, when, as here, there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories."); Gherebi v. Bush, 352 F.3d 1278, 1292 (9th Cir. 2003) ("This Court's duty to give effect, where possible, to every word of a treaty . . . should make us reluctant to deem treaty terms, or terms used in other important international agreements, as surplusage." (internal citation omitted)). The Court has defended the use of a "uniform, text-based approach" as critical to "ensur[ing] international consistency in interpreting the Convention." Abbott, 560 U.S. at 12.

160 *See* Stern v. Am. Home Mortg. Servicing, Inc. (*In re* Asher), 488 B.R. 58, 64–65 (Bankr. E.D.N.Y. 2013) (exploring the connection and distinction); Shachmurove, *Claims*, *supra* note 46, at 528–31 (same).

these motley rules of thumb,[161] courts have no power to amend,[162] harshness and unreason (short of patent absurdity) be damned.[163]

Nonetheless, because treaties are different than the typical federal statute in origination and purpose, representing both "the law of this land" and "an agreement among sovereign powers,"[164] otherwise atypical sources of interpretive guidance may be used to dispel ambiguity and to select the perfectly apposite plain and unambiguous import of a particular provision. Indeed, "courts [may] look to [such] extrinsic sources to aid in the interpretation of a treaty even with a relatively low level of ambiguity."[165] These interpretive aids include: (1) "the negotiation and drafting history of the treaty,"[166] (2) "the post[-]ratification understanding of signatory nations,"[167] (3) the reasonable view of a provision's meaning espoused by the executive branch agencies charged with the treaty's negotiation and/or enforcement,[168] (4) the interpretations of other nations'

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[161] *See, e.g.*, Sebelius v. Cloer, 569 U.S. 369, 381 (2013); Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992).

[162] Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989); *see also* The Amiable Isabella, 6 Wheat. 1, 71 (1821) ("[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions.").

[163] *See, e.g.*, Dodd v. United States, 545 U.S. 353, 359 (2005); Badaracco v. Comm'r, 464 U.S. 386, 398 (1984); Edwards v. Valero Refining-Merauc, LLC, No. 3:14-CV-00772-JWD-EWD, 2016 U.S. Dist. LEXIS 9898, at *14 (M.D. La. Jan. 28, 2016).

[164] Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996).

[165] Eid v. Alaska Airlines, Inc., 621 F.3d 858, 878 (9th Cir. 2010) (Otero, J., dissenting), *cert. denied*, 131 S. Ct. 3874 (2011).

[166] Medellin v. Texas, 552 U.S. 491, 507 (2008) (internal quotation marks omitted) (relying on Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996)); *see also, e.g.*, Bishop v. Reno, 210 F.3d 1295, 1299 (11th Cir. 2000) ("In construing treaties, we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." (internal quotation marks omitted) (citing Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988))), *cert. denied*, 531 U.S. 897 (2000).

[167] Medellin, 552 U.S. at 507 (internal quotation marks omitted); *accord* El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 176 (1996) (quoting Air France v. Saks, 470 U.S. 392, 404 (1985) (finding "the opinions of our sister signatories to be entitled to considerable weight")); *see also* Schroeder v. Lufthansa German Airlines, 875 F.2d 613, 618 (7th Cir. 1989) ("[I]t is well established that treaty interpretation involves a consideration of legislative history and the intent of the contracting parties.") (quoting Maugnie v. Compagnie Nat'l France, 549 F. 2d 1256, 1258 (9th Cir. 1977).

[168] Sumitomo Shoji Am. v. Avagliano, 457 U.S. 176, 184–85 (1982) (relying on Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.")); *see also, e.g.*, McKesson v. Islamic Republic of Iran, 539 F.3d 485, 491 (D.C. Cir. 2008) (quoting *Sumitomo*, 457 U.S. 176 at 184–85, and giving "great weight to the fact that the United States shares" a particular view regarding a treaty's meaning).

courts,[169] and (5) scholarly commentaries.[170] Beyond these sources, the so-called "rule of equality" prohibits implementing statutory law that renders any treaty term nugatory.[171] Hence, for most treaties, while a court must begin "with the[ir] text . . . and the context in which the written words are used,"[172] a more liberal interpretive scheme than the one applicable to statutes controls.[173]

B. CISG's Domestic Status

1. Preeminence

With trade having "always been an incentive for harmoni[z]ing or unifying law,"[174] CISG represents the culmination of decades of labor.[175] This stunningly successful treaty sought to "contribute to the removal of legal barriers in . . . and promote the development of international trade"[176] and has been described as "arguably the greatest legislative achievement aimed at harmonizing the international law of sales,"[177] enjoying "widespread acceptance as the governing law of contracts for international trade."[178] A self-executing treaty[179] that creates

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169 Negusie v. Holder, 555 U.S. 511, 537 (2009) (Stevens, J., concurring in part and dissenting in part) (citing Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226–28 (1996)).

170 Roser Technologies, Inc. v. Carl Schreiber GmbH, No. 11cv302 ERIE, 2013 U.S. Dist. LEXIS 129242, at *13–14 (W.D. Pa. Sept. 10, 2013) (relying in part on United States v. Alvarez-Machain, 504 U.S. 655, 669 (1992)).

171 Asakura v. City of Seattle, 265 U.S. 332, 341 (1803), *amended on other grounds*, 265 U.S. 332.

172 Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988) (quoting Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522, 534 (1987)).

173 Tachiona v. United States, 386 F.3d 205, 216 (2d Cir. 2004) (internal quotation marks omitted) (quoting E. Airlines, Inc. v. Floyd, 499 U.S. 530, 534 (1991)).

174 Schwenzer et al., *supra* note 126, at 427.

175 *See, e.g.*, H. Allen Blair, *Hard Cases under the Convention on the International Sale of Goods: A Proposed Taxonomy of Interpretive Challenges*, 21 DUKE J. COMP. & INT'L L. 269, 275 (2011); Christopher Sheaffer, *The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law*, 15 CARDOZO J. INT'L & COMP. L. 461, 469 (2007).

176 CISG pmbl., art. I(1)(a); Honey Holdings I, Ltd. v. Alfred L. Wolff, Inc., 81 F. Supp. 3d 543, 551 (S.D. Tex. 2015) (quoting *id.*).

177 David Frisch, *Commercial Common Law, the United Nations Convention on the International Sale of Goods, and the Inertia of Habit*, 74 TUL. L. REV. 495, 501 (1999); *see also* Marcia J. Staff, *United Nations Convention on Contracts for the International Sale of Goods: Lessons Learned from Five Years of Cases*, 6 S.C. J. INT'L L & BUS. 1, 3 (2009) (describing CISG as "one of the most successful international conventions promulgated by the United Nations").

178 Jeffrey R. Hartwig, Note, *Schmitz-Werke GMBH & Co. v. Rockland Industries, Inc. and the United Nations Convention on Contractions for the International Sale of Goods (CISG): Diffidence and Developing International Legal Norms*, 22 J. L. & COM. 77, 98 (2003).

179 VLM Food Trading Int'l, Inc. v. Ill. Trading Co., Nos. 13–1799, 13–1697, 2014 U.S. App. LEXIS, 6692, at *18 (7th Cir. Apr. 10, 2014) (quoting Chi. Prime Packers, Inc. v. Northam Food Trading Co., 408 F.3d 894, 897 (7th Cir. 2005) (describing CISG as "a self-executing agreement between the United States and other

a private right of action in all federal courts,[180] an understanding at least partly based on CISG's legislative history and its commercial subject-matter,[181] any action based on a CISG provision squarely falls within the federal courts' subject matter jurisdiction.[182] Pursuant to Article VI of the U.S. Constitution, moreover, any properly enacted treaty constitutes "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding,"[183] so that CISG is as much a part of every state's law as the Constitution itself.[184] In light of these facts, if CISG does indeed apply to a

signatories")); Beth Schiffer Fine Photographic Arts, Inc. v. Colex Imaging, Inc., No. Civ. No. 10-05321, 2012 U.S. Dist. LEXIS 36695, at *18–19 (D.N.J. Mar. 19, 2012) ("The CISG is a self-executing treaty that preempts contrary provisions of article 2 of the UCC and other state contract law to the extent that those causes of action fall within the scope of the CISG."); Delchi Carrier v. Rotorex Corp., 71 F.3d 1024, 1027–28 (2d Cir. 1995) (affirming district court decision that treated CISG as self-executing); *cf, e.g.*, Medellin v. Texas, 552 U.S. 491, 505 n.2 (2008) ("What we mean by 'self-executing' is that the treaty has automatic domestic effect as federal law upon ratification."); Cook v. United States, 288 U.S. 102, 119 (1933) ("For in a strict sense the [t]reaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions."); *see also, e.g.*, Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 922, 959, 989 (2004); James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales*, 32 CORNELL INT'L L.J. 273, 281, 304 (1999). If it was not self-executing, CISG would lack domestic effect in the absence of implementing legislation. At least some scholars have theorized that this fact explains United States courts' haphazard treatment of CISG. Kina Grbic, *Putting the CISG Where it Belongs: In the Uniform Commercial Code*, 29 TOURO L. REV. 173, 191 (2012).

[180] Genpharm Inc. v. Pliva-Lachema a.s., 361 F. Supp. 2d 49, 53–54 (E.D.N.Y. 2005), *cited in* Profi-Parkiet Sp. Zoo v. Seneca Hardwoods LLC, No. 13 CV 4358(PKC)(LB), 2014 U.S. Dist. LEXIS 71289, at *8 (E.D.N.Y. May 23, 2014).

[181] Asante Techs., Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142, 1150–52 (N.D. Cal. 2001); Bailey, *supra* note 179, at 281.

[182] 28 U.S.C. § 1331(a) (2014); *see, e.g.*, ECEM Europa Chem. Mktg. B.V. v. Purolite Co., 451 F. App'x 73, 79 (3d Cir. 2011) ("[I]f . . . the CISG (an international treaty) governs the dispute, then we may treat the dispute as a federal question."); Genpharm Inc. v. Pliva-Lachema, 361 F. Supp. 2d 49, 53–54 (E.D.N.Y. 2005) (concluding CISG applied and federal subject matter jurisdiction therefore existed over an action for breach of contract); BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333, 336–37 (5th Cir. 2003) (concluding that per § 1331(a) "CISG . . . creates a private right of action in federal court"). This fact has led one judge to discount the potential difficulties of interpreting and applying CISG specifically. Taub v. Marchesi Di Barolo S.P.A., No. 09-CV-599 (ADS)(ETB), 2009 U.S. Dist. LEXIS 115565, at *11 (E.D.N.Y. Dec. 10, 2009) (Spatt, J.); Genpharm Inc. v. Pliva-Lachema a.s., 361 F. Supp. 2d 49, 53-54 (E.D.N.Y. 2005) (Spatt, J.). Of course, as this jurisdictional grant does not appear to be exclusive but rather concurrent, no constitutional stricture necessarily forecloses state courts from ruling on CISG. Alstine, *supra* note 158, at 690 & n.13.

[183] U.S. CONST., art. VI, cl. 2; Mut. Pharm. Co. v. Bartlett, 133 S. Ct. 2466, 2472–73 (2013); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1832 (1833) ("In regard to treaties, there is equal reason, why they should be held, when made, to be the supreme law of the land. . . . [T]reaties constitute solemn compacts of binding obligation among nations . . . . [T]hey ought to have a positive binding efficacy as laws upon all the states, and all the citizens of the states.").

[184] Hauenstein v. Lynham, 100 U.S. 483, 490 (1880); *accord* Sanchez-Llamas v. Oregon, 548 U.S. 331, 346 (2006) ("is well established that a self-executing treaty binds the States pursuant to the Supremacy Clause, and that the States therefore must recognize the force of the treaty in the course of adjudicating the rights of litigants."); Filanto S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1237 n.5 (S.D.N.Y. 1992) (emphasizing that CISG, like the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, is "state law");

prepetition contract between two or more parties, one of whom later assumes a debtor's mantle, its provisions automatically preempt any contrary state law such as the UCC[185] or any federal statute enacted prior to its effective date of January 1, 1988.[186] Only to the Constitution[187] and a later federal law[188] can CISG be inferior.[189] Despite U.S. courts' seeming reluctance to invoke it,[190]

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see also, e.g., Alstine, *supra* note 179, at 901, 920; Sunil R. Harjani, *The Convention on Contracts for the International Sale of Goods in United States Courts*, 23 HOUS. J. INT'L L. 49, 53 (2000); Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 301 (1984). Thus, CISG can never be deemed "foreign law" that must be raised in accordance with Federal Rule of Civil Procedure 44.1, FED. R. CIV. P. 44.1, though one appellate court strangely concluded otherwise in 1996, Attorneys Trust v. Videotape Computer Prods., 94 F.3d 650 (9th Cir. 1996) (unpublished disposition).

[185] U.S. CONST., art. VI, cl. 2; Ware v. Hylton, 3 U.S. 199, 237 (1796) ("It is the declared will of the people of the United States that every treaty made, by the authority of the United States, shall be superior to the Constitution and laws of any individual State."); *see also, e.g.*, It's Intoxicating, Inc. v. Maritim Hotelgesellschaft mbH, No. 11-CV-2379, 2013 U.S. Dist. LEXIS 107149, at *46–47 (M.D. Pa. July 31, 2013) (holding that, if CISG controlled, Pennsylvania law was fully preempted); Citgo Petroleum Corp. v. Seachem, No. H-07-2950, 2013 U.S. Dist. LEXIS 7288, at *12–13 (S.D. Tex. May 23, 2013) (reaching the same conclusion as to plaintiff's state law contract claims); BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333, 336 (5th Cir. 2003) (holding that CISG creates a private right of action in federal court); Valero Mktg. & Supply Co. v. Greeni Oy, 373 F. Supp. 2d 475, 480 n.7 (D.N.J. 2005) (noting that the CISG preempts state contract law to the extent that state causes of action fall within the scope of the CISG); Usinor Industeel v. Leeco Steel Prods., Inc., 209 F. Supp. 2d 880, 884 (N.D. Ill. 2002) (holding that under the Supremacy Clause, the CISG would displace any contrary state sales law such as the UCC's article 2).

[186] Whitney v. Robertson, 124 U.S. 190, 194, (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. . . . [I]f the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing."); *accord* Breard v. Greene, 523 U.S. 371, 376 (1998) (quoting Reid v. Covert, 354 U.S. 1, 18 (1957) (plurality opinion)). The Senate ratified CISG on October 9, 1986, setting an effective date of January 1, 1988, and the United States deposited its ratification at the United Nations on December 11, 1986. Bailey, *supra* note 179, at 279.

