Comparative Efficiency in International Sales Law

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COMPARATIVE EFFICIENCY IN INTERNATIONAL SALES LAW
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This article uses economic criteria to assess the efficiency of select provisions of the United Nations Convention on Contracts for the International Sale of Goods (CISG).\(^1\) Signed in Vienna in 1980 and ratified by more than seventy countries, the CISG applies to contracts for the sale of goods between merchants whose places of business are in different Contracting States.\(^2\) Reflecting diverse legal traditions, the CISG provides in an interesting mix of civil and common law rules.\(^3\) When civil and common law rules coincide, the CISG typically adopts the convergent view. When they differ, the CISG sometimes adopts one approach, and sometimes the other. In some instances, the CISG creates alternative rules, no doubt the result of negotiation and compromise among the drafting nations.\(^4\) In other


\(^{2}\) *Id.* at Art. 1. Article 1 (1)(b) provides jurisdiction when only one party is from a Contracting State if private international or conflict of law rules direct the court to that State. However, some countries, most notably the United States, have opted out of that basis of jurisdiction.


\(^{4}\) Like any form of government regulation, the efficiency of terms expected from free market competition may or may not be expected from governmental (represented by academics in this case) negotiation. Efficiency is but one, among many, competing governmental goals. Because (national)
instances, the drafting nations failed to reach consensus resulting in gaps in the CISG consisting of expressly excluded areas of law\textsuperscript{5} and implicit delegation.\textsuperscript{6}

The goal of this article is to analyze whether the more efficient rules were selected from the civil and common law alternatives or whether other considerations resulted in the election of a non-efficient alternative.\textsuperscript{7} Inefficiency in the selection of CISG rules takes two forms: (1) compromise away from a more efficient national rule;\textsuperscript{8} and (2) bargaining impasse leading to the abdication of efficient selection.\textsuperscript{9} The Chicago School’s normative efficiency is likely to be a major motivational force of such negotiations, however, one hopes that on the whole the more efficient rules will be selected. Of course, inefficient compromise is possible as well. \textit{See infra} Part II A (discussing the treaty negotiation process and incumbent choices).

\textsuperscript{5} For example, the CISG expressly excludes coverage over products liability for personal injury (Article 5), property rights (Article 4), and intellectual property rights claims (Article 42).

\textsuperscript{6} The CISG implicitly delegates to states issues dealing with capacity, legality or consumer protection (Article 6), specific performance (Article 28), process of selling rejected goods (Article 88), and payment of interest on deposits or damage awards (Article 78).

\textsuperscript{7} \textit{See} Catherine Valcke, \textit{Comparative Law as Comparative Jurisprudence}, 52 AM. J. COMP. L. 713 (2004) (noting that “comparative law has provided a bottomless supply of data to test philosophical, economic, sociological, and anthropological theories about law”).

\textsuperscript{8} There is evidence that the negotiating parties were sometimes willing to concede national rules in an effort to promote conformity. For example, the United States agreed to the adoption of a no writing requirement so as to better mirror civil law rules, even though its Uniform Commercial Code contains a writing requirement. \textit{See infra} Part III B 1 (discussing the writing requirement). Whatever one’s opinion of the efficiency of the statute of frauds, it is easy to see that having different rules applying to the same issue is inefficient (raises the level of uncertainty and increases transactions costs). Ironically, the United States elected not to opt out of the no writing requirement thus creating divergent rules within its legal systems—one for domestic sales and one for international sales.

\textsuperscript{9} Bargaining impasse leads to a less comprehensive code or convention. In such cases, issues clearly within the scope of sales law may be excluded due to non-agreement. \textit{See infra} Part III A (discussing non-selectivity inefficiency with reference to the enforceability of penalty clauses).
goal of wealth maximization provides a useful benchmark with which to compare the efficiency of alternative contract law rules.\textsuperscript{10} To understand the efficiency implications of impasse, one needs to compare the wealth maximization implications of a centralized rule with the wealth implications of a decentralized and heterogeneous legal regime.

The analysis proceeds in four parts followed by a conclusion. Part II begins with a brief history of the CISG, identifying the choices involved in the drafting process. It then discusses the central tenets of the economic analysis of law (EAL). Part III uses these tenets to assess the efficiency of specific CISG rules, including rules addressing liquidated damages, evidentiary rules governing the statute of frauds and parol evidence, and rules addressing contract interpretation and formation. Part IV discusses the implications of these CISG choices for best business practices. Part V assesses the value of comparative EAL as a means of understanding and critiquing legal reforms.

Taken collectively, the analysis illuminates the structure and choices incumbent in the CISG. It also illustrates the usefulness of EAL as a means of advancing comparative contract law. Over the last thirty years, EAL has emerged as a leading jurisprudential view, especially in the United States, that informs judicial decision-making, legal education, and scholarly analysis. The present analysis demonstrates its usefulness in a comparative law context.

\textsuperscript{10}The most popular definition of efficiency is that a given rule results in greater wealth maximization. See RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (1973). The wealth maximization principle asserts that distributional consequences should be irrelevant in the enforcement of contract rules since the key goal is an overall net gain in utility. See Alan Schwartz & Robert E. Scott, Contract Theory and the Limits of Contract Law, 113 YALE L.J. 541 (2003) (contract law should encourage efforts of contracting parties to maximize "contractual surplus").
II. CISG AND ECONOMIC ANALYSIS

We begin with a brief overview of the CISG, highlighting the various choices that the drafters faced. We then address the central tenets of economic analysis of law. These tenets will be used to assess the efficiency of specific CISG rules in Part III. We begin with the choices incumbent in the drafting of the CISG.

A. Drafting the CISG

The CISG reflects a culmination of a century old process of failed attempts to achieve an international sales law.\textsuperscript{11} Given the differences in the legal systems involved—civil, socialist, common law—the drafting process involved intense negotiation and compromise.\textsuperscript{12} Compromise at times took the avenue of abdication. In areas such as specific performance,\textsuperscript{13} validity,\textsuperscript{14} and pre-contractual liability,\textsuperscript{15} the CISG delegates to national law as the

\textsuperscript{11} The modern phase of the development of an international sales law is traced to the creation of the International Institute for the Unification of Private Law (UNIDROIT). \textit{See} Peter Huber & Alastair Mullis, \textit{The CISG} 2 (2007).


\textsuperscript{13} CISG Article 28 states that “a court is not bound to enter a judgment for specific performance unless the court would do so under its own law.”

\textsuperscript{14} CISG Article 4 states that the CISG is “not concerned with the validity of the contract or any of its provisions.”

\textsuperscript{15} CISG Article 4 states that it “governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer.” \textit{Id.}
source of relevant rules. In this way, the CISG is less comprehensive than it potentially could have been, and some areas of coverage are left to the inefficiency of the private international law system which the CISG was attempting to replace. Notwithstanding this and other limitations, the CISG embodies a major advance in international law.

Generally speaking, one of the most important functions of any system of contract law is to offer to the parties a set of ready-made “default rules” that they do not have to bargain over. This function is undermined by a less comprehensive code which does not offer the necessary mix of optimal defaults for the parties. Hence, in drafting the CISG, member states needed to agree on which default rules to embrace. Failure to agree threatened the overall efficiency of the system.

The drafters of the CISG had to select a core methodology in order to build an international sales law. They employed both the “common core” and “better rule” approaches. The common core approach was used whenever the civil law and common law rules were essentially similar and there was little difference in national interpretations of those rules. The fact that the negotiators possessed expertise in civil and common law framed the dis-

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16 Like the Uniform Commercial Code, the CISG are largely made up of default terms. Such rules only apply if the parties’ agreement fails to provide a necessary term. This is the gap-filling function of contract law. Stated in the alternative, parties are free to derogate from most of the rules supplied by the UCC or CISG. There is a deep literature discussing the notion of default rules. See, e.g., Randy E. Barnett, The Sound of Silence: Default Rules and Contractual Consent, 78 VA. L. REV. 821 (1992) (arguing that by failing to provide a necessary term, contracting parties are consenting to the default rules; therefore, default rules are not the product of regulation but rather consent and private autonomy); Richard Craswell, Contract Law, Default Rules, and the Philosophy of Promising, 88 Mich. L. Rev. 489 (1989).

cussions. Given that background, the CISG reflects the common core of the major principles found in the civil and common law legal traditions. The common core approach is essentially a descriptive enterprise that provides a better understanding of the similar rules and principles found in most legal systems.

The better rule approach, by contrast, was needed whenever common law and civil law conflicted, or whenever national interpretations of facially similar rules varied. Implicit in this choice is the normative determination of which one of alternative rules or interpretations is better. An extended analysis would ask whether fabrication of an alternative rule would prove even better in advancing the normative goals of an international sales law.

1. Types of Rules

Employing the common core and better rules approaches resulted in an interesting amalgam of common law and civil law rules. The CISG consists of rules that can be characterized as: (1) rules consistent with both common and civil law legal traditions, (2) rules that recognize the superiority of a given common law or civil law rule at least for the sake of transborder transactions, (3) rules that are fabricated to be national system-neutral, (4) rules that abdicate to national law by expressly refusing to cover certain topics, and (5) rules that fit in one of the first three categories but are subject to modification by the CISG’s preference for original or autonomous interpretation of its rules.¹⁸

¹⁸ Article 7 (1) states that in interpreting the Convention “regard is to its international character and to the need to promote uniformity in its application.” It has generally been argued that regard to those goals implies original or autonomous interpretation of its Articles, that is, an interpretation not framed by the national law of the court (homeward trend bias). See Frank Diedrich, *Maintaining Uniformity in*
The first category of rules has the closest affinity to a common core approach. The evolution of similar rules in different legal traditions may suggest that these rules reflect the needs of commerce and are inherently efficient, but this will not always be the case. There is no guarantee that the “common rules” found in both legal traditions are the “better rules.” Common rules have value, however, because they tend to provide stability and to avoid misunderstandings between contracting parties.

The second category of rules—the primary focus of the analysis in Part III—represents instances where there was a selection between opposing civil and common law rules. Consider, for example, the CISG’s rejection of the United States Uniform Commercial Code’s (UCC) perfect tender rule\(^\text{19}\) in favor of a fundamental breach rule.\(^\text{20}\) Given the distribution system and readily available secondary markets in the United States, the UCC provides a right to the buyer to reject non-conforming goods for any reason. The reselling and reshipping of goods within domestic markets is manageable, and such a pro-buyer rule is reasonable in such a context.\(^\text{21}\) In contrast, such a rule in the international context proves prob-

\footnotesize{International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG, 8 PACE INT’L L. REV. 303 (1996); see also LARRY A. DI MATTEO, ET AL., INTERNATIONAL SALES LAW: A CRITICAL ANALYSIS OF CISG JURISPRUDENCE 6, 11-13, 22, 36 (2005). The international character of the CISG “calls for a non-domestic, autonomous interpretation . . . divorced from the idiosyncrasies of domestic jurisprudence.” Id. at 12. For an example of “homeward trend bias” or the framing an interpretation of the CISG through the prism of national law see Angela Maria Romito & Charles Sant’Elia, Case Comment, CISG: Italian Court and Homeward Trend, 14 PACE INT’L L. REV. 179 (2002).
\(^{19}\) UCC § 2-601 (1977).
\(^{20}\) See CISG Articles 25 & 49.
\(^{21}\) This does not solve the moral hazard problem where the buyer uses the perfect tender rule in order to avoid the contract in a market with falling prices. The solution is the seller negotiating a modification of the rule in the contract. Also, non-contract sanctions such as relationship-destroying and reputational costs likely curtail the use of the rule as a bad faith means to terminate a
lematic. The higher costs of reselling or reshipping the goods is likely to lead to waste. Due to such costs and a lack of a readily available secondary market, the seller may simply elect not to retrieve the goods. In order to discourage such waste, the CISG limits the buyer's right to reject. This reflects the more efficient choice because the buyer is in a better position to make use or resell the nonconforming goods. The CISG protects the buyer by providing a price reduction remedy. This remedy, not found in the common law, allows the buyer to unilaterally reduce the contract price to reflect the diminishment of value relating to the nonconformity. In the end, the seller avoids the costs of retrieving the goods and the buyer is made whole through a price reduction.

Despite the general similarities of the sales law of the representative countries, there remained a significant number of differences in which a choice between civil and common law had to be made. Examples include: (1) the civil law's receipt rule for the effectiveness of acceptances was adopted over the common law's dispatch or mailbox rule; (2) the civil law's material breach rule for rejection or avoidance of contracts was selected over the American UCC's perfect tender rule; (3) the civil law's enforcement of purely oral sales contract. See generally Stuart Macaulay, Non-contractual Relations in Business, 28 AM. SOCIOLOGICAL REV. 45 (1963) (providing a seminal discussion on non-legal, social and relational support for contracting); David Charny, Nonlegal Sanctions in Commercial Relationships, 104 HARV. L. REV. 375 (1990).

