The Vision : Integration of (UN)CISG Principles with American Sale of Goods Law

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Résumé

Cet article est un survol des dispositions internationales et américaines traitant de la vente de marchandises. Il présente une analyse comparative de la *Convention des Nations Unies sur les contrats de vente internationale de marchandises* (CVIM) et de l'article 2 du *Uniform Commercial Code* (UCC), afin de mettre de l'avant l'importance de développer un droit commercial uniforme qui intègre efficacement les principes contenus dans ces deux outils et plus spécifiquement les règles sur les preuves littérales (*Statute of Frauds*) et extrinsèques (*Parole Evidence Rule*). L'auteure y défend l'hypothèse qu'une interprétation uniforme et internationale, capable de s'extraire véritablement d'une perspective nationale (*homeward trend*), puisse conduire à l'efficacité accrue des transactions commerciales et des activités des tribunaux devant s'y pencher ainsi qu'à une réduction significative des coûts associés à la vente des marchandises.

Abstract

This paper introduces both international and American Sale of Goods Laws. There is a basic introduction to both the CISG and Article 2 of the U.C.C., which permits the reader to take notice of the similarities and differences between the two laws. The author of the essay further contends for a unified sale of goods commercial law, and emphasizes the urgency to merge principles of the United Nations Convention on Contracts for the International Sale of Goods, with Article 2 of the Uniform Commercial Code. More specifically, in regards to the rules pertaining to the Statute of Frauds and the Parol Evidence Rule. Arguments supporting the uniformity and international character of the CISG versus an interpretation based on a homeward trend will be presented. Despite this consistent duality, the integration would bring forth more efficiency in commercial transactions and within the courts of law. Ultimately leading to financial costs associated with sales of goods transactions to presumably be dramatically decreased.

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INTRODUCTION

This vision, for a unified commercial code, is not a new concept. Over several centuries all the way to the present, academic scholars, legal professionals and business-people have searched for an effective and uniform commercial law that could be applied to the sale of goods. These individuals primarily seek a uniform commercial law that would promote a legal balance in sale of goods transactions by offering one consistent juridical solution irrespective of the jurisdiction in which the transaction took place. In addition, a uniform commercial law would ensure accuracy and facilitate cross-border business. The final outcome of a unified law would help increase sale profits on both the national and international level.

The first of the modern academic scholars to hold this vision was Lord Mansfield, in approximately 1740; he spoke optimistically when he said that, "mercantile law…is the

same all over the world. For from the same premises, the sound conclusions of reason and justice must universally be the same".[1]

Later, Karl Llewellyn, prominent American jurisprudential scholar and 1944 Chief Reporter of the *Uniform Commercial Co*de (*UCC*),[2] stated that, "law means so pitifully little to life. Life is so terrifying dependent on the law".[3] Llewellyn held a realist vision concerning the relationship that exists between commerce and law;[4] as a result the original drafters of the Uniform Commercial Code were not shy about "importing commercial practices as a source of legal rules".[5] Karl Llewellyn's aim was to provide the court system with the power to arrive at decisions that would take into consideration the "realities of commercial transactions".[6] In the legal sphere this meant that courts should avoid rigorous and primitive legal precedents and outdated ways of thought.[7] He was also predominately responsible for the concept of "commercial reasonableness", which is a standard of conduct strongly associated with commercial law and the *UCC*.[8]

Approximately forty years later, when the *United Nations Convention on Contracts for the International Sales of Goods* (*CISG*)[9] was being promoted as an alternative to national law in international commercial transactions, Gyula Eorsi, the President of the Diplomatic Conference made the following remark:[10]

[1] *Pelly v Royal Exch Assurance Co*, 97 Eng Rep 342, 346 (1757).
[2] I D Abyad, "Commercial Reasonableness in Karl Llewellyn's Uniform Commercial Code Jurisprudence" (1997) 83 *Va LR* 429 at 429; *Uniform Commercial Code* [hereinafter referred to as the *UCC*] online: *Cornell University Law School, Legal Information Institute, Uniform Commercial Code*, available at <www.law.cornell.edu/ucc>.
[3] Karl N Llewellyn, "What Price Contract? – An Essay in Perspective" (1931) 40 *Yale LJ* 740.
[4] This may in part be attributed to the fact that Mr Llewellyn was a prominent contributor to the Legal Realism movement. See generally Karl N Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Chicago: The University of Chicago Press, 1962).
[5] *Abyad*, *supra* note 2 at 429.
[6] *Ibid.*
[7] *Ibid*.
[8] *Ibid.*
[9] *United Nations Convention on Contracts for the International Sale of Goods*, Apr 11, 1980, UN Doc A/Conf.97/18, *reprinted* in 19 *ILM* 68 [hereinafter occasionally referred to as the *CISG* or the *Convention*] online: *UNCITRAL, United States Commission on International Trade Law*, available at <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html>.
[10] Camilla Baasch Andersen, "The Uniform International Sales Law and the Global Jurisconsultorium" (2005) 24 *JL & Com* 159 at 165, online: *Pace Law School, Institute of International Commercial Law, CISG Database*, available at <www.cisg.law.pace.edu/cisg/biblio/andersen3.html>.

> It could be argued that the provisions of Article 7(1) [which states that: 'In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.'] are but pious wishes: the paragraph is necessarily vague and therefore open to surprising results…[T]he elements of regard to the international character of the Convention and uniformity in its application were well chosen. The first, as we have seen, was devised to check the homeward trend, and the second is an admonition to follow precedents on the international plane.[11]

Although these three individuals used varying means, their aim was to promote the universality of commercial law through reasonableness, alignment, and international understanding and acceptance.

As such, this paper will defend the argument that an integration of the *United Nations Convention on Contracts for the International Sale of Goods* (*CISG*) principles with Article 2 of the *Uniform Commercial Code* (*UCC*) would be an important step in finally achieving universality of commercial law and true commercial reasonableness in the United States.

1. THE REASONS FOR INTEGRATING *CISG* PRINCIPLES WITH ARTICLE 2 OF THE *UCC*

1.1 Uniformity & International Character of the Law

Upon ratification of the *United Nations Convention on Contracts for the International Sale of Goods*, a country declares that, for disputes concerning the international sale of goods, the *CISG* takes precedent over domestic sales law. It is widely considered as an instrument with paramount importance in international trade and commercial law. According to the Department of Trade and Industry and echoed by the

[11] Gyula Eörsi, "General Provisions"e in Nina M Galston & Hans Smit, eds, *International Sales: The United Nations Convention On Contracts For The International Sale Of Goods* (1984), 2-1 and 2-4, cited in Camilla Baasch Andersen, "The Uniform International Sales Law and the Global Jurisconsultorium" (2005) 24 *J L Com* 159 at 165, online: *Pace Law School, Institute of International Commercial Law, CISG Database*, available at <www.cisg.law.pace.edu/cisg/biblio/andersen3.html>; article 7(1) of the *CISG*, *supra* note 9.

United Nations Commission on International Law (UNCITRAL) since September 26, 2014, 83 countries are members of the *CISG*.[12]

The crucial elements of this Convention are found in its "uniformity and global recognition of legal traditions".[13] The "uniformity" concept found in the *CISG*[14] states, "that regard is to be had to its international character and the need to promote uniformity in its application…".[15] This inspirational guideline strives to "diminish barriers frequently encountered in trade and commercial law", by adopting and applying the same rules to international sale of goods contracts.[16] Regarding the global recognition of legal traditions, the Preamble of the *Convention* reminds us that, " the adoption of the uniform rules which govern contracts for the international sale of goods takes into account the different social, economical and legal systems which contribute to the removal of legal barriers in international trade and promote the development of international trade".[17] However, as pointed out by John Honnold, with regards to the *CISG* and its application, "uniform words do not create uniform results".[18]

In reality, the unfortunate result of such varying application of the *CISG* is that legal practitioners and business entities "forum shop" in order to receive a more favorable outcome in trade or commercial disputes.[19] For example, in the context of court decisions on what constitutes a "reasonable time" for a party to give notice of non-conformity of

[12] United Nations Commissions on International Trade Law [UNCITRAL], *United Nations Convention on Contracts for the International Sale of Goods* (Vienna 1980), online: *UNCITRAL*, available at: <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.
[13] Andersen, *supra* note 10 at 161.
[14] Art 7(1) of the *CISG*, *supra* note 9.
[15] *Ibid.*
[16] Andersen, *supra* note 10 at 161.
[17] *Ibid*; *CISG*, *supra* note 9.
[18] John Honnold, "The Sales Convention in Action – Uniform International Words: Uniform Application?" (1998) 8 *J L Com* 207. online: *Pace Law School, Institute of International Commercial Law, CISG Database*, available at: <www.cisg.law.pace.edu/cisg/biblio/honnold-sales.html>. Also see Andersen, *supra* note 10 at 162; Franco Ferrari, "Homeward Trend and Lex Forism Despite Uniform Sales Law" (2009) 13 *Vindobona Journal of International Commerce Law & Arbitration* 15 at 29, online: *Pace Law School, Institute of International Commercial Law, CISG Database*, available at: <www.cisg.law.pace.edu/cisg/biblio/ferrari17.html>.
[19] Andersen, *supra* note 10 at 161; Ferrari, *supra* note 18 at 29.

goods via article 39(1) of the *CISG*, German Courts have held that a fourteen-day period is appropriate, but Austrian Courts have decided that a one-month period was sufficient.[20]

Thus, unlike tin international public law, monitoring institutions and bi-lateral or multi-lateral treaties are often set up to ensure the correction application and the uniformity. For most commercial law, and the *CISG* in particular, no such help or framework exists."[21] As a result legal and trade advisors are left alone and isolated to discover new territories and "find uniformity".[22]

Homeward Trend

John E. Murray contended that "[f]rom the earliest comparisons of the *UCC* and *CISG*, major differences in the challenges to their uniform interpretation and construction have been clear."[23]

Many American legal practitioners and business-oriented people are often very familiar with article 2 of the *UCC*, but are less knowledgeable or even completely oblivious of the *CISG* and its application. This creates a barrier for international trade. Roy Goode made the following remark concerning the importance of expanding and appreciating foreign legal knowledge and application:

> If the harmonization process is to have any hope of acceleration it is essential for law schools to reduce their preoccupation with national law and their assumption of its superiority over other legal systems and to revert at least in some degree to the internationalism of medieval law teaching. It is primarily by the spreading of awareness of foreign legal systems among students that we can hope to accelerate the process of harmonization and to produce practitioners and judges of the future prepared to look beyond the horizon of their systems.[24]

[20] Andersen, *supra* note 10 at 162.
[21] *Ibid* at 163-164.
[22] *Ibid* at 164.
[23] John E Murray Jr, "The Neglect of CISG: A Workable Solution" (1998) 17 *J L Com* 365, online: *Pace Law School, Institute of International Commercial Law, CISG Database*, available at: <www.cisg.law.pace.edu/cisg/biblio/murray1.html>.
[24] Roy Goode, "Reflections on the Harmonization of Commercial Law" in Cranston & Goode, eds, *Commercial and Consumer Law: National and International Dimensions* (Oxford University Press, 1993).