[187] Reid v. Covert, 354 U.S. 1, 16 (1957); *see also, e.g.*, Boos v. Barry, 485 U.S. 312, 324 (1988); Alstine, *supra* note 179, at 950. Whether the Constitution places limited on federalism in the course of implementing a legal treaty via statute remains an open question, left unresolved by the most recent Court case within this particular field.

[188] Whitney, 124 U.S. at 194, *cited in* Ntakirutimana v. Reno, 184 F.3d 419, 426–27 (5th Cir. 1999) (citing *id.* for "the last in time rule that, if a statute and treaty are inconsistent, then the last in time will prevail"), *cert. denied*, 528 U.S. 1135 (2000); *see also* Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp., 724 F.3d 230, 233–34 (D.C. Cir. 2013) (reiterating the rule).

[189] Bailey, *supra* note 179, at 284. In all other cases, "CISG automatically applies to international sales contracts between parties from different contracting states unless the parties agree to exclude [its] application." Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co., Ltd., No. 06 Civ. 3972 (LTS)(JCF), 2011 U.S. Dist. LEXIS 110716, at *9 (S.D.N.Y. Sept. 28, 2011) (alteration in original) (internal quotation marks omitted) (quoting Zhejiang Shaoxing Yongli Printing & Dyeing Co., Ltd. v. Microflock Textile Grp. Corp., No. 06-CV-22608(JJO), 2008 U.S. Dist. LEXIS 40418 (S.D. Fla. May 19, 2008)). Consequently, in the case of a true and irresolvable conflict between the earlier adopted Code and later ratified CISG, the Code would have to give.

[190] Shani Salama, *Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, an Inter-American Application*, 38 U. MIAMI INTER-AM. L. REV. 225, 231 (2006–07).

CISG's coverage is seen as far-reaching,[191] its every article imbued with the full "preemptive force of federal law."[192]

2. *Caveats about Utility of Domestic Case Law in CISG Cases*

Prior to any attempted construction of a CISG article by court or commentator, four sematic signs must be minded.

First, the Court's approach to treaty exposition does not necessarily cohere with scholars' understanding of CISG's interpretive template. In fact, as to treaties like CISG that regulate conduct between private entities and implicate no foreign policy or sovereignty concerns, there may be "no reason," as the Court has done,[193] "to give controlling deference to the intent of the contracting parties or the views of the Executive Branch in interpreting . . . [their] substantive provisions."[194] Nonetheless, binding precedent leaves no room for the utilization of other theories, and any objection, however valid it may seem, cannot be sustained unless the Court itself interposes a newer and more apt model. In addition, despite scholarly insistence to the contrary,[195] the Court's tiered approach—plain text, then structure, then purpose as evidenced by a panoply of sources[196]—and its utilization of a wide array of sources appears to conform to the interpretive scheme established in CISG's seventh article.[197] In

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[191] It's Intoxicating, Inc., 2013 U.S. Dist. LEXIS 107149, at *47; *see also* MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino, S.p.A., 144 F.3d 1384, 1389 (11th Cir. 1998) ("Despite the CISG's broad scope, surprisingly few cases have applied the Convention in the United States." (citation omitted)), *cert. denied*, 526 U.S. 1087 (1999).

[192] Am. Mint LLC v. GOSoftware, No. 05–CV–650, 2005 U.S. Dist. LEXIS 45003, at *8 (M.D. Pa. Aug. 16, 2005); *accord, e.g.*, Stawski Distrib. Co. v. Zywiec Breweries PLC, No. 02 C 8708, 2003 U.S. Dist. LEXIS 17676, at *7 (N.D. Ill. Oct. 7, 2003); Usinor Industeel v. Leeco Steel Prods., Inc., 209 F. Supp. 2d 880, 884 (N.D. Ill. 2002).

[193] *See supra* Part IV.A.

[194] Alstine, *supra* note 158, at 708; Grbic, *supra* note 179, at 192 n.132. CISG's article 7, for one, "rejects the restrictive approach that is evidence in much of the recent Supreme Court treaty jurisprudence." Alstine, *supra* note 158, at 757.

[195] Franco Ferrari, *Applying the CISG in a Truly Uniform Manner: Tribunale di Vigevano (Italy)*, 12 July 2000, NS Vol. 6, Uniform Law Review / Revue de Droit Uniforme, 203, 205–06 (2001).

[196] Alstine, *supra* note 179, at 982; Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183, 207 (1994).

[197] *E.g.*, Camilla Baasch Andersen, *The Uniform International Sales Law and the Global Jurisconsultorium*, 24 J. L. & COM. 159, 165 (2005); Bailey, *supra* note 179, at 297; Alstine, *supra* note 158, at 753; Franco Ferrari, *The Relationship Between the UCC and the CISG and the Construction of Uniform Law*, 29 LOY. L.A. L. REV. 1021, 1027 (1996) *see also* Harjani, *supra* note 184, at 61 (enumerating seven sources in descending importance: "(1) general principles of contract law contained in the CISG; (2) the legislative history of the CISG; (3) case law from foreign jurisdictions interpreting the Convention; (4) treatises and commentary of noted scholars on the CISG; (5) general principles of private international law; (6) case law from domestic jurisdictions interpreting the Convention; and (7) case law from domestic jurisdictions interpreting domestic sales law"). Consideration of each source therein identified is perfectly customary as a matter of domestic treaty

effect, then, any U.S. judge who interprets CISG pursuant to the Court's dominant model will often find itself acting consistently with CISG's unambiguous directives,[198] if not necessarily with the kind of utmost regard for its implicit and contestable interpretive exhortations demanded by many international law experts.[199]

Second, a problem rooted in common law systems' preference for decisions based on precedent[200] may also stymie any judicial interpreter. Within the domestic arena, CISG's already "vague" and "relatively abstract" phraseology[201] has led to the emergence of an oft-disparaged "homeward trend" in certain nations.[202] Influenced by this potent predilection, federal and state courts throughout the United States continue to rely on UCC case law, assert the virtual absence of CISG case law, and exhibit an almost complete disregard for CISG cases decided by foreign courts.[203] Consequently, as "a majority of courts [have] look[ed] across federal jurisdictions for guidance in dealing with cases of first impression,"[204] initial errata have often been duplicated, with the United States decried as one of the "leading countries in misapplications of the Convention's provisions."[205] This fact should not be overlooked when CISG's

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interpretation. And it is by no means clear that CISG requires such a ranking. *See* Bailey, *supra* note 179, at 293–94 ("[W]hile the Convention's requirement that decisions from other jurisdictions be considered is clear, just how much significance a court should attach to those decisions is.").

[198] *See* Sheaffer, *supra* note 175, at 487–88. In practice, U.S. courts have often strayed.

[199] Ferrari, *supra* note 197, at 1033. Whether bankruptcy's oddities may yet allow for the harmonization of these discordant strands is an interesting question worthy of further exploration, but beyond this Article's purview.

[200] William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Unmodified)*, 60 LA. L. REV. 677, 701 (1999–2000) ("A major difference between the civil law and common law is that priority in civil law is given to doctrine (including the codifiers' reports) over jurisprudence, while the opposite is true in the common law."). In part, CISG's drafters hoped to "harmoniz[e] civil and common law jurisprudence." Sarah Howard Jenkins, *Construing the Laws Governing International and U.S. Domestic Contracts for the Sale of Goods: A Comparative Evaluation of the CISG and the UCC*, 26 TEMP. INT'L & COMP. L.J. 181, 183 (2012); *accord* Camilla Andersen, *The Global Jurisconsultorium of the CISG Revisited*, 13 VINDOBONA J. INT'L COM. L. & ARB. 43, 45 (2009).

[201] Larry A. DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT'L L. & BUS. 299, 311 (2004).

[202] Salama, *supra* note 190, at 250.

[203] Staff, *supra* note 177, at 15.

[204] Michael F. Sturley, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?*, 21 TEX. INT'L L.J. 540, 542 (1986); *see also, e.g.*, Marlyse McQuillen, Note, *The Development of a Federal CISG Common Law in U.S. Courts: Patterns of Interpretation and Citation*, 61 U. MIAMI L. REV. 509, 511 (2006); Vivian Grosswald Curran, *The Interpretive Challenge to Uniformity*, 15 J.L. & COM. 175, 176 (1995).

[205] Sheaffer, *supra* note 175, at 477; *accord* Bailey, *supra* note 179, at 275 ("Despite the CISG's political and economic significance to the United States, for the past decade, U.S. courts and attorneys have overlooked, misconstrued, and misapplied the terms of the Convention."). Other, less charged reasons may explain this

domestic precedent is perused for aid in the explication of a specific CISG provision, for the likelihood of an original error is greater than in normal cases of a purely domestic law's interpretation.

Third, encomia aside,[206] CISG's flaws as a document and a body of law are legion.[207] Honestly explicated, CISG's articles provide only "very general, vague default rules tied to the concept of reasonableness";[208] consequently, its methodology of interpretation is itself ambiguous.[209] The lack of any official commentary or any comment within CISG itself about the "role, if any, contemplated for authoritative judicial interpretation,"[210] interjects further doubt about the rightful weight of any precedent, whether foreign or domestic, scholars' complaints notwithstanding. Just as significantly, certain terms, from the prosaic, such as article 3's definition of "goods," to the more hortatory, such as article 7's "general principles" and "international character," are not well-defined.[211]

In fact, so many principles critical for the delineation of parties' duties—"fundamental breach," "reasonable time," and "good faith," among the most significant—are expressly espoused but ambiguously delineated, CISG's interpretation an often "daunting" task.[212] Compounding the problem, although CISG mandates the employment of general principles in unclear cases, it specifies "very few principles," making it a "poor guide for those faced with the concrete task of giving meaning to the words."[213] These noted details cannot but compel an assiduous attention to CISG's precise and ratified text, thereby obviating the need to rely on an often incoherent international jurisprudence,[214] except as to those ambiguous articles upon which a decided juridical and scholarly consensus has settled. As such, for all the vociferous disparagement of

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apparent pattern, including CISG "relative newness" and the "lack of utilization . . . by contracting parties." Lopez, *supra* note 117, at 155.

[206] JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN THE USA: A COMPACT GUIDE TO THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1 (2d ed. 2004).

[207] *See* Susan J. Martin-Davidson, *Selling Goods Internationally: Scope of the U.N. Convention on Contracts for the International Sale of Goods*, 17 MICH. ST. INT'L L. REV. 657, 660–61 (2008) (enumerating four of the more prominent weaknesses).

[208] DiMatteo et al., *supra* note 201, at 320.

[209] Sheaffer, *supra* note 175, at 487–495.

[210] Rosett, *supra* note 184, at 297.

[211] *See* Bailey, *supra* note 179, at 287, 291, 309.

[212] Blair, *supra* note 175, at 313–14; Bailey, *supra* note 179, at 295.

[213] Rosett, *supra* note 184, at 299.

[214] *Cf.* Salama, *supra* note 190, at 250 (noting that article 7(2)'s prominent shortcomings include "the absence of a common and comprehensive understanding of the meaning of 'general principles'"); Hartnell, *supra* note 17, at 7 (describing article 4(a)'s validity exception as "a particular danger to the development of a coherent jurisprudence of international trade").

American courts' parochial penchants, the only form of CISG interpretation that is both reasonable and defensible in light of such international disagreement over issues large and small corresponds strikingly well with American precedent.[215]

Lastly, the real state of CISG case law within the domestic arena is debatable. To this day, U.S. tribunals repeat the old saw that "[t]here is little case law interpreting the CISG."[216] This assertion, however, is of dubious validity, not only due to the existence of much foreign CISG case law,[217] opinions worthy of a U.S. court's cogitation,[218] but also due to the fact that numerous domestic decisions have been issued in the last two decades.[219] Nonetheless, many of these rulings are not published in the federal courts' official reporters, rendering them bereft of conclusive and decisive precedential weight.[220] Equally telling, less than a handful of bankruptcy opinions have extensively cited and rigorously applied CISG's substantive provisions to a creditor's claim.[221] Indeed, one of the more famous bankruptcy-related cases, *Helen Kaminski Pty. Ltd. v. Marketing Australians Products Inc.*,[222] has elicited withering and justified criticism.[223]

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215 *But see* Monica Kilian, *CISG and the Problem with Common Law Jurisdictions*, 10 J. TRANSNAT'L L. & POL'Y 217, 227–30 (2000) (collecting authorities).

216 Rienzi & Sons, Inc. v. N. Puglisi & F. Industria Paste Alimentari S.P.A., No. 08-CV-2540 (DLI) (JMA), 2014 U.S. Dist. LEXIS 41478, at *4 (E.D.N.Y. Mar. 27, 2014); Caterpillar, Inc. v. Usinor Industeel, 393 F. Supp. 2d 659, 673 (N.D. Ill. 2005); Usinor Industeel v. Leeco Steel Prods., Inc., 209 F. Supp. 2d 880, 884 (N.D. Ill. 2002).

217 Francesco G. Mazzotta, *Why Do Some American Courts Fail to Get it Right?*, 3 LOY. U. CHI. INT'L L. REV. 85, 95 (2005).

218 *See supra* Part IV.A.

219 Staff, *supra* note 203, at 14; McQuillen, *supra* note 204, at 511.

220 *See* Johanna S. Schiavoni, *Who's Afraid of Precedent?: The Debate Over the Precedential Value of Unpublished Opinions*, 49 UCLA L. REV. 1859, 1860–77 (2002) (discussing the debate amongst the courts regarding the value of unpublished opinions).

221 *E.g.*, *In re* World Imps., Ltd., 511 B.R. 738 (Bankr. E.D. Pa. 2014); *In re* Siskiyou Evergreens, Inc., No. 02-66975-fra11, 2004 Bankr. LEXIS 1044 (D. Or. Mar. 29, 2014). A few others engage in no substantial analysis. *E.g.*, *In re* Access Cardiosystems, Inc., 361 B.R. 626, 641 n.19 (Bankr. D. Mass. 2007) (quoting the relevant contact's exclusionary clause); Ayers Aviation Holdings, Inc. v. First Nat'l Bank of Ga. (*In re* Ayers Aviation Holdings, Inc.), No. 00-11881, 2002 Bankr. LEXIS 1151, at *2 (Bankr. M.D. Ga. July 25, 2002) (noting that CISG's second article excludes aircraft); Victoria Alloys, Inc. v. Fortis Bank SA/NV (*In re* Victoria Alloys, Inc.), 261 B.R. 424, 431 (Bankr. N.D. Ohio 2001) (observing that both CISG and the UCC "require payment per the contract's terms").