22 See CISG Article 50.

23 The buyer is also able to collect any other damages that it incurred due to the delivery of nonconforming goods.

24 See CISG Article 18.


agreements was selected over the UCC’s statute of frauds; and (4) the common law’s parol evidence rule was rejected in favor of the free admissibility of extrinsic evidence.

The third category of rules recognizes that the CISG drafters, in rare instances, fabricated new rules instead of adopting existing (common or competing) national rules. Unfortunately, from an efficiency perspective this does not always result in the adoption of better rules. For example, the no-writing/writing hybrid of Articles 11 and 12 is an inefficient creation in which opposing rules are both incorporated into what was intended to be a unifying law. This was not the case of the fabrication of better rules, but one of political compromise.

The fourth category involves nonselective inefficiency or failure to provide any rules or coverage. There are numerous incidents were the CISG fails to provide rules in areas that a more comprehensive, international code would cover. In some areas, such as product liability and specific performance, compromises were not obtained. Hence, the CISG is less comprehensive than it could have been. As a consequence, it is less efficient then it should have been since it fails to unify international sales law in numerous areas. Generally, the rules from the different legal systems competed for recognition. Many of the rules that were selected where the rules of one of the competing systems. Where the negotia-

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29 See discussion infra Part III. B. 1.
30 This is sometime hidden by the fact that the CISG uses rules not readily found in any national legal system in order to advance the notion of neutrality and to encourage autonomous interpretation of the rules. Thus, words like “avoidance,” “fundamental breach,” and “non-conformity” are utilized. In the common law the words would be rejection, material breach, and defect.
tors were unable to agree on the better rule, compromise often resulted in abdication or removal of coverage.  

The fifth and final category of rules involves issues of interpretation. These rules reflect the temporal nature of fixed rules. The evolution of rule application and adjustment is obtained through the study of the resulting jurisprudence. This type of study has resulted in a voluminous CISG literature. The important point here is that even where the drafters chose between competing rules, the CISG expressly rejects the use of any corresponding national jurisprudence. The CISG espouses original interpretation of its rules. Application of CISG rules is to be based upon the general principles underlying the CISG and not through application of concepts found in a domestic legal system. This approach aims to foster a “better jurisprudence” in the future interpretation of CISG rules. The judicial or arbitral interpreter is mandated to interpret CISG rules in regard to their “international character” and the “need to promote uniformity in its application.” This requires the search for original interpretations and rejects “homeward trend” bias in which national rules

31 See, e.g., CISG Article 4 (addressing validity).
32 The Institute of International Commercial Law “CISG Database” at University of Pace Law School contains a bibliography with 8,000 citations to works on the CISG. Available at http://www.cisg.law.pace.edu/cisg/biblio/biblio.html.
34 See CISG Article 7 (1).
35 Article 7(1).
36 See, e.g., Diedrich, supra note 18; Franco Ferrari, supra note 33; Franco Ferrari, Gap-Filling and Interpretation of the CISG: Overview of International Case Law, 7 VINDOBONA J. INT’L COM. L. & ARB. 63 (2003)
and jurisprudence are used to fill in interpretive gaps. The fact that the drafters often selected national system-neutral terminology, such as avoidance, non-conformity, and fundamental breach, indicates their desire for the development of original, uniform, and more efficient interpretations of CISG rules.\textsuperscript{38}

2. Summary

The drafters of the CISG faced a number of dilemmas in negotiating a convention that would supersede the legal rules of both civil and common law countries. The first was how to select among rules that are inherently conflictive. An example can be found in writing requirements (statute of frauds) and the parol evidence rule. Generally, these two common law doctrines are not as pervasive or as formalized in many civil law countries.\textsuperscript{39} Other examples include the perfect tender rule found in the UCC versus the need for fundamental or material breach in the civil law,\textsuperscript{40} and the civil law’s receipt rule versus the common law’s dispatch rule\textsuperscript{41} in the area of effectiveness of acceptance. In all of these cases—writing re-

\textsuperscript{38} UNCITRAL states: “The drafters of the Convention took special care in avoiding the use of legal concepts typical of a given legal tradition.” A/CN.9/562, at p. 1. See generally COMMENTARY ON THE INTERNATIONAL SALES LAW 74 (1987) (“When drafting the single provisions these experts had to find sufficiently neutral language on which they could reach a common understanding.”).

\textsuperscript{39} Interestingly, other types of formalities, such as the notary’s stamp, persist in a number of civil law countries and in the Russian Federation.


\textsuperscript{41} For an explanation for the common law’s dispatch or mail box rule see Marwan Al Ibrahim, Ala’eldin Ababneh & Hisham Tahat, The Postal Acceptance Rule in the Digital Age, 2 J. INT’L COM. L. & TECH. 47 (2007).
requirement, admissibility of extrinsic evidence, the need for receipt of acceptance, and the need for a fundamental breach to trigger avoidance—the drafters of the CISG selected the civil law rules.

The second drafting dilemma was whether to incorporate or ignore legal concepts that exist in one system but are foreign to the other system. This dilemma involves instances of incorporation and avoidance. Examples of incorporation include the adoption of the price reduction remedy\textsuperscript{42} and nachfrist notice,\textsuperscript{43} both of which are foreign to the common law system. Examples of avoidance include non-coverage in areas relating to pre-contractual liability, enforceability of penalty clauses, and the availability of the remedy of specific performance. A vague and potentially crippling abdication of coverage is found in the Article 4 deference to national law on issues pertaining to validity. This abdication was largely due to countries wanting to protect the operation of their consumer protection laws.\textsuperscript{44} Unfortunately, the CISG fails to provide a definition of validity. This may allow validity to be used to invalidate contract terms intended to be covered by the CISG. The use of Article 4 to adopt nation-specific rules undermines the CISG’s unifying goal and diminishes its overall efficiency.\textsuperscript{45}


\textsuperscript{43} CISG Articles 47, 48 & 63.

\textsuperscript{44} “Economic regulations such as export or import controls or consumer-protection laws which prohibit certain formulations may void contracts falling under the Convention.” PETER SCHLECH-TRIEM, \textsc{Uniform Sales Law: United Nations Convention on Contracts for the International Sale of Goods} 33 (1986).

B. Economic Analysis of Contract Law

The EAL movement in the United States traces its modern roots to the 1960s, but the milestone event is the 1973 publication of Judge Richard Posner’s *Economic Analysis of Law*. Posner’s approach is part of the Chicago School of EAL which asserts that common law rules evolve efficiently. Eventually, EAL spread to Europe and lead to the establishment of the European Association of Law and Economics.

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49 The European Association of Law and Economics (EALE) is the institutional response to the increasing importance of the economic analysis of law in Europe EALE was founded in 1984 with the purpose of providing assistance to law and economics scholars and bringing their scholarship to a wider audience, including policy makers, legislators and judges. There is evidence that EAL appeared in Continental scholarship at an earlier time. See, e.g., Roberto Pardolesi & Giuseppe Bellantuono, “Law and Economics in Italy,” available at [http://encyclo.findlaw.com/0345book.pdf](http://encyclo.findlaw.com/0345book.pdf), (asserting that EAL can be traced to the 1960 work of Pietro Trimarchi on strict liability).
EAL scholarship has become the major school of legal thought in American law schools. After the reluctant reception and the outright opposition of the late seventies and early eighties, EAL has become a major force in American legal theory and it exerts a dominant influence on contract law in particular. Today it’s very difficult to find an American contract law monograph or law review article which does not discuss EAL arguments. In areas such as breach, remedies, impossibility and commercial impracticability, unconscionability, a deep literature has been produced.

On the other hand EAL has not been a major theoretical force in Europe, but has recently become more widely studied in the European and comparative law literature.

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Some of the conclusions of EAL theory have been more readily accepted while others have failed to gain widespread acceptance.\textsuperscript{56} For example, the theory of efficient breach, broadly embraced by EAL scholars in the United States,\textsuperscript{57} has been largely rejected in Europe.\textsuperscript{58} Professor Mattei offers this explanation:

On policy grounds, it is not clear that efficient breaches should be encouraged by a legal system, since in the long run the certainty of property rights may be undermined. This is the reason why most legal systems of the civil law tradition tend to resist efficient breaches (at least in theory), and why they have traditionally assigned a more central role to specific performance than has the common law.\textsuperscript{59}


\textsuperscript{57} Eric Posner, \textit{supra} note 53, at 834-36 (discussing the evolution of the academic writings regarding efficient breach). We return to the issue of remedies \textit{infra} Part III A (addressing liquidated damages).


\textsuperscript{60} The normative argument against the theory is that breaches (efficient or not) should not be aided
itself that economic reasoning plays no role in civil law. Rather, the rejection suggests that
the comparative efficiency of the civil law treatment of specific performance as an ordinary
remedy, or any other contract rule for that matter, can only be assessed on a rule by rule ba-
sis.

Notwithstanding objections from abroad, EAL provides a means of both understanding
and critiquing the structure and content of the CISG. In comparing alternative academic
theories of contract law, Eric Posner concludes that “only economic analysis appears to be
on solid footing.”61 He recognizes the highly nuanced nature of EAL theory and the diffi-
culty of empirically testing many of its assertions, but he nonetheless finds value in its ap-
proach. He writes, “Even if economic analysis cannot determine the magnitude of [eco-
nomic] costs and benefits, and the extent to which they offset or interact with each other,
the judge who knows about them is more likely to make a wise decision than a judge who
does not.”62

This article organizes the economic logic of contract law with reference to three central
tenets of EAL: deferring to individual autonomy, reducing transactions costs, and providing
stability in transactions. Although alternate schemes are possible, these tenets provide a
means of keeping the discussion tractable. Taken collectively they provide a basis for the
comparative EAL analysis of the CISG that follows.

by contract law given the moral basis of promise-keeping. See generally CHARLES FRIED, CON-
TRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981) (examining the moral basis
of contracts).

61 Eric Posner, supra note 53, at 829 (comparing EAL with doctrinal, moral, radical, and cognitive
psychology based theories of contract).

62 Id. at 854-55.
1. Deferring to Individual Autonomy

Economic reasoning begins with the proposition that individuals are in a better position to understand what is in their own best interests than are courts or governments. Individual preferences are highly idiosyncratic and presumably individuals do not agree to an exchange unless they feel that the agreement will advance their own interests. Based on this assumption, a voluntary exchange, duly consummated, makes both parties better off. This pareto-superior perspective of private exchange has been the primary tenet of economic theory since Adam Smith. For Smith, the relative wealth of nations depends on their degree of specialization. Specialization, in turn, depends on the establishment of

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63 The view of individual autonomy that motivates EAL is far from obvious. Many cognitive scientists and postmodern philosophers insist that human preferences cannot be separated from a cultural context. In other words, culture precedes the individual. See generally JEFFREY REIMAN, JUSTICE AND MODERN MORAL PHILOSOPHY (1990) (identifying the notion of autonomy with a “radical theory” of human agency). Like neoclassical economics generally, EAL asserts the primacy of the individual.

64 See generally GARY S. BECKER, ACCOUNTING FOR TASTES (1996) (discussing the source of individual preferences).

65 See JAMES BUCHANAN, ECONOMICS: BETWEEN PREDICTIVE SCIENCE AND MORAL PHILOSOPHY 26-29 (1987) (asserting that the potential for gains from trade provides virtually the only lesson of economic theory).

66 See JOSEPH SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 187-89 (1954) (noting that for Adam Smith, specialization foster by the gains of trade was the sole determinant of economic progress).

67 See id. See generally ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Canned ed. 1904) (1776) (providing the seminal statement of classical economics).
free markets. An efficient market facilitates private exchange, enables specialization, and promotes economic growth.

The private laws of property, tort, and contract provide the legal foundations of market transactions. Property law identifies alienable entitlements; tort law protects them; and contract law enables the exchange of those entitlements. Due deference to individual autonomy, not only respects the rights of individuals, it also promotes economic ends. In contract law, this translates to a regime of free contracting.

No one has been more articulate in explaining the economics of free contracting than the Austrian economist, Friedrich Hayek. To Hayek, markets provide a means of coping with the dispersal of information in society. Market actors have idiosyncratic knowledge as to how resources can best be used in society. Much of this knowledge is difficult, if not impossible, to communicate. Hayek saw two alternatives: central planning and free markets. He concluded that central planning does not work. The government simply does not have sufficient information to direct the workings of a modern economy.

