
Sarah H Jenkins
Some twenty-four years after the effective date of UN Convention on Contracts for the International Sale of Goods and seventy-eight contracting states, U.S. domestic lawyers, judges, academics, and law students remain challenged by the provisions and policies of the Convention. Early on, the practicing bar in the United States ignored or was oblivious to the applicability of the Convention. Some encouraged domestic clients to opt-out of the Convention’s coverage, choosing instead the security of the Uniform Commercial Code, without assessing the viability of the Convention given the client’s business goals or risk tolerance. The Model Rules of Professional Conduct mandate that attorneys are to be competent and diligent. Without an understanding of the Convention, attorneys, whether engaged in litigation or transactional practices, are failing to meet these two important ethical standards. This article is part of a larger resource designed to demystify the Convention and to provide guidance to the legal community on its provisions. Practitioners, judges and law students must engage in the mundane yet essential task of construing the Convention, determining its operative legal effect. This article is designed to assist in that process; it also delineates the similarities and differences between the processes employed for interpreting the Convention and the UCC. Finally, this article addresses those contextual settings that trigger the applicability of the Convention and those key Reservations or other provisions that redefine or limit its applicability.
Table of Contents

I. INTRODUCTION .......................................................................................................................1
   A. GOALS AND OBJECTIVES OF THE CONVENTION .........................................................3
      1. Interpreted Consistent with Its International Character ..............................................5
      2. Interpreted to Promote Uniformity of Application .......................................................11
      3. Interpreted to Encourage Observance of Good Faith in International Trade ..........14
         a. U.S. Domestic Law on Good Faith Performance .................................................15
         b. Good Faith and the CISG ....................................................................................21

II. UNIFORM COMMERCIAL CODE ..........................................................................................25
   A. ITS CHARACTER ...............................................................................................................25
   B. CISG – UCC: Assessing the Differences and Similarities ............................................29
      1. Analogical Development of Provisions ..................................................................30
      2. Resort to Domestic Law .........................................................................................32
      3. Uniformity of Interpretation ..................................................................................35

III. APPLICABILITY OF THE CONVENTION .........................................................................35
   A. Reservations
      1. Reservation 93: The Federal State Clause .............................................................42
      2. Reservation 94: Same or Closely Related Law ......................................................45
      3. Reservation 95: Article 1 (1) (b) Exclusion .............................................................47
   B. Multiple Business Locations ......................................................................................48

IV. CONCLUSION ......................................................................................................................51

by Sarah Howard Jenkins

INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods\(^1\) came into force in 1986 and, therefore, became applicable to transactions between parties with their places of business in different contracting states or signatory nations.\(^2\) For parties with their places of business in the United States, this uniform law for international sales of goods governed relevant transactions entered into on or after January 1, 1988. Now, some twenty-four years after the effective date of the enforceability of CISG and seventy contracting states later,\(^3\) lawyers, judges, academics, and law students remain challenged by the provisions and policies of the Convention. This article demystifies the Convention and provides guidance to the legal community. Early on, the practicing bar in the United States ignored or was oblivious to the applicability of the Convention\(^4\) or encouraged domestic clients to opt-out of the Convention’s

\(^{1}\)United Nations Convention on Contracts for the International Sale of Goods [hereinafter “the Convention”].

\(^{2}\)See text and notes, \textit{infra} at nn. ___, for a discussion of the determination of the applicable place of business if a party has places of business in more than one contracting state, a nation that has ratified or acceded to the CISC.

\(^{3}\)See http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (last viewed ____________).