Additionally, in *Genpharm Inc v Pliva-Lachema AS*[25], the court stated that "there are only a handful of American cases interpreting the CISG […] Federal case law interpreting and applying the CISG is scant."[26]

One must also take into consideration that common law judges are hesitant to apply the *CISG* not only because there are so few cases available, but also because they have demonstrated a preference for the law they know best, the national sale of goods law.[27] The lack of international commercial legal knowledge is well demonstrated in *Helen Kaminski Pty Ltd v Marketing Australian Products, Inc.*[28] The plaintiff, Helen Kaminski Pty Ltd, was an Australian based corporation manufacturing fashion accessories.[29] The American defendant who had its principal place of business in New York entered into a distribution agreement with the plaintiff to hold the exclusive right to distribute the plaintiff's goods in North America.[30] One month later both parties amended the distribution agreement and the defendant ordered additional goods from the plaintiff, who had sent notice to the defendant that the goods were ready for shipment.[31] However, the distribution agreement provided that the defendant had to open a letter of credit prior to shipment, which she failed to do.[32] The plaintiff sent notices to the defendant asking her to cure her default within a specified time period.[33] The defendant filed for bankruptcy prior to the expiration of the time specified under the period to cure her default.[34] The bankruptcy was filed in the United States Bankruptcy Court, which granted her additional time to cure her default, and which equally decided that the plaintiff was stayed from

[25] 361 F Supp 2d 49 (2005) [*Pliva-Lachema AS*].
[26] *Ibid* at 6.
[27] Monica Kilian, "CISG and the Problem with Common Law Jurisdictions" (Spring 2001) 102 *J L Com* 217 at 233, online: *Pace Law School, Institute of International Commercial Law, CISG Database*, available at: <www.law.fsu.edu/journals/transnational/vol102/kilian.pdf>.
[28] No 96B46519, 1997 US Dist LEXIS 10630 (SDNY) [*Marketing Australian Products, Inc*].
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*
[32] *Ibid.*
[33] *Ibid*; art 63 of the *CISG* states, "(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations. (2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.": *supra* note 9.
[34] *Ibid.*

suing the defendant in Australian courts.[35] The plaintiff, in front of the Federal District Court on a motion for leave to appeal an interlocutory order from the Bankruptcy Court, argued that the *CISG* had priority over the *Bankruptcy Code* and that the Bankruptcy Court exceeded their powers by authorizing the defendant the additional time period to cure.[36] The Federal District Court ruled that the amended distribution agreement did not fall into the realm of the *CISG* because it did not specifically pertain to the subsequent goods purchased by the defendant.[37] As a result of this reasoning the Federal District Court affirmed the Bankruptcy Court's order.[38]

The fascinating part of this case is that the Federal District Court "dismissed discussing the applicability of the CISG in any detail",[39] when it was clear that an international contract dispute existed. The Court simply and quickly stated the following:

> For this reason, although I find that there is little to no case law on the CISG in general, and none determining whether a distribution agreement falls within the ambit of the CISG, Helen Kaminski's rationale for why the CISG applies to the debate about the breach for goods ordered but not shipped is not supported by the facts of the case. The identification in the Distribution Agreement of certain goods—about which there is no claim of breach—is insufficient to bring the Distribution Agreement within the coverage of the CISG when the dispute concerns goods not specially identified in the Distribution Agreement. Thus, while the question does present a controlling issue of law over which there may be substantial disagreement, it does not appear that a determination of the issue would materially advance the litigation as Helen Kaminski does not maintain that the general Distribution Agreement—absent the February amendment which does not concern the goods at issue—is definite enough to constitute a contract for the sale of goods.[40]

A decision such as *Helen Kaminski Pty Ltd. Marketing Australian Products, Inc*[41] contradicts the very essence of the *CISG*'s interpretation, which is structured on promoting uniformity in its application and appreciating its international character

[35] *Ibid.*
[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid.*
[39] Kilian, *supra* note 27 at 233.
[40] *Marketing Australian Products, Inc*, *supra* note 28.
[41] *Ibid.*

through the use of international authorities.[42] The Court referred to article 14 of the *CISG*[43], and held that the *CISG* was not applicable as no contract existed due to the fact that the goods in question did not qualify as being sufficiently identified.[44] However, under article 55 of the *CISG*[45] a contract is valid even if a price is not fixed, just like under article 2 of the *UCC*. Yet the Courts failed to refer to article 55 of the *CISG*.[46] Furthermore, if the courts had applied articles 30[47] and 53 of the *CISG*[48] that deal with payment and delivery of a distribution agreement, the courts would have found that a sale of goods contract indeed existed and that the *CISG* would apply.[49] Finally, regarding the Court's comment that "there is little to no case law on the CISG in general, and none determining whether a distributor agreement falls within the ambit of the CISG", the Court was right regarding American cases, but should have turned towards international case law which offers more *CISG* precedents on distribution agreements.[50] Victoria M Genys suggests that tthe court exhibits an extreme ethnocentricity by preferring to cite no interpretive sources in its decision rather than cite secondary sources or international cases on point".[51]

It should never be overlooked that both the *UCC* and the *CISG* regulate the sale of goods on the national as well as international level. For those engaged in international

[42] VM Genys, "Blazing a Trail in the 'New Frontier' of the CISG: *Helen Kaminski v. Marketing Australian Products, Pty. Ltd. Inc.*" (1998) 17 *J L Com* 415.
[43] Art 14 of the *CISG* states, "(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price. (2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.": *CISG, supra* note 9.
[44] *Marketing Australian Products, Inc, supra* note 28; Kilian, *supra* note 27; Genys, *supra* note 42.
[45] Art 55 of the *CISG* states, "Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.": *supra* note 9.
[46] *Ibid*; Kilian, *supra* note 27 at 236.
[47] Art 30 of the *CISG* states, "The 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.": *supra* note 9.
[48] Art 53 of the *CISG* states, "The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.": *supra* note 9.
[49] Genys, *supra* note 42 at 421.
[50] *Ibid* at 425.
[51] *Ibid* at 426.

commerce, the *CISG* remains somewhat of a mystery, but its application is nonetheless critical.

Thankfully, in *Genpharm Inc v Pliva-Lachema AS*[52] the Court recognized that it is essential to apply the *CISG* to international commercial practices.[53] The parties consisted of a European manufacturer who was to supply warfarin sodium to a Canadian drug manufacturer, who in turn sold their product to the USA; the defendant argued that the issue at hand was not within the scope of the *CISG* and as a result the Federal Court did not have subject matter jurisdiction to hear the case.[54] The court determined that it did indeed have jurisdiction, and that "the CISG is an international treaty that governs the formation of international sales contracts as well as the rights and obligations of the parties".[55]

Without a doubt, the American courts, the d that "the CISG is alack of uniformity and awareness of the *CISG* leads to a circular argument. The courts' failure to take immediate incentives to adequately identify and resolve issues that are clearly *CISG* concerns cause the judicial and commercial worlds to remain unfamiliar with the *CISG* and its application. Furthermore, their refusal to refer to other international *CISG* precedents results in the *CISG* being ignored and the *status quo* with the familiar and domestic article 2 of the *UCC* being maintained.[56]

Thus, when an "autonomous interpretation of the CISG" is avoided, a "homeward trend" regarding the interpretation of the international sales of goods legislation is created and sustained.[57] There are two schools of thoughts regarding the interpretation of the *CISG* based on a homeward trend. The first believes that if the *CISG* is interpreted using a national-based perspective that it will promote the application of the *CISG*.[58] For instance in an article entitled, "Parol-Evidence Under the CISG: The 'Homeward Trend'

[52] *Pliva-Lachema AS*, s*upra* note 25.
[53] *Ibid.*
[54] *Ibid.*
[55] *Ibid.*
[56] See generally *Kilian*, *supra* note 27; *Genys*, *supra* note 42.
[57] Larry A DiMatteo et al, *International Sales Law: A Critical Analysis of CISG Jurisprudence* (New York: Cambridge University Press, 2005) at 3. The "homeward trend" was originally coined by John Honnold.
[58] Ferrari, *supra* note 18 at 20.