Free markets, according to Hayek, provide a means of addressing information problems. Two contract principles underscore free markets—freedom to contract and freedom from contract. Freedom to contract means that individuals should be allowed to exchange

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68 See generally John R. Commons, Legal Foundations of Capitalism (1924) (tracing evolving manifestations of markets with reference to changes in property law).

69 See Richard A. Epstein, Unconscionability: A Critical Reappraisal, 18 J.L. & Econ. 293, 293-95 (1975) (distinguishing between libertarian and utilitarian justifications for the principle of deferring to individual autonomy).

70 See generally Friedrich A. Hayek, Individualism and Economic Order (1948) (providing a seminal statement in defense of decentralized markets).


their entitlements free from government restrictions. Freedom from contract means that the
government should not force individuals to transfer entitlements without their consent. By
insisting that each party secure the consent of the other, a regime of free contracting en-
ables each party to signal their idiosyncratic preferences and communicate private informa-
tion. Free contracting enables meaningful prices to emerge, which in turn can direct the
workings of a decentralized economy.

In short, the first economic tenet provides a presumption against governmental inter-
vention into the substance of private agreements. Both forced transfers (required contract
terms) and prohibited transfers (contract terms that are prohibited by public policy) frus-
trate the price system and erode efficiency. Alternatively stated, contract terms that reflect
the subjective agreement of the parties should be readily and strictly enforced.

2. Reducing Transaction Costs

Whereas deference to private autonomy provides an overarching goal, tone, and orient-
tation to EAL; the second tenet, reducing transactions costs, provides the details. Market
activities are promoted by providing contract rules that reduce the costs of private ex-
changes, including the costs of negotiation, performance, and enforcement. In a seminal
work articulating the economic logic of contract law, Richard Posner and Anthony Kron-
man identify three ways contract law can reduce transaction costs: (1) by providing a rem-
ed for breach, contract law encourages performance of mutually agreed upon terms; (2) by

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ducing the same distinction).
offering standard terms, the law reduces the need to negotiate; and (3) by punishing fraud and other improprieties during contract negotiations, the law deters misleading conduct.\footnote{See Kronman & Posner, supra note 47, at 4-5.}

The first economic function of contract law is to determine which transfers will be enforced and which will not be enforced. Deference to autonomy suggests that the court should enforce every transfer that was subjectively agreed to by the affected parties and withhold enforcement of any transfer that was not subjectively understood. As a practical matter, however, it is difficult to resolve or prove subjective claims of intent. Hence, courts must look for objective manifestations as a surrogate for subjective intent.\footnote{See Randy E. Barnett, A Consent Theory of Contract, 86 Colum. L. Rev. 269, 272 (1986) ("It has long been recognized that a system of contractual enforcement would be unworkable if it adhered to a will theory requiring a subjective inquiry into the putative promisor’s intent."). See generally Larry A. DiMatteo, Contract Theory: The Evolution of Contractual Intent (1998) [hereinafter DiMatteo, Contractual Intent] (providing an historical analysis of the evolution and fabrication of the reasonable person standard).}

Most contract rules address this evidentiary function. For example, rules that require specificity in contract negotiations, require a writing, demand conformity to offer and acceptance rules, or inquire into the presence of fraud, all provide objective evidence of subjective intent. The inevitable slippage—the divergence between subjective and objective intent produced by the fact that objective evidence is second best or indirect evidence of subjective intent—in these evidentiary surrogates results in both over-enforcement and under-enforcement of contractual language.\footnote{See Larry A. DiMatteo, The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment, 48 S. C. L. Rev. 293 (1997) (examines the divergence of the objective theory of contract and the subjectivity involved in its application).} Over-enforcement occurs when courts enforce transfers that were never subjectively agreed to. Under-enforcement results when courts

\footnote{See Kronman & Posner, supra note 47, at 4-5.}
\footnote{See Randy E. Barnett, A Consent Theory of Contract, 86 Colum. L. Rev. 269, 272 (1986) ("It has long been recognized that a system of contractual enforcement would be unworkable if it adhered to a will theory requiring a subjective inquiry into the putative promisor’s intent."). See generally Larry A. DiMatteo, Contract Theory: The Evolution of Contractual Intent (1998) [hereinafter DiMatteo, Contractual Intent] (providing an historical analysis of the evolution and fabrication of the reasonable person standard).}
refuse to enforce agreements *ex post* that were subjectively understood *ex ante*. The second tenet of EAL of contract law suggests that rules should be designed to minimize the sum of over-enforcement and under-enforcement costs.\textsuperscript{76}

Contract rules also reduce transaction costs by providing default terms that help fill the gaps in contractual language. It is not cost effective, or even possible, for parties to account for all contractual contingencies *ex ante*. Contractual activity, like life, is simply too complex and multifaceted. Contract law responds with standard terms.\textsuperscript{77} EAL suggests that these terms should reflect customary expectations so as to facilitate subjective agreement. Difficulties arise when the parties do not share similar customs. In such situations, EAL supports a preference for industry customs, so as to provide an incentive for all parties to learn the language and usages of the particular trade.\textsuperscript{78}

EAL also generates insights into the substantive content of default terms. Most contract or default terms allocate risk between the contracting parties. Both parties benefit if these costs are allocated to the party who can best absorb them at lower cost.\textsuperscript{79} Such an allocation generates an exchange surplus that can be divided by the parties. EAL suggests default rules reflect this cost reduction logic. For example, an implied warranty of mer-

\textsuperscript{76} Addressing the tension between objective and subjective intent, Anthony Kronman and Richard Posner observe that “only a contract that involves a meeting of the minds satisfies an economist’s definition of a value-maximizing exchange. KRONMAN & POSNER, *supra* note 47, at 5. However, they note that EAL allows for “rules designed to prevent people from misleading others into thinking that they have an agreement with them; hence both the subjective and objective theories have a place in contract law. *Id.*

\textsuperscript{77} See Barnett, *supra* 16 (providing analysis of the gap filling function of contract law).

\textsuperscript{78} See POSNER, *supra* note 47, at 84.

chantability assigns the risk of a faulty product to the merchant seller—the party best able to take precautions and to insure against non-conforming products. Similarly, liability for damage to goods in shipment typically rests with the common carrier—the party best able to take efficient precautions and insure against loss.

Finally, contract law reduces transaction costs by deterring fraud and other negotiation improprieties. To this end, the law must balance two forms of welfare-diminishing opportunism. Perhaps one party has misled the other into an agreeing to a transfer the latter party did not fully understand. On the other hand, the party asserting the fraud may be trying to avoid a bad bargain. Both type of opportunism generates costs. An efficient contract law system will minimize the sum of these costs. Such calculations inform the laws of fraud, misrepresentation, undue influence, duress, mutual mistake, and unconscionability.\(^{80}\)

In sum, the logic of cost reduction provides a powerful heuristic. Although the logic can be complex and multi-faceted, EAL benefits from sharpness of focus. Virtually every contract rule impacts transaction costs and this provides a useful benchmark for comparative efficiency analysis.

3. Providing Stability

For contract rules to have their desired instrumental effects, the content of the rules need to be effectively communicated to the affected parties. EAL views law as an incentive structure that directs business conduct. The importance of predictability and stability in the law is particularly important in the international context of the CISG. Transacting

parties need to be alerted to gaps in the CISG and to interpretations developed by CISG tribunals. The third tenet emphasizes the need for legal predictability and stability in international transactions.

In a number of areas, the CISG failed to select a stable rule simply by failing to bring certain areas of contract law within its jurisdictional scope.\textsuperscript{81} One area of non-selective inefficiency is the duty to negotiate in good faith. The duty of good faith in pre-contractual negotiations is unknown to the common law.\textsuperscript{82} An efficiency argument that would argue for a duty of good faith negotiation is that the ability to negotiate in bad faith creates incentives for opportunism and moral hazard as well as having adverse selection effects. This increase in transaction costs leads to a suboptimal number of concluded contracts. CISG does not recognize such a requirement even though it adopts the duty of good faith in the interpretation of CISG rules.

The fact that the CISG has numerous gaps in the scope of its coverage has led to a number of problems. One commentator states, “Because uniform rules are lacking, simi-


\textsuperscript{82} Unlike the common law, the civil law does assess pre-contractual damages for the bad faith breaking off of negotiations under the tort doctrine of \textit{culpa en contrahendo}. Even though the common law rejects a duty to negotiate in good faith, more and more courts have allowed the recovery of reliance damages when negotiations include a “preliminary agreement.” Professors Schwartz and Scott have argued that such recovery is economically efficient. They argue that preliminary agreements allow for “the realization of a socially efficient opportunity.” Therefore, they conclude that “contract law should encourage relation-specific investments in preliminary agreements by awarding the promisee his verifiable reliance if the promisor has strategically delayed investment.” Alan Schwartz & Robert E. Scott, \textit{Precontractual Liability and Preliminary Agreements}, 120 HARV. L. REV. 661, 661 (2007).
larly situated parties sometimes receive vastly different results; the disparities undermine the purpose of the CISG. 

The abdication of authority over areas clearly within the body of sales law makes the CISG less comprehensive and more inefficient than a law that is drafted with fewer intended gaps. That said, this article is primarily focused on determining the relative efficiency of the rules found in the CISG. The relative or comparative efficiency analysis is determined by comparing the rule options available to the drafters to the one incorporated into the CISG. The options available can be described as those provided by competing civil and common law rules, a compromised or modified version of one of those rules, or the creation of a new, system-neutral rule. Ultimately, the comparative efficiency analysis is based on whether the chosen rule provides a stable or predictable outcome when applied to similarly situated circumstances or fact patterns.

III. ASSESSING THE EFFICIENCY OF CISG RULES

EAL provides a powerful heuristic with which to assess the CISG. Part III begins with an assessment of the CISG treatment of liquidated damages. The CISG failed to take a stand on the issue of liquidated damages—and the enforceability of penalties—leaving this issue to national legal systems. This is an example of non-selective inefficiency. Part III then turns to the evidentiary rules embodied in the statute of frauds and parol evidence rule. In this area, the CISG chose to follow the civil law. Part III concludes with CISG rules per-

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taining to contract interpretation and contract formation—areas in which the CISG drafters tended to fabricate compromise positions.

A. Liquidated Damages

The voiding of all penalty clauses in the common law has produced a significant amount of EAL literature. Commentators are split between: (1) those who see the non-enforcement of penalty clauses as a facilitation of efficient breach and prevention of moral hazard problems, (2) those who argue that not enforcing such clauses undermines contracts as an allocation of risk mechanism, creates barriers to entry, and is antithetical to general economic theory, and (3) those who would like to see a bifurcation of the concept of penalties into efficient and inefficient penalties. The common law has long seen penalties as

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84 Penalty clauses are void pursuant to both the Uniform Commercial Code and U.S. common law. See U.C.C. §2-718(1) (1977) (“A term fixing unreasonably large liquidated damages is void as a penalty.”); RESTATEMENT (SECOND) OF CONTRACTS §356(1) (“A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.”).


a coercive means of ensuring performance—either perform or be punished. Under this rationale, the penalty violates the principle of compensatory damages that underlay common law remedies.

The second approach noted above asserts that the common law needs to change and allow for the enforcement of penalties. This view argues that common law damages are undercompensatory which allows the breaching party to obtain more than its fair share of the subsequent surplus. In addition, general economic theory holds that rational contracting parties will negotiate efficient contract terms. Therefore, the penalty clause insertion is likely to be offset by a price adjustment. It also allows a contracting party to be more competitive by using the penalty clause as a signal of its reliability. Finally, the penalty clause assigns the risk of nonperformance to the most efficient insurer. These arguments see the use of penalty clauses as efficient deal-making devices and the failure to enforce them works an inequitable windfall to the breaching party.88

Comparatively, commentators in the third camp—those who seek a bifurcation—assert that the civil law essentially gets it right by adopting a presumption in favor of the enforcement of penalty clauses. The presumption of enforceability can only be overcome if the penalty is determined to be “manifestly or grossly excessive.” A similar result would be achieved in American law if the rule against penalties was expunged with the problem of excessive penalties being policed under the doctrine of unconscionability.