\(^{4}\)Michael Wallace Gordon, \textit{Part II - Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles as Reflected in One State’s (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice, and (3) Judges}, 46 AM. J. COMP. L. SUPP. 361 (1998) (survey reveals general unfamiliarity among faculty, practicing bar, specialty bar, and judiciary with CISG and UNIDROIT contract principles); Sandra Saiegh, \textit{The Business Lawyer’s Perspective, in DRAFTING CONTRACTS UNDER CISG} 253, 258 (HARRY M. FLECHTNER ET AL. eds., 2008) (reporting that a quick review of standard terms available on companies’ website indicate that opting-out of CISG is prevalent); see generally Sandeep Gopalan, \textit{A Demandeur-Centric Approach to Regime}
coverage, choosing instead the security of the Uniform Commercial Code. In the absence of a contrary agreement, the Convention provides default rules to govern the formation and performance of transactions for the international sale of goods. Unlike the Convention, UCC Article 2 contains a substantial number of mandatory provisions obviating the opting out of its provisions with the ease accorded by the CISG. Other than the impact of an Article 96 Reservation by a contracting state, which limits the ability of the parties to contract around a

---

5CISG art. 6: The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

6Uniform Commercial Code [hereinafter UCC].

7The following provisions should be construed as mandatory: 1) Statute of Frauds--UCC § 2-201 Formal Requirements; Statute of Frauds; 2) The Parol Evidence Rule--UCC § 2-202 Final Written Expression in a Record: Parol or Extrinsic Evidence; 3) UCC § 2-302 Unconscionable Contract or Clause. Section 2-302 provides a substantive tool designed to encourage uniformity in policing bargains to prevent oppression and unfair surprise; parties may not, by agreement, negate the applicability of the provision; 4) UCC § 2-318 Third Party Beneficiaries of Warranties Express or Implied. Each of the statutory alternatives that extend the rights of express and implied warranties to third parties expressly prohibits the exclusion or limitation of a seller's liability to third parties for warranties made by the seller to its buyer; 5) UCC § 2-603 Merchant Buyer's Duties as to Rightfully Rejected Goods. Here, the language of the section is mandatory rather than discretionary and the duty to follow the seller's instructions or to resell when none are given is imposed as a matter of good faith and commercial necessity; 6) Duty to Mitigate Damages--UCC § 2-715 (2)(a) -- the section restates a general public policy of a buyer's duty to mitigate damages (see U.C.C. § 2-715 cmt. 2 (2000), U.C.C. §§ 1-103, 1-106 cmt. 1, 1-305 cmt. 1 (2001) (common law duty to mitigate damages) see also U.C.C. § 2-803(b) (Draft, March 1999) (mitigation requirements bar aggrieved parties to transactions from recovering the portion of losses resulting from breach of contracts that could have been avoided by “reasonable measures under the circumstances”)); 7) UCC § 2-718 Liquidation or Limitation of Damages; Deposits. Agreements liquidating damages must be reasonable; 8) UCC § 2-719 Contractual Modification or Limitation of Remedy, an agreement must provide a “fair quantum” of a remedy and the limitation of consequential damages cannot be unconscionable; 9) UCC § 2-725 Statute of Limitations in Contracts for Sale, the statutory provision defining a default rule for the statute of limitations expressly limits variation to not less than one year and not more than four years. In addition to the foregoing mandatory sections, several sections are partially mandatory in character. See, e.g., U.C.C. §§ 2-403(2), 2-607(1), (4) (2000). See Jenkins, Contracting Out Of Article 2: Minimizing The Obligation Of Performance & Liability For Breach, 40 Ly. LA L. Rev. 401, 403 nn. 10 (2006).
writing requirement that the Reservation imposes,\(^8\) the applicability of the Convention is subject to the agreement of the parties. This article will discuss the foundational goals and objections of the Convention, the interpretative guidelines and goals specified in the Convention, then address the interpretative guidelines of the UCC and the interpretative processes implicated by these guidelines. A comparative evaluation of the processes mandated by the two regimes will conclude the discussion on the interpretative processes. Finally, this article will discuss the scope and applicability of the Convention.