Reconsidered"[59], the author maintains that a homeward trend is inevitable when a uniform law is in question.[60] Furthermore, a domestic-based interpretation may actually promote the *CISG*'s "legitimacy and acceptability" during the course of time.[61] Ideally, an "autonomous interpretation of the *CISG* is sought, but a domestic-oriented interpretation of the *Convention* may at the very least provide for an applicable international sales of goods law, which is ultimately better than none.[62] Thus, an imperfect international sale of goods law that produces heterogeneous perspectives is more desirable than no *Convention on the International Sale of Goods*.[63]

The second school maintains that it is inconceivable to suggest the aforementioned.[64] The position is strongly supported by leading *CISG* author, Franco Ferrari. In his article entitled, "Homeward Trend and Lex Forism Despite Uniform Sales Law", he advocates that article 7 of the *CISG* be understood "to mean that the CISG is to be interpreted 'autonomously', not 'nationalistically', i.e. not in the light of domestic law, as difficult as this may be".[65] He furthermore refers to a decision by the Swiss District Court, which reasoned that opting for a "nationalistic approach" would not only lead to disparities, but equally "to forum shopping, which the CISG aims to reduce".[66] Mr Ferrari moreover notes that the domestic-based approach would also lead to the non-advancement of the application of the *CISG* since it stops the *Convention* from acting "as a neutral law"[67], that a homeward trend is not always distinguishable, thus causing business expenses to escalate, and that it promotes the application of domestic sales of goods law.[68]

Article 95: Reservation / Article 6: Opting Out

It is also worthwhile to take note that the United States has made an article 95 reservation, limiting the application of the *CISG*, which "excludes the Contracting State's

[59] Karen Halverson Cross, "Parol-Evidence Under the CISG: The "Homeward Trend" Reconsidered" (2007) 68 *Ohio St LJ* 133.
[60] *Ibid* at 138.
[61] *Ibid.*
[62] *Ibid* at 159.
[63] *Ibid*.
[64] Ferrari, *supra* note 18.
[65] *Ibid* at 17.
[66] *Ibid* at 18.
[67] *Ibid* at 21
[68] Ferrari, *supra* note 18.

obligation under public international law to apply the Convention in accordance with Article 1(1)(b)." [69] This results in the US finding the *CISG* to be applicable only in circumstances when both parties to a dispute are Contracting States to the *CISG* via article 1(1)(a) of the *CISG*.[70] This has equally been confirmed in the following cases: *Impuls v Psion-Teklogix*[71], *Prime Start v Maher Forest Product*[72], and *Princess d'Isenbourg et Cie Ltd v Kinder Caviar, Inc*.[73] It has been suggested that the US possibly made the original reservation in order to ward off the application of the *CISG* and to remain faithful to domestic law.[74] This may have further contributed to the homeward trend of interpreting the *CISG*, and the unawareness of the Convention and its international application.

The aforementioned reasoning would make the integration of *CISG* principles into article 2 of the *UCC* appear troublesome. However, the passage of time has revealed that because more States are now becoming Contracting Parties to the *CISG* they are bound to the *Convention* under article 1(1)(a) — and the effects of an article 95 reservation are ultimately diminishing.[75] As a result, having resort to article 1(1)(b) of the *CISG* will eventually become an obsolete tactic.[76] Thus, the US' article 95 *CISG* reservation would be sufficient to justify ignoring the international application and uniformity of the *CISG*.

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[69] Art 95 of the *CISG* states, "Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.
Article 1 of the CISG states, "(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State. (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract. (3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention."3 *supra* note 9; see especially Ulrich G Schroeter, University of Mannheim, Germany, Rapporteur, *CISG-AC Opinion No. 15, Reservations under Articles 95 and 96 CISG* (adopted by the CISG Advisory Council following its 18th meeting, in Beijing, China on October 21-22, 2013).
[70] *Ibid.*
[71] US District Court [SD Florida], 22 November 2002, 234 F.Supp.2d 1267, 1272.
[72] 17 July 2006, *Internationales Handelsrecht* (2006), 259 at 260.
[73] US District Court [ED Kentucky], 22 February 2011.
[74] Ulrich G Schroeter, University of Mannheim, Germany, Rapporteur, *CISG-AC Opinion No 15, Reservations under Articles 95 and 96 CISG* (adopted by the CISG Advisory Council following its 18th meeting, in Beijing, China on October 21-22, 2013.
[75] *Ibid* at 5.
[76] *Ibid.*

Lastly, in keeping with the essence of the *Convention*, which assures freedom of contract, the application of the *CISG* is not a legal obligation on the parties: under article 6 of the *CISG*[77] buyers and sellers in international commercial transactions can fully or partially "opt out" of the Convention.[78] In *Orbisphere Corp v United States*[79], the following observation was made, "Generally, the CISG governs sales contracts between parties from different signatory countries. However, the Convention makes clear that the parties may by contract choose to be bound by a source of law other than the CISG, such as the Uniform Commercial Code…"[80]

Yet merely inserting a choice of law clause such as a specific US State law is not sufficient and will not automatically result in excluding the *Convention*'onapplication.[81] It is of paramount importance that legal practitioners and business people know that in addition to inserting a choice of law clause, they must explicitly state that the *Convention* does not apply.[82] Conversely, a choice of law clause in an international sale of goods contract that refers to the laws of a Contracting or Signatory State will effectively apply to the commercial transaction.[83] Many arbitral tribunals and courts – both nationally and internationally – have held that this reasoning stems from the fact that Contracting or Signatory States upon ratification of the Convention incorporated the *CISG*'s rules into their domestic law on the governance of international contracts for the sale of goods.[84]

In *Asante Technologies, Inc v PMC-Sierra, Inc*,[85] the U.S. District Court for the northern District of California […] made clear that a choice of law clause which merely specifics the law of a U.S. State or the general law of a Contracting State is insufficient to exclude the application of the Convention."[86] Both the buyer and the seller were Delaware corporations; the former's principal place of business was Santa Clara Country,

[77] Art 6 of the *CISG* states, "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.": *supra* note 9.
[78] Thomas J Drago & Alan F Zoccolillo, "Be Explicit: Drafting Choice of Law Clauses in International Sales of Goods Contracts" (2002) *The Metropolitan Corporate Counsel* at 2.
[79] 726 F Supp 1344 (US Court Int'l Trade 1989).
[80] *Ibid.*
[81] *Drago & Zoccolillo, supra* note 78.
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*
[85] 164 F Supp 2d 1142 (ND Cal 2001) [*Asante Technologies*].
[86] *Ibid*; Drago *& Zoccolillo, supra* note 78.

California, while the defendant/seller's was British Columbia, Canada.[87] The buyer argued that the *CISG* did not apply because the parties, while both being in jurisdictions that had ratified the Convention, had expressively "opted out" of the *CISG*'s application by inserting choice of law clauses in the "Terms and Conditions".[88] The defendant, in return, argued that the terms of the contract were controlled by another document, the "Seller's Terms and Conditions".[89] Equally, the defendant submitted to the Court that merely inserting a choice of law clause indicating a certain jurisdiction was insufficient to be deemed as "opting out" of the Convention, and that an obvious exclusion was a requirement.[90] The courts agreed with the defendant, stating the following:

> Although selection of a particular choice of law, such as 'the California Commercial Code' or the 'Uniform Commercial Code' could amount to an implied exclusion of the CISG, the choice of law clauses at issue here do not evince a clear intent to opt out of the CISG. For example, [seller's] choice of applicable law adopts the law of British Columbia, and it is undisputed that the CISG is the law of British Columbia [citation omitted]. Furthermore, even [buyer's] choice of applicable law generally adopts the 'laws of' the State of California, and California is bound by the Supremacy Clause to the treaties of the United States. Thus, under general California law, the CISG is applicable to contracts where the contracting parties are from different countries that have adopted the CISG. In the absence of clear language indicating that both contracting parties intended to opt out of the CISG […] the choice of law provisions [do not] preclude the applicability of the CISG.[91]

In a much later case, entitled *Easom Automation Systems, Inc v Thyssenkrupp Fabco, Corp*,[92] the Court held that where a contract is governed by two parties that are both from Contracting States and a choice of law clause does not expressly exclude the *CISG*'s applicability the *CISG* will prevail, even if this was not the intention of the parties to the contract.[93]

[87] *Ibid.*
[88] *Ibid.*
[89] *Ibid.*
[90] *Ibid.*
[91] *Ibid.*
[92] US Dist LEXIS 72461 ED Mich (2007).
[93] *Ibid.*

It has been suggested that in the United States, it is not uncommon for "parties to transnational sales contracts [to] routinely opt out of the CISG".[94] In addition, the US tendency to opt-out is presumably attributed to the fact that the *Convention* is perceived as being a "novelty", because it includes unfamiliar law that is different from domestic law.[95] This likely causes the American judiciary to turn to a homeward interpretation in disputes relating to international sales of goods.

As explained, by leading *CISG* expert Jan Smits, there is a twofold reason for opting-out of the *Convention*: those who are familiar with the *CISG* believe that there is "too much room for varying interpretations",[96] while those unfamiliar with it are unwilling to provide both "time and money" towards acquiring *CISG* knowledge.[97]

At first glance, the implementation of *CSIG* principles into article 2 of the *UCC* could perhaps be menacing, for it could promote an interpretation based on a nationalistic method. But, as suggested, "the homeward trend is akin to the 'natural' tendency of those interpreting the CISG to promote the domestic law in which the interpreter was trained (and with which he or she is likely most familiar) onto the international provisions of the Convention".[98] Thus, if knowledge and awareness of the *CISG* would start in the early formative years of legal professionals – during law school – the *Convention* would quite possibility be approached as being autonomous from domestic sale of goods law.[99] As a result, merging the provisions of the *CISG* within the *UCC* would not necessarily remove its international character, in the sense that international sale of goods transactions would be relevant. For there should ultimately be no confusion between "the need for uniformity with the interests of parties or the wish to promote international trade: the one does not follow the other."[100]

[94] Cross, *supra* note 59 at 135.
[95] Steven Walt, "Novelty and the Risks of Uniform Sales Law", (1999) 39 *Va J Int'l L* 671 at 687-88; *ibid.*
[96] Jan Smits, "Problems of Uniform Sales Law –Why the CISG May Not Promote International Trade", *Working Paper, Maastricht European Private Law Institute* (2013) at 8.
[97] *Ibid*.
[98] Ferrari, *supra* note 18 at 23.
[99] *Ibid* at 42.
[100] Smits, *supra* note 96 at 8.