The Council of Europe’s Resolution 78(3) on Penal Clauses adopts the civilian approach that the penalty amount “may be reduced by the court when it is manifestly excess-

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Another amalgamation of civil law and common law is the *European Principles of Contract Law*. The goal of this effort was to select the best elements of the two legal systems. In the area of penalty clauses, the civilian approach is selected as the better option. Article 9.509(1) states that “the aggrieved party shall be awarded that sum (penalty) irrespective of his actual loss.” The only limitation on the enforcement of penalty clauses is the reduction in an amount of the penalty if it is deemed to be “manifestly excessive.” The Comment to Article 9:509 provides an efficiency rationale for the rule: the parties want to avoid “the difficulty, delay and expense involved in proving the amount of loss in a claim for unliquidated damages.” The comparative efficiency analysis becomes more complicated when the differences among civil law systems are considered. Although most civil law systems limit the non-breaching party to the stipulated damages provided in the penalty clause, German and Austrian law allow the non-breaching party to make a claim for damages in addition to the stipulated amount. The later approach defeats the efficiency gains attributed to the avoidance of litigation. The best rationale for this allowance is in the case where the stipulated amount is set too low and is thus undercompensatory.

To summarize, the common law holds that all penalty clauses are unenforceable and provides a void-only remedy. The civil law holds that mutually agreed upon penalties are fully enforceable unless they are deemed to be excessive. Further, the civil law encourages courts to reform the clause instead of voiding the clause. General economic theory argues that the law is most efficient when enforcing express terms because the contracting parties

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89 Council of Europe’s *Resolution 78(3) on Penal Clauses*, Article 7.
90 *PRINCIPLES OF EUROPEAN CONTRACT LAW* (Ole Lando & Hugh Beale eds., 2000).
91 *Id.* at 453.
92 *Id.* at 454, Comment A.
93 *Id.* at 455 n.2.
are in the best position to determine the valuation of such terms. The argument here against efficient breach theory is that not all breaches are efficient. In practice, it is rather difficult to determine if a breach is efficient since a *sine qua non* requirement for the efficiency of the breach is full compensation of the promisee. In truth, it is difficult for the courts to determine what constitutes full compensation in a given case since subjective valuations are difficult to measure or quantify. In contrast, a penalty clause gives a clear indication of the value that the promisee places on the performance, the fee paid for such clauses can be invested by the likely breaching party to ensure timely performance, and penalties protect sunk costs.

Unfortunately, the CISG abdicated its coverage of this contentious area of law by not enacting rules dealing with the enforceability of liquidated damages-penalties. The result is the allocation of that issue to conflicting national laws. In the case of the common law, it means delegation to a hopelessly conflictive and chaotic jurisprudence. In such areas as penalties, specific performance, capacity, and pre-contractual liability the CISG missed the opportunity to harmonize conflicting areas of law. As a result, from the perspective of global efficiency the CISG is less efficient than it could have been.

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94 *See infra* Part II B 1 (discussing the efficiency gains generated by deferring to individual autonomy).

95 The problem of gaps in CISG coverage has been widely discussed. Some commentators have suggested use of other supranational laws to fill in the gap instead of resorting to national laws. *See, e.g.*, Gotanda, *supra* note 83.

96 For a discussion of the chaotic nature of the common law of liquidated damages see Larry A. DiMatteo, *supra* note 85, at 655-75.
B. Evidentiary Rules

The negotiators of the CISG faced what seemed to be an insurmountable conflict between countries that preferred the formal requirement of writing and those who recognized the full enforceability of oral agreements or less formal writings. Although, the statute of frauds had been done away with in the United Kingdom, it remains a requirement in a number of categories of contracts, including the sale of goods, in the United States. The CISG adopted the civil law approach of no writing requirement with an important compromise. The compromise was to allow countries to opt out of the no writing requirement when ratifying the convention. As a result, a number of countries, mostly former Soviet-affiliated countries, retained their national writing requirements. Interestingly, the United States elected not to opt out of the no writing rule.

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97 The formality necessary to satisfy the “writing requirement” is not necessarily homogeneous. For example, in some nations, a notary stamp is needed to validate a sale of an interest in land.
99 See CISG Articles 12 & 96.
100 For example, the following countries opted out of the “no writing” rule: Russian Federation, Ukraine, Belarus, Estonia, and Hungary.
101 This is an example of the difference between formal and operative rules. Despite the UCC’s retention of a writing requirement in practice it has been greatly diminished by the lessening of the threshold for “writing” and “signature,” and the existence of numerous exceptions, such as the written confirmation rule and purchases of specially manufactured goods. These differences of formal law and law in fact, and the narrowing of evidentiary thresholds, provide insight into the possible inefficiencies of such formalities.
1. Writing Requirement

Before analyzing the efficiency of requiring a written instrument as a prerequisite for contract enforceability, a comment as to the “opt out” provisions of Articles 12 and 96 is needed. A system that allows for such an opting out is inherently inefficient. Providing alternative, conflictive rules in any law increases uncertainty and transaction costs. To allow an affirmative defense in a contract dispute for failure to provide a written instrument adds to the uncertainty of international transactions. Where a custom of oral agreement, honored internationally, is trumped by the parochial formality requirements of national legal systems the efficiency gains of a uniform system of rules is diminished.

There are contrasting views on the efficiency of the writing requirement. Some argue that requiring a writing promotes transactional certainty and consequently reduces dispute resolution costs. Allowing oral testimony to establish a contract creates a moral hazard, as parties have an incentive to fabricate obligations where none were intended. However, when the parties believe that a writing is not necessary, a legal regime’s requirement

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103 See, e.g., KRONMAN & POSNER, supra note 47, at 94-95 (noting the cost reduction logic incumbent in the Stature of Frauds).

of a writing increases transaction costs.\textsuperscript{105} Sometimes the negotiation and drafting costs of putting a contract in writing exceed the benefit from entering the contract and a mutually beneficial trade is forgone.\textsuperscript{106} In addition, by requiring a writing an opportunistic party may seek to nullify a bone fide oral agreement and escape a contractual obligation.\textsuperscript{107}

The economic critique of the writing requirement ultimately depends on whether the benefits of requiring a writing (reducing fraudulent allegations of oral contracts) exceed the costs (increased drafting expense and propensity to nullify bone fide transactions). Enforcing a false allegation of an oral contract violates freedom \textit{from} contract, while failing to enforce a legitimate exchange, violates freedom \textit{to} contract.\textsuperscript{108} In accord with this logic, the civil law entrusts courts to ferret out bogus claims of oral contracts, while preserving the efficiency of permitting parties to transact without prior written documentation. The CISG follows this rule as well.

\textsuperscript{106} Id. at 1997.
2. Parol Evidence Rule

Just as important as the issue of whether a writing is required is whether the writing limits the admissibility of extrinsic evidence to supplement or contradict the written instrument? Civil law countries, like France, do not make a distinction regarding oral and written contracts with regards to the admissibility of extrinsic information.\textsuperscript{109} Generally, extrinsic evidence is freely admitted in the interpretation of contracts. In contrast, the common law, especially in the United States, relates the integration of an agreement into a written contract to the inadmissibility of extrinsic evidence. The parol evidence rule holds that if a writing was intended as a final integration of an agreement, whether or not a writing is required under the statute of frauds, extrinsic evidence is barred if it would contradict the plain meaning of the written agreement.\textsuperscript{110} In reality, American courts often avoid the parol evidence bar by declaring contract language to be ambiguous and therefore, parol


\textsuperscript{110} The common law's parol evidence rule dates back four hundred years to the Countess of Rutland case. Countess of Rutland's Case, 77 Eng. Rep. 89 (K.B. 1604). This rule bars from consideration external evidence that contradicts the plain meaning of the written text. Thus, prior inconsistent writings or witness testimony regarding contract negotiations would be inadmissible evidence when there is an integrated contract or were the issue relates to the written terms of a partially integrated contract. One commentator argues that Lord Coke’s reason for formulating the rule was his pro-market orientation: “Coke seemed interested in the contractual tool itself, the one used by purchasers and farmers. The danger he visualized was in all likelihood the danger of chaos—of never-ending clashes and contradictions between written contracts and oral promises, between legal texts and the human contexts that threaten to change their meaning.” Hila Keren, Textual Harassment: A New Historicist Reappraisal of the Parol Evidence Rule with Gender in Mind, 13 AM. U.J. GENDER SOC. POL’Y & L. 251, 297 (2005).
evidence is admitted to clarify and not to contradict the contract. The CISG rejects any limitations on the use of extrinsic evidence. The question relevant to the current undertaking is whether the CISG’s rejection of a writing requirement and restrictions on extrinsic evidence were efficient choices.

EAL scholarship has supported the certainty provided by written agreements and the plain meaning interpretation of them. The protection of written agreements through a rigid parol evidence rule is seen as enhancing the certainty of written agreements. However, the certainty protection provided by the parol evidence rule is somewhat muted by the fact that there are different versions of the rule. Professor Linzer explains the variations:

What we call the parol evidence rule is better thought of as a spectrum. Some courts, old and new, presume that almost all documents, however skimpy or haphazard, represent the final word. Others will not go that far, but still apply Williston’s famous "four corners rule" strictly, rejecting extrinsic evidence unless questions of integration and ambiguity of meaning are patent on the face of the writing. Other courts, although they recite the four corners approach, actually require the facial uncertainty to be much less palpable, and admit extrinsic evidence more readily. Still others allow extrinsic evidence to show non-integration and ambiguity, and some even go as far as the Restatement (Second) of Contracts and admit evidence to show meaning


without regard to ambiguity.\textsuperscript{113}

In some instances the parol evidence rule may be “hard” for purposes of determining the completeness of the written contract and “soft” for determining whether an ambiguity exists in the contract.\textsuperscript{114} A purely formalist interpretive methodology focused on the four-corners of a writing blunts the uncovering of the true intention of the parties. EAL holds that the parties are the best evaluators of value and preferences. As such, extrinsic evidence that provides insight into their true intentions provides the most efficient interpretation of contractual terms.

\textsuperscript{113} Linzer, \textit{supra} note 111, at 805-06 (citations omitted). Linzer goes on to note that “Eric Posner, after sketching out what he called the ‘hard-PER’ (roughly the Williston, four-corners, plain meaning approach) and the ‘soft-PER’ (roughly that of Corbin and the Second Restatement of Contracts), cautioned his readers that … the rule was far more complex than the stylized versions of the parol evidence rule developed for purposes of analysis.” \textit{Id.} at 807 (parentheses in original) (citing Eric A. Posner, \textit{The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation}, 146 U. Pa. L. REV. 533, 534-40 (1998)).

\textsuperscript{114} Linzer, \textit{supra} note 111, at 807. Ultimately, the evidence made available for contract interpretation can be seen as a spectrum moving from most restrictive to more liberal evidence regimes:

1. Only Documents (only documents regarded as a final integration) (legal formalism)
2. “Four-Corner’s Analysis” with patent ambiguity exception (Williston)
3. Broader Interpretation of Patent Obligation
4. More Liberal Use of Extrinsic Evidence to Show Ambiguity or Non-Integration
5. Use of Extrinsic Evidence to Uncover meaning (without ambiguity) (contextualism) (Restatement (Second) Evidence).
The CISG rejects the common law’s parol evidence rule. The CISG evidence regime provides for the liberal admission of parol and other types of extrinsic evidence. This evidence regime allows for the use of “vague” or open forms of contracting. Professor Triantis has argued that vagueness in written contracts can serve certain economic purposes such as lowering transactions costs by lowering the costs of negotiation and writing of contracts. Judge Posner has also seen the benefits of a certain degree of vagueness in written contracts. He writes, “Deliberate ambiguity may be a necessary condition of making the contract; the parties may be unable to agree on certain points yet be content to take their chances on being able to resolve them, with or without judicial intervention, should the need arise.” In the end, Judge Posner speaks in favor of a modified “four-corners” rule.

115 There has been a debate as to whether the parol evidence rule is a rule of civil procedure and thus American courts may use it in applying the CISG or a rule of substantive contract law. The better argument is that it is the later and thus cannot be used in the application of the CISG. See Rod N. Andreasen, MCC-Marble Ceramic Center: The Parol Evidence Rule and Other Domestic Law Under the Convention on Contracts for the International Sale of Goods, BRIGHAM YOUNG U. L. REV. 352 (1999).


117 Gap-filling, under the CISG and UCC, for material terms such as price may be cost effective because of the fungible nature of goods and the relative ease of determining market price. In contrast, such gap filling may be too burdensome for other types of contracts. Richard A. Posner, The Law and Economics of Contract Interpretation, 83 TEX. L. REV. 1581, 1587 (2005) (hereinafter Posner, Interpretation).

118 Id. at 1583. Posner further states that “perfect foresight is infinitely costly, so that, as the economic literature on contract interpretation emphasizes, the costs of foreseeing and providing for every possible contingency that may affect the costs of performance to either party over the life of the contract are prohibitive.” Id. at 1582.
one that allows extrinsic ambiguity to be shown by objective evidence. Evidence of custom or trade usage would be an example of objective evidence.