A. **Goals and Objectives of the Convention**

The stated purpose of the Convention is “to provide a modern, uniform and fair regime for contracts for the international sale of goods . . . [and] contribute significantly to introducing certainty in commercial exchanges and decreasing transaction costs.”\(^9\) Its objectives are numerous: 1) harmonizing of civil and common law jurisprudence to facilitate cross border commercial transactions;\(^10\) 2) serving as a unifying force in international trade;\(^11\) 3) negating the risk of the application of indecipherable foreign law to a transaction after a breach has occurred; 4) minimizing the arduous and unpredictable task of choice of law analysis for courts;\(^12\) and 5) preventing the presumed prejudice to foreign litigants through the application of local law by a

---

\(^8\)See generally CISG arts. 96, 11, 12, & 29 and the discussion of the effect of an Article 96 Reservation, *infra*, text at nn.____.


\(^12\)Id., ¶3.
forum court. The Convention delimits it applicability to commercial transactions in goods,\textsuperscript{13} an undefined term with specified exclusions,\textsuperscript{14} and without regard for liability that might accrue from the purchase or use of the goods such as products liability,\textsuperscript{15} or the relative property rights in the goods.\textsuperscript{16}

The Convention’s rules of construction are few. Analogous to the role played by UCC 1-103 of the Uniform Commercial Code,\textsuperscript{17} Article 7 directs courts to interpret the Convention: 1) consistent with its international character rather than permitting the analysis to be driven by local law and policy;\textsuperscript{18} 2) to promote uniformity in its application – thus, mandating consideration of

\begin{itemize}
  \item \textsuperscript{13}CISG Art. 1 (1).
  \item \textsuperscript{14}CISG Art. 2 (a) - (f).
  \item \textsuperscript{15}CISG Art. 5.
  \item \textsuperscript{16}CISG Art. 4 (b).
  \item \textsuperscript{17}U.C.C. § 1-103: Construction of [Uniform Commercial Code] to Promote its Purposes and Policies; Applicability of Supplemental Principles of Law. (a) [The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions.
  \item \textsuperscript{18}Case # VIII ZR 67/04, Germany: Federal Court of Justice (February 3, 2006) (uniformity of application requires that the CISG be interpreted autonomously, without consideration of non-uniform national laws and judicial decisions); Case #2 Ob 100/00 w, Austria: Supreme Court (April 13, 2000) (uniformity in application precludes applicability of local conformity laws of buyer’s state unless (1) these laws also exist in the seller's state, (2) the parties agreed to follow these laws in the contract, or (3) the buyer notifies the seller of their existence at the time of contract formation, according to CISG art.
\end{itemize}
opinions of courts and arbitral awards emanating from other contracting states; and 3) to encourage the observance of good faith in international trade.

1. Interpreted Consistent with Its International Character

Those charged with interpreting the Convention are directed to glean a meaning that is consistent with its international character and to, thereby, the “rules and techniques traditionally followed in interpreting . . . domestic legislation.” The Convention is an autonomous body of law that displaces “all the rules” in the ratifying nation state’s “legal system that previous governed” matters within the scope of the Convention. Furthermore, an interpretation of the

---


20 See discussion of art. 7(1) good faith in international trade, infra, at nn.____.

Convention requires “a liberal and flexible attitude” and consideration of the “underlying purposes and policies” of its individual provisions and the Convention as a whole; that no specific domestic law was envisioned when the provisions were agreed to by the delegations. Finally, the mere context of drafting – debate and “hard technical negotiations”22 among worldwide delegations -- resulted in a neutral, international, term rather than one reflective of a particular legal regime.23 For example, the Convention recognizes a goods oriented remedy termed “avoidance.”24 If a seller commits a fundamental breach of the contract,25 a buyer may as one of its remedies declare the contract avoided. Upon avoidance, both parties are released from their contractual obligations,26 the buyer returns the goods – unless they were sold in the ordinary course of business before the nonconformity was discovered,27 and the seller must refund the purchase price paid for the goods.28 This term “avoidance” is distinguishable from the Common Law Contract right that arises if a contract is voidable because of the status of one party, such as an infant,29 or conduct by one party such as fraud30 or the exercise of undue influence.31 This