222 *See generally* Helen Kaminski PTY Ltd. v. Marketing Australian Prods., No. M-47 (DLC), 1997 U.S. Dist. LEXIS 10630 (S.D.N.Y. July 23, 1997) (denying appellant's motion for leave to appeal the bankruptcy court's interlocutory order holding that CISG did not apply to a distributorship agreement).

223 Kilian, *supra* note 215, at 227 n.47; Victoria M. Genys, Note, *Blazing a Trail in the "New Frontier" of the CISG:* Helen Kaminski Pty. Ltd. v. Marketing Australian Products, Inc., 17 J. L. & COM. 415, 419 (1997).

C. Defining CISG's Boundaries

1. Jurisdictional Requirements

CISG contains a "comprehensive set of rules governing the formation, performance, and remedies for breach of contracts within its jurisdictional scope."[224] It thus preempts contrary state laws only to the extent those statutory or common law rules impinge upon this specialized ambit: "the formation of the contract of sale and the right and obligations of the seller and buyer that arise from such a contract."[225] Once this jurisdictional standard is untangled into its components, the five legal elements that need to be established for CISG to govern a transaction can be succinctly stated: (1) the existence of "a contract for a sale;" (2) the sale concerns "goods;" (3) the parties' "place[s] of business" or "habitual residence" are in different contracting states;[226] (4) the plaintiff and defendant are the immediate buyer or the immediate seller;[227] and (5) the parties have not expressly excluded CISG's application in the relevant contract. Either explicitly stated or implicit in its text, these five elements are CISG's threshold prerequisites. If even one is absent, CISG will not apply. Conversely, if all characterize the relevant transaction, CISG's reach is absolute as a matter of valid and binding federal law,[228] solicitude for any material differences from the UCC's common variants of utmost significance,[229] as the choice may often prove to be outcome determinative.[230]

The first two of these essential prerequisites are relatively easy to ascertain. A "contract of sale" is defined in articles 30 through 52 as a contract pursuant to which one party (the seller) is bound to deliver the goods and transfers the property in the goods sold and the other party (the buyer) is obligated to pay the

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[224] Frisch, *supra* note 177, at 503; *accord* Grbic, *supra* note 179, at 175 (describing it as an "independent body of law").

[225] CISG arts. 1(1)(a), 4; *accord, e.g.*, Usinor Industeel v. Leeco Steel Prods., Inc., 209 F. Supp. 2d 880, 885 (N.D. Ill. 2002). Axiomatically, of course, contracts negotiated by an agent of the buyer or the seller would bind either party. *See* TeeVee Toons, Inc. v. Gerhard Schubert GmbH, No. 00 Civ. 5189 (RCC), 2002 U.S. Dist. LEXIS 5546, at *8–12 (S.D.N.Y. Mar. 29, 2002) (refusing to dismiss a complaint when complaint plausible alleged that the third party was but an agent).

[226] CISG art. 1(1)(a). The third requirement is due to a reservation made by the United States, as permitted by article 95, prohibiting the application of section 1(b) of article 1 to sales between U.S. entities and business based in non-contracting states.

[227] Martini E. Ricci Iamino S.P.A. v. Consortile Societa Agricola, No. 1:13-CF-276 AWI SAB, 2014 U.S. Dist. LEXIS 90604, at *35 (E.D. Cal. July 2, 2014).

[228] Chateau Des Charmes Wines Ltd. v. Sabate USA Inc., 328 F.3d 528, 530 (9th Cir. 2003), *cert. denied*, 540 U.S. 1049 (2003).

[229] Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1028 (2d Cir. 1995).

[230] *See, e.g.*, Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc., 254 F. App'x 646, 647 (9th Cir. 2007); Frisch, *supra* note 177, at 505.

price and accept the goods.[231] Unfortunately, CISG provides no concrete definition for the second, but its second article does explicitly exclude from its coverage the sales of six categories of "goods": (a) "goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;" (b) "by auction;" (c) "on execution or otherwise by authority of law;" (d) "of stocks, shares, investment securities, negotiable instruments or money;" (e) "of ships, vessels, hovercraft or aircraft;" and (f) "of electricity."[232] These exclusions appear based on the purpose of the goods' acquisition as ascertained at the time of purchase (article 2(a)), the type of sales contract involved (article 2(b) and (c)), or on the kind of goods sold (article 2(d), (e), (f)),[233] CISG exempting goods bought for purely personal and non-commercial use[234] but covering contracts where seller is obliged to provide services and labor in addition to a commercial product[235] or where goods are manufactured or produced by a seller without the buyer supplying "a substantial part of the materials necessary for such manufacture or production."[236]

CISG's tenth article helps clarify the third prong. That article declares: "[T]he closest relationship theory" is to be employed in determining whether the parties "place[s] of business" is in a contracting state.[237] As "a general rule," the place of business is regarded as where "the center of the business activity directed to the participation is located."[238] As a textual matter, "[n]either the nationality of the parties nor the civil or commercial character of the parties or of the contract" matters.[239] Instead, a contract's internationality depends upon the parties having their places of business (or habitual residences) in different

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[231] CISG arts. 30–52.

[232] CISG art. 2(a)–(f); *cf.* Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 201 F. Supp. 2d 236, 286 (S.D.N.Y. 2002) (liming CISG's scope); Frisch, *supra* note 177, at 504 ("[D]espite some similarities, the CISG does not necessarily resemble current article 2 [of the UCC] in either scope or substance.").

[233] Franco Ferrari, *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writin*g, 15 J.L. & COM. 1, 69, 73 (1995).

[234] Michael Kabik, *Through the Looking-Glass: International Trade in the "Wonderland" of the United Nations Convention on Contracts for the International Sale of Goods*, 9 INT'L TAX & BUS. LAW. 408, 411 (1992).

[235] Ferrari, *supra* note 233, at 61–62. The "*preponderant* part of the obligations" of the seller, however, cannot consist of "the supply of labor or other services." CISG art. 3(2) (emphasis added).

[236] CISG art. 3; Genphram Inc. v. Pliva-Lachema a.s., 361 F. Supp. 2d 49, 54 (E.D.N.Y. 2005).

[237] CISG art. 10(a)–(b); VLM Food Trading Int'l, Inc. v. Ill. Trading Co., 748 F.3d 780, 787 (7th Cir. 2013).

[238] Ferrari, *supra* note 233, at 26–27.

[239] CISG art. 1(3); Frank N. Fisanich, Note & Comment, *Application of the U.N. Sales Convention in Chinese International Commercial Arbitration: Implications for International Uniformity*, 10 AM. REV. INT'L ARB. 101, 106 n.32 (1999).

contracting states,[240] unless this fact would be impossible to discern from the contract itself or the parties' prior dealings.[241]

The fourth and fifth requirements have been consistently limned in case law. The fourth—that the parties be the transaction's "immediate" participants, not "remote" purchasers or sellers—has been consistently imputed into CISG's fourth article, which refers solely to buyers and sellers.[242] As for the fifth, whereas, in accordance with article 6, CISG cannot apply if the parties expressly opted out of CISG,[243] courts appear unwilling "to recognize implied agreements which exclude application of the convention."[244] Indeed, with one exception,[245] the understanding that contractual opt-outs must explicitly exclude CISG's application to be effective is one of the few unmistakably endorsed by U.S. and foreign courts.[246]

2. *Explicit and Implicit Omissions from CISG's Scope*

While CISG governs all issues dealing with the relevant contract's formation and the rights and obligations of the seller and buyer arising from the covered contract, the areas beyond its purview are equally apparent. Domestic law still dictates "the validity of the contract or of any of its provision or of any usage" and "the effect which the contract may have on the property in the goods sold."[247] Accordingly, "those points of domestic law which express a country's

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240 Ferrari, *supra* note 233, at 23–24, 25.

241 CISG art. 1(2); Impuls I.D. Internacional, S.L. v. Psion-Teklogix Inc., 234 F. Supp. 2d 1267, 1271 (S.D. Fla. 2002).

242 CISG art. 4 ("This Convention governs *only* the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract." (emphasis added)); Beth Schiffer Fine Photographic Arts, Inc. v. Colex Imaging, Inc., No. 10-05321, 2012 U.S. Dist. LEXIS 36695, *19 (D.N.J. Mar. 19, 2012) (collecting cases). Article 4 is nearly identical to article 1, the only difference being the addition of "only" in the former. *Compare* CISG art. 4, *with* CISG art. 1(1).

243 CISG art. 6. For examples of such clauses, see, e.g., Kofax, Inc. v. United States, No. 11-449 C, 2013 U.S. Claims, LEXIS 1026, at *9 (Fed. Cl. Aug 8, 2013); Stella Maris, Inc. v. Cork Supply USA, Inc., No. 6:11-cv-954-HO, 2012 U.S. Dist. LEXIS 58497, at *7–8 (D. Or. Apr. 26, 2012); Belcher-Robinson, L.L.C. v. Linamar Corp., 699 F. Supp. 2d 1329, 1332 (M.D. Ala. 2010); Hawaiian Telcom Comm., Inc. v. Tata Am. Int'l Corp., No. 10-00112 HG-LEK, 2010 U.S. Dist. LEXIS 63187, at *3 (D. Haw. May 24, 2010); *In re* Yahoo! Inc., 313 F. App'x 722, 722 (5th Cir. 2009) (*per curiam*); Doe 1 v. AOL LLC, 552 F.3d 1077, 1080 (9th Cir. 2009); Jacada (Europe) Ltd. v Int'l Mktg. Strategies, Inc., 255 F. Supp. 2d 744, 746 (W.D. Mich. 2003).

244 Isaak I. Dore & James E. DeFranco, *A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code*, 23 HARV. INT'L L.J. 49, 53 (1982).

245 Am. Biophysics Corp. v. Dubois Marine Specialties, 411 F. Supp. 2d 61, 63–64 (D.R.I. 2006). Between 2003 and 2008, every other American court disagreed with this one opinion. Staff, *supra* note 203, at 28.

246 McQuillen, *supra* note 204, at 519–20.

247 CISG art. 4; *see also* Allied Dynamics Corp. v. Kennametal, Inc., 965 F. Supp. 2d 276, 298–99 (E.D.N.Y. 2013) (noting that CISG "governs the substantive question of contract formation" and collecting

public policies"[248]—a class of doctrines clearly including fraud, mistake, duress, unconscionability, and illegality;[249] possibly encompassing initial impossibility and apparent consent;[250] and generally any provisions of domestic law that would "render the contract void, voidable, or unenforceable"—may work their influence untrammeled by CISG's own.[251] Logically, CISG will also not govern tort claims distinct from a party's contractual action.[252] Article 5, in turn, expressly removes actions and claims for personal injuries, including death, from CISG's umbrella.[253] Additionally, many "[c]ourts interpreting the CISG . . . have concluded that the law does not extend to agreements that create a framework for the future sale of goods but fail to establish specific terms for quantity and price."[254] This definition obviously excludes agreements, like distribution ones, that relate to the future sale of goods and not "a *particular* sale of goods" with "definite terms regarding quantity and price" enumerated.[255]

3. *General Principles and Trade Usages as Interpretive Aids*

Its reach so circumscribed, several of CISG's provisions set forth the general precepts intended to shepherd interpretation of an ambiguous provision.[256] In particular, during such a task, per article 7(1), "regard is to be had to its

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cases); Golden Valley Grape Juice & Wine, LLC v. Centrisys Corp., No. CV F 09-1424 LJO GSA, 2010 U.S. Dist. LEXIS 11884, at *8 (E.D. Cal. Jan 22, 2010) ("CISG governs only the formation of the contract of sale, and the rights and obligations of the seller and the buyer arising from such a contract."); Caterpillar, Inc. v. Usinor Industeel, 393 F. Supp. 2d 659, 674 (N.D. Ill. 2005) (quoting CISG).

[248] Ulrich Drobnig, *Substantive Validity*, 40 AM. J. COMP. L. 635, 635 (1992).

[249] Hartnell, *supra* note 17, at 62, 69, 71, 83; Rosett, *supra* note 184, at 291.

[250] Hartnell, *supra* note 17, at 62, 69, 71.

[251] Tellingly, these doctrines are themselves "subject to multiple interpretations by domestic jurisdictions within the United States" and "lack of definite contours." Lopez, *supra* note 205, at 14.

[252] Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp., L.L.C., 718 F. Supp. 2d 1019, 1024 (D. Minn. 2010); *accord, e.g.*, Semi-Materials Co., Ltd. v. MEMC Elec. Materials, Inc., No. 4:06CV1426 FRB, 2011 U.S. Dist. LEXIS 1790, at *8 n.2 (E.D. Mo. Jan. 10, 2011); Viva Vino Imp. Corp. v. Farnese Vini S.r.l., No. 99-6384, 2000 U.S. Dist. LEXIS 12347, at *2 (E.D. Pa. Aug. 29, 2000). Of course, as under domestic law, mere nomenclature may not be dispositive, and "a tort that is in essence a contract claim and does not involve interests existing independently of contractual obligations . . . will fall within the scope of CISG regardless of the label given to the claim." Electrocraft Ark., Inc. v. Super Elec. Motors, Ltd., No. 4:09cv00318 SWW, 2009 U.S. Dist. LEXIS 120183, at *15–16 (E.D. Ark. Dec. 23, 2009); *accord* Weihai Textile Grp. Imp. & Exp. Co., Ltd. v. Level 8 Apparel, LLC, No. 11 Civ. 4405 (ALC)(FM), 2014 U.S. Dist. LEXIS 53688, at *47 (S.D.N.Y. Mar. 28, 2014).

[253] CISG art. 5; Peter Schlechtriem, *Requirements of Application and Sphere of Applicability of the CISG*, 36 VICTORIA U. WELLINGTON L. REV. 781, 792 (2005).

[254] Gruppo Essenziero Italiano, S.p.A. v. Aromi D'Italia, Inc., No. CCB-08-65, 2011 U.S. Dist. LEXIS 82217, at *10 (D. Md. July 27, 2011); *accord* Multi-Juice, S.A. v. Snapple Beverage Corp., No. 02 Civ. 4635 (RPP), 2006 U.S. Dist. LEXIS 35928, at *21–22 (S.D.N.Y. June 1, 2006) (collecting sources).