In sum, the use of economic logic to assess the parol evidence rule is highly nuanced. Common law courts use the rule to protect the integrity of integrated writings, while simultaneously permitting extrinsic evidence to explain ambiguities. By contrast, most civil law systems and the CISG allow parol evidence, trusting the courts to assess its probative value. While the common law approach is generally supported by economic theory, the distinction between the common law and civil law approaches to extrinsic evidence should not be over-stated. Given the many exceptions to the rule, the two systems often reach the same results. The use of extrinsic evidence will be further studied in the next section’s coverage of contract interpretation.

C. Contract Interpretation

Judge Posner has noted that although the literature involving the economic analysis of contract law is deep in the areas of contract formation and remedies, the economic analysis

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119 Posner explains, “By ‘objective,’ I mean to exclude a party’s self-serving testimony that cannot be verified.” Id. at 1598-99.

120 “Were evidence of trade usage barred in contract litigation, parties to contracts would be driven to include additional detail in their contracts . . . . The need to add this detail would increase the costs of negotiation and drafting, while the benefits would be realized only in the small minority of cases that would result in a legal dispute.” Id. at 1600.
of contract interpretation is less deep and more abstract.\textsuperscript{121} Nonetheless, he asserts that contract interpretation can be better managed through an economic analysis.\textsuperscript{122}

Contract interpretation deals with three fundamental scenarios: (1) contractual incompleteness, (2) contractual ambiguity, and (3) situations in which the parties seek \textit{ex ante} to establish rules of interpretation that will apply \textit{ex post}. Before discussing these scenarios, the next subsection will address the more abstract question of the efficiency of the objective and subjective theories of contract interpretation.

1. Objective Versus Subjective Theories of Interpretation

The two broad theories of contract interpretation are illustrated by the civil law’s adoption of a subjective (agreement in fact) approach and the common law’s embrace of the objective (external manifestation of assent) approach. Article 1156 of the \textit{Code Civile} of 1804, as well as Section 133 of the \textit{Bürgerliches Gesetzbuch} of 1900, require a search for “the common intention of the contracting parties.”\textsuperscript{123}

The divergence between subjective and objective theories of interpretation\textsuperscript{124} is not as profound in practice. The subjective theory in the civil law gives way when the objective meaning is clear and the subjective obscure. Thus, Articles 1157 to 1164 of the \textit{Code Civile} acknowledges that the path to subjective understanding is through more objective

\textsuperscript{121} \textit{Id.} at 1581.
\textsuperscript{122} “I shall try to show that economics can be of considerable help in understanding the problems involved in interpreting contracts.” \textit{Id.}
\textsuperscript{123} French Code Civil, Article 1156.
\textsuperscript{124} For a fuller explanation of these theories of interpretation see DiMATTEO, CONTRACTUAL INTEGRITY, \textit{supra} note 74.
benchmarks such as the nature or purpose of the contract, trade usage and custom, and “the context of the contractual document.” The German law has more expressly abandoned subjectivism in favor of the reasonable person interpretive methodology. The CISG adopts a modified subjective approach.

The CISG interpretive methodology, as expressed in its Articles 8 and 9, reject the formalist approach to interpretation associated with the brand of objectivism that focuses solely on the written words of a contract. In the common law, this approach is embedded in the duty to read, four-corners, and plain meaning rules of interpretation. If intent is associated with the meaning of the parties’ written agreement, then EAL would assert that such rules protect the autonomy or will of private parties. However, true intent is most likely to be made available only through a contextual analysis of meaning. The uncovering of true intent better protects the principal of private autonomy that underlies contract law. The CISG interpretive methodology is best understood as one that embraces the objective theory of contract interpretation through a full contextual inquiry. This is made clear given the following interpretative framework provided in CISG Articles 8 and 9:

- Statements and conduct “are to be interpreted according to the understanding [of] a reasonable person”\(^{127}\)
- In applying the reasonable person standard “due consideration is to be given to all relevant circumstances . . . including the negotiations, any practices [between] the parties . . ., usages and any subsequent conduct of the parties.”\(^{128}\)

\(^{125}\) Vogenauer, supra note 109.

\(^{126}\) Id.

\(^{127}\) CISG Article 8(2).
• “The parties are considered . . . to have impliedly made applicable to their contract . . . a usage”¹²⁹ widely known in international trade.

The major exception to this objectivist framework is the inter-subjectivist methodology found in Article 8(1). It mandates that a party is bound to another party’s subjective intent “where the other party knew or could not have been unaware what that intent was.”¹³⁰ Under this perspective, the objective meaning of a promise is trumped by the known idiosyncratic, subjective meaning of the promise-receiving party. An illustration can be taken from the common law’s unilateral mistake doctrine. Generally, a reasonable person interpretation of a contract term will prevail over the mistaken unilateral interpretation of one of the parties. However, the unilateral mistake doctrine provides relief if the subjective error was known or could not have been unknown to the non-mistaken party at the time of contract formation.¹³¹

2. Intentional Contractual Incompleteness

There are three rationales for intentional contractual incompleteness: (1) avoiding the transaction costs of negotiating a more complete contract, (2) strategic informational asymmetry, and (3) consensual strategic incompleteness. Judge Posner refers to these types

¹²⁸ CISG Article 8(3).
¹²⁹ CISG Article 9(2)
¹³⁰ For a discussion of intersubjectivity in contract interpretation see DIMATTEO, CONTRACTUAL INTENT, supra note 74, at 49-50.
¹³¹ See, e.g., Smith v. Hughes, 6 L.R. 597 (Q.B. 1871).
of incompleteness as “deliberate ambiguity.” One of the rationales for intentional incompleteness is that such ambiguity is “a necessary condition of making the contract.” From an efficiency perspective, such an ambiguity is rational when the cost of clarifying or adding a term is greater than the benefit of having a more complete contract. The costs are likely to outweigh the benefits of completeness where there is a low probability of the event that the term deals with will occur. The more efficient strategy would be to keep the term open for future negotiation. Since the overwhelming majority of transactions do not result in costly dispute resolution proceedings, it is often efficient to avoid negotiation of a given term. The costs of such negotiation outweigh the costs of resolving a dispute over the term in litigation or arbitration due to the low probability of such an occurrence. So often the gaps and vagueness found in contracts are the conscious choices of the contracting parties.

Strategic informational asymmetry occurs when a party decides to strategically withhold information in order to avoid less beneficial terms that would result by the disclosure of the information. One suggested response is for the courts to fill in the gap with a “penalty default” term that punishes the non-disclosing party. The literature on disclosure in

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133 *Id.*
135 *Id.*
136 *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989). The Ayres-Gertner Model distinguishes between default terms that can be altered by agreement the parties and immutable contract terms that cannot be altered. Most default terms, known as “majoritarian” defaults, seek to mimic the terms that the parties would have agreed to if they had address them. By contrast, a “penalty default” provides a term
contract law balances the need to protect individual autonomy by not requiring disclosure against the fairness of requiring the disclosure of at least material information. Although the CISG failed to adopt mandatory disclosure rules, its inter-subjective interpretive methodology does place pressure on the information holder to disclose in order to subsequently prove contractual assent.\textsuperscript{137}

The case of consensual strategic incompleteness exists where both parties suffer from a lack of full information. This lack of full information often revolves around the transactional uncertainty of predicting future events in a long-term contract. The parties may agree to an open term with the aim of renegotiating the issue in the event of a post-formation development.\textsuperscript{138}

Another reason for such consensual ambiguity is the avoidance of the risk that negotiation over a particular term will lead to a deal-preventing impasse. The agreement to an open term or gap in the contract is likely to be strategic in nature because each party will work to frame the future renegotiation in its favor; thus, the intentional nature of the openness makes it strategic in nature. This is to be compared to unintentional openness which will be discussed in the next section’s coverage of contractual ambiguity.

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\textsuperscript{137} We will return to this notion under the topic of “particularized consent.” \textit{See infra} Part IV.

\textsuperscript{138} Economists distinguish between “obligational incompleteness” and “contingent incompleteness.” The former refers to “contracts in which the obligations are not fully specified.” Ian Ayres \& Robert Gertner, \textit{Strategic Contractual Inefficiency and the Optimal Choice of Rules}, 101 \textit{YALE L.J.} 729, 730 (1992). Contingent incompleteness refers to a failure to “fully realize the potential gains from trade.” \textit{Id.} In this language, obligational incompleteness can be used strategically to more fully capture these potential gains as events unfold.
A similar case of strategic incompleteness in both long-term and short-term contracts is related to market self-enforcing mechanisms, such as reputation. In consumer contracts, the consumer expects that a major corporation in a competitive market will agree to a fair settlement of any problem created by a low-probability event. This kind of trust boosts the particular corporation’s reputation (which is very valuable in a competitive market where there is little competition on the price). The costs from moral hazard incentives are superseded by greater sales and the reduction in transaction costs because of the consensual strategic incompleteness. The same holds for long-term contracts. The parties decide not to regulate their relationship ex ante since they know that for any low-probability event it will be more efficient to modify their contract ex post, avoiding the drafting costs and the possible relation-stressing effects of prolonged bargaining.

The problem of filling in gaps in written contracts has been the focus of EAL literature dealing with “incomplete contracts.” This literature generally discusses the issue of the fabrication and selection of default rules. Defaults can be either immutable or subject to modification by the parties. Given our first tenet, deference to individual autonomy, economic reasoning suggests that most defaults should be structured so that the parties can

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139 See generally IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (1980) (discussing the role of various social and economic norms that support long term relational contracting).

140 See Ostas, supra note 80, at 546-48 (discussing the role that trust plays in consumer contexts).

141 The economic significance of “trust” and “confidence” plays a prominent role in the socio-economic approach to contracting. See, e.g., AMITAI ETZONI, THE MORAL DIMENSION: TOWARD A NEW ECONOMICS (1988).

142 See Ayres & Gertner, supra note 136.

143 Id.
easily tailor them to their own needs. In addition, there is a general consensus that these defaults should reduce transaction costs by seeking to mimic what the parties themselves would have chosen if they had addressed the term in their contract. Judge Posner notes that the parliaments of Germany and other nations of Continental Europe have enacted detailed codes of “contractual obligations constituting implied terms that the parties can, however, negate.” A similar pattern can be found in the CISG, which provides a host of gap fillers, most of which can be modified by express agreement of the parties.


145 Such rules are often referred to as “majoritarian” defaults. See Ayres & Gertner, supra note 136; Posner, Interpretation, supra note 117, at 1585 (noting that contractual gaps are typically filled by the judiciary with “guesses as to what the parties would have provided for explicitly had they written a more complete contract); Frank H. Easterbrook & Daniel R. Fischel, The Corporate Contract, 89 Colum. L. Rev. 14190 (1989) (arguing that default terms should mimic what the parties would have chosen with “full information and costless contracting). See generally Charles J. Goetz & Robert E. Scott, The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms, 73 Cal. L. Rev. 261 (1985) (noting that default rules should be chosen so as to minimize the sum of negotiation and litigation costs); Marcel Kahan & Michael Klausner, Standardization and Innovation in Corporate Contracting (or “The Economics of Boilerplate”), 83 Va. L. Rev. 713 (1997) (arguing that in situations where network externalities prevent parties from choosing optimal individual terms, default terms should be centrally chosen for their substantive efficiency). For an alternate approach to contract interpretation see Avery Wiener Katz, The Economics of Form and Substance in Contract Interpretation, 104 Colum. L. Rev. 496 (2004) (advocating a transactional approach to the problem of interpretation); Katz, supra note 134.

146 Posner, Interpretation, supra note 117, at 1586.
3. Contractual Ambiguity

The most common form of ambiguity, unlike those discussed in the previous section, are those that are unintended. Professor Linzer’s critique of a formalist interpretation of written contracts notes that the “flaw in plain meaning is, of course, the notion of a latent ambiguity.”¹⁴⁷ In the plain meaning and four-corners analysis, extrinsic evidence can only be introduced in cases of patent ambiguity. Justice Traynor in his *Pacific Gas & Electric v. Thomas Drayage*¹⁴⁸ decision reviewing the parol evidence rule had this to say regarding the determination of ambiguity: “The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.”¹⁴⁹ This idea of an alternative reasonable latent meaning supports a more contextual interpretive methodology. It asserts that one can rarely reach the threshold of sufficient clarity of the written words without viewing the context behind the words’ usage. Thus, seemingly clear contract language may be susceptible to an alternative (non-plain meaning) interpretation through the use of extrinsic evidence.