24 CISG Arts. 26 & 49.

25 CISG Art. 25.

26 CISG Art. 81.

27 CISG Art. 82.

28 CISG Art. 81(2).

29 See generally Restatement (Second) of the Law of Contracts § 14.

30 See generally Restatement (Second) of the Law of Contracts § __.

31 See generally Restatement (Second) of the Law of Contracts § __.
interpretative perspective mandates that legal counsel immerse the judiciary in the mores of international contract law, the discussion and debate surrounding the promulgation of the Convention, its legislative history, case law addressing the 1964 Hague Conventions of the Sale of Goods, and the broad based scholarly commentary assessing the terms of the Convention. Although complex given the change in article numbers in subsequent drafts, the legislative history provides access to the deliberations of the Commission and its working groups and access to the purposes and goals sought to be achieved in the Convention in general and in specific provisions.\(^{32}\) Case authority developed in resolving disputes subject to the 1964 Hague Conventions -- the Uniform Law for the International Sales and the Uniform Law on the Formation of Contracts for the International Sale of Goods -- juxtaposed the Commission’s decision to reject, modify, or retain that effect in the Convention provides guidance on interpreting the Convention.\(^{33}\)

Finally, the structure of the Commission and the drafting processes support the rejection of an interpretative approach employed by courts based on their own local law. This conclusion must be adhered to even though similarity exists between language in the official translated versions of the Convention and domestic law, unless domestic law is required by a given provision of the Convention.\(^{34}\) The General Assembly of the United Nation created UNCITRAL, the UN Commission on International Trade Law,\(^{35}\) as a representative body of its

\(^{32}\)See Honnold, §86 p.88 (4th 2000); see also John Honnold, UNCITRAL Documents: Research Sources, Style, Citation, 27 American Journal of Comparative Law 217-221 (1979).

\(^{33}\)Honnold, §86 p.88 (4th 2000).

\(^{34}\)See for example CISG arts. 4 and 7(2).

\(^{35}\)UN Commission on International Trade Law.
member states “to promote” the harmonization and unification of the law of international trade in 1966. The Commission was comprised of representatives of thirty-six nations who were diverse in both legal and linguistic background. To assist and facilitate the processes of the Commission and its working groups, the Secretariat, comprised of the UN International Trade Law Branch and its Chief, prepared: “studies analyzing the divergences among the existing legal rules; reports on commercial practices to assist [the Commission] in making a choice among alternative solutions to pivotal factual examples; [and] draft statutory texts formulated . . . with clearly labeled alternatives to facilitate debate and decision.” This body in its deliberations developed the provisions by reaching a consensus that reflected a harmonization of the collective experience and expertise of the Commission.

To interpret the Convention consistent with its international character, a court must begin from a perspective based on the foregoing factors, rejecting domestic policy and goals, embracing the underlying purposes and policies of the Convention, and respecting both the context of the drafting and the legislative history that birthed the consensus reached. An opinion issued by the Netherlands Arbitration Institute in 2002, employed the foregoing model and recommended tools in determining the scope of a seller’s implied obligation of quality imposed

36Africa 9; Asia 7, Eastern Europe 5, Latin America 6, Western Europe and others (US, Canada, Australia and New Zealand) 9. See Honnold §8, at page 8 (4th ed. 2009); see generally E. Allan Farnsworth, Developing International Trade Law, 9 Cal. W. Int’l L. J. 461 (1979).

37Honnold §8, at pp 8-9 (4th ed. 2009).

38Arbitral Award, Number: 2319, Netherlands Arbitration Institute (October 15, 2002) (hereinafter: Arbitral Award, Number: 2319; available at www.unilex.info; last visited ______________).
by Article 35 (2) (a). Analogous to the implied warranty of merchantability under UCC section 2-314, Article 35 (2) (a) imposes an obligation on the seller to deliver goods that are fit for the purposes for which goods of the same description would ordinarily be used. In the matter

39 U.C.C. § 2-314. Implied Warranty: Merchantability; Usage of Trade: (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. (2) Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and (e) are adequately contained, packaged, and labeled as the agreement may require; and (f) conform to the promise or affirmations of fact made on the container or label if any.