[255] Viva Vino Import Corp. v. Farnese Vini S.r.l., No. 99-6384, 2000 U.S. Dist. LEXIS 12347, at *3–4, (E.D. Pa. Aug. 29, 2000) (emphasis added).

[256] If the provision is not in any way ambiguous, it would be improper to consult these principles despite the apparently inclusive wording of article 7. *See* Part IV.A–B.

international character and to the need to promote uniformity in its application and the observance of good faith in international trade."[257] Closely related,[258] these separable concerns—"international character," "uniformity in application," and "observance of good faith"—essentially authorize utilization of foreign case law[259] and a court's detachment from its own existing legal order.[260] In essence, CISG's plain text effectively compels resort to its own "general principles,"[261] as does its use of "simple, non-nation specific language."[262] To interpret any CISG provision, a court must consider four factors: (1) CISG's "international character;" (2) "the need to promote uniformity in its application" it embodies; (3) "the observance of good faith in international trade" it encourages; and (4) the provision of "some degree of certainty as to the principles of law that would govern potential disputes and [the] remov[al of] the previous doubt regarding which party's legal system might otherwise apply" that it seeks to achieve[263] by, among other features, its attempts to reduce forum shopping and private international law's salience.[264] Promulgated in article 7(1), these principles cannot be marginalized.[265]

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[257] CISG art. 7(1); Genpharm Inc. v. Pliva-Lachema a.s., 361 F. Supp. 2d 49, 54 (E.D.N.Y. 2005) (quoting CISG art. 7(1)).

[258] Jenkins, *supra* note 200, at 187, 189.

[259] *See, e.g.*, Jenkins, *supra* note 200, at 184; Camilla Baasch Andersen, *The Uniform International Sales Law and the Global Jurisconsultorium*, 24 J.L. & COM. 159, 165 (2005); James P. Quinn, *The Interpretation and Application of the United Nations Convention on Contracts for the International Sale of Goods*, 9 INT'L TRADE & BUS. L. REV. 221, 237, 239 (2004); Alstine, *supra* note 158, at 732; Ferrari, *supra* note 197, at 1027.

[260] Alstine, *supra* note 158, at 761; *accord, e.g.*, Jenkins, *supra* note 200, at 185; Ferrari, *supra* note 233, at 10–11.

[261] *See* Delchi Carrier Spa v. Rotorex Corp., 71 F.3d 1024, 1027–28 (2d Cir. 1995); Topp Paper Co., LLC v. ETI Converting Equip., No. 12-21014-CIV-Rosenbaum/Seltzer, 2013 U.S. Dist. LEXIS 141193, at *7 (S.D. Fla. Sept. 28, 2013).

[262] St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support GmbH, No. 00 Civ. 9344 (SHS), 2002 U.S. Dist. LEXIS 5096, at *7–8 (S.D.N.Y. Mar. 26, 2002).

[263] CISG art. 7(1) (listing (1) through (3)); Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1028 (2d Cir. 1995) (same); MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova d'Agostino, S.P.A., 144 F.3d 1384, 1391 (11th Cir. 1998) (enumerating (4), as stated in the President's transmittal letter), *cert. denied*, 526 U.S. 1087 (1999).

[264] Forestal Guarani S.A. v. Daros Int'l, Inc., 613 F.3d 395, 398 (3d Cir. 2010). Generally, "private international law" encompasses the area of jurisprudence that American courts "call 'conflict of laws,' dealing with the application of varying domestic laws to disputes that have an interstate or international component." Zicherman v. Korean Air Lines Co., 516 U.S. 217, 227 (1996).

[265] Bruno Zeller, *The UN Convention on Contracts for the International Sale of Goods (CISG) – A Leap Forward Towards Unified International Sales Laws*, 12 PACE INT'L L. REV. 79, 86, 105 (2000); Ferrari, *supra* note 197, at 1023–24, 1026.

Nevertheless, pursuant to article 7(2), implicitly triggered only if both the plain text and article 7(1) do not divulge a single concrete answer,[266] questions concerning matters "not expressly settled in" yet still "governed" by CISG "are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."[267] Two problems immediately arise from this command: first, the phrase "general principles" has been criticized as inherently and impossibly vague,[268] and second, CISG does not actually specify a single "general principle[]."[269]

Despite this overwhelming paucity, based on the widely invoked model laws and commentary published by the International Institute for the Unification of Private Law ("UNIDROIT"),[270] the following "general principles" have earned this vital classification: (1) both buyer and seller have an affirmative duty to disclose material facts and communicate all material information;[271] (2) relatedly, a party may not contradict a statement on which the other party relied;[272] (3) subject to article 4's validity exception,[273] autonomous parties may freely contract to whatever duties and obligations they believe necessary or appropriate,[274] and courts are bound to respect those clearly expressed intentions;[275] (4) courts should strive to preserve an apparent deal and ensure each party receives the reasonably projected fruits of an open exchange;[276] (5) technicalities and formal requirements should not be enforced for their own sake;[277] (6) a non-breaching party should take reasonable efforts to mitigate any damages[278] and should cooperate with the other to fix any curable defect prior

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[266] *See* Alstine, *supra* note 158, at 729, 742. Others have more expansively contended: "CISG mandates the use of general principles, both express and implied, found within its Articles." DiMatteo et al., *supra* note 201, at 315.

[267] CISG art. 7(2); Forestal Guarani S.A. v. Daros Int'l, Inc., 613 F.3d 395, 400 (3d Cir. 2010) (quoting *id.*).

[268] Ferrari, *supra* note 196, at 211.

[269] Alstine, *supra* note 158, at 959; *see also* Bailey, *supra* note 179, at 287.

[270] Indeed, while CISG commentators have bemoaned about the absence of something akin to a restatement, Hartwig, *supra* note 178, at 97, the UNIDROIT principles have been described as an international restatement of contract law, *see* Joseph Lookofsky, *The Limits of Commercial Contract Freedom: Under the UNIDROIT 'Restatement' and Danish Law*, 46 AM. J. COMP. L. 48, 485–88 (1998).

[271] Alstine, *supra* note 158, at 752; Rosett, *supra* note 184, at 290; Dore & DeFranco, *supra* note 244, at 63.

[272] Salama, *supra* note 190, at 241; Alstine, *supra* note 158, at 752.

[273] *See supra* Part IV.C.2.

[274] Blair, *supra* note 175, at 286.

[275] Quinn, *supra* note 259, at 229, 231.

[276] *Id.* at 229; Harjani, *supra* note 184, at 64.

[277] Sheaffer, *supra* note 175, at 473.

[278] Alstine, *supra* note 158, at 752.

to a deadline's expiration or the good's irreparable dilapidation;[279] (7) if a truly unforeseen impediments arose, reasonable contractual modifications ought to be considered, even if not accepted;[280] (8) full compensation should be ordered in the event of a breach,[281] but awards should be directed at "compensate[ing] aggrieved parties" rather than "punish[ing] breaching parties";[282] and (9) unless a party's subjective state of mind has been made known to the other party, its responsibilities under the contract must be determined in accordance with a reasonable person standard,[283] a term that itself appears more than thirty times in the entire convention.[284] Finally, although "CISG does not recognize as a general obligation of the parties an implied duty of good faith and fair dealing in the performance and enforcement of contracts,"[285] the possible inclusion of such a standard invoking much disagreement during its drafting,[286] the weight of precedent has endorsed a tenth general tenet: (10) a duty of good faith,[287] one analogous to the UCC's variant.[288] Serving to reinforce CISG's express provisions, this good faith principle has been employed to punish "fraudulent conduct, unfair conduct, and deliberate conduct contrary to the essential purposes or terms of the agreement."[289]

A source of guidance distinct from the foregoing is lodged in CISG's ninth article. Having induced much debate among CISG's drafters,[290] article 9 selectively incorporates internationally known and observed trade usages. Thus, per article 9(1), "parties are bound by any usage to which they have agreed and

[279] Rosett, *supra* note 184, at 290.

[280] *Id*. at 290.

[281] Alstine, *supra* note 158, at 752.

[282] Quinn, *supra* note 259, at 229.

[283] Alstine, *supra* note 158, at 751–52; Ferrari, *supra* note 196, at 225. Like its domestic counterpart, this standard has been critiqued for being "defined differently by courts" and "particularly vague," Sheaffer, *supra* note 175, at 473 n.75.

[284] DiMatteo et al., *supra* note 201, at 317.

[285] Jenkins, *supra* note 200, at 193.

[286] Rosett, *supra* note 184, at 289.

[287] *See, e.g.*, DiMatteo et al., *supra* note 201, at 319 ("Despite the confinement of the express duty of good faith to CISG interpretation, courts and arbitral panels have implied a general duty of good faith to dealings between contracting parties."); Alstine, *supra* note 158, at 780–81 ("Scholarly analysis subsequent to the adoption of the Convention, however, has led to an emerging consensus on a much more expansive role for good faith. Whatever the drafters' actual intent, this new consensus recognizes 'good faith' as one of the 'general principles' of the Convention."); Dore & DeFranco, *supra* note 244, at 61 ("Thus, the good faith provision in the Convention appears to be a pervasive norm analogous to the good faith obligation of the U.C.C.").

[288] Dore & DeFranco, *supra* note 244, at 61.

[289] Jenkins, *supra* note 200, at 193–94; *see also* Zeller, *supra* note 265, at 101 ("Good faith . . . covers . . . the parties' rights and obligations. Basically, it is a 'general duty' based on judicial interpretation of community standards, reasonableness and fair play.").

[290] Leonardo Graffi, *Remarks on Trade Usages and Business Practices in International Sales Law*, 29 J.L. & COM. 273, 275 (2011).

by any practices which they have established between themselves,"[291] and such usages, subjectively understood, can "bind the parties either through express or implied agreement,"[292] with the party relying upon a particular usage bearing the burden to prove its existence.[293] If, however, the parties did not share a provable subjective understanding, article 9(2) intones, "[t]he parties are considered . . . to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."[294] Because, based on this text, trade usages must be both widely observed and widely known for them to bind parties under article 9(2), so-called "incoterms," a series of pre-defined commercial terms published by the International Chamber of Commerce ("ICC"), have become usages within the meaning of this second paragraph,[295] a position affirmed by several U.S. courts.[296] Still, in accordance with article 9(1), when comparing express contractual terms, a verifiable course of performance or dealing normally trumps even such objectively demonstrable trade usages.[297]

IV. UNIFIED APPROACH: THE CODE AND THE CISG

Perhaps unsurprisingly,[298] CISG and the UCC encode a number of similar legal principles,[299] leading more than one court to (too hastily) describe the former as "an international analogue" to the latter's second article.[300] True, both

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[291] CISG art. 9(1); Riccitelli v. Elemar New Eng. Marble & Granite LLC, No. 3:08CV01783(DJS), 2010 U.S. Dist. LEXIS 95086, at *13 (D. Conn. Sept. 11, 2010).

[292] Dore & DeFranco, *supra* note 244, at 57.

[293] Graffi, *supra* note 290, at 281.

[294] CISG art. 9(2); Kabik, *supra* note 234, at 417–18 (discussing article 9(2)).

[295] *E.g.*, Graffi, *supra* note 290, at 283–84; Staff, *supra* note 177, at 31–32; Ingeborg Schwenzer, *The Danger of Domestic Pre-Conceived Views with Respect to the Uniform Interpretation of the CISG: The Question of Avoidance in the Case of Non-Conforming Goods and Documents*, 36 VICTORIA U. WELLINGTON L. REV. 795, 804 (2005).

[296] BP Oil Int'l Ltd. v. Empresa Estatal Petroleos de Ecuador (PetroExuador), 332 F.3d 333, 335, 337–38 (5th Cir. 2003); St. Paul Guardian Ins. Co. v. Siemens Med. Sys. Inc., No. 00 Civ. 9344 (SHS), 2002 U.S. Dist. LEXIS 5096, at *9–11 (S.D.N.Y. Mar. 26, 2002); *see also, e.g.*, Urica, Inc. v. Pharmaplast S.A.E., No. CV 11-02476 MMM (RZx), 2014 U.S. Dist. LEXIS 110015, at *10 n.50 (C.D. Cal. Aug. 8, 2014) (citing *BP Oil Int'l Ltd.*, 332 F.3d at 335, and *St. Paul Guardian Ins. Co.*,), 2002 U.S. Dist. LEXIS 5096, at *9–11).

[297] Dore & DeFranco, *supra* note 244, at 59.

[298] *See* Magellan Int'l Corp. v. Salzgitter Handel GmbH, 76 F. Supp. 2d 919, 924 (N.D. Ill. 1999) (describing the pleading requirements set forth in CISG and the UCC as what "common sense" would dictate as a minimum in their absence).

[299] *E.g.*, Simar Shipping Ltd. v. Global Fishing, Inc., 540 F. App'x 565, 567 (9th Cir. 2013); Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp., L.L.C., 635 F.3d 1106, 1108 (8th Cir. 2011).

[300] Dingxi Longhai Dairy, Ltd., 635 F.3d at 1107; *accord, e.g.*, Sierra Seed Internacional SA de CV v. Al Harrison Co. Distribs., No. CIV 13-206 TUC LAB, 2013 U.S. Dist. LEXIS 92777, at *2 (D. Ariz. June 10, 2013); Chi. Prime Packers, Inc. v. Northam Food Trading Co., 408 F.3d 894, 898 (7th Cir. 2005).

CISG and the common law consider "a meeting of the minds on essential terms" as the linchpin for "[a] valid contract,"[301] and both demand the same elements for a breach of contract action to be properly pled and later proved: formation, performance, breach, and damages.[302] Indeed, the common law and common sense compel as much.[303] For such reasons, in many cases, the relevant provisions of CISG and the UCC will produce the same legal consequences in a particular case.[304] Yet, regardless of the courts' frequent refrain,[305] CISG's design and provisions, scholars have long observed, are predisposed towards a contract's establishment and damages' assessment in the interest of facilitating international trade. In essence, this penchant aligns with the logic presumed to animate international commercial treaties. As the Court once incisively observed regarding the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[306] "concerns of international comity . . . and sensitivity to the need of the international commercial system for predictability in the resolution of disputes"[307] may require enforcement of a parties' accord without regard to domestic law's necessarily more "parochial concept[s]."[308]

In short, despite these the structural congruencies between these two distinct bodies of contract law, as to the three traditional elements necessary to prevail

[301] Simar Shipping Ltd., 540 F. App'x at 567 (alteration in original) (quoting with approval Simar Shipping Ltd. v. Global Fishing, Inc., No. C09-1825-JCC, 2012 U.S. Dist. LEXIS 67076, at *7 (W.D. Wash. May 14, 2012)); *compare* CISG art. 14(1), *with* Merrin-Chapman & Scott Corp. v. Gunderson Bros Eng'g Corp., 305 F.2d 659, 662 (9th Cir. 1962).