1.2 Achieving One Legal Result in a Dispute

In a legal dispute, uncertainty as to which sale of goods law should apply can often create the possibility of different legal outcomes. One must also consider the fact that by having one commercial law for national sales and another for international sales a party to a case may obtain a benefit to which that they would not be entitled. Furthermore, improper interpretation of an applicable law would also create adverse effects for a party who might have been entitled to win. The following cases demonstrate these conflicts.

In *GPL Treatment, Ltd v Louisiana-Pacific Corp*[101], the parties comprised a Canadian seller and an American buyer.[102] The issue was whether the *Statute of Frauds* was satisfied in regards to the sales contract of wood products.[103] Despite the fact that the case was not decided on the application of the *CISG*, but on the *UCC*, the plaintiff did recognize the benefit that she would have gained by asserting the *CISG* to enforce her oral contract.[104] Both the trial court and the majority of the Court of Appeals ruled in favor for the application of Oregon's *Uniform Commercial Code* and application of the *Statute of Frauds.*[105] The Court based its reasoning on a procedural instead of a substantive point of law.[106] Nevertheless, it was clearly evident that the *CISG* was the applicable law because the two parties were from different Contracting States. In their remarks on this case, Goldsweig & Lee said the following:

> A U.S. court case, *GPL Treatment Ltd. v. Lousiana-Pacific Corp*., serves as a warning to attorneys that ignorance of CISG is no excuse. GPL Treatment involved the sale of wood products by a Canadian seller to a U.S. buyer. Although the dispute was resolved under U.S. domestic law, the governing law of the contract should have been the CISG since both Canada and the United States are Contracting States to CISG. Apparently, the plaintiff's attorney was unaware that CISG governed the contract until it was too late to amend the pleadings. The court ruled that the plaintiff's attempt to raise the CISG issue was untimely and therefore waived any cause of action under CISG. The material issue in this case was defendant's statute of frauds defense. The UCC requires a writing for sale of goods contracts over US $500, while CISG specifically states that a contract and sale need not be

[101] 894 P 2d 470 (Or Ct App 1995); 914 P 2d 682 (Or 1996) [*GPL Treatment*].
[102] *Ibid.*
[103] *Ibid.*
[104] *Ibid.*
[105] *Ibid.*
[106] *Ibid.*

> concluded or evidenced by writing. If the plaintiff's attorney had recognized the applicability of CISG, he might have won the case.[107]

In *United Technologies International Inc Pratt & Whitney Commercial Engine Business v Malev Hungarian Airlines*,[108] the issue was whether a valid contract existed.[109] The plaintiff/seller was an American manufacturer of aircraft engines and the defendant/buyer was a Hungarian manufacturer of Tupolev aircrafts.[110] The plaintiff had made two different offers for two various aircraft engines to the defendant without quoting a definite price; nonetheless, the buyer concluded an order.[111] Under the Metropolitan Court of Budapest, the plaintiff filed for a declaratory judgment in order to establish that a contract existed between the two parties despite the fact that the issue concerned an open price proposal.[112] The court of first instance concluded that a valid contract existed based on the fact that the offer not only specified the goods, but that it equally referred to the price and quantity.[113] On appeal, the Hungarian Supreme Court held that no contract existed between the plaintiff and the defendant due to article 14[114] and 55[115] of the *CISG*. , The Court determined that under article 14 of the *CISG* no contract existed due to the fact that the price was not sufficiently indicated.[116] Thus, the contract failed because the offer was indefinite.[117]

It remains to be noted that the courts perhaps actually failed to properly interpret the *CISG* in the *Malev*[118] case. For, in accordance with article 8 of the *Convention*[119], the

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[107] Cited in Albert H Kritzer, "Editorial Remarks for *GPL Treatment Ltd. v. Louisiana-Pacific Corp*." online: *Pace Law School, Institute of International Commercial Law, CISG Database*, available at <cisgw3.law.pace.edu/cases/950412u1.html>; s 2-201 of the *UCC*, *supra* note 2; a revision of the Code would require a written contract of the sale of goods over $5000.00 U.S. but none of the States have adopted this revision. See David Twomey & Marianne Jennings, *Business Law; Principles for Today's Commercial Environment*, (Stamford Ct: Cengage Learning, 2013) at 427.
[108] Legfelsbb Birosag Gf.I.31, 349/1992/9 [*Malev Hungarian Airlines*].
[109] *Ibid.*
[110] *Ibid.*
[111] *Ibid.*
[112] *Ibid.*
[113] *Ibid.*
[114] *Supra* note 43.
[115] *Supra* note 45.
[116] *Malev Hungarian Airlines*, *supra* note 108; Kilian, s*upra* note 27 at 239.
[117] *Ibid.*
[118] *Malev Hungarian Airlines*, *supra* note 108.
[119] Art 8 of the *CISG* states, "(1) For the purposes of this Convention 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

intentions of the parties to be bound to a contract are fundamental aspects that must be taken into consideration in determining whether a contract exists or not.[120] These intentions, although addressed by the Court, were nevertheless not correctly evaluated in the *Malev*[121] case.

Author Monica Kilian discussed the aforementioned decision, drawing attention to section 2 of the *UCC*, which states that "[e]ven though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract, and there is a reasonably certain basis for giving an appropriate remedy[122] […] [t]he parties if they so intend can conclude a contract for the sale of goods even though the price is not settled."[123] In addition, Paul Amato asserted that under the *CISG*'s perspective open-priced contracts are usually, but not always, interpreted under local legislation, and that, "sometimes CISG's provisions will align with a nation's legal tradition, and sometimes they will not."[124] If the *Convention* follows the nation's legal tradition, a different decision would have been rendered, for both an American court and a German court would have held that regardless of the fact that a fixed price had been omitted, a valid sale of goods contract existed in terms of the *UCC*.[125]

If *CISG* principles were integrated into article 2 of the *UCC* the concerned parties and the courts would not have to wrestle with the possibility of producing differing outcomes. A unification of legal solutions would be created especially in relation to the formation and validity of sales of goods contracts.

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unaware what that intent was. (2) If the preceding paragraph is not applicable, statements made by and other conduct of parties are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. (3) In determining the intent of a party 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."1 *supra* note 9.

[120] *Ibid.*

[121] *Malev Hungarian Airlines*, *supra* note 108.

[122] Kilian, *supra* note 27 at 239; s 2-204(3) *UCC*, *supra* note 2.

[123] *Ibid*; s 2-305(1) *UCC*, *supra* note 2.

[124] Paul Amato, "U.N. Convention on Contracts for the International Sale of Goods – The Open Price Term and Uniform Application: An Early Interpretation by the Hungarian Courts" (1993) 13 *JL & COM* 1, cited in Kilian, *supra* note 27 at 239.

[125] *Ibid.*

1.3 Obtaining Legal and Economical Balance

As demonstrated throughout this paper, an increasing number of individuals are concluding commercial transactions involving both international and national territories. The integration of *CISG* principals into national commercial law would help to achieve not only a harmonization of legal solutions, but also an economical balance. First of all, article 2 of the *UCC* is a highly respected and fairly well known national US commercial law. Secondly, as previously discussed, one must take into consideration that the *CISG* is considered as foreign legislation in the United States. An integration of commercial law principles would avoid confusion as to which legal regime should be applied and would preserve economic balance in the business world. We are all aware that the business world is highly paced, with money and time being crucial factors. We must consider that due to extensive commercial litigation, the courts systems are equally concerned with these same factors. Such an integration of rules might bring forth a decrease in the costs and time associated with both the preparation of a sale of goods contract and commercial legal disputes. As a result, harmonization of commercial contract laws would facilitate the expanding world of cross-border sales.

It is also important that there would be a significant decrease in the number of uncooperative legal jurisdictions who refuse to apply the CISG's principles. Courts basically set up their precedents on "a first come, first serve principle"; however, the legal system tends to avoid scenarios where "foreign courts establish authority on issues that domestic courts would instinctively decide differently".[126] This concept was previously demonstrated in *United Technologies International Inc Pratt & Whitney Commercial Engine Business v Malev Hungarian Airlines.*[127]

However, it is reassuring to know that exceptions to this uncooperative trend are increasing. In *Medical Marketing International, Inc v Internazionale Medico Scientifica, SRL*[128], American courts closely inspected "foreign CISG case law and considered it

[126] Kilian, *supra* note 27 at 240.
[127] *Malev*, *supra* note 108; *ibid.*
[128] No 99-0380, 1999 US Dist LEXIS 7380 (ED La May 17, 1999) [*Internazionale Medico Scientifica, SRL*].

authoritative."[129] In this case the plaintiff was a Louisiana marketing corporation and the defendant was an Italian manufacturer of radiology materials.[130] The defendant gave the plaintiff exclusive marketing rights in relation to mammography devices.[131] The argument centered on who was to assume the burden of complying with US governmental safety regulations standards.[132] The case was submitted to arbitration.[133] The arbitrators having found the defendant guilty of delivering devices that were not in conformance with US governmental safety standards, decided in favor of the plaintiff.[134] The plaintiff based his argument on the *Federal Arbitration Act* rather than the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* in order to seek legal ratification of the arbitrator's awards.[135] The defendant argued that the award should be set aside.[136] According to the defendant, the arbitrators erred by overlooking the *CISG*'s application, having failed to rule in accordance with a German Supreme Court case.[137] The District Court held that the arbitration court had considered the German case and that the issue at hand constituted an exception that had been tailored by the same German Supreme Court case[138]. It concluded that the arbitration court had acted in conformance with its powers.[139]

In his commentary on this case, Peter Schlechtriem[140], observed that the decision was astounding because the court approached the foreign case as "precedent", and "treated the CISG as a kind of international common law."[141]

Thus, knowledge of the Convention is crucial insofar as preservation of economical balance and growth is concerned,. Indeed, if we were to calculate the exporting and

[129] Kilian, *supra* note 27 at 241.
[130] *Internazionale Medico Scientifica, SRL*, *supra* note 128.
[131] *Ibid.*
[132] *Ibid.*
[133] *Ibid.*
[134] *Ibid.*
[135] *Ibid.*
[136] *Ibid.*
[137] *Ibid.*
[138] *Ibid.*
[139] *Ibid.*
[140] *Internazionale Medico Scientifica, SRL*, *supra* note 128.
[141] Peter Schlechtriem, "Conformity of the Goods and Standards Established by Public Law Treatment of Foreign Court Decision as Precedent *Medical Marketing International, Inc. v. Internazionale Medico Scientifica, S.R.L.* District Court, Eastern District of Louisiana, 17 May 1999" (case comment).

importing revenues for Contracting States and their trading partners[142], commercial lawyers and business people would quickly understand how important knowledge and application of the *CISG* principles are, as well as the fact that synergy between the *Convention* and article 2 of the *UCC* would greatly benefit the trading industry.