40 CISG Art. 35: (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used; (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller’s skill and judgment; (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model; (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods. (3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph
before the Netherlands Arbitration Institute, the seller sought damages because the buyer terminated an installment contract for the purchase of petroleum condensate, a liquid product derived from the exploration of gas fields, called Rijn Blend.\textsuperscript{41} After successful performance of the contract for five years, the buyer complained that the mercury content in the condensate was excessive and refused to take further deliveries. The agreement did not contain specifications regarding quality. The buyer argued that the condensate did not conform to the contract and the Tribunal framed the issue as an asserted failure to satisfy the Article 35 (2) (a) obligation. The Tribunal perceived three potential standards as the relevant interpretation of the obligation: the merchantable quality standard espoused in English common law – “goods conform if a reasonable buyer would have concluded the contract if he had known the quality of the goods without bargaining for a price reduction;”\textsuperscript{42} the average quality standard of the relevant product in the relevant geographical market – as reflected in civil continental European law;\textsuperscript{43} or the reasonable expectations of the buyer as suggested by several commentators.\textsuperscript{44} The Tribunal considered the division among scholarly commentaries, existing CISG case authority, the Canadian delegation’s proposed “average quality” standard that was later withdrawn during the drafting of Article 35, and the policy goal of rejecting, in the first instance, an existing domestic standard for an international one. On these grounds, the Tribunal interpreted Article 35 (2)(a) to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{41} Arbitral Award, Number: 2319, at ¶39.
\item \textsuperscript{42} Arbitral Award, Number: 2319, at ¶¶68, 88-91.
\item \textsuperscript{43} Arbitral Award, Number: 2319, at ¶¶69, 92-100.
\item \textsuperscript{44} Id., at ¶71.
\end{itemize}
\end{footnotesize}
obligate the seller to deliver goods of a reasonable quality\textsuperscript{45} and held that the delivered goods were not of reasonable quality given the substantial reduction in price received by the seller in its substitute transactions and the long term nature of the agreement.\textsuperscript{46} The pattern of analysis reflected in the resolution of the meaning of the Article 35 (2)(a) obligation is the model that should be employed to derive a meaning that is reflective of the international character of the Convention.

2. Interpreted to Promote Uniformity of Application

The resulting promulgation was not an attempt to replicate any existing domestic legal regime but to create an autonomous one by harmonizing disparate approaches to legal problems. The international working groups drafting the provisions of the Convention chose to avoid “abstract, disembodied concepts”\textsuperscript{47} such as the term "property" or "title" and rather sought to use plain language referring to things and events rather than concepts likely tied to domestic law.\textsuperscript{48} This autonomous legal regime with its own special policies and goals must be applied. Consequently, the Article 7 (1) interpretive guideline that counsels interpreting the Convention to promote uniformity of application is closely related to the interpretative guideline of "regard for its international character." If the harmonization effort is to be successful, existing local law and the interpretative and construction guidelines and policies of the local law must not impact the interpretation and construction of the uniform text that is birthed through the harmonization efforts. Rather, the uniform text must preempt and supplant local law to the extent required by

\textsuperscript{45}Id., at ¶118.

\textsuperscript{46}The Tribunal found that the goods were unmerchantable. See Id., at ¶¶90, 99, 100, 102.

\textsuperscript{47}Citation [Flectner?]

\textsuperscript{48}Citation [Flectner]
What impact, however, does the mere promulgation of the Convention in six official languages, collectively referred to as “a single original,” have on its interpretation? The differences inherent in the various languages, such as nuances in meaning, produce "textual non-uniformity." These six different languages result in diversity in meaning and tone. Therefore, actual uniformity, textual uniformity, is unlikely. Applied uniformity, "uniform understanding and uniform interpretation is possible even in the absence of textual uniformity. [R]ules or laws labelled ‘uniform’ are not necessarily uniform at all . . . only where they have been applied cross-jurisdictionally on the intended legal phenomenon and created the intended degree of similarity that the label ‘uniform’ fits."