The objective approach, stripped of the formal requirements of a writing and the parol evidence rule, allows for a fuller contextual inquiry. It is this contextualism that the CISG embraces in order to uncover the true intent of the contracting parties. The formalist ap-

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¹⁴⁷ Linzer, *supra* note 111, at 802.
¹⁴⁹ *Id.* at 644.
The majority of EAL literature has supported the formalist approach to contract interpretation. The contextualist approach asserts that written words are generally indeterminate and a totality of the circumstances analysis is required to uncover true intent. Furthermore, the so-called bright line rules of formalism are not very fixed or bright given that extrinsic evidence is allowed to supplement but not contradict a written contract. The determination of ambiguity is left to judicial discretion. This discretion can be used to “find” an ambiguity and allow for the admission of extrinsic evidence in cases where exclusion works an injustice.

The contextualist approach holds that bright line rules such as the statute of frauds, plain meaning rule, four-corner analysis, and parol evidence rule provide greater certainty, and thus reduce transaction costs. The contextualist approach asserts that written words are generally indeterminate and a totality of the circumstances analysis is required to uncover true intent. Furthermore, the so-called bright line rules of formalism are not very fixed or bright given that extrinsic evidence is allowed to supplement but not contradict a written contract. The determination of ambiguity is left to judicial discretion. This discretion can be used to “find” an ambiguity and allow for the admission of extrinsic evidence in cases where exclusion works an injustice.

The majority of EAL literature has supported the formalist approach to contract interpretation. Schwartz and Scott have argued in favor of the formal interpretation of written contracts in business to business contracts. This formal approach includes plain meaning interpretation, a hard parol evidence rule, and full enforcement of merger clauses. Such an approach is viewed as promoting efficiency given the sophistication of businesspersons and their ability to negotiate efficient contracts. In these cases, even where there is a long-term relationship, the inclusion of a merger clause in a contract signifies the genuine consent of the parties on the enforcement of their contract without having to worry about

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152 Schwartz & Scott, *supra* note 10, at 547.
judicial discretion. The probability of such a clause being included in the contract without the will of one of the parties is minimal, thus a strong parol evidence rule seems efficient.

The anti-formalists argue that the efficiency gains in formalism are overstated. In fact, there are efficiency costs related to a strong parol evidence rule and formalistic interpretation of contracts. Avery Katz argues that such an approach “can encourage parties to expend extra resources in negotiation, on one hand by attempting to manipulate the formal text of the agreement in their favor, and on the other hand by attempting to prevent the counterparty from doing so.” 153 This approach replaces efficient negotiators with inefficient lawyer-drafters 154 which leads to an increase of transaction costs that cannot be counterbalanced by the parallel reduction in administration (court) costs since only a small fraction of contracts end up in court.

The UCC, despite its adoption of a statute of fraud requirement, rejects the plain meaning approach in favor of a totality of circumstances analysis. 155 It further rejects the formality of the promise-based will theory in favor of an agreement-in-fact approach. 156 The

154 Katz argues that excessive formalism can “take power to set the terms of the agreement away from sales and purchasing agents, and confer it on lawyers and other drafting agents who control the production of formal contractual documents—even when the former agents are better placed to promote overall organizational interests than the latter agents.” Id.
155 The “totality of the circumstances” analysis is found, at least in part, in UCC § 2-202 which states that “the terms of a written agreement may be supplemented by course of dealings, usages of trade and course of performance.” For a fuller explanation of the “totality of the circumstances” analysis, see Larry A. DiMatteo, supra note 75, at 317-25.
156 UCC Section 1-201(3) states that: “‘Agreement’ means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance.”
agreement-in-fact approach requires the use of contextual evidence to determine the parties’ true intent.

The differences between evidentiary thresholds for admitting extrinsic evidence under the CISG and the UCC are not as great as the formal rules indicate. The main difference is that the UCC orders the probative value of the evidence. Section 1-303(e) states that when conflictive, the written agreement prevails over extrinsic evidence, course of performance prevails over evidence of prior dealings, and prior dealings evidence prevails over trade usage. In contrast, under the CISG, the judge or arbitrator determines the probative value of the different types of evidence on a case by case basis.

The ordering-non-ordering distinction is also overblown. The civil law systems will generally hold that the written contract is most probative even though there are no formal constraints on the use of extrinsic evidence. Also, despite the UCC ordering rule, the judge remains free to determine whether the contract language is ambiguous or not. If the judge determines that it is ambiguous, then extrinsic evidence can be admitted. Nanakuli Paving & Rock Co. v. Shell Oil Co., Inc. provides an example. The case involved a contract for the long-term supply of asphalt products used in road construction. The contract expressly granted the supplier the right to unilaterally change its prices without notice. The contract

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157 1-303(e) [T]he express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:

1. Express terms prevail over course of performance, course of dealing, and usage of trade;
2. Course of performance prevails over course of dealing and usage of trade; and
3. Course of dealing prevails over usage of trade.

158 Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772 (9th Cir. 1981).
provided that the supplier may “post the price at the time of delivery.” The contractor asserted that despite the express term it was a widely accepted trade custom to honor the prices previously posted under long-term supply contracts. The Court held that, despite the clarity of the express term in allowing ad hoc price increases, the jury was at liberty to construe the trade usage of price protection as consistent with the express term. The role of contextual evidence is at its height in this case. Despite clear, unambiguous contract language the court was willing to allow the jury to use evidence of trade usage to trump the operation of the express term.

4. Party-Controlled Rules of Interpretation

Given the inherent ambiguity of written contracts, be it intended or unintended, is there anything the contracting parties can do to prevent the admission of extrinsic evidence in a subsequent dispute? The principle of private autonomy suggests that the parties should be allowed to agree on how their contract is to be interpreted.

One way to overcome the inefficiency of determining and applying default rules of interpretation, be it common or civil law rules, is for the parties to pre-agree on the post hoc rules of interpretation. For example, the parties may agree to avoid the application of the

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159 Id. at 778.
160 “Lastly we hold that, although the express price terms . . . may seem, a first glance, inconsistent with a trade usage . . . a jury could have reasonably construed price protection as consistent with the express term.” Id. at 780.
161 “Contracting parties can also opt into relatively formalistic interpretative regimes by designating the tribunal or rule of law that will hear any dispute that arises under their agreement; and again there are various ways to achieve such a result.” Katz, supra note 134, at 179.
contra proferentum rule. A contract could incorporate the following clause: “The parties agree that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be applied in the construction or interpretation of this Agreement.” However, there is no guarantee that a court will disregard traditional rules of interpretation in face of such a provision.\textsuperscript{162}

Party-determined rules of interpretation have fared better in the common law. The incorporation of a merger clause has generally met with favorable judicial enforcement. This is likely because such clauses are aligned with the traditional rules of interpretation. The merger clause expressly warrants that the contract is a final and complete integration of the parties’ agreement. Its preclusion of the use of parol evidence to interpret or add to the contract’s meaning is the same result as if the court, independent of any merger clause, determined that the contract was a complete integration. Thus, a merger clause acts to mimic the parol evidence rule in order to assure its applicability. It is doubtful that a merger clause will prevent the entry of extrinsic evidence under CISG rules. CISG Advisory Opinion No.3 attempts to clarify the enforceability of a merger clause within the CISG’s liberal evidence regime.\textsuperscript{163} It states:

A Merger Clause, also referred to as an Entire Agreement Clause, when in a contract governed by the CISG, derogates from norms of interpretation and evidence contained in the CISG. The effect may be to prevent a party from relying on evidence of statements or agreements not contained in the writing. Moreover, if the parties so intend, a Merger Clause may bar evidence of trade usages.

\textsuperscript{162} “Even when the substantive rule of interpretation is the same, differences in local legal culture, procedural and evidentiary rules, or other resource constraints may make one tribunal considerably less inclined to take an open-ended approach to gap filling than another.” \textit{Id.}

The Opinion affirms that a merger clause may be viewed as a permissible derogation under CISG Article 6. However, unless it is expressly negotiated and agreed to it is unlikely to bar extrinsic evidence.\textsuperscript{164}

\textit{D. Contract Formation}

We close our assessment of specific provisions of the CISG with an inquiry into issues associated with contract formation. As a general rule, civil and common law traditions have evolved similar rules regarding contract formation and performance. Examples include rules pertaining to anticipatory repudiation,\textsuperscript{165} transfer of risk,\textsuperscript{166} implied warranties of merchantability and for a particular purpose,\textsuperscript{167} the foreseeability limitation on damages,\textsuperscript{168} the mitigation principle,\textsuperscript{169} and excuse.\textsuperscript{170} In each of these areas, the drafters of the CISG followed the “common core” approach, and adopted the uniform treatments. However, with regard to two formation issues—effectiveness of acceptance and firm offer—the common law and civil law diverge. Interestingly, in each case the CISG offers a compro-

\textsuperscript{164} The Opinion notes that in a case of a written merger clause: “[I]n determining the effect of such a Merger Clause, the parties’ statements and negotiations, as well as all other relevant circumstances shall be taken into account.” \textit{Id. See infra} Part IV (exploring the notion of particularized consent).

\textsuperscript{165} See CISG Articles 71 & 72.

\textsuperscript{166} See CISG Articles 66-70.

\textsuperscript{167} See CISG Article 35.

\textsuperscript{168} See CISG Article 74.

\textsuperscript{169} See CISG Article 77.

\textsuperscript{170} See Article 79.
mise, fabricating a modified third approach—an amalgamation of conflicting civil and common law rules.

1. Effectiveness of Acceptance

Regarding the effectiveness of an acceptance, the common law offers the mailbox rule which makes an acceptance effective on dispatch by the offeree, rather than on receipt by the offeror.\footnote{The mailbox rule traces to the King’s Bench. See Adams v. Lindsell, 106 Eng. Rep. 250 (K.B. 1818).} The mailbox rule protects the offeree’s expectations by forming the contract at the moment of dispatch.\footnote{See generally Courtenay Canedy, Note, The Prison Mailbox Rule and Passively Represented Prisoners, 16 GEO. MASON L. REV. 773, 775-76 (2009) (reviewing the traditional rationales offered in defense of the mailbox rule).} From an efficiency perspective, the rule misallocates of the risk that the acceptance will not reach the offeror by placing the risk on the less efficient insurer.\footnote{See generally Beth A. Eisler, Default Rules for Contract Formation By Promise and the Need for the Revision of the Mailbox Rule, 79 KY. L.J. 557 (1991) (arguing on both economic and other grounds that the mailbox rule needs to be reformed).} Under the rule, the risk of a lost transmission is on the offeror despite the fact that the offeree is the party most able to effectuate delivery.

Article 18(2) of the CISG rejects the common law’s mailbox rule in favor of the civil law’s receipt doctrine.\footnote{See generally Matyas Eorsi, Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods, 27 AM. J. COMP. L. 311, 317-19 (1979).} The allocation of transmission risk to the more efficient insurer supports the receipt rule. Article 16(1) of the CISG addresses the common law’s expectancy protection rationale by freezing the offeror’s right to revoke once the acceptance
is dispatched. However, if the acceptance does not reach the offeror within a reasonable time, then the receipt rule allows for the “unfreezing” of the revocation.\textsuperscript{175} Taken together Articles 18 and 16 provide a creative set of rules that allows for the adoption of the civil law’s receipt rule while protecting the expectancy interest to which the common law’s dispatch rule is directed.

2. Firm Offer Rule

In the area of firm offer, both civil and common laws recognize the importance of prohibiting merchant sellers from revoking offers that the offeree reasonably expects to remain open. However, under the UCC the reasonableness determination is made by the Code’s enunciation of formal requirements—the offer must assure that it will remain open for a fixed time not exceeding 90 days, it must be in writing, and signed by the offeror.\textsuperscript{176} The CISG, by contrast, expands the breadth of the firm offer principle, rendering irrevocable any offer on which the offeree reasonably relied.\textsuperscript{177}

The advantage of the UCC approach is that it provides a bright line rule that is efficient to administer. The formalities of a writing, a signature, and fixing a time provide strong proof of a firm offer. The problem with the CISG’s approach is that there is no foolproof means by which an offeror can prevent a post hoc determination that he had made a firm offer. Although, Article 6 of the CISG allows for the derogation from CISG rules, there is

\begin{itemize}
\item \textsuperscript{175} CISG Article 18 (2) states that the acceptance is not effective if it does not reach the offeror “within a reasonable time.” Reasonable time is determined by the “circumstances of the transaction” and the “rapidity of the means of communication employed by the offeror.” \textit{Id.}
\item \textsuperscript{176} UCC § 2-205.
\item \textsuperscript{177} CISG Article 16 (2) (b).
\end{itemize}
no certainty that an affirmation in the offer that it is not open or that it will only remain open for a shorter than customary time will be recognized by a court. Article 6 requires both parties to agree to any derogation.\textsuperscript{178} The question becomes whether there can be a reasonable reliance beyond the stated time in the offer. There is a plausible argument that a recognized trade usage that an offer should remain open for a certain period may trump a provision in the offer stating otherwise, especially if the provision is in a standard form.