1.4 Avoiding Malpractice

When lawyers are representing or advising clients regarding commercial sale of goods transactions they have a duty to offer their clients optimal legal services. This is an ethical and legal obligation under lawyers' respective codes of professional conduct and responsibility. Failure to apply the appropriate law to the transaction leads to undesirable results. The following cases demonstrate the consequences of lawyers who did not properly represent their clients in sale of goods conflicts.

In a case entitled *China Nat'l Metal Products Import/Export Co v Apex Digital Inc,*[143] the lawyers submitted to the District Court that the *CISG* should apply to the case at hand.[144] The case was pleaded before the Court on the basis that California's *Uniform Commercial Code* was the law of application.[145] The parties to the case were Apex Digital, a United States importer of electronic goods, and China National Metal Products, a Chinese exporter.[146] Both had entered into a sale of goods contract for DVD players.[147] A dispute arose regarding the following issues: failure to deliver goods in conformance with the order, the DVD players were defective, failure to properly adhere to intellectual property royalties for technology employed in the DVD players, and the non-rendering of payments.[148] Each contract that the parties had entered into contained an arbitration clause; as a result the issues were pending arbitration.[149] Apex refused to pay its invoices based on the argument that the goods delivered did not conform and consequently it had

[142] The trading partner also being a Contracting State.
[143] *China Nat'l Metal Products Import/Export Co v Apex Digital Inc* 141 F Supp 2d 1013, 1022, n6 (S D Cal 2001) [*Apex Digital Inc*].
[144] *Ibid*.
[145] *Ibid*.
[146] *Ibid*.
[147] *Ibid*.
[148] *Ibid*.
[149] *Ibid*.

to reimburse its dissatisfied clients, namely Circuit City.[150] During the same period, China National filed for an attachment order against Apex's property in the California Court.[151] Apex raised an objection on the grounds that the California Court did not have proper jurisdiction to grant such a writ.[152] The Appeal Court confirmed the District Court's decision that it did have proper jurisdiction to grant an order of attachment.[153] The Court confirmed that California's *Uniform Commercial Code* applied to the US and China sale transactions, rendering its decision in reliance upon a case named *Interpool Ltd v Char Yigh Marine (Panama) SA*[154], which had held that "in the absence of argument from either party (including demonstrating how foreign law would apply) […] California law is the default rule of law to be applied." [155]

Reference was made earlier in this article to *GPL Treatment Ltd v Lousiana-Pacific Corp*,[156] where the parties were Canadian manufactures and a US corporation. The issue was whether a valid contract existed since there was no written agreement to satisfy the *Statute of Frauds* requirement as contained in Oregon's *Uniform Commercial Code*.[157] The majority of the Court of Appeals judges erred in concluding that the *Oregon Commercial Code* applied to the case at hand. Without a doubt the *CISG* was the correct law of application, yet only one minority judge reasoned thus in a tiny footnote.[158] This judge was correct in his determination of the relevant and appropriate law that should have applied.[159]

What happens, therefore, in a sale of goods debate where the loser should clearly be the winner, but loses due to the misapplication or ignorance of the *CISG*? Many CISG experts, including Harry Flechtner, have warned of legal consequences linked to lawyers who are ignorant of the *Convention*.[160] The main consequence of the improper application

[150] *Ibid.*
[151] *Ibid*.
[152] *Ibid*.
[153] *Ibid*.
[154] *Interpool Ltd v Char Yigh Marine (Panama) SA*, 890 F2d 1453 (9th Cir 1989).
[155] *Apex Digital*, *supra* note 143.
[156] *GPL Treatment*, *supra* note 101.
[157] *Ibid.*
[158] *Ibid*; Harry M Flechtner, "Another CISG Case in the U.S. Courts: Pitfalls for the Practitioners and the Potential for Regionalized Interpretations"(1995) 15 *J L Com* 127.
[159] *Ibid.*
[160] Flechtner, *supra* note 158.

of a commercial sales law and its effects on the parties is that inappropriate laws are pleaded and appropriate laws are ignored. This will quite possibly affect cross-border trade and sustainable business growth in the long term.. The aspect that is most crucial to remember, is that the *CISG* focuses directly on and is in touch with the expectations of the business community. Without this Convention there would be more legal disputes and increasing doubts on how to proceed in the international legal field since various laws would all seek to control the issues.[161]

2. APPLICATION OF THE *CISG* AND ARTICLE 2 OF THE *UCC*

Part 1 of this article has highlighted some of the major reasons why the *CISG* should be implemented into American sale of goods law. Part 2 will present the applications of such laws, and the most prominent articles of the *CISG* that should be merged with article 2 of the *UCC*.

2.1 When Do They Apply?

Article 2 of the *UCC* was established to aid interstate national commerce, by making it as fluid as possible. In international sale of goods transactions the *CISG* applies and not article 2 of the UCC. Thus, the *CISG* is indeed a "contract or binding agreement between nations".[162]

As discussed throughout this article, the *Convention* dictates rules for conducting international commercial contracts. Thus, experts in this area often refer to the *CISG* as the "international counterpart to the Uniform Commercial Code".[163] When parties have places of businesses in Contracting or Signatory States, meaning countries that have ratified the *CISG*, the *CISG* will prevail as law unless the parties have agreed to derogate from the application of the *Convention*. Although determining the "place of business" might present a complex situation, for instance where a business has several branches or

[161] John P McMahon, "Applying the CISG, Guides for Business Managers and Counsel", online: *Pace Law School, Institute of International Commercial Law, CISG Database*, available at <www.cisg.law.pace.edu/cisg/guides.html> .
[162] *Ibid.*
[163] V Susanne Cook, "CISG: From the Perspective of the Practitioner" (1998) 17 *J L Com* 343 at 345, online: *Pace Law School, Institute of International Commercial Law, CISG Database*, available at <www.cisg.law.pace.edu/cisg/biblio/cook.html>.

headquarters that are situated in different locations, the decisive criterion will be "that which has the closest relationship to the contract and its performance".[164] It is also very important to note that the *CISG* applies to the sale of goods when both the seller and the buyer are domestic/national companies.[165] The criterion for determining whether it applies is whether their primary places of business are located in different Signatory States, as is demonstrated in *Asante Technologies Inc. v PMC-Sierra Inc.*[166] In this case, the buyer sued the seller for breach of a sale of goods contract and for breach of warranties of electronic components.[167] The seller moved the action from the Superior Court for the State Court of California to a Federal District Court, asserting the issue of federal jurisdiction; the seller pleaded that the *CISG* was the appropriate law for purposes of the case at hand.[168] In return, the buyer filed a motion to remand the case to the Superior Court of California, arguing the Court's lack of substantive jurisdiction over the case.[169] The District Court held that it had jurisdiction to hear the case and that the *CISG* applied to the dispute.[170] The interesting aspect of this case is the fact that the buyer and the seller were two companies that had both been incorporated in the US State of Delaware.[171] Both the buyer and the seller had places of business in several locations.[172] The buyer had its primary place of business in California and the seller's primary place of business was situated in British Columbia.[173] Thus the *CISG* could find application on the basis that the parties had places of business in different Contracting States "that held the closest relationship to the contract and its performance".[174]

[164] Art 10 of the *CISG* states, "For the purposes of this Convention: (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract; (b) if a party does not have a place of business, reference is to be made to his habitual residence."o *supra* note 9.
[165] *Asante Technologies*, *supra* note 85; McMahon, *supra* note 161.
[166] *Asante Technologies*, *supra* note 85.
[167] *Ibid.*
[168] *Ibid.*
[169] *Ibid.*
[170] *Ibid.*
[171] *Asante Technologies*, *supra* note 85; McMahon, *supra* note 161.
[172] *Asante Technologies*, *supra* note 85.
[173] *Ibid.*
[174] *Ibid*; *supra* note 163.

2.2 What Do the Commercial Laws Apply to?

Both the *CISG* and article 2 of the UCC apply to the sale of goods and not to services.[175] The courts have determined that although most sales provide for both goods and services, one must look at the dominant part of the sales contract, and if it consists of the sales of goods, then either the *CISG* or article 2 of the *UCC* will apply. The courts apply the preponderant purpose test in their determination.[176] The same test is used under the *CISG* and the *UCC*.[177] The preponderant purpose test was demonstrated in *Lohman v Wagner*,[178] a case which involved a sale of goods contract governed by article 2 of the UCC.[179] The contract dealt with the sale of wiener pigs still attached to their mother.[180] The courts decided that this was a contract of goods as opposed to a contract of services.[181] They reasoned that even though the services provided were extensive, nevertheless they were incidental to the sale of wiener pigs.[182]

Goods *CISG* are undefined under the, but the *CISG* finds no application where such sales of goods pertain to "personal, family, or household use".[183] However, the *Convention* provides for an exception: if the seller did not know or could have not known that the buyer purchased the goods for such reasons then the *CISG* will apply.[184] In addition, Article 4(b) of the *CISG* mentions that the Convention does not apply to "the effect which the contract may have on the property in the goods sold".[185] The fact that the

[175] *UCC*, *supra* note 2: *CISG*, *supra* note 9.
[176] *Lohman v. Wagner* 842 A2d 1042 54 UCC (md 2004) [*Lohman*]. Art 3 of the *CISG* states, "(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production. (2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.": *CISG*, *supra* note 9.
[177] *Ibid.*
[178] *Lohman*, *supra* note 176.
[179] *Ibid.*
[180] *Ibid.*
[181] *Ibid.*
[182] *Ibid.*
[183] Art 2 of the *CISG* states, "This Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use; (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; (f) of electricity."h *supra* note 9.
[184] *Ibid.*
[185] See especially *CISG*, *supra* note 9.