49See generally Camilla Andersen, The Global Jurisconsultorium of the CISG Revisited, 13 Vindobona J. International Commercial Law & Arbitration 43 (2009). The author selects art. 39's obligation to provide notice of nonconformity and the variations among opinions as to the length of time that constitutes untimely notice as an example for the need for applied uniformity. This choice is regrettable. The nature or complexity of the goods sold and other factual differences among the cases impact the determination of what is a reasonable time and consequently the variations may be justified.


52 Id., at 44.
Uniformity in application results if courts of different languages, cultures, and styles apply the same principles or guidelines for interpreting the Convention and if courts of different languages review and consider authority from other contracting states.\textsuperscript{53} To ensure applied uniformity, some advocate for the creation of a global jurisconsultorium of the Convention, "a process of consultation which takes place across borders and legal systems with the aim of producing autonomous and uniform interpretations and applications of a given rule."\textsuperscript{54} Pervasive in the processes of many courts and in many opinions by these courts is the review of and reference to existing authority interpreting and applying the provisions of the Convention by other contracting states. Some advocate for a more formalized system such as a jurisconsultorium that goes beyond reviewing and considering the opinions of courts of other nations. This more formalized system involves, first, a scholarly jurisconsultorium – cooperation and consultation between transnational scholars rather than scholarship from and within a single jurisdiction.\textsuperscript{55} Second, a practical jurisconsultorium, with transnationally shared case law, is used to resolve disputes before domestic courts.\textsuperscript{56} The International Sales Convention Advisory Council is an example of a scholarly jurisconsultorium. A private endeavor, the CISG-AC’s stated objective is “promoting a uniform interpretation of the CISG.”\textsuperscript{57} Its members are scholars

\begin{flushleft}
\footnotesize
\textsuperscript{53} Andersen, \textit{supra.}, n. \textemdash at 42-44.
\textsuperscript{54} Andersen, \textit{supra.}, n. \textemdash at \textemdash.
\textsuperscript{55} See, for example, International Sales Convention Advisory Council (“CISG-AC”) website located at http://www.cisgac.com/.
\textsuperscript{56} Andersen, \textit{supra.}, n
\end{flushleft}
whose participation is without official ties to any country or “legal culture.” The CISG-AC issues opinions upon request or its own initiative. Less structured endeavors such as the 2004 analytical digest of court and arbitral decisions identifying trends in interpreting the Convention and the 2005 Proceedings of the UNCITRAL - VIAC Joint Conference inform the processes for achieving an international and uniform interpretation of the Convention. These efforts effectuate, in part, the goals of a scholarly jurisconsultorium. The increased availability of opinions of contracting states and arbitral awards through UNCITRAL, UNILEX, and Pace School of Law facilitate the development of a practical jurisconsultorium. Direct consultation among the courts of contracting states or a system of “certifying” of issues was not envisioned and among contracting nation states might have been viewed as an intrusion into state sovereignty.

3. Interpreted to Encourage Observance of Good Faith in International Trade

The third prong of the interpretative guideline of Article 7(1) directs that interpretation must encourage observance of good faith in international trade. Before addressing this prong, an assessment of the good faith obligation imposed in U.S. domestic law is warranted and will provide a basis for evaluating the mandate of the Convention. UCC Section 1-304 and

---

58 Id., http://www.cisgac.com/
59 Michael Joachim Bonell is editor in chief of this electronic database dedicated to international case law and bibliography on the UNIDROIT Principles of International Commercial Contracts and on the Convention.