[302] Dingxi Longhai Dairy, Ltd., 635 F.3d at 1108 (quoting Magellan Int'l Corp., 76 F. Supp. 2d at 924) *accord, e.g.*, Martini E Ricci Iamino S.P.A. – Consortile Societa Agricola v. Trinity Fuirt Sales Co., 30 F. Supp. 3d 954, 965 (E.D, Cal. 2014) (citing Dingxi Longhai Dairy, 635 F.3d at 1107; Chi. Prime Packers, Inc., 408 F.3d at 898; and Delchi Carrier SpA v. Rotorex, 71 F.3d 1024, 1028 (2d Cir. 1995)).

[303] Dingxi Longhai Dairy, Ltd., 635 F.3d at 1108.

[304] Chi. Prime Packers, Inc., 408 F.3d at 898, *cited in* VLM Food Trading Int'l, Inc. v. Ill. Trading Co., 748 F.3d 780, 787 (7th Cir. 2014); *accord, e.g.*, Martini E. Ricci Camino S.P.A. – Consortile Societa Agricola v. Trinity Fruit Sales Co., No. 1:13-CV-276 AWI SAB, 2014 U.S. Dist. LEXIS 90604, at *17 (E.D. Cal. July 2, 2014); Hilaturas Miel, S.L. v. Republic of Iraq, 573 F. Supp. 2d 781, 799 (S.D.N.Y. 2008).

[305] *See, e.g.*, Hilaturas Miel, S.L., 573 F. Supp. 2d at 800; Chi. Prime Packers, Inc., 408 F.3d at 898; Delchi Carrier SpA, 71 F.3d at 1028.

[306] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

[307] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985); *see also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974) (characterizing a forum-selection clause as "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction").

[308] The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972); *see also, e.g.*, Estate of Myhra v. Royal Caribbean Cruises, Ltd., 695 F.3d 1233, 1240 (11th Cir. 2012). "We cannot," Chief Justice Warren E. Burger wrote in 1972, "have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." The Bremen, 407 U.S. at 9; *see also* Lindo v. NCL (Bahamas) Ltd., 652 F.3d 1257, 1264 (11th Cir. 2011) (quoting *The Bremen* after describing it as "not strictly an arbitration case").

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on a breach of contract claim—(1) "the existence of an enforceable contract;" (2) "nonperformance amounting to a breach of contract;" and (3) "damage caused by the breach of contract"[309]—CISG and the UCC delineate these elements rather differently.[310] Accordingly, assuming the jurisdictional constraints set forth in articles 1, 2, 3, 4, and 5 have been met and that no intent to derogate from CISG sufficiently unequivocal to trigger article 6 can be established, CISG will always impel a unique approach and, sometimes, an unfamiliar result.

A. Existence of an Enforceable Contract

1. Summary of Relevant Articles

Under CISG (and the UCC, for that matter), the existence of an offer and the communication of a valid acceptance are threshold elements for a contract to be engendered.[311] For a statement, whether written or oral, to constitute an offer, the offeror must express an intention to be bound, and the proposal itself must be definite by "indicat[ing] the goods and expressly or implicitly fix[ing] or mak[ing] provision for determining the quantity and the price."[312] In contrast to the UCC, article 15(1) contains a receipt, not a mailbox, rule: an offer becomes effective when it "reaches," as defined in article 24,[313] the offeree.[314] However, "[a]n offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer."[315] In fact, "[u]ntil a contract is concluded an offer may be revoked if the revocation reaches the offeree before

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309 Smith v. BAC Home Loans Servicing, LLP, 552 F. App'x 473, 478 (6th Cir. 2014) (enumerating the elements required under Tennessee law).

310 Of course, in some situations, outcomes may still be identical. *See, e.g.*, New World Trading Co. v. 2 Feet Prods., No. 11 civ. 6219 (SAS), 2014 U.S. Dist. LEXIS 17599, at *4 n.15 (S.D.N.Y. Feb. 11, 2014). Some courts, however, seem willing to posit a seamless identity and to overlook, via a self-evident assumption, the significance of a possible divergence. *See* Harry Flechtner, *Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods*, 19 PACE INT'L L. REV. 29, 47–48 (2007).

311 CISG art. 23; Orica Australia Pty. Ltd. v. Aston Evaporative Servs., LLC, No. 14-cv-0412-WJM-CBS, 2015 U.S. Dist. LEXIS 98248, at *15 (D. Colo. July 28, 2015).

312 CISG art. 14(1); It's Intoxicating, Inc. v. Maritim Hotelgesellschift mbH, No. 3:CV-11-2379, 2015 U.S. Dist. LEXIS 897, at *37–38 (M.D. Pa. Jan. 27, 2015); Joseph M. Perillo, Essay, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORDHAM L. REV. 281, 320 (1994).

313 CISG art. 24; Charles H. Martin, *The Electronic Contracts Convention, the CISG, and New Sources of E-Commerce Law*, 16 TUL. J. INT'L & COMP. L. 467, 481 (2008).

314 CISG art. 15(1); *cf.* Feng Chen, *The New Era of Chinese Contract Law: History, Development and a Comparative Analysis*, 27 BROOKLYN J. INT'L L. 153, 173–74 (2001) (comparing Chinese contract law with CISG).

315 CISG art. 15(2); Franco Ferrari, *Formation of Contracts in South American Legal Systems*, 16 LOY. L.A. INT'L & COMP. L.J. 629, 642 n.102 (1994).

he has dispatched an acceptance," unless the offer declares its irrevocability or the offeree relied upon the offer's apparent irrevocability.[316] Even if irrevocable, an offeree's rejection will terminate an offer whenever that rejection reaches the offeror.[317] Critically, "[a] statement made by or other conduct of the offeree indicating assent to an offer is an acceptance;" nonetheless, "[s]ilence or inactivity does not in itself amount to acceptance."[318]

Whatever its form, an acceptance is effective at the moment the offeree's "indication of assent" reaches the offeror, but not if that indication does not arrive within the time fixed by the offeror, as defined in article 20,[319] or within "a reasonable time."[320] Oral offers must be accepted "immediately unless the circumstances indicate otherwise,"[321] and provision is made for late acceptances.[322] In another pivotal difference with the UCC, CISG's nineteenth article adopts the "now discarded common law mirror rule with the exception that minor differences do not defeat an otherwise valid acceptance."[323] Thus, if an additional term contains even minimal "additions, limitations or other modifications," it amounts to a rejection and a counter-offer.[324] But, unless those additional terms are "material," broadly defined as "relating, among other things, to the price, payment, 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,"[325] the original offeror's failure to timely objects will be construed as

[316] CISG art. 16(1)–(2). This importation of the UCC's presumption of revocability into CISG's sixteenth article was a concession by civil law countries, one foreign to the civil law. *See* Courtney Parrish Smart, *Formation of Contracts in Louisiana under the United Nations Convention for the International Sale of Goods*, 53 LA. L. REV. 1339, 1349–50 (1993) (explaining how CISG differed from Louisiana's civil law system). Notably, CISG still allows an offer to be irrevocable in only two instances. CISG art. 16(2)(a)–(b).

[317] CISG art. 17; *see also* DiMatteo *et al.*, *supra* note 201, at 335–36 ("Article 17 may be linked to Article 19 when the rejection is ambiguous, since it may be interpreted as a counteroffer (rejection) or as an acceptance.").

[318] CISG art. 18(1); Solae, LLC v. Hershey Can., Inc., 557 F. Supp. 2d 452, 457 (D. Del. 2008).

[319] CISG art. 20(1)–(2); Sarah Howard Jenkins, *Contract Resurrected! Contract Formation: Common Law ~ UCC ~ CISG*, 40 N.C. J. INT'L L. & COM. REG. 245, 271–72 (2015).

[320] CISG art. 18(2); Orica Australia Pty. Ltd. v. Aston Evaporative Servs., LLC, No. 14-cv-0412-WJM-CBS, 2015 U.S. Dist. LEXIS 98248, at *10–11 (D. Colo. July 28, 2015); Anjanette H. Raymond, *Manner, Method, Receipt or Dispatch: The Use of Electronic Media is Nothing New to the Law*, 52 LOY. L. REV. 1, 17 n.72 (2006).

[321] CISG art. 18(2); Easom Automation Sys., Inc. v. Thyssenkrupp Fabco, Corp., No. 06-14553, 2007 U.S. Dist. LEXIS 72461, at *9–10 (E.D. Mich. Sept. 28, 2007).

[322] CISG art. 21(1)–(2).

[323] DiMatteo *et al.*, *supra* note 201, at 349.

[324] CISG art. 19(1); CSS Antenna, Inc. v. Amphenol-Tuchel Elecs., GmbH, 764 F. Supp. 2d 745, 752 (D. Md. 2011).

[325] CISG art. 19(3); VLM Food Trading Int'l, Inc. v. Ill. Trading Co., 748 F.3d 780, 786 (7th Cir. 2014) (contending that article 19(3) defines "'materiality' in a broad way that would appear to cover attorney's fees

an acceptance of "the offer with the modification contained in the acceptance."[326] Once concluded, a contract can be modified by the parties' mere agreement unless the contract itself requires a written one.[327] In other words, "oral termination or modifications . . . are ineffective if the parties have previously prescribed formalities to such acts."[328]

Where CISG applies, several defenses that may be raised to a contract's enforcement, reflecting "certain familiarities"[329] embedded in Anglo-American contract law and otherwise available to offended buyers under the UCC and relevant for a claim's disallowance per § 502(b)(1) and a debt's dischargeability under § 523(a)(2), have no legal force.

First, as CISG contains no statute of frauds, it does not require contracts for sale to be concluded in writing; a contract may be "proved by any means, including witnesses."[330] Relatedly, binding modifications need not be reduced to writing.[331] Second, the parol evidence rule has no place in interpretation.[332] Instead, per article 8(1), "statements made by and other 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."[333] And while a reasonable person standard applies when no such knowledge exists,[334] article 8(3) vastly expands the scope of the inquiry normally permitted: "In determining the intent of a party

and interest provisions"); 2P Commercial Agency S.R.O. v. SRT USA, Inc., No. 2:11-cv-652-FtM-29SPC, 2013 U.S. Dist. LEXIS 9186, at *10 (M.D. Fla. Jan. 23, 2013) (quoting article 19(3)).

[326] CISG art. 19(2); *see, e.g.*, Belcher-Robinson, L.L.C. v. Linamar Corp., 699 F. Supp. 2d 1329, 1337 (M.D. Ala. 2010); Hanwha Corp. v. Cedar Petrochemicals, Inc., 760 F. Supp. 2d 426, 431–32 (E.D.N.Y. 2004); Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1236, 1240 (S.D.N.Y. 1992); DiMatteo *et al.*, *supra* note 201, at 355.

[327] CISG art. 29; Kabik, *supra* note 234, at 420.

[328] DiMatteo et al., *supra* note 201, at 331.

[329] Forestal Guarani S.A. v. Daros Int'l, Inc., 613 F.3d 395, 398 (3d Cir. 2010).

[330] CISG art. 11; *see also, e.g.*, Forestal Guarani S.A. v. Daros Int'l, Inc., 613 F.3d 395, 398 (3d Cir. 2010); Miami Valley Paper LLC v. Lebbing Eng'g & Consulting GmbH, No. 1:05-CV-00702, 2009 U.S. Dist. LEXIS 25201, at *12 (S.D. Ohio Mar. 26, 2009).

[331] CISG art. 29; *see also, e.g.*, Forestal Guarani S.A. v. Daros Int'l, Inc., 613 F.3d 395, 398 (3d Cir. 2010); Valero Mktg. & Supply Co. v. Greeni Oy, 242 F. App'x 840, 845 (3d Cir. 2007); Chateau Des Charmes Wines LTD. v. Sabate USA Inc., 328 F.3d 528, 531 (9th Cir. 2003). The term "writing" includes telegram and telex. CISG art. 13.

[332] CSS Antenna, Inc. v. Amphenol-Tuchel Elecs., GmbH, 764 F. Supp. 2d 745, 753 (D. Md. 2011); *accord, e.g.*, Weihai Textile Grp. Import & Export Co., Ltd. v. Level 8 Apparel, LLC, No. 11 Civ. 4405 (ALC)(FM), 2014 U.S. Dist. LEXIS 53688, at *16–17 (S.D.N.Y. Mar. 28, 2014). Per article 12, however, a nation-state can make a declaration under article 96 to exempt itself from this embracing this informal system. CISG art. 12.

[333] CISG art. 8(1); MCC-Marble Ceramic Ctr. v. Ceramica Nuova D'Agostino, S.P.A., 144 F.3d 1384, 1387 n.7 (11th Cir. 1998).

[334] CISG art. 8(2); Turfworthy, LLC v. Dr. Karl Wetekam & Co. KG, 26 F. Supp. 3d 496, 503–04 (M.D.N.C. 2014).

or the understanding a reasonable person would have had, 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."[335] Due to these related tenets, "[c]ontrary to what is familiar practice in United States courts," CISG permits "a substantial inquiry into the parties' subjective intent, even if the parties did not engage in any objectively ascertainable means of registering this intent."[336] With CISG rejecting the Statute of Frauds and the parol evidence rule,[337] neither a debtor nor a creditor will be able to negate a contract simply due to the absence of an objective text. One exception does exist: an express merger clause, permissible under article 29, may foreclose use of extrinsic evidence in the same manner as allowed under the UCC.[338]

2. *Code Application of CISG's Oddities*

Based on the foregoing, the following intelligence can be drawn. So as to ascertain whether a Code cognizable "claim," as defined in § 101, could exist for purposes of §§ 501, 502, and 523 and Rule 3018(a),[339] a court must disregard the statute of frauds and the parol evidence rule and apply the receipt and the mirror image doctrines.[340] In the process of disregarding the former duo and utilizing the latter twosome, the court must be prepared to make a "substantial inquiry into the parties' subjective intent, even if the parties did not engage in any objectively ascertainable means of registering this intent," in deciding whether an enforceable contract had ever effectively been struck.[341] Concurrently, the court must interpret even ambiguous contractual provisions in light of CISG's ascertainable general principles and verifiable trade usage.[342]

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[335] CISG art. 8(3); *Tuftworthy LLC*, 26 F. Supp. at 504; ECEM European Chem. Mktg. B.V. v. Purolite Co., No. 05-3078, 2010 U.S. Dist. LEXIS 7373, at *30–31 (E.D. Pa. Jan. 29, 2010).