Convention is inapplicable "to sales of stocks, shares, investments securities, negotiable instruments or money […] of ships, vessels, hovercrafts, or aircrafts [and] of electricity"[186] is also important.

3. INCORPORATING THE *CISG*'S RULES PERTAINING TO THE STATUTE OF FRAUDS AND THE PAROL EVIDENCE RULE WITH ARTICLE 2 OF THE *UCC*

Two of the most pertinent principles of the *Convention* that should be implemented into article 2 of the *UCC* are the rules regarding the *Statue of Frauds* and Parol Evidence.

Neither the *Statute of Frauds*, nor the Parol Evidence Rule is a binding requirement or formality under the *CISG*.[187] The reasoning behind this exclusion is that the *CISG* features as its main objective "freedom of contract".[188] The *Convention* was designed to facilitate international commerce, by doing away with legal barriers and rigid formalities, and as a result, it offers a very practical approach to contracts.[189]

Regarding the freedom of contract principle, the *Convention* removed one of the major legal barriers in national commercial contracts, namely the formalities required under the *Statute of Frauds* as found in article 2-201 of the *UCC*.[190] Under the *CISG*, a contract for the sale of goods is not required to adhere to any particular form, and witnesses may confirm the existence of a contract.[191] Therefore, in order to simplify international business, article 11 of the *CISG* expressly stipulates that a "contract of sale need not be concluded in or evidenced by writing".[192] Thus no special prerequisites exist in relation to form, as a result this eliminates a second legal barrier, namely the Parol

[186] *Supra* note 183.
[187] *CISG*, *supra* note 9.
[188] McMahon, *supra* note 161.
[189] *Ibid.*
[190] Further discussions of s 2-201 of the *UCC* can be found below; *UCC*, *supra* note 2; McMahon, *supra* note 161.
[191] *CISG*, *supra* note 9; McMahon, *supra* note 161.
[192] Art 11 of the *CISG* states, "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses."a *supra* note 9.

Evidence Rule.[193] As we will see, all forms of evidence are admissible under the *Convention*, and the Parol Evidence Rule does not apply.[194]

3.1 No Contract Formalities: The *Statute of Frauds*

In the United States, article 2 (201) of the UCC and the *Statue of Frauds* requirement hold that all sale of goods contracts consisting in a value of $500.00 or more must be in written form and signed by the responsible party.[195]

It is important to understand the reason why the United States still adheres to the requirement imposed by the *Statute of Frauds*. The *Statute* was introduced in 1677 as "*An Act for Prevention of Frauds and Perjuries*"[196] During this same period, evidence law was just making its debut. At the time certain documents, mostly deeds, thus had to be in writing, largely to avoid evidence problems, considering "that procedural rules did not allow the parties to testify".[197] In the US the default rule is for the courts to bar oral testimony that contradicts or modifies the written term of a contract.

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[193] Richard Hyland, Rutgers Law School, Camden, NJ, USA, Rapporteur, *CISG-AC Opinion no 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG* (23 October 2004).
[194] *Ibid.*
[195] *UCC*, *supra* note 2; S 2-201 "Formal Requirements" *Statute of Frauds* of the UCC, states, "Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing. (2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received. (3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable (a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or (b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or (c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2-606)."
[196] SM Waddams, MJ Trebilcock & MA Waldron, *Cases and Materials on Contracts*, 2nd ed, (Toronto: Emond Montgomery Publications Limited) at 873.
[197] SM Waddams, *The Law of Contracts*, 4th ed, (Toronto: Canada Law Book Inc, 1999) at 158.

However, under the *CISG*, the *Statute of Frauds* is not a requirement for the formation or modification of a sale of goods contract.[198] Basically, the *Convention* will enforce an oral sale of goods contract. Interestingly, the *UCC* will also enforce oral sales contracts. US courts will in several ways conclude that a sale of goods contract exists in the absence of evidence of a written contract.[199] The first method is through Part Performance: a verbal contract to a value of $500.00 or more will be considered enforceable by the courts if part performance was executed.[200] Under the UCC, "the oral sales contract will be enforceable to the extent of the plaintiff's performance".[201] This extent is measured as follows: where the plaintiff is the seller and he delivered goods to the defendant/buyer, the goods that were accepted by the buyer; or where the plaintiff being the buyer made payment to the seller for goods, the goods that were not delivered.[202] A verbal sales contract may also be enforced through Judicial Admission, where the defendant acknowledges in his pleadings that the parties had a verbal agreement. [203] Thirdly, the Merchant Memorandum[204] is one of the most popular methods used. Where the parties to the sale contract are two merchants, a verbal sale contract will be enforceable if one of the contracting merchant parties confirms the verbal contract's existence in writing within a reasonable time frame.[205] The other contracting merchant party may object to it within a ten-day period of reception of the written merchant memorandum, failing which the contract will be enforceable.[206] It is very important to take note that under the *UCC* this memorandum must include the quantity. [207] Where all legal requirements have been respected, the Statute of Frauds cannot find application. The application of the Merchant Memorandum Rule was demonstrated in *GPL Treatment, Ltd v Louisiana Pacific-Corporation*[208]. Before the court of appeals of

[198] *Supra* note 192. See *CISG*, *supra* note 9.
[199] *Supra* note 195.
[200] *Ibid.*
[201] *Ibid*.
[202] *Ibid.*
[203] *Ibid.*
[204] *Ibid*.
[205] *Ibid.*
[206] *Ibid.*
[207] *Ibid.*
[208] *GPL Treatment, supra* note 101 [Louisiana Pacific-Corporation is hereinafter referred to as "L-P"].

Oregon, Louisiana Pacific Corporation[209] argued that the trial court had erred in granting a judgment in favor of the seller.[210] The judgment allowed for the recovery of lost profits from the sale of eighty-eight truckloads of cedar shakes based on alleged agreements.[211] L-P argued that the alleged agreement did not respect the requirement of the *Statute of Frauds* that it be executed in writing, which is found in Oregon's *Uniform Commercial Code*.[212] It furthermore pleaded that the confirmation orders which the plaintiff had sent were not satisfactory to qualify as a "Merchant's Memorandum" under article 2 of the *UCC* and did not constitute agreements between the parties.[213] However, L-P acknowledged that the alleged agreement contained all the relevant provisions as required by a confirmation order, but argued that it did not count as a true agreement because the seller had ordered the buyer to sign the confirmation and return it to the seller.[214] The buyer was of the view that the seller specifically demonstrated its intention to be bound by the agreement only after the buyer had approved the terms of the contract.[215] The court held that a sale contract did indeed come into existence.[216]

We recall that in this case, the seller at the trial court had tried to invoke the application of the *CISG* to the issues at hand, but that the Courts ruled it to be untimely;[217] the majority of the court rendered their reasoning in terms of the *Uniform Commercial Code of Oregon*.[218] Surprisingly enough, had the courts rendered their decision in terms of the *CISG*, the result would have been the same: a finding that an

[209] *Ibid*.
[210] *Ibid.*
[211] *Ibid.*
[212] *Ibid*. *ORS* s 72.2010 states, "(l) Except as otherwise provided in this section a contract for the sale of goods for the price of $ 500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by the authorized agent or broker of the party. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this subsection beyond the quantity of goods shown in such writing. (2) Between merchants, if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) of this section against such party unless written notice of objection to its contents is given within 10 days after it is received."
[213] *GPL Treatment, supra* note 101.
[214] *Ibid.*
[215] *Ibid.*
[216] *Ibid.*
[217] *Ibid.*
[218] *Ibid.*

enforceable contract existed. Judge Leeson, the dissenting judge in this case, made the following comments in relation to the *CISG* and its correct application to the present case:

> I would, however, address plaintiffs' cross-assignment that the trial court erred in refusing to apply the United Nations Convention on Contracts for the International Sale of Goods (CISG), 15 U.S.C.A. App. (Supp. 1994), instead of the U.C.C. Article 11 of the CISG does not require a contract to be 'evidenced by writing' and thus, would defeat L-P's statute of frauds defense if the trial court abused its discretion under ORCP 23 B [governing the amendment of pleadings to conform to the evidence] in ruling that plaintiffs' attempt to raise the CISG was untimely and that they had waived reliance on that theory.[219]

As noted, Judge Leeson was correct in assuming that the *CISG* should have applied to this case.[220] The parties were both from different Contracting States, and had never made an article 96 declaration in terms of the *CISG*, which would have excluded the application of article 11.[221] An article 96 declaration under the *CISG* would have required the parties to conclude their contract in writing. Thus, in the *GPL Treatment* case, [222] the majority erred in its selection of the appropriate law to be applied. Had the majority applied the appropriate law in interpreting the sale of goods transaction, they would have found that under the *Convention*, a contract of sale need not be concluded in or be evidenced by writing, unless article 12 of the *CISG*[223] applies, i.e. it constitutes an exception to the written contract requirement under the *Statute of Frauds*, or, as previously mentioned, in terms of an article 96 declaration under the *CISG*.[224]

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[219] *Ibid.*
[220] *Ibid.*
[221] Art 96 of the *CISG* states that: "A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State." *supra* note 9.
[222] *GPL Treatment*, *supra* note 101.
[223] Art 12 of the *CISG* states, "Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.": *supra* note 9."
[224] *Supra* note 221.