60 U.C.C. §1-304. Obligation of Good Faith: *Every contract or duty* within [the Uniform Commercial Code] *imposes an obligation of good faith* in its performance and enforcement.
Restatement (Second) of the Law of Contracts Section 205\footnote{Restatement (Second) of the Law of Contracts [hereinafter “Restatement”]§ 205 Duty of Good Faith and Fair Dealing: Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. (emphasis added).} both impose an obligation of good faith performance and good faith enforcement of every duty and contract. This good faith obligation of performance and enforcement is implied in every duty and in every contract.\footnote{Id.; U.C.C. § 304 (2002).}

\begin{itemize}
  \item[a.] Domestic Law Good Faith Performance
\end{itemize}

Article 2 of the UCC reflects an assumption that parties, as a general rule, invest minimal effort and minimal resources in forming contractual relationships. The Code facilitates such conduct by providing gap fillers to supplement the bargain of the parties. This approach to contracting is a by-product of the perceived inefficiency of detailed planning and negotiating.\footnote{Steven J. Burton, \textit{Breach of Contract and the Common Law Duty to Perform in Good Faith}, 94 HARV. L. REV. 369, 371 (1980); see Michael P. Van Alstine, \textit{Of Textualism, Party Autonomy, and Good Faith}, 40 WM. & MARY L. REV. 1223, 1267 (1999).} Concomitantly, parties “rely on the good faith of their exchange partners” to perform consistently with reasonable commercial standards.\footnote{Burton, supra note ___, at 371.} Section 1-304 of Revised Article 1 imposes, as its predecessor,\footnote{U.C.C. § 1-203 (2000).} “an obligation of good faith” in the performance and enforcement of every contract or duty within the Code’s ambit.\footnote{U.C.C. § 1-304 cmt. 1 (2001); see also \textit{Restatement (Second) of Contracts} § 205 (1981) (restating this general principal as applicable to contracts not within the scope of an}
obligations of performance as part of the contractual relationship, it must in good faith perform those express obligations undertaken, the terms implied from course of dealing, trade usage, and course of performance, any applicable suppletory gap-filling default rules, and any other statutory duties imposed. No independent duty of good faith, such as fairness or 

---

67 U.C.C. § 1-304 (2001); see Sons of Thunder, Inc. v. Borden, Inc., 690 A.2d 575, 588-89 (N.J. 1997) (supplementing former Article 1's honesty in fact good faith standard with the common law implied covenant of good faith and fair dealing to find that the buyer breached its duty of good faith performance by failing to purchase the agreed quantity of clam meat, in refusing to honor the contract, and in exercising its right to terminate the agreement); Southface Condo. Owners Ass'n v. Southface Condo. Ass'n, 733 A.2d 55, 58 (Vt. 1999) (each party to a contract impliedly promises that each will not do anything to undermine or destroy the other's rights to receive the benefits of the agreement). But see Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78, 91-92 (3d Cir. 2000) (holding that Pennsylvania law would not recognize an independent cause of action for breach of an implied duty of good faith if the allegations of bad faith are identical to another claim for relief). See generally Richard E. Speidel, The “Duty” of Good Faith in Contract Performance and Enforcement, 46 J. Legal Educ. 537, 544-45 (1996) (positing that a failure to adhere to a developed course of performance constitutes bad faith).
reasonableness, is implied as a result of Section 1-304. Rather, UCC section 1-304 imposes a duty to perform the required obligations consistent with the reasonable expectations of the parties at the time of contracting. The purpose of this duty is to avoid conduct constituting the recapture of a foregone opportunity or the exercise of a contractual right in a manner that evades the spirit of the transaction.

Although an implied obligation, the parties may not eliminate the duty by agreement. Both Revised and former Article 1 expressly prohibit disclaiming the obligation to perform or enforce contractual duties in good faith. The parties may, however, establish standards delineating the conduct or requirements for satisfying the good faith obligation, unless the agreed standard is manifestly unreasonable. Without an agreed to standard established by the parties for determining if the obligation of good faith has been fulfilled, courts should employ the

---


69U.C.C. § 1-302 (b) (2001); see also U.C.C. § 1-102(3) (2000).

70See Sarah Howard Jenkins, Contracting out of Article 2: Minimizing the Obligation of Performance & Liability for Breach, 40 LOY. L.A. L. REV. 401, nn. 128-137 and accompanying text.
definitional standard imposed by the specific substantive Article that is applicable to the transaction. Revised