[336] MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova d'Agostino, S.p.A., 144 F.3d 1384, 1387 (11th Cir. 1998); *see also* Fercus, S.R.L. v. Palazzo, No. 98 CIV. 7728 (NRB), 2000 U.S. Dist. LEXIS 11086, at *7–8 (S.D.N.Y. Aug. 8, 2000) (applying the U.C.C.).

[337] Filanto, S.p.A. v. Chilewich Int'l. Corp., 789 F. Supp. 1229, 1238 n. 7 (S.D.N.Y. 1992); *see also, e.g.*, Claudia v. Olivieri Footwear Ltd., No. 96 Civ. 8052(HB) (THK), 1998 U.S. Dist. LEXIS 4586, at *14 (S.D.N.Y. Apr. 7, 1998).

[338] DiMatteo *et al.*, *supra* note 201, at 333 (citing MCC-Marble Ceramic Ctr., Inc., 144 F.3d at 1391). *But see* CISG Advisory Council Opinion No. 3 ("The effect [of a merger clause] may be to prevent a party from relying on evidence of statements or agreements not contained in the writing . . . [and] may bar evidence of trade usages. However, in determining the effect of such a Merger Clause, the parties' statements and negotiations, as well as all other relevant circumstances shall be taken into account.").

[339] *See supra* Part III.B–D.

[340] *See supra* Part V.A.1.

[341] MCC-Marble Ceramic Ctr., 144 F.3d at 1387.

[342] *See supra* Part IV.C.3.

Effectively, so as to do so in the most reasonable and predictable fashion, thereby honoring international trade's need for uniform and predictable rules, UNIDROIT's nine precepts and ICC's Incoterms must be utilized to demarcate undefined terms and fill unexpected gaps.[343] Though debate continues, consistent with modern interpretive constraints,[344] the good-faith principle implicit in every contract[345] and sanctioned by the UCC has no place where CISG reigns.[346]

B. Duties and Breach Defined

1. Summary of Relevant Articles

Under CISG, the seller,[347] whether or not that entity was the original offeror or offeree, must comply with a series of express commands to avoid committing a breach, however material or fundamental it may later be proven to be. A seller "must deliver the goods, hand over any documents relating to them[,] and transfer the property in the goods, as required by the contract and this Convention."[348] If the contract itself does not specify a "particular place" for the goods' delivery, a seller satisfies his, her, or its delivery obligation in one of three ways: (1) "if the contract of sale involves carriage of the goods, in handing the goods over to the first carrier for transmission to the buyer"; (2) in other cases, if the contract "relates to specific goods[] or [to] unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place—in placing the goods at the buyer's disposal at that place"; or (3) in all other cases, "in placing the goods

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[343] *See supra* Part IV.C.3.

[344] *See supra* Part IV.

[345] *Cf.* Shachmurove, *Claims*, *supra* note 46, at 564–65 (summarizing the "ancient" obligation of good faith and fair dealing).

[346] *See, e.g.*, DiMatteo *et al.*, *supra* note 201, at 319 (discussing the reliance and uncertain foundation for this principle); Richard E. Spiedel, *The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 NW. J. INT'L L. & BUS. 165, 177 (1995) ("CISG imposes no explicit duty of good faith in the performance or enforcement of the contract for sale[,]" yet "'good faith and fair dealing' is a fundamental idea underlying the UNIDROIT Principles of International Commercial Contracts as well.").

[347] Once a contract has been concluded, the terms "offeree" and "offerror" are no longer apposite. Instead, CISG divided responsibilities between the goods' seller (or the deliverer) and the buyer or purchaser of the designated goods (or the recipient).

[348] CISG art. 30; Urica, Inc. v. Pharmaplast S.A.E., No. CV 11-02476 MMM (RZx), 2014 U.S. Dist. LEXIS 110015, at *45–46 (C.D. Cal. Aug. 8, 2014); Douglas A. Hass, *A Gentleman's Agreement Assessing the Gnu General Public License and Its Adaptation to Linux*, 6 CHI.-KENT J. INTELL. PROP. L. 213, 224 n.100 (2007).

at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract."[349]

Under article 32, if the seller employs a carrier and the goods are not "clearly identified to the contract" by their own markings, "the seller must give the buyer notice of the consignment specifying the goods."[350] Logically, "[i]f the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation."[351] Governed by article 34, delivery of critical documents is subject to a similar structure.[352] Article 33 sets forth the rules for ascertaining the proper time for delivery. "[I]f a date is fixed by or determinable from the contract," the seller must deliver the goods on that date or "at any time within that period unless circumstances indicate that the buyer is to choose a date."[353] "[I]n any other case," the seller must do so "within a reasonable time after the conclusion of the contract."[354] Like other CISG provisions littered with the ambiguous "reasonable," articles 31, 32, and 34 are interpreted pursuant to article 9.[355] To wit, use of trade terms and consideration of the parties' courses of dealing and performance will determine the propriety of the location and means of transportation ultimately chosen.[356]

Assuming a seller has timely delivered the goods, one more hurdle must be cleared. As article 35(1) makes clear, "[t]he seller must deliver goods which are of the quantity, quality and description required by the contract and which are

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[349] CISG art. 31 (emphasis added); Ronald A. Brand, *CISG Article 31: When Substantive Law Rules Affect Jurisdictional Results*, 25 J. L. & COM. 181, 182 & n.1 (2005) ("CISG Article 31 sets up four rules for determining the place of performance of the seller's obligation to deliver goods: a party autonomy rule followed by three default rules.").

[350] CISG art. 32(1); Martini R Ricci Iamino S.P.A. – Consortile Societa Agricola v. Trinity Fruit Sales Co., 30 F. Supp. 3d 954, 969 (E.D. Cal. 2014).

[351] CISG art. 32(2); Citgo Petroleum Corp. v. Seachem, No. H-07-2950, 2013 U.S. Dist. LEXIS 72898, at *21–22 (S.D. Tex. May 23, 2013); DiMatteo *et al.*, *supra* note 201, at 385–86.

[352] CISG art. 34; John C. Duncan, Jr., *Nachfrist Was Ist? Thinking Globally and Acting Locally: Considering Time Extension Principles of the U.N. Convention on Contracts for the International Sale of Goods in Revising the Uniform Commercial Code*, 2000 BYU. L. REV. 1363, 1380 (2000); Henry D. Gabriel, *A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code*, 7 IND. INT'L & COMP. L. REV. 279, 294 (1997).

[353] CISG art. 33(a)–(b); New World Trading Co. v. 2 Feet Prods., Nos. 11 Civ. 6219 (SAS), 13 Civ. 1251 (SAS), 2014 U.S. Dist. LEXIS 68304, at *23 & n.124 (S.D.N.Y. May 16, 2014) (citing art. 33(a)).

[354] CISG art. 33(c); Alpha Prime Dev. Corp. v. Holland Loader Co., No. 09-cv-01763-WYD-KMT, 2010 U.S. Dist. LEXIS 67591, at *18 (D. Colo. July 6, 2010); Norfolk S. Ry. v. Power Source Supply, Inc., No. 06-58 J, 2008 U.S. Dist. LEXIS 56942, at *9–10 (W.D. Pa. July 25, 2008).

[355] *See supra* Part IV.C.

[356] DiMatteo *et al.*, *supra* note 201, at 385, 389.

contained or packaged in the manner required by the contract."[357] Unless the parties have agreed otherwise, the delivered goods will be deemed nonconforming, the seller in breach, in four cases: (1) they are not "fit for the purposes for which goods of the same description would ordinarily be used"; (2) they are not "fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract"; (3) they do not "possess the qualities of goods which the seller has held out to the buyer as a sample or model"; or (4) they are not "contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods."[358]

A seller remains liable for any lack of conformity which exists "at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time"[359] and even afterward if this dearth was "due to a breach of ***any*** of . . . [the seller's] obligations."[360] In these situations, article 35 itself provides a seller with two safe harbors of varying effectiveness. First, the seller may still correct any nonconformity if the offending goods were delivered before the set "date for delivery," assuming "the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense;" the seller will nonetheless remain liable for any damages traceable to the original nonconformity.[361] Second, the seller will avoid any liability under article 35 "if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity."[362] So structured, article 35(2) appears to incorporate the implied warranties for a particular purpose.[363] In contrast with the UCC, these warranties may be disclaimed so long as the parties have agreed

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357 CISG art. 35(1); St. Tropez Inc. v. Ningbo Maywood Indus. & Trade Co., No. 13 Civ. 5230 (NRB), 2014 U.S. Dist. LEXIS 96840, at *26 (S.D.N.Y. July 16, 2014).

358 CISG art. 35(2)(a)–(d); Miami Valley Paper LLC v. Lebbing Eng'g & Consulting GmbH, No. 1:05-CV-00702, 2009 U.S. Dist. LEXIS 25201, at *28 (S.D. Ohio Mar. 26, 2009) (incorrectly citing to article 35(3)).

359 CISG art. 36(1); Orica Australia Pty. Ltd. v. Aston Evaporative Servs., LLC, No. 14-cv-0412-WJM-CBS, 2015 U.S. Dist. LEXIS 98248, at *20 (D. Colo. July 28, 2015); Alpha Prime Dev. Corp. v. Holland Loader Co., No. 09-cv-01763-WYD-KMT, 2010 U.S. Dist. LEXIS 67591, at *15 (D. Colo. July 6, 2010); Chi. Prime Packers, Inc. v. Northam Food Trading Co., 408 F.3d 894, 897 (7th Cir. 2005).

360 CISG art. 36(2) (emphasis added); TeeVee Toons, Inc. v. Gerhard Schubert GmbH, No. 00 Civ. 5189 (RCC), 2006 U.S. Dist. LEXIS 59455, at *44 (S.D.N.Y. Aug. 22, 2006).

361 CISG art. 37; David G. Fagan, *The Remedial Provisions of the Vienna Convention on the International Sale of Goods 1980: A Small Business Perspective*, 2 J. SMALL & EMERGING BUS. L. 317, 344 n.177 (1998).

362 CISG art. 35(3); *In re* Siskiyou Evergreens, Inc., No. 02-66975-fra11, 2004 Bankr. LEXIS 1044, at *7 (Bankr. D. Or. Mar. 29, 2004).

363 Kabik, *supra* note 234, at 420.

to do orally or in writing or the buyer knew or could not have been unaware of the nonconformity.[364]

The buyer, naturally enough, must adhere to separate set of often reciprocal obligations.[365] Generally, "[t]he buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention,"[366] including taking "taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made."[367] Article 57 governs the buyer's obligation to remit payment;[368] article 58 is applicable when the contract establishes no specific time for payment; [369] and article 59 makes clear the buyer's obligation to "pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller."[370] The buyer must also take delivery, which consists of two distinct tasks: (1) "doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery," and (2) "taking over the goods."[371]

Moreover, "[l]oss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller."[372] Per article 67(1), "[i]f

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[364] *Compare* CISG art. 35(3), *with* U.C.C. § 2-316 ("[T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.").

[365] *See* Tacy Katherine Hass*, New Governance: Can User-Promulgated Certification Schemes Provide Safer, Higher Quality Food?*, 68 FOOD DRUG L.J. 77, 91 (2013) (noting that "the buyer's main duty under the CISG" is "to pay for the goods he has purchased, elaborated in Articles 53 and 54").

[366] CISG art. 53; Victoria Alloys, Inc. v. Fortis Bank SA/NV (*In re* Victoria Alloys, Inc.), 261 B.R. 424, 431 (Bankr. N.D. Ohio 2001).

[367] CISG art. 54; Hilaturas Miel S.L. v. Republic of Iraq, 573 F. Supp. 2d 781, 799 (S.D.N.Y. 2008); Alejandro Osuna-Gonzalez, *Buyer's Enabling Steps to Pay the Price: Article 54 of the United Nation's Convention on Contracts for the International Sale of Goods*, 25 J. L. & COM. 299, 302–07 (2005) (dissecting article).

[368] CISG art. 57; Franco Ferrari, *PIL and CISG: Friends or Foes?*, 31 J. L. & COM. 45, 89 n.219 (2013). For clarity's sake, "PIL" refers to private international law.

[369] CISG art. 58; Urica, Inc. v. Pharmaplast S.A.E., No. CV 11-02476 MMM (RZx), 2014 U.S. Dist. LEXIS 110015, at *48 (C.D. Cal. Aug. 8, 2014).

[370] CISG art. 59; Le Pupille v. Nickolas Imps., No. 1:12-cv-668-TRJ, 2013 U.S. Dist. LEXIS 188823, at*3–4 (E.D. Va. Mar. 7, 2013).

[371] CISG art. 60(a)–(b); Henry D. Gabriel, *The Buyer's Performance under the CISG: Articles 53-60*, 25 J. L. & COM. 273, 282 (2005) ("Article 60 43 articulates the requirements of the second of the buyer's primary responsibilities under Article 53": to "take delivery of the goods.").

[372] CISG art. 66; Donald L. Grace, Comment, *Force Majeure, China & the CISG: Is China's New Contract Law a Step in the Right Direction?*, 2 SAN DIEGO INT'L L.J. 173, 192 (2001) ("The theory of passage of risk," as embodied in article 66, "is consistent with the contractual norm of leaving the parties at status quo when a contract becomes terminated due to a force majeure event.").

the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale."[373] In fact, "[t]he risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract," unless "the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer" at the time of the contract's conclusion.[374] However, this risk will not pass unless and until "the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise."[375] By virtue of these interlocking articles, the risk of loss passes under CISG without regard to the goods' actual owner.[376]

Closely linked to the deliverer's obligations under article 35, a buyer has a duty to inspect the delivered goods and provide the seller with any notice of nonconformity under CISG. To satisfy article 38, this examination must occur "within as short a period as is practicable in the circumstances,"[377] though it may be deferred in two expressly identified situations,[378] and be "reasonable."[379] The first requirement—"as is practicable"—has been strictly construed as necessitating great promptness;[380] based on these and similar cases, scholars have concluded that inspection may be deferred under article 38(1) only when "the buyer is a mere intermediary or when the goods are delivered directly to end users" or can show "the absence of a real opportunity to examine all of the goods."[381] Imported into CISG, the second—that the inspection must be "reasonable"— depends on "the provisions of the contract in question, usage of

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[373] CISG art. 67(1); St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, No. 00 Civ. 9344 (SHS), 2002 U.S. Dist. LEXIS 5096, at *12–13 (S.D.N.Y. Mar. 26, 2002).