The CISG’s firm offer rule’s failure to adopt a formality requirement is consistent with the fact that the CISG does not require a writing for contract formation. The interpretation rules used to determine whether an offer is firm are the same as the rules for interpreting a consummated contract. The CISG’s recognition of international trade usage in the interpretation of contracts is a means by which the reasonable reliance of the offeree is likely to be determined. Practices developed by merchants in a given trade generally provide an efficient means of applying the firm offer rule. Hence, the drafters of the CISG once again seem to have fabricated a hybrid, adopting the common law firm offer principle, but allowing it to evolve over time through trade custom.

\textbf{IV. PARTICULARIZED CONSENT: MOVING BEYOND LAW TO BEST PRACTICES}

In order to avoid the regulatory function of contract law and frame the interpretation process, the use of particularized consent is the most efficient means of accomplishing these goals. Particularized consent is the use of some means, such as negotiation, legal representation, disclosure, initialing a contract term, to heighten the awareness of the other

\textsuperscript{178} “The parties may . . . derogate from or vary the effect of any of its [CISG] provisions. CISG Article 6.
contracting party.\textsuperscript{179} The use of particularized consent in the international sales setting is the best practice in ensuring the enforcement of important contract terms. It merges the subjective and objective approaches to contract law. It provides an heightened objective base to prevent the use of extrinsic evidence to contradict the enforcement of a contract provision. It provides an evidentiary base against the party seeking the non-enforcement of a contract provision by showing she did know or should have known the meaning and intent of the provision.\textsuperscript{180}

The use of particularized consent is especially important to buttress the enforcement of non-material or fine print terms that one of the contracting parties deems important. In the battle of the forms scenario a heightened consent method increases the chances that the designated terms will be enforced. The method of particularized consent consists of the building of evidence of knowledge and consent in order to overcome the admission of contradictory extrinsic evidence. From an efficiency perspective, a party should deem important any term in which the benefit obtained based upon the probability of its use and value to the party is greater than the additional transaction costs incurred to particularize the consent.

Most legal systems provide a number of immutable rules, mostly in the consumer contract scenario, that aims to ensure the awareness of the form-receiving party of certain contract terms. The UCC provides a limited example of the importance of demonstrating actual consent in the enforcement of a sales contract. In the area of disclaimer of liability, it

\textsuperscript{179} For a slightly briefer discussion of particularized consent see DiMATTEO ET AL., \textit{supra} note 18, 166-68 (2005).

recognizes the importance of conspicuousness.\textsuperscript{181} The purpose of the conspicuousness requirement is to indicate that the appearance of consent, such as knowledge or the appearance of knowledge, is an important force in judicial decision making in this area of law. The requirement of conspicuousness in the disclaimer laws embodied in the UCC and the Magnusson-Moss Act is as close as American law gets to the notion of particularized consent.\textsuperscript{182} It is a weak form of particularized consent. It is hoped that by displaying such terms in a conspicuous manner, a party will be alerted to their existence. Such a notice will hopefully provide a cautionary incentive to read and understand such terms.\textsuperscript{183}

The Uniform Computer Information Transactions Act (UCITA) requires that terms involving the use of self-help remedies must “separately manifest assent to a term authorizing the use of electronic self-help.”\textsuperscript{184} The EU’s Unfair Terms in Consumer Contracts Directive\textsuperscript{185} dictates that a contractual term which has not been \textit{individually negotiated} shall be

\textsuperscript{181} Conspicuous is merely a procedural device or formality. For Example, Revised Article 2 of the UCC Conspicuous terms include the following:

\begin{itemize}
  \item[(A)] a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size and;
  \item[(B)] language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.
\end{itemize}


\textsuperscript{183} Revised Article 2 states that: “‘Conspicuous’” with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it.”

\textsuperscript{184} UCITA § 816.

regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer. In the event, that there has been no individualized agreement, Article 4 (1) provides that:

[T]he unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent. 186

The Hungarian Civil Code, 187 in introducing its national law rules on unfair terms provides that “in assessing the unfairness of a contractual term, all of the circumstances attending the conclusion of the contract which led the parties to conclude it must be considered, as well as the nature of the service agreed and the relationship of the term at issue with other terms of the contract or of other contracts.” 188 The English courts have insisted on a totality of the circumstances-type of analysis under it unfair contracts legislation. 189 In a case applying the law, the court noted that “two of the guidelines concerned the relative bargaining power of the parties, and the extent to which the other side was familiar with the particular term” were crucial in determining if the term was enforceable. 190

186 Id.
187 Article 209/B of the Ptk (Hungarian Civil Code). See Court of Justice of the European Communities, European Court reports 2006 Page I-00371, 2005 ECJ CELEX LEXIS 713 (September 22, 2005).
188 Id.
A final example of the use of particularized consent is found in the *Principles of European Contract Law* which states that “terms which have been individually negotiated take preference over those which have not.” More telling is Article 2:104 entitled “Terms Not Individually Negotiated.” It states that non-negotiated terms cannot be enforced against a party unless “the invoking party took reasonable steps to bring them to the other party’s attention when the contract was made.” It further raises the threshold of notice by stating that “terms are not brought appropriately to a party’s attention by a mere reference to them in the contract document, even if that party signs the document.” These guidelines should be used by the international merchant to ensure the enforcement of its contract terms. The obtaining of particularized consent is especially warranted when the seller transacts business through intermediaries. Requiring the foreign sales representative to obtain particularized consent from ultimate purchasers provides strong evidence of knowing consent to the terms important to the seller.

Under general economic theory, the providing of additional information, transactions costs aside, should lead to more efficient contract terms. Knowledge of the existence and meaning of a contract term increases the chances that it is the product of consent. Professor Baker asserts that “[i]t would seem senseless to deny that contract terms can shape expectations and determine precisely what it is reasonable for one party to expect from the agree-

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191 PECL at Article 5:104.
192 Id. at Article 2:104 (1).
193 Id. at Article 2:104 (2).
ment. Provided procedural requirements are satisfied, chiefly that the party knows about and fully understands the effect of the term, and assents to it, this negates any other expectation he may have which is at variance with the term."

When a party seeks to incorporate standard terms into an offer or acceptance, courts consider whether such terms have been fairly communicated to the other party. While the CISG does not specifically address the incorporation of standard terms, national courts generally agree that the CISG’s provisions on contract formation and interpretation determine whether standard terms have been validly incorporated into the contract. An alternative view is that CSIG Article 4 makes the validity of standard terms beyond the scope of the CISG and in the domain of domestic law.

The argument here is not that the CISG requires or even encourages particularized consent of certain contract terms, but that it is a best practice that a party obtain particularized consent to terms its deems important. The additional transaction cost of obtaining such consent is likely to be outweighed by the benefits of increasing the probability of enforcement. Off hand, the most common terms for which particularized consent would produce efficiency gains include: arbitration, price adjustment, warranties, notice of non-conformity requirements, unusual force majeure events, extended inspection rights, damages and remedy limitation clauses.

Assuming the efficiency of obtaining particularized consent on certain contract terms, the issue becomes how much information needs to be communicated to the form or contract receiving party? Civil law legal systems have emphasized that a party must be reasonably

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195 CRITICAL ANALYSIS OF CISG at 64-66.

196 CISG at Art. 4.
aware of the terms the other seeks to incorporate, but how does one measure reasonable awareness?

In general, a party that wishes to incorporate standard terms must show good faith efforts to communicate those terms to the other party. Failure to provide standard terms in the other party’s language, failure to note that standard terms are listed on the back of a form, and failure to provide the text of standard terms have lead courts to exclude such terms from the contract. In *ISEA Industrie S.p.A. and Compagnie d’Assurances*, a French court held that where the buyer’s standard terms were printed on the back of a form and the seller had signed only the front page, the standard terms were not part of the contract. The court held that the terms of the contract had already been determined and the seller’s attempt to impose additional terms was ineffective. A German court, however, held that where standard terms were printed on the back of the order form in both parties’ languages and the front side of the order form specifically referred to the standard terms, the terms were validly incorporated into the contract. Likewise, where an offer made reference in bold letters to particular industry standards and the seller made repeated reference to such standards throughout negotiations, the buyer was aware or should have been aware that these general conditions were part of the agreement, according to Articles 8 (1) and 8 (3).

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197 *ISEA Industrie S.p.A. and Compagnie d’assurances Generali v. LU. S.A. and Beil S.A., Cour d’Appel de Paris, 95-018179 (Dec. 13, 1995 France).* In the same case, the court held that standard terms in a confirmation letter from the seller were not valid when the letter was sent after the contract had been performed.

198 *See AG Nordhorn 3 C 75/94 (June 14, 1994 Germany).*

The Federal Supreme Court of Germany addressed the issue of the type of information needed to prove intent to standard or general conditions or terms.\textsuperscript{200} Using Articles 14 and 18, supplemented by Article 8’s rules on interpretation, the court held that the seller’s “Sales and Delivery Terms,” which included a notice of warranty exclusion, were not part of the parties’ contract. Although the contract referred to such terms, a copy of the seller’s Sales and Delivery Terms was never transmitted to the buyer. The court held that “the user of general terms and conditions is required to transmit the text to the other party or make it available in another way.”\textsuperscript{201} According to the court, the burden to provide the terms was on the party inserting such clauses.\textsuperscript{202} The court emphasized the fact that parties to an international contract should not be expected to know the particular terms and conditions that might be familiar to parties that share the same national legal system and business customs.\textsuperscript{203} Requiring one party to make general terms and conditions available to the other party, would, according to the court, promote the CISG’s goals of good faith and uniformity.\textsuperscript{204} Similarly, an Austrian court held that a seller’s attempt to incorporate standard terms

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\textsuperscript{200} The Bundesgerichtshof, VII ZR 60/01, (Oct. 31, 2001 Germany), available at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/01103g1.html.

\textsuperscript{201} Id.

\textsuperscript{202} Id.

\textsuperscript{203} Id.

\textsuperscript{204} Id. Although the court relied on the CISG, it also noted that the United Sales Law requires users of general terms and conditions to transmit the text or make it available in another way. The Supreme Court of Germany’s decision to require the terms to be transmitted has been criticized as “contrary to commercial practice.” Whether or not the terms should be incorporated in the contract should turn on whether a reasonable party was aware or could not have been unaware of the intent to include such terms. One author maintains that a general duty to transmit standard terms goes too far and is not supported by the Convention. This author fears that the development of a general duty to transmit may prevent even better known standard terms from being included, absent transmis-
requiring a contract to be in writing was not valid.\textsuperscript{205} Although the seller had proposed such terms as part of a master contract prior to a subsequent sales contract, the master contract was never concluded, so that reference to terms in that agreement could not be binding on the buyer in the subsequent contract.\textsuperscript{206} The court recognized that contractual negotiations, prior practices and trade usages may provide evidence that the offeree was aware of the inclusion of standard terms. This transaction was the parties first together, however, and the court found that the offeree had no reason to be aware that the general terms were to be included in the deal.\textsuperscript{207}

Another Austrian court held that where the seller had standard terms that required acceptance to be in writing, such terms would apply only if the buyer had knowledge of them, otherwise the oral acceptance was sufficient to conclude a valid contract under the CISG.\textsuperscript{208} The court in \textit{Chateau des Charmes Wines Ltd. v. Sabate USA Inc.} noted that the mere permission. \textit{See} Dr. Martin Schmidt-Kessel, \textit{On the Treatment of General Terms and Conditions of Business under the UN Convention on Contracts for the International Sale of Goods (CISG)}, available at \url{http://www.cisg.law.pace.edu/cisg/wais/db/cases2/011031g1.html}. “The development of a general duty to transmit without recognizable exceptions would have the effect that other, better known standard clauses – such as Incoterms 2000, the several ECE-Terms, or branch-specific terms such as GAFTA 100 or the rules of the Sugar Association of London – could not become the basis of contracts without being transmitted.”) \textit{Id.}

\textsuperscript{205} \textit{See} Oberster Gerichtshof, 10 Ob 518/95 (Feb. 6, 1996 Austria).