If an article 96 declaration of the CISG is made[225] article 11 will not apply.[226] The ratifying countries may make such a declaration and may in return request that the *Statute of Fraud'*s formality of a contract in writing be required. Two interpretations are possible where a State seeks to retain this formality. The first is as follows: for the State that desires to see the *Statute of Frauds* applied, the request will be effective in all contract disputes along with the *CISG* regulations.[227] The second interpretation is that where one makes an article 96 declaration under the *CISG*[228], one must turn to private international law and verify to see if it favours a State who made the declaration or its opposite.[229] The United States is not one of the States that decided to make a declaration under article 96 of the *CISG*.[230] In deciding not to do so, the US perhaps took into consideration the importance of maintaining the efficiency of international trade, and possibly found that the respect of informal contracts was of paramount importance in ensuring quick international business transactions. Therefore, when a party is concluding international sales contracts with the United States it is very important to note that the US party will not be subject to the *Statute of Frauds* requirement. This means that asserting the *Statute of Frauds* requirement will not raise a vital defence.

Finally, under the Specially Manufactured Goods theory, a contract will exist despite the fact that it is not in writing due to the impossibility of mitigating damages.[231] Sale contracts involving specially manufactured goods pose vital conditions: the facts must show that the goods were made for the buyer, that the seller made a substantial start with or commitment for their procurement, and that the goods are not suitable for re-sale.[232] Once these element have been proved, the *Statute of Frauds* will not be applicable and the verbal sales contract will be enforceable.[233]

[225] *Ibid*.
[226] *Supra* note 192.
[227] Louis F Del Duca, "Implementation of Contract Formation Statute of Frauds, Parol Evidence, and Battle of Forms CISG Provisions in Civil and Common Law Countries" (2005) 25 *J L Com* 133.
[228] *Supra* note 183.
[229] *Del Duca, supra* note 227.
[230] *Supra* note 69.
[231] *Supra* note 195.
[232] *Ibid.*
[233] *Ibid.*

Thus, if the national courts are presently enforcing non-written contracts in relation to domestic sale of goods contracts, are we not better off to integrate the *CISG* principle into the *UCC,* and to eliminate the uncertainty associated with sale of goods transactions and the *Statue of Frauds* requirement?

3.2 *CISG* and The Parol Evidence Rule

Historically, in Common Law contract law, the rule pertaining to parol evidence stated that extrinsic evidence was inadmissible in attempts to modify a written contract.[234] Lord Denman explained the parole evidence rule, saying that "by the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the instrument was made, or during the time that it was in state of preparation, so as to add to, or subtract from, or in any manner to vary or qualify the written contract".[235]

Article 2-202 of the *UCC* applies the Parol Evidence Rule as found in Common law contract law.[236] The rule states that when a contract is the complete and final expression of the parties' agreement, previous (written or oral) or "contemporaneous oral agreements" cannot contradict the terms of the final expression of the parties.[237] However, the *UCC* will permit extrinsic evidence to explain or supplement the terms through course of dealings, usage of trade, or course of performance.[238]

Regarding prior dealings between parties and the CISG, in an early case named *Filanto, SpA v Chilewich International Corp,*[239], there was an agreement between the plaintiff, an Italian footwear manufacturer and the defendant, a New York

[234] *Waddams, supra* note 197 at 225.
[235] *Ibid* at 225 note 10.
[236] S 2-202 of the *UCC* states that, "Final Written Expression: Parol or Extrinsic Evidence. Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.": *supra* note 2.
[237] *Ibid.*
[238] *Ibid*.
[239] 789 F Supp 1229 (S D N Y 1992), appeal dismissed 984 F 2d 58, 61 (2d cir 1993) [*Filanto, SpA*].

importing/exporting firm[240] By reference, the agreement incorporated arbitration provisions from a Russian contract.[241] The issue was whether an arbitration agreement existed between the parties.[242] The court held that no agreement to arbitrate existed, basing its reasoning on the *CISG*'s perspective and on prior dealings between the parties.[243] It stated:

> *Imptex International Corp. v. Lorprint, Inc.*, 625 F. Supp. 1572, 1572 (S.D.N.Y. 1986) (Weinfeld, J.) (party who failed to object to inclusion of arbitration clause in sales confirmation agreement bound to arbitrate). The Sale of Goods Convention itself recognizes this rule: Article 18(l), provides that 'A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance'. Although mere "silence or inactivity" does not constitute acceptance, Sale of Goods Convention Article 18(l), the Court may consider previous relations between the parties in assessing whether a party's conduct constituted acceptance, Sale of Goods Convention Article 8(3). In this case, in light of the extensive course of prior dealing between these parties, Filanto was certainly under a duty to alert Chilewich in timely fashion to its objections to the terms of the March 13 Memorandum Agreement--particularly since Chilewich had repeatedly referred it to the Russian Contract and Filanto had a copy of that document for some time.[244]

Thus, as mentioned, it is paramount to take notice that unlike article 2 of the *UCC*, the Parole Evidence Rule does not apply to *CISG*. Article 8 of *CISG* enforces a more liberal perspective, by allowing evidence that contradicts the final and complete expressions of the parties.[245] One of the modern CISG cases, *Teevee Toons, Inc v Gerhard Schubert GMBH*[246] held that there is no Parole Evidence Rule in *CISG*, and, as a

[240] *Ibid.*
[241] *Ibid.*
[242] *Ibid.*
[243] *Ibid.*
[244] *Ibid.*
[245] Art 8 of the *CISG* states, "(1) For the purposes of this Convention 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. (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. 4 United Nations Convention on Contracts for the International Sale of Goods (3) In determining the intent of a party 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.": *supra* note 9.
[246] 2006 US Dist LEXIS 59455 (SD NY 2006).

result, extrinsic evidence is admissible to contradict the final written contract of the parties.[247]

The classic example of *CISG* and the Parole Evidence Rule is found in *MCC-Marble Ceramic Center, Inc v Ceramica Nuova D'Agostina.*[248] Here the Court identified and defined the application of the rule in traditional Common Law and with relation to article. 8 of *CISG*.[249] It remains a very important case for it "is now precedent for U.S. case law on CISG."[250] In this case, although there was a signed standard contract, both the buyer and the seller had orally agreed that the contract would not apply to their immediate sale and purchase of goods.[251] The buyer sued the seller for breach of contract due to non-conforming tiles. The buyer had ordered them using the standard contract. In return, the seller sued the buyer for non-payment.[252] The seller argued before the Court that the contract stipulated that non-conforming goods had to be called to the attention of the seller within a ten-day period.[253] The buyer argued that the standard contract did not apply because the parties had orally agreed to exclude it; he produced affidavits from the seller's company's head office confirming that the standard contract did not apply.[254] In its decision, the District Court held that the Parole Evidence Rule barred evidence of prior or contemporaneous oral negotiations and agreements that contradict, modify, or vary contractual terms and that such evidence would be deemed inadmissible where the written contract is intended as a complete and final expression of the parties.[255] Consequently, the affidavits were excluded as evidence.[256] Unfortunately, the District Court's decision was wrong because it was based on an interpretation of the national law and not on *CISG*.[257] The Appeal Court overruled the District Court's decision, and held the Parole Evidence Rule to be inapplicable to *CISG* cases.[258] The affidavits were

[247] *Ibid.*
[248] 144 F 3d 1384, 1387-92 (11th Cir 1998) [*MCC-Marble*].
[249] *Ibid*; Kilian, *supra* note 27 at 231.
[250] *Ibid* at 233.
[251] *MCC-Marble, supra* note 248.
[252] *Ibid.*
[253] *Ibid.*
[254] *Ibid.*
[255] *Ibid.*
[256] *Ibid.*
[257] *Ibid.*
[258] *Ibid.*

admissible in order to prove the subjective intent of the parties to the contract.[259] An interesting part of this case is the manner in which the Courts arrived at their conclusions: even though the District Court is of Common Law jurisdiction, it referred to Civil Law scholarly studies instead of Common Law ones in determining whether the Parole Evidence Rule applied to the *Convention*.[260]

Similarly, in *Calzaturificio Claudia snc v Olivieri Footwear Ltd*,[261] the plaintiff Calzaturificio Claudia was an Italian shoe manufacturer with its place of business in Italy, and the defendant was Olivieri Footwear Ltd, a United States establishment with its place of business in New York.[262] The plaintiff brought action for breach of contract for the recovery of payment of shoes that were delivered to the defendant but not paid to the manufacturer in return.[263] The defendant counterclaimed, arguing that goods were either delivered too late or were not in conformance.[264] Their commercial relationship comprised thirteen transactions and four invoices involved failure to pay.[265] There was no written contract evidencing the terms of the contract and equally no purchase orders; no oral evidence was ever presented either. The Italian plaintiff presented bills of lading and four invoices as evidence of the unambiguous and final agreement between the parties.[266] The invoices all contained the words "Merce Resa Ex Factory", also known as "Merchandise delivery ex works (or ex factory)", meaning that the seller's delivery obligation is merely to deliver the goods to the buyer at the seller's factory.[267] The plaintiff argued that he had never received any objection from the defendant in relation to the issue of delivery.[268] The defendant argued that it had never entered into a purchase contract since there were no purchase orders.[269] The defendant also submitted several faxes as evidence to demonstrate that the invoices contained contradictory provisions and