[374] CISG art. 68; Sandeep Gopalan, *Transnational Commercial Law: The Way Forward*, 18 AM. U. INT'L L. REV. 803, 807 n.12 (2003).

[375] CISG art. 67(2); Jan Ramberg, *To What Extent Do Incoterms 2000 Vary Articles 67(2), 68 and 69?*, 25 J. L. & COM. 219, 220 (2006).

[376] St. Paul Guardian Ins. Co, 2002 U.S. Dist. LEXIS 5096, at *13.

[377] CISG art. 38(1); Electrocraft Arkansas, Inc. v. Super Electric Motors, Ltd., No. 4:09cv00318 SWW, 2010 U.S. Dist. LEXIS 85610, at *17 (E.D. Ark. Aug. 19, 2010).

[378] CISG art. 38(2)–(3); Profi-Parkiet Sp. Zoo v. Seneca Hardwoods LLC, No. 13 CV 4358 (PKC)(LB), 2014 U.S. Dist. LEXIS 71289, at *16 (E.D.N.Y. May 23, 2014) (citing article 28(2)); Chi. Prime Packers, Inc. v. Northam Food Trading Co., 320 F. Supp. 2d 702, 709 (N.D. Ill. 2004) (citing article 38(2) and (3)).

[379] DiMatteo et al., *supra* note 201, at 362.

[380] Shuttle Packaging Sys. LLC v. Tsonakis, No. 1:01-CV-691, 2001 U.S. Dist. LEXIS 21630, at *26 (W.D. Mich. Dec. 17, 2001) ("[T]he wording of CISG reveals an intent that buyers examine the goods promptly and give notice of defects to sellers promptly." (then setting up a deadline of two years for barring late notices)); *accord* Electrocraft Arkansas, Inc, 2010 U.S. Dist. LEXIS 85610, at *20 (citing Chi. Prime Packers, Inc, 320 F. Supp. 2d at 711–12).

[381] DiMatteo et al., *supra* note 201, at 362.

the trade, the type of goods, and the technical facilities and expertise of the parties."[382] Despite this necessarily flexible standard, the buyer will be held responsible for the failure to discover "nonconformity readily apparent from" a reasonable inspection and will only be excused from a "complete examination" if the "quantity or nature of the products renders comprehensive inspection unreasonable."[383] Under article 39, after such an inspection, a buyer must give specific notice of the goods' partial or complete nonconformity within a "reasonable time," a standard more strictly construed under CISG than the UCC, or, at most, within two years from the goods' delivery.[384]

Like the seller, the buyer has two weapons at his, her, or its disposal even if the notice sent was either untimely or too general. First, this failure will be deemed immaterial "if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer."[385] Second, regardless of article 39, "the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice."[386]

Both deliverers and recipients may make use of article 79 and bear a duty to preserve any goods ordered or received. Article 79 excuses nonperformance upon a three-part showing: (1) "the failure [to perform] was due to an impediment beyond . . . [the breaching party's] control"; (2) that party "could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract"; and (3) that same party could not have reasonably "avoided or overcome" this impediment "or its consequences."[387]

Distinct from the common law's impossibility standard and the UCC's own impracticability variant,[388] a distinction famously missed by one court,[389] this test focuses on the causal link between the asserted impediment and the

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[382] *Id.*

[383] *Id.* at 363.

[384] CISG art. 39(1)–(2); Ferrari, *supra* note 233, at 111. If a delivery is only partially nonconforming, then the buyer may only invoke CISG's remedial provisions as to that portion unless that partial failure alone amounts to a "fundamental breach."

[385] CISG art. 40; BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador (Petroecuador), 332 F.3d 333, 338 (5th Cir. 2003).

[386] CISG art. 44. Unsurprisingly, the definition of "reasonable excuse" is contested and unsettled. DiMatteo et al., *supra* note 201, at 370.

[387] CISG art. 79(1); JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 423.4 (2d ed. 1991).

[388] Bruno Zeller, *The Challenge of a Uniform Application of the CISG – Common Problems and Their Solutions*, 3 MACQUARIE J. BUS. L. 309, 313 (2006).

[389] Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1029 (2d Cir. 1995).

breaching party's inability to perform.[390] In particular, attention must be paid to the impediment's reasonable foreseeability, the breaching party's control of this unexpected barrier, and the practices of international trade.[391] Complicating any such analysis is the absence of any definition for the word "impediment" and the phrase "due to" in article 79.[392] Still, that performance has become unforeseeably more difficult or unprofitable will not suffice to establish an impediment.[393] Article 85 obliges the seller to "take such steps as are reasonable in the circumstances to preserve" goods if "the seller is either in possession of the goods or otherwise able to control their disposition" and the buyer has delayed in paying the price or taking delivery.[394] Its counterpart, article 86 reads: "If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances."[395] Any unreasonable delay in completing performance or as to goods subject to rapid deterioration or unreasonably expensive to store automatically allows a party to sell the relevant goods, provided notice of this intention has been given to the breaching party.[396]

Under CISG, a breach may be either fundamental or non-fundamental. The latter engenders no more than a right to damages as measured by several CISG articles;[397] the former entitles the non-breaching party not only to damages but also to the remedy of avoidance.[398] As defined in CISG's article 25, "[a] breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him [or her] of what he [or she] is entitled to expect under the contract."[399] Divided into its two clear elements, a "fundamental" breach is uniquely material, substantially depriving a party of the bargain's benefits, and results in a deprivation that was reasonably

390 Mazzotta, *supra* note 217, at 108.

391 Todd Weitzmann, Comment, *Validity and Excuse in the U.N. Sales Convention*, 16 J.L. & COM. 265, 286 (1997).

392 *Id*. at 282.

393 DiMatteo et al., *supra* note 201, at 425.

394 CISG art. 85; *see* Jianming Shen, *The Remedy of Requiring Performance under the CISG and the Relevance of Domestic Rules*, 13 ARIZ. J. INT'L & COMP. LAW 253, 276 (1996) ("Articles 85 through 88 impose upon the parties general duties of preservation and disposal of the goods.").

395 CISG art. 86(1); 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, 1508 n.190 (2001).

396 CISG art. 88(1)–(2).

397 *See infra* Part V.C.1.

398 Schwenzer, *supra* note 295, at 799.

399 CISG art. 25; Valero Mktg. & Supply Co. v. Greeni Oy, No. 01-5254 (DRD), 2006 U.S. Dist. LEXIS 16620, at *24 (D.N.J. Apr. 4, 2006); Hilaturas Miel, S.L., 573 F. Supp. 2d at 799 (defining "fundamental breach" under CISG).

foreseeable at the time of the contract's formation.[400] Though the term is inescapably vague,[401] based on this two-part delineation, at least seven actions have been regarded as "fundamental breaches" by a multitude of courts, including: (1) non-delivery or refusal to deliver goods, though not a failure to fulfill a minor condition; (2) late delivery if time of performance is of the essence, a seller knows of the buyer's urgent need, the prices of the goods purchased are subject to extreme fluctuations, or the buyer has already fixed an additional period for delivery after the seller's initial failure to timely deliver; the seller infringes (3) a resale restriction, (4) a valid exclusive sales agreement, or (5) a re-import restriction;[402] (6) "non-payment of the purchase price," characterized by one court as "the most significant form of a fundamental breach by a buyer";[403] or (7) the non-conformity of the delivered goods.

Interestingly, nonperformance will not alone constitute a fundamental breach as long as "prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract" and "the party intending to declare the contract avoided . . . give[s] reasonable notice to the other party in order to permit him [or her] to provide adequate assurance of his [or her] performance."[404] This latter provision as to notice does not apply "if the other party has [already] declared that he [or she] will not perform his obligations."[405] Any such breach as to one delivery of an installment contract does not entitle the non-breaching party to assert a fundamental breach of the entire contract.[406] The latter is only justified if this discrete failure "gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments" as well.[407] When viewed overall, then,

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400 CISG art. 25; Citgo Petroleum Corp. v. Seachem, No. H-07-2950, 2013 U.S. Dist. LEXIS 72898, at *27–28 (S.D. Tex. May 23, 2013); *see also, e.g.*, Harry M. Flechtner, *Remedies under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.*, 8 J. L. & COM. 53, 57, 75 (1988); DiMatteo et al., *supra* note 201, at 414.

401 Clemens Pauly, *The Concept of Fundamental Breach as an International Principle to Create Uniformity of Commercial Law*, 19 J. L. & COM. 221, 229 (2000).

402 Ulrich Magnus, *The Remedy of Avoidance of Contract under CISG – General Remarks and Special Cases*, 25 J. L. & COM. 423, 432–35 (2005-06) (finding (1) through (5) from a series of international cases); Shuttle Packaging Sys. L.L.C. v. Tsonakis, No. 1:01-CV-691, 2001 U.S. Dist. LEXIS 21630, at *27–28 (W.D. Mich. Dec. 17, 2001) (positing (6)).

403 Shuttle Packaging Sys. L.L.C. v. Tsonakis, No. 1:01-CV-691, 2001 U.S. Dist. LEXIS 21630, at *27–28 (W.D. Mich. Dec. 17, 2001).

404 CISG art. 72(1)–(2); Magellan Int'l Corp. v. Salzgitter Handel GmbH, 76 F. Supp. 2d 919, 925 (N.D. Ill. 1999).

405 CISG art. 72(3); *Magellan Int'l Corp.*, 76 F. Supp. 2d at 925.

406 CISG art. 73(1); Blair, *supra* note 175, at 313 n.197.

407 CISG art. 73(2); Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp. L.L.C., 635 F.3d 1106, 1108 n.2 (8th Cir. 2011).

CISG strives to preserve the contract short of the most dramatic of violations of a bargain provably struck.

2. *Code Application of CISG's Oddities*

Now moving decisively beyond the UCC's terrain, the foregoing articles create a novel set of duties and concept of breach. Whether a breach has occurred sufficient to trigger liability and, with it, a Code claim, these interlocking tenets must be applied. Whether the debtor is a seller or buyer, a failure to comply with these requirements may leave a debtor subject to a cause of action under § 523(a)(2). These consequences arise from this subsection's common construal: an omission of a material fact and a failure to make an effort to perform, both misdeeds actionable under § 523(a)(2)(A), and actions inconsistent with those of a reasonable person, such substandard conduct triggering liability under § 523(A)(2)(B), must be measured by the debtor's duties, as imposed by the pertinent contract and these sundry CISG articles. If the debtor fulfilled its CISG-imposed duties, no contractual breach could have taken place, but if it ignored them, it has not only birthed a claim but also violated § 523(a)(2). Lastly, CISG alone will determine how the breach—and liability for a debt—must be classified, whether branded as "fundamental" or something else entirely.

C. *Measuring Damages*

1. *Summary of Relevant Articles*

Articles 45 and 61 establish the cumulative remedies available to a non-breaching buyer and seller, respectively.[408] In accordance with article 61(1), an aggrieved *seller* may require the buyer's performance as defined in article 62, fix an additional time for compliance as permitted by article 63, avoid or cancel the contract under article 64, or have the goods identified under the contract per article 65.[409] In addition to one of these remedies, the seller may seek damages as measured under article 74.[410] Under article 45(1), an aggrieved *buyer* may require performance or substitute performance under article 46(2), demand repair of defective goods under article 46(3), fix an additional time for

[408] CISG arts. 45, 61; Harry M. Flechtner, *Buyers' Remedies in General and Buyers' Performance-Oriented Remedies*, 25 J.L. & COM. 339, 341 (2005–06).

[409] CISG art. 61(1)(a); Fabio Bortolotti, *Remedies Available to the Seller and Seller's Right to Require Specific Performance (Articles 61, 62, and 28)*, 25 J.L. & COM. 335, 335 (2005–06).

[410] CISG art. 61(1)(b), (2); Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Group L.L.C., 635 F.3d 1106, 1108 (8th Cir. 2011) (citing to article 61(1)).

performance under article 47, accept a seller's cured performance under articles 37 and 48, avoid or cancel the contract under article 49, or unilaterally reduce the sales price pursuant to article 50.[411] In addition to one of these nonmonetary remedies, the buyer may ask for any and all damages authorized by article 74.[412]

Intended to provide the injured party with the bargain's benefit,[413] article 74 sets the general rule for damages: "Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach."[414] As widely construed, this article does not require that damages be proven with "reasonable certainty."[415]

Regardless of the breach's nature; however, CISG expressly limits the size of any award under article 74 by means of two provisions. Article 74's second sentence specifically subjects any damages determination to a foreseeability principle; thus, damages may not exceed "the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract."[416] The second restriction is the mitigation principle provided for in article 77, which directs the non-breaching party "[to] take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach."[417] Failure to do so entitles the breaching party "[to] claim a reduction in the damages in the amount by which the loss should have been mitigated."[418] Once damages under article 74 have been tabulated, article 78 allows for interest "without prejudice to any claim for damages recoverable" under the latter article.[419] The expenses for preserving goods received or to be delivered, set

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[411] CISG art. 45(1)(a); Flechtner, *supra* note 408, at 340.

[412] CISG art. 45(1)(b), (2); TeeVee Toons, Inc. v. Gerhard Schubert GmbH, No. 00 Civ. 5189 (RCC), 2006 U.S. Dist. LEXIS 59455, at *31 (S.D.N.Y. Aug. 22, 2006).

[413] Eric C. Schneider, *Measuring Damages under the CISG – Article 74 of the United Nations Convention on Contracts for the International Sale of Goods*, 9 PACE INT'L L. REV. 223, 228 (1997).

[414] CISG art. 74; Zapata Hermanos Sucesores v. Hearthside Baking Co., 313 F.3d 385, 388 (7th Cir. 2002).

[415] Schneider, *supra* note 413, at 229.

[416] CISG art. 74; Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1029 (2d Cir. 1995).

[417] CISG art. 77; Schneider, *supra* note 413, at 236–37.

[418] CISG art. 77; 2P Commercial Agency S.R.O. v. SRT USA, Inc., No. 2:11-cv-652-FtM-29SPC, 2012 U.S. Dist. LEXIS 112706, at *6 (M.D. Fla. Aug. 10, 2012).