\textsuperscript{206} \textit{Id.}

\textsuperscript{207} \textit{Id.} Another Belgian case stated that standard terms regarding contractual damages mentioned in a seller’s invoice were not part of the contract because there was no evidence that the buyer had knowledge of the standard terms and so could not accept them. The written contract did not include or even mention the standard terms. BV BA G-2 v. AS C.B., A/00/00665, (April 25, 2001 Belgium), available at \url{http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010425bl.html}.

\textsuperscript{208} \textit{See} Oberster Gerichtshof, 10 Ob 518/95 (Feb. 6, 1996 Austria) \textit{available at} \url{http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960206a3.html}. 
formance of obligations under the oral contract did not indicate assent to what would be additional material terms under Article 19(3).\textsuperscript{209}

Some courts have refused to enforce derogation from CISG rules without proof of particularized express consent. Article 6 states that “parties may exclude the application of the Convention or derogate from or vary the effect of any of its provisions.” However, excluding or varying the application of a CISG provision may require more than inserting an express term in the written contract. An Italian court required that the party enforcing the derogation prove that the other party was aware of the relevant CISG provision and that she expressly intended to exclude it. An ICC arbitration panel held that derogation should not be implied from related terms in a contract.

Another example of the need for particularized consent relates to CISG’s Article 29’s express recognition that a contract can require modifications to be made in writing. However, an Austrian court rejected such a derogation from Article 11’s \textit{no writing requirement} when it failed to enforce a writing requirement clause inserted into a standard form con-

\textsuperscript{209} \textit{Id.} at *8. The Supreme Court of Spain took a similar approach in a case where one party attempted to renegotiate the price of a concluded contract and the proposed modification was not accepted. \textit{See Internationale Jute Maatschappij BV v. Marín Palomares S.L.}, Tribunal Supremo 454/2000 (Jan. 28, 2000 Spain), available at \url{http://www/cisg.law.pace.edu/cisg/wais/db/cases2/000128s4.html}. Finding that the original contract was not impaired by the subsequent attempt to modify, the court cited Article 19: “a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.” \textit{Id}. The court’s reasoning is difficult to ascertain as it referred primarily to Spanish civil law and its previous rulings throughout the opinion, but approach appears consonant with that of the U.S. court.
tract. It held that such a writing requirement is only enforceable if the non-derogating party gives informed assent.  

In sum, due to the CISG’s liberal use of extrinsic evidence, the implementation of procedural steps in contracting practice to obtain particularized consent to “important” terms is the most efficient means to ensure their enforcement. Particularized consent should be recognized as a best practice when the costs of obtaining consent (including the probability that the term would be construed as a deal-breaker) is outweighed by the value placed upon term enforcement by the inserting party (diminished by the probability of the term’s use).

V. ASSESSING THE VALUE OF COMPARATIVE EAL

It has been argued elsewhere that comparative EAL is a relatively useless method for comparing laws from different national legal systems. The argument is that the differences in legal culture often justify the development of different contract rules and at the same time be efficient within the given cultural context. Professors Alpa and Giampieri assert that:

The analysis of some of the rules related to the breach of contract and the relative damages recovery techniques shows that the models of law and economics cannot be always applied: they are always based either on a certain law system or on legal concepts typical to a peculiar experience; the adoption of a perfect, ideal, abstract model may be useful as a general framework, but, in order to achieve practical results, it is necessary to carry out an analysis in light of the applicable law, taking into account the interpretation given by the jurisprudence and the con-

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cepts on which same is grounded.211

In the examples examined in this article, where the CISG choose between rules from the different legal regimes, it was observed that in most cases the rule was found in the civil law. However, a conclusion that this supports the civil law as more efficient is an illusion since the so-called divergence in rules often is marked by similar results. For example, it was noted that CISG’s Article 18 (2) rejected the common law’s mailbox rule in favor of a receipt rule. But, Article 16 (1) alleviates the major concern of the mailbox rule by freezing the offeror’s right to revoke his offer upon the dispatch of the acceptance.212

Another example of divergence is the CISG’s rejection of the UCC’s perfect tender rule in favor of the fundamental breach rule. It was argued that both rules are relatively efficient within the context of their use.213 A closer look at the UCC shows that the absolute right of the buyer to reject non-conforming tenders of goods under the perfect tender rule is not so absolute. That right is qualified under UCC Sections 2-602 and 2-603. Section 2-602 requires the buyer to inspect the goods within a reasonable time and then to give seasonable notice or lose the right to reject.214 Section 2-603 places duties on the merchant buyer to “follow any reasonable instructions received from the seller with respect to the goods.”215 It further obligates the buyer to obtain salvage value for goods that are “perish-

212 Supra Part III.2.D.
213 Supra notes 19-23 and accompanying text.
214 Compare, CISG Articles 38 & 39.
able or threaten to decline in value speedily.”

Thus, the divergence, context aside, is not as great as initially perceived and relative efficiency of result is closer than the rejection rule indicates.

A. Evolutionary Efficiency

Judge Posner has argued that the common law is generally made up of efficient rules. The reason given for such efficiency is that courts in deciding cases intuitively use an economic analysis in the application of legal rules. Others have extended this theory to argue that the common law has become more efficient over time. One version of this evolutionary model asserts that those cases most likely to be disputed involve inefficient rules. Disputes involving the application of efficient rules are more likely to be settled out of

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216 Id.

court. Thus, courts over time have the opportunity to work inefficient rules out of the common law. Professor Rubin qualifies this assertion by noting that evolutionary efficiency is not uniform throughout the common law because it depends more on the characteristics of the litigants than it does on the action of judges.\textsuperscript{218}

Evolutionary efficiency is most likely to happen when both parties to the dispute are interested in setting a precedent where the existing rule is inefficient.\textsuperscript{219} The only further modification of this version of evolutionary theory is that the characteristics of the parties changes over time. Cases of only one or no interested parties could change to cases of two interested parties. This is likely to happen in response to changes in the market including changes in government regulation of the market. From the perspective of the long-term evolution of legal rules, all rules will evolve towards efficiency or the government will intervene in an attempt to provide more efficient rules.

The importance of the evolutionary efficiency argument is that it is internal to a given legal system. If we assume that both the civil law and common law have evolved toward

\textsuperscript{218} Professor Rubin distinguishes levels of evolutionary efficiency based on the characteristics of the disputing parties. The pairings of parties is divided into cases where both parties are interested in setting a precedent, where only one party is interested in setting a precedent, and where neither party is interested in setting a precedent. It is only in the first scenario (two-party interest) that efficient evolutionary efficiency is most likely. If the defendant in the first scenario is subject to an inefficient rule, then he will have the incentive to litigate. In short, “efficient rules will be maintained, and inefficient rules litigated until overturned.” \textit{Rubin}, supra note 217, at 53. In the second scenario (one party interest), the party with interested in setting or retaining a precedent is over time more likely to get a solution favorable to his side. This solution (rule change) may not be the most efficient one. In the third scenario (no party interest), the status quo rule while persist because neither party has an incentive to litigate for a rule change and are most likely to settle out of court based upon the existing rule.

\textsuperscript{219} \textit{Id.}
more efficient rules, then we are still presented with the issue of which one is more efficient in cases where they have evolved different rules. This is where comparative law and economics has a role to play. This comparison would be most striking if legal systems were highly insulated. The greater the level of insularity the more one would expect to see divergence in rules and the relative efficiency of rules. This is not the case with the civil and common law systems. Both systems have been exposed to each other for centuries. This has allowed for greater convergence in the systems through cross-fertilization, transplantation, and harmonization.\footnote{See, e.g., Michael Joachim Bonell, The UNIDROIT Principles and CISG -- Sources of Inspiration for English Courts?, 19 PACE INT’L L. REV. 9 (2007). Convergence in European contract law has been a by-product to the evolution of the common market} No doubt, convergence in European contract law has been assisted by the evolution of the common market.

The CISG provides an opportunity to examine some of the remaining vestiges of divergence in the law of sales from an efficiency perspective. Some have argued that when legal systems compete the more efficient one will win in the battle of competing rules.\footnote{See Daniel Klerman, Jurisdictional Competition and the Evolution of the Common Law: A Hypothesis, 8 AUSTL. J. LEGAL HIST. 1 (2004); Todd J. Zwicki, The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis, 97 NW. U. L. REV. 1551 (2003).} The findings of this article tentatively support this argument.

\section*{B. Benefits of Comparative EAL}
Comparative EAL is part of a long history of comparative law. Legal systems have borrowed rules from each other for many years. Some have transplanted entire areas of law. Comparative legal historian Alan Watson has noted that “legal transplants—the moving of a rule or a system of law from one country to another or from one people to another—have been common since the earliest recorded history.” Comparative contract law has been around as long as comparative law. Given the different sources—Roman Law for the civil law and English judge-made law for the common law—scholars continue to compare divergences in the contract law between the two systems. This is partly due to the search for an international contract law to facilitate transborder transactions. The CISG is a recent product of that search.

It is only natural that comparative legal scholarship should analyze such movement between legal systems. Such a descriptive endeavor leads to prescriptive suggestions of which legal system-specific rules are more responsive to modern, international transactions.


EAL provides one means of choosing between divergent national rules. International private law conventions, like the CISG, provide opportunities to apply EAL principles to non-nation-specific private law. This is especially true when alternative rules are available to writers of such conventions. The fact that the CISG is a blend of common law and civil law rules makes it an ideal avenue for comparative EAL scholarship.

C. Comparative EAL and the CISG

The current comparative efficiency analysis suggests three general areas for further inquiry—two descriptive and one normative. The first area asks whether the CISG has made international sales contracting more or less efficient. This descriptive analysis can and should be done at two levels. The first level, the one implored in this article, looks at the choices presented to the CISG drafters and the resultant adopted rules to assess the efficiency of the selected rules. The second level analysis recognizes the likely divergence between the rules as written and the rules as applied. This divergence is most likely in the CISG context due to the fact that its rules are applied by courts from different legal traditions. This divergence requires an analysis into whether jurisprudential developments in the application of CISG rules have made the rules more or less efficient. At the same time, an ongoing normative analysis would involve taking the findings of the comparative efficiency analysis and ask what changes should be considered to make international sales law more efficient?
The intellectual benefit of comparative efficiency analysis in the context of the CISG is that it forces the evaluator to critically assess nation-specific rules. A major benefit of the use of EAL in comparative law is that it improves the means by which scholars from different legal traditions are able to communicate. The nomenclature of efficiency—transaction costs, most efficient insurer, default rules, wealth maximization—can be applied across legal systems. It provides a means to more rigorously describe the consequences of competing rules. Economic rationales may also be used to justify a compromise between competing rules. The CISG’s acceptance of the receipt rule can be seen as the proper allocation of risk to the best insurer. The freezing of the revocation of offer power upon the dispatch of the acceptance can be seen as an efficient attempt at protecting the expectancy of the offeree. In the end, the underlying policies behind the adoption of divergent rules among different legal systems cannot be uncovered through EAL. However, EAL allows for a better description of the degree that divergence exists.

A final example of the descriptive power of EAL can be seen in the area of pre-contractual liability. On the surface there seems to be two diametrically opposed rules—the civil law’s acceptance of the duty of good faith negotiations and the common law’s rejection of any good faith obligation prior to contract formation. In fact, the common law has evolved means to overcome the inefficiency of a party incurring sunk costs while promoting the efficiency of allowing parties the freedom to investigate potentially efficient collaborations without incurring liability. This balance of protecting reasonable reliance and not inhibiting exploratory negotiations can be seen in the evolution in the common law’s principle of promissory estoppel and the recognition that parties can enter into a binding agreement to negotiate in good faith.
Law and economics allows for the study of the comparative efficiency of rules found in different legal systems. It also allows for the normative claim that only the better or more efficient rules should be adopted at the level of uniform international contract law. The ability to select or fabricate efficient rules offers an alternative to a common-core approach to unification and harmonization of national laws. The economic analysis of law provides a means of selecting the more efficient of conflicting national rules.

The Convention on Contracts for the International Sale of Goods (CISG) provides a tool for such a comparative analysis. The CISG is a hybrid or amalgamation of civil and common law rules. The drafters were faced with competing or conflictive rules offered by the two legal systems. Their ultimate selection of rules provides an opportunity to test the theoretical efficiency of the competing rules found in the two major legal systems. This article begins such an analysis of whether the rules selected were the more efficient ones. In the end, it concludes that the drafters were mostly successful in selecting the more efficient rules. However, the lack of comprehensiveness and the abdication of coverage in numerous areas of contract law renders the overall efficiency of the CISG less than optimal.