[259] *Ibid.*
[260] *Ibid*.
[261] *Calzaturificio Claudia snc v Olivieri Footwear Ltd* 1998 US Dist LEXIS 4586 (S D N Y) [*Calzaturificio*].
[262] *Ibid.*
[263] *Ibid.*
[264] *Ibid.*
[265] *Ibid.*
[266] *Ibid.*
[267] *Ibid*.
[268] *Ibid.*
[269] *Ibid.*

with reference to the question whether or not the parties had performed in accordance with their undertakings.[270] In several faxes the defendant objected to the invoice terms of "Franco Fabrica" (Merchandise Delivery Ex Factory and ex works) and stipulated that the parties' original agreement was that the goods were to be inspected and accepted by the defendant prior to shipment.[271] The plaintiff furthermore argued that under the Parol Evidence Rule extrinsic evidence (referring to the faxes and prior oral communications) may not contradict the parties' final expression of their agreement.[272] The Court said the following:

> Unlike the U.C.C., under the CISG a contract need not be evidenced by a writing… See CISG Art.11 ('A contract of sale need not be…evidenced by a writing and is not subject to any other requirements as to form.'). According to the CISG, a contract 'may be proved by any means […][and 'any evidence that may bear on the issue of formation is admissible.' ncontracts governed by the CISG are freed from the limits of the parol evidence rule and there is a wider spectrum of admissible evidence to consider in construing the terms of the parties' agreement.…The CISG's 'lack of a writing requirement allows all relevant information into evidence even if it contradicts the written documentation.' Under the CISG's 'any relevant statement made in negotiations prior to the signing of the contract are [sic] admissible into evidence.[273]

Prior to *MCC-Marble*[274], in a case entitled *Beijing Metals & Minerals v American Business Center, Inc*[275] – which was cited but not followed in *MCC-Marble*[276] – the Appeal Court held that the Parol Evidence Rule applied to the case regardless whether or not *CISG* was involved.[277] The seller/plaintiff was a Chinese manufacturer and the buyer/defendant was a US importer. The goods involved were the manufacturer's weight lifting equipment that the buyer had agreed to develop in North America.[278] One of the issues was whether a modified payment that had been made in writing was enforceable

[270] *Ibid.*
[271] *Ibid*.
[272] *Ibid*.
[273] *Ibid*.
[274] *MCC-Marble, supra* note 248.
[275] 993 F 2d 1178, 1182-83 (5th Cir 1993) [*Beijing Metals*].
[276] *MCC-Marble, supra* note 248.
[277] *Beijing Metals, supra* note 275; Kilian, *supra* note 27 at 232.
[278] *Beijing Metals, supra* note 275.

by the seller, relying on the *Texas Uniform Commercial Code*.[279] The buyer argued that an oral agreement was entered into contemporaneously with the payment agreement, relying on *CISG*, however "[t]he court barred the buyer's effort to explain his intent with extrinsic evidence to the payment agreement".[280]

This is an astonishing case because the Court did not conduct a thorough reasoning as to which law should apply, the *UCC* or the *CISG*.[281] It automatically held the *UCC* to be applicable and ruled that "regardless of which law would have applied, the Parol Evidence rule is applicable".[282] Thus, "[t]hey treated the CISG as a mere extension of the U.C.C.".[283] One cannot help but wonder, in the light of it being one of the earlier cases dealing with the international sale of goods, whether the Court was wary of applying the *CISG* because it was unfamiliar with it. Be that as it may, this is what the Court had to say in rendering its decision:

> We apply Texas law in this diversity action. *Salve Regina College v. Russell, U.S.* 111 S. Ct. 1217 (1991). , In its complaint, and thereafter, MMB relied on Texas law. ABC maintains, instead, that MMB's claim is governed by the United Nations Convention on Contracts for the International Sale of Goods (Sales of Goods Convention) *codified at* 15 U.S.C. Appendix (West Supp. 1993). MMB insists that Texas law controls. As noted in *Filanto S.P.A. v. Chilewich International Corp.*, &*(F. Supp. 1229, 1237 (S.D.N.Y. 1992), *appeal dismissed*, 984 F. 2d 58 (2d Cir. 1993), 'there is as yet virtually no U.S. case law interpreting the Sale of Goods Convention'. We need not resolve this choice of law issue, because our discussion is limited to application of the parol evidence rule (which applies regardless) […][284]

It is important to note is that under the *CISG* it is possible to derogate from the inapplicability of the Parol Evidence Rule. Parties wishing that the written contract rule prevail must merely insert a "standard merger clause" in their international sale of goods contract stating that they seek to be excluded from the application of article 8 of the *CISG*.[285] As a result of the insertion of the derogation clause, the final written contract

[279] *Ibid*.
[280] *Ibid*.
[281] Kilian, *supra* note 27 at 232.
[282] *Ibid.*
[283] *Ibid*.
[284] *Beijing Metals*, *supra* note 275.
[285] McMahon, *supra* note 161.

will be the only vehicle used to express the parties' intentions and the Parol Evidence Rule will apply to a *CISG* sale of goods contract.

However, in order to further demonstrate how important extrinsic evidence truly is to the *CISG*, ratifying countries – with the use of an article 92 *CISG* declaration[286] – who have opted out of part II of the *CISG* (entitled "Formation of Contract") will still be subject to the *CISG*'s Parol Evidence Rule.[287]

In *Mitchell Aircraft Spares, Inc. European Aircraft Service*,[288] an Illinois buyer brought suit for breach of both contract and warranty involving airplane parts against a Swedish seller.[289] Sweden, in its ratification instrument, had made the above-mentioned article 92 *CISG* declaration.[290] As a result Illinois law was to govern the issue of contract formation.[291] However, the *CISG* governed the admissibility of parol evidence for purposes of rectifying the conflict that existed between what the parties said the purchase order contained, and what the buyer had actually ordered.[292]

CONCLUSION

Throughout this article, the vision for one unified sale of goods law was presented. This idea, which originated with Lord Mansfield, first surfaced centuries ago. Over the course of time academic scholars, legal professionals and business people have presented similar point of views — that a harmonization of commercial laws would assure accuracy and facilitate sale of goods contracts. The union would not only promote universality of commercial laws, but, most importantly, the achievement of true commercial reasonableness in the United States.

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[286] Art 92 of the *CISG* states, "(1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention. (2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.", *supra* note 9.
[287] *Ibid.*
[288] 23 F Supp 2d 915 (N D 111. 1998) [*Mitchell Aircraft Spares*].
[289] *Ibid.*
[290] *Ibid*; Joseph Lookofsky, "Alive and Well in Scandinavia: Part II", (1999) 18 *J L Com* 289 at 290, online: *Pace Law School, Institute of International Commercial Law, CISG Database*, available at <cisgw3.law.pace.edu/cisg/biblio/lookofsky1.html>.
[291] *Mitchell Aircraft Spares*, *supra* note 288.
[292] *Ibid.*

The article furthermore presented the idea that an increasing number of business transactions are concluded on both domestic territory and abroad. In order to further facilitate the progress of cross-border business success and to help ensure stability, there eventually needs to exist a union between both the *UCC* and the *CISG*. The article also established that a unified commercial law would eliminate barriers associated with international trade since many American legal practitioners and businesses are less knowledgeable or completely unaware of the *CISG*.

It was further suggested that in order to achieve a unified commercial law, the fundamental solution is to implement critical *CISG* principles with article 2 of the UCC. As a result, doing away with both the *Statute of Frauds* and the Parol Evidence Rule would eliminate the major and common hurdles in cross-border sale transactions. These two concepts are rigid requirements and formalities closely associated with article 2 of the *UCC*, but not with the *CISG*. Unfortunately, lawyers and business people may think that doing away with the *Statute of Frauds* requirement in a commercial sales contract is a terrible thing and that is a practice to be avoided.[293] There may accordingly be fears of an increase in court cases involving deception surfacing.[294] However, some jurists are either not aware, or merely choose to ignore the fact that there presently are "many exceptions to the Statute of Frauds and the U.C.C. and common law", in which a verbal contract will be held valid, regardless of the absence of evidence of writing.[295] Equally, legal professionals may fear that unfair or prejudicial consequences may occur if application of the Parol Evidence Rule is disregarded in commercial sales of goods contracts. As previously discussed, what these domestic trend-based practitioners are crucially forgetting or ignoring is that under the *CISG*, the oral contract still has to be proved before a court of law,[296] which is not always the easiest task to accomplish,[297] since courts seek to establish "credible evidence".[298] Because of this required burden of proof, practitioners should rest at ease knowing that the "dreaded no-writing requirement

[293] Cook, *supra* note 163 at 346.
[294] *Ibid.*
[295] *Ibid.*
[296] *Ibid.*
[297] *Ibid.*
[298] *Ibid.*

is not an invitation to fraud…"[299]

The manner in which the *CISG* principles and article 2 of the *UCC* would be merged is beyond the scope of this paper. However, assuring that the *CISG* is taught in the early formative years of law school will ensure that future lawyers, justices, legislators and business people will have acquired a complete knowledge and understanding of sales of goods laws, which could lead domestic law drafters to eventually incorporate international sale of goods principles. This would provide a complete knowledge of sales of goods transactions, ease legal confusions, and aid the promotion of commercial and economical growth.

Finally, in an article entitled "Drafting Considerations Under the 1980 United Nations Convention on Contracts for the International Sales of Goods,[300]" the author mentioned that:

> The practice of law, Holmes taught us, is the art of predicting what a court will do in a given set of circumstances. Notwithstanding computerized research, psychological profiles for jurors and other technological hoopla of the 20th century, it remains an art, and an imprecise one at that. If the outcome in a modern U.S. commercial case is so difficult to predict where the rules of the game, the language, the approach to analytic thinking and the cultural influences are familiar, consider the dilemma […] with the Convention where the task remains the same, but everything else is completely different".[301]

If the "practice of law" is perceived as an "imprecise" form of art, then perhaps the integration of *CISG* principles with American sale of goods law will create a modern legal masterpiece – one unified commercial law – which can ease the imprecision associated with the practice of sale of goods laws.

[299] *Ibid.*
[300] B Blair Crawford, "Drafting Considerations Under the 1980 United Nations Convention on Contracts for the International Sale of Goods", (1988) 8 *J L Com* 187.
[301] *Ibid* at 187-188.