[419] CISG art. 78. Because CISG "provides no guidance for calculating such interest and gives no indication of the circumstances under which pre-judgment interest should be awarded," Schneider, *supra* note 413, at 230–31, domestic and foreign courts almost uniformly regard the matter as a procedural issue outside of CISG's scope, Djakhongir Saidov, *Damages: The Need for Uniformity*, 25 J.L. & COM. 393, 399 (2005–06).

forth in articles 85 and 86, are equally recoverable from the breaching party or deductible from the sales proceeds.[420]

Of the aforementioned nonfinancial remedies, that of avoidance, available to buyers under article 49 and sellers under article 64, "releases both parties from their obligations under it, subject to any damages which may be due."[421] A cabined remedy, CISG's avoidance provisions can only be invoked either when a breach is fundamental or when the other party does not fulfill any of his, her, or its obligations within the additional time,[422] if any, granted by the non-breaching party.[423] Further subject to the constraints in article 49(2) whenever delivery has been made, or article 64(2) when the price has been paid,[424] avoidance further requires that notice both be given and be properly communicated,[425] though notice may be in writing or orally, CISG itself requiring no specific form.[426] If a contract is avoided and either the buyer has entered into a substitute transaction or the seller has resold the goods, the damages must equal "the difference between the contract price and the price in the substitute transaction."[427] If the contract is avoided but neither a substitute transaction or a resale has transpired, the aggrieved party may instead "recover the difference between the price fixed by the contract and the current price at the time of avoidance."[428] "Current price" is defined in article 76(2) as "the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods."[429]

On the other hand, if a party operating under article 76 has taken over the goods prior to the contract's proper avoidance, "the current price at the time of such taking over shall be applied instead of the current price at the time of

[420] CISG arts. 85, 86(1), 88(3).

[421] CISG art. 81(1); Topp Paper Co., LLC v. ETI Converting Equip., No. 12-21014-CIV-Rosenbaum/Seltzer, 2013 U.S. Dist. LEXIS 141193, at *8 (S.D. Fla. Sept. 28, 2013).

[422] The procedure to be followed in such cases is known as the "*Nachfirst* procedure" and is detailed in articles 47 and 63.

[423] CISG arts. 49(1), 64(1); Flechtner, *supra* note 400, at 70.

[424] CISG arts. 49(2), 64(2).

[425] CISG arts. 26–27.

[426] Magnus, *supra* note 402, at 426.

[427] CISG art. 75; Semi-Materials Co. v. MEMC Elec. Materials, Inc., No. 4:06CV1426 FRB, 2011 U.S. Dist. LEXIS 1791, at *7 (E.D. Mo. Jan. 10, 2011).

[428] CISG art. 76(1); Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp. L.L.C., 635 F.3d 1106, 1108 n.2 (8th Cir. 2011).

[429] CISG art. 76(2); Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp., L.L.C., No. No. 08-762(DSD/SRN), 2008 U.S. Dist. LEXIS 51066, at *5 (D. Minn. July 1, 2008), *rev'd*, 635 F.3d 1106.

avoidance."[430] Under articles 75 and 76, the aggrieved party may claim any and all "further damages recoverable under article 74."[431] Avoidance concurrently allows both the breaching and no-breaching party to "claim restitution from the other party of whatever the first party has supplied or paid under the contract."[432]

2. *Code Application of CISG's Oddities*

Generally, perhaps as a consequence of their pro-buyer proclivities, CISG and the UCC catalogue the same remedies, as aggrieved party can cancel a contract, sue for performance, or collect damages, including consequential damages,[433] and set a similar upper limit as to damages.[434] Yet, as perusal reveals, several pivotal differences as to these remedies' extent and exercise can be pinpointed. Touching upon how a breach is to be monetized and unrealized bargains are to be quantified, these distinctions can produce vastly different valuations of the same contractual violation and thus any potential creditor's bankruptcy claim.

In certain ways, CISG's application will yield a claim larger than the UCC countenances. First, because CISG elects for no precise or certain statute of limitations,[435] no time's passing will necessarily extinguish a valid action for breach of contract. Conversely, the UCC both specifies that "a cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach"[436] and implements a four-year maximum.[437] Second, while CISG and the UCC provide that warranties exist only as provided for in the parties' agreement,[438] the former's article 35 can be properly read to suggest

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[430] CISG art. 76(1); Saidov, *supra* note 369, at 321 n.71; Jeffrey S. Sutton, Comment, *Measuring Damages under the United Nations Convention on the International Sale of Goods*, 50 OHIO ST. L.J. 737, 746 (1989).

[431] CISG arts. 75, 76(1); DiMatteo et al., *supra* note 201, at 419.

[432] CISG art. 81(2); Frisch, *supra* note 177, at 552 & n.287.

[433] CISG arts. 45–52, 61–65, 74–77; U.C.C. §§ 2-703, 2-711. This congruence may be partly due to the federal courts' use of the UCC to construe CISG's central damages provision, article 74. *See* Delchi Carrier Spa v. Rotorex Corp., 71 F.3d 1024, 1030 n.2 (2d Cir. 1995) (interpreting article 74 by looking to the U.C.C. and case law defining "incidental damages").

[434] *Compare* CISG art. 74, *with* General Star Indem. Co. v. Bankr. Estate of Lake Geneva Sugar Shack, Inc., 572 N.W.2d 881, 889 (Wis. Ct. App. 1997) (citing Wisconsin's version of the U.C.C., which limits consequential damages to those "as are the natural and probable consequences of the breach and were within contemplation of the parties when the contract was made").

[435] *See, e.g.*, U.S. Nonwovens Corp. v Pack Line Corp., 4 N.Y.S.3d 868, 873 (N.Y. Gen. Term 2015). Unsurprisingly, this absence has often led courts to borrow the U.C.C. statute of limitations in accordance with article 7. *See, e.g.*, Thyssenkrupp Metallurgical Prods. GmbH v Energy Coal, No. 653938/14, 2015 N.Y. Misc. LEXIS 3741, at *11–12 (N.Y. Gen. Term Oct. 14, 2015); *U.S. Nonwovens Corp.*, 4 N.Y.S.3d at 873.

[436] U.C.C. § 2-725(b).

[437] *Id.* § 2-725(a).

[438] *Compare* CISG art. 35(1), *with* U.C.C. § 2-313.

the existence of implied warranties of fitness for a particular purpose and merchantability[439]—and actually eases a buyer's burden of proving the former's breach relative to the UCC.[440] Third, in a likely reflection of its ambivalence regarding the issue of consequential damages,[441] the UCC allows the buyer to seek consequential and incidental damages[442] but bars the seller from obtaining anything other than incidental damages.[443] CISG, however, explicitly authorizes any aggrieved party, whether buyer or seller, to pursue consequential and incidental damages,[444] subject to the limitations of foreseeability and mitigation.[445] In fact, CISG differs in two more crucial particulars from the UCC and its attendant case law as to this very issue: it both allows an aggrieved party first to declare the contract voided and then demand damages[446] and does not require that any loss be foreseeable by both parties at the time of the contract's conclusion.[447] Under CISG, then, a simple claim may exceed its total value under the UCC.[448]

In other ways, however, CISG would constrict, not augment, any contractual claim. Most significantly, this treaty recommends a higher bar for imposing liability for breach of contract. On the other hand, because the UCC recognizes the perfect tender rule, it empowers a buyer to reject goods that fail in any respect to conform to the contract even if a defect is minor and substantially the same goods for which the buyer has bargained have been delivered;[449] a minor defect, then, may rightly engender the full panoply of contractual damages. In contrast,

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[439] *See, e.g.*, Electrocraft Ark., Inc. v. Super Elec. Motors, Ltd., No. 4:09cv00318 SWW, 2009 U.S. Dist. LEXIS 120183, at *11 (E.D. Ark. Dec. 23, 2009); Norfolk S. Rail Ry. V. Power Source Supply, Inc., Civ. No. 06-58 J, 2008 U.S. Dist. LEXIS 56942, at *14 (W.D. Pa. July 25, 2008).

[440] *Compare* CISG art. 35(2), *with* U.C.C. § 2-315.

[441] *See* U.C.C. § 1-305(a).

[442] *Id.* § 2-715.

[443] *Id.* § 2-710. Recovery by sellers for consequential damages may be possible, however, if the "lost profit" language of section 2-708(2) is liberally applied. *Id.* § 2-708(2). Another avenue for accomplishing the same result would be for the seller to argue that the loss falls under the heading of incidental damages.

[444] *See* CISG art. 74. Naturally enough, CISG itself complicates this analysis by defining damages as "a sum equal to the loss, including loss of profit, suffered by the other party as a *consequence* of the breach." *Id.* (emphasis added). Courts and scholars nonetheless construe article 74 as authorizing recovery of all damages, however labeled, traceable to the breach.

[445] *See* CISG arts. 74, 77.

[446] *Compare id.* at art. 45(2), *with* U.C.C. §§ 2-711(1), 2-703.

[447] *Compare* CISG art. 74, *with* U.C.C. §§ 2-715(2)(a).

[448] One more difference merits mention. Famously, CISG treats specific performance as a standard remedy, claimable "unless the buyer has resorted to a remedy which is inconsistent with this requirement," while the UCC disfavors such a tonic's imposition, strictly specifying how and in what circumstances specific performance may be compelled.Logically, when specific performance is no longer a feasible, the loss of that possible remedy should be included in the aggrieved party's complete tabulation of damages. Article 28, of course, forecloses this possibility.

[449] U.C.C. § 2-601

the CISG forecloses the possibility of such an award by requiring the occurrence of a "fundamental breach" before a contract may be terminated in full.[450] Second, the UCC lets a buyer to collect consequential damages for "[i]njury to person or property proximately resulting from any breach of warranty."[451] CISG, however, bars any such relief.[452]

CONCLUSION

With unremitting confidence and mind-numbing repetition, CISG has been described as the international counterpart to the UCC's second article.[453] Admittedly, because "[m]any provisions of the UCC and the CISG are the same or similar,"[454] "case law interpreting analogous provisions of Article 2" may "inform a court where the language of the relevant CISG provision tracks that of the UCC."[455] And, in many situations, though "[t]he common law of contracts evolved from the . . . [*lex mercatoria*], the civil law of contracts from canon law," "differences in outcome under the two legal regimes are small and shrinking."[456] This undeniable fact, however, can obscure a crucial verity: because textual and interpretive divergences do persist, "UCC caselaw 'is not *per se* applicable,'"[457] and CISG sometimes dictates an outcome impossible under the UCC. For these reasons, "it is shortsighted and misleading to say that the concepts of the CISG correspond to those of the UCC and that the UCC lawyer can find comfort in the CISG's similarities to the UCC."[458]

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[450] CISG arts. 25. Notably, however, article 35 requires goods to strictly conform to the contract's specifications. As a result, despite implying a stricter standard, a seller remains effectively liable under the CISG for "any lack of nonconformity." Regardless, a buyer may always opt for the self-help remedy of unilateral proportionate purchase price reduction for the seller's delivery of non-conforming goods.

[451] U.C.C. § 2-715(2)(b).

[452] CISG art. 5.

[453] Chicago Prime Packers, Inc. v. Northam Food Trading Co., 408 F.3d 894, 898 (7th Cir. 2005); *see also* Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp. L.L.C., 635 F.3d 1106, 1107 (8th Cir. 2011) (quoting Chicago Prime Packers, Inc., 408 F.3d at 898).

[454] Chicago Prime Packers, Inc., 408 F.3d at 898; *see also* VLM Food Trading Int'l, Inc. v. Ill. Trading Co., 748 F.3d 780, 786 (7th Cir. 2014) (citing Chicago Prime Packers, Inc., 408 F.3d at 898).

[455] Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1028 (2d Cir. 1995).

[456] Bodum USA, Inc. v. La Cafetiere, Inc., 621 F.3d 624, 635 (7th Cir. 2007) (citing to Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORDHAM L. REV. 281, 308 n.190 (1994)); *cf.* Harold J. Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 2 EMORY J. INT'L DISP. RESOL. 235, 295 (1988) ("Despite wide differences among national legal systems, enterprises of all countries have developed a high degree of uniformity in contract practices for the export and import of goods," leading to "general similarities of contract practice and contract law.").

[457] Delchi Carrier SpA, 71 F.3d at 1028 (quoting Orbisphere Corp. v. United States, 726 F. Supp. 1344, 1355 (Ct. Int'l Trade 1989)); *see also* Ferrari, *supra* note 197, at 1023–24.

[458] Ferrari, *supra* note 197, at 1033.

As this Article has demonstrated, in three particular areas—contract formation, breach definition, and damages' calculation—CISG, in fact, does so more often than not. Even as an overwhelming majority of U.S. courts have proved reluctant to acknowledge these dissimilarities, producing a body of precedent riven with methodological infirmities upon which others foolishly rely, this truth cannot be rightly ignored within bankruptcy's domain. In point of fact, when an international contract is implicated, upon a court's proper choice between CISG and the UCC may depend the security of debtor's fresh start and a creditor's return as well as the legitimacy of a liquidation or the unassailability of a reorganization. If the Code's ends are to be achieved in such cases, CISG's provisions, then, must be fully heeded, the map sketched throughout this piece intently followed. By command of Senate, President, and countless others, this singular law, one which rightly reigns domestically and internationally, thus commands so that trade may escalate and barriers may fall. Otherwise, good faith will wither, and ills unwanted will be unleashed, far beyond the reach of any single court and any single code. Via these means, commerce will, as so many hoped, flourish among honest merchants,[459] the only class of debtors for which the Code reserves its succor[460] and that CISG strives to serve. As history attests, such a world has been the goal of every mercantile corpus forged since the first country fair was held,[461] the ends deemed just by "the prosaic agencies of th[is most] commercial world"[462] within and beyond the mutable bounds of modern bankruptcy law.

[459] Baird, *supra* note 26, at 1292 ("Llewellyn's commercial law . . . sought to work within an existing landscape," with the goal of "ensuring that commerce flourishes among honest merchants.").

[460] Marrama v. Citizens Bank, 549 U.S. 365, 374 (2007) (observing that the bankruptcy laws were enacted to protect honest but unfortunate debtors).

[461] *See* Baird, *supra* note 26, at 1290.

[462] JOSEPH CONRAD, THE SHADOW-LINE, A CONFESSION 35 (Penguin Books 2007) (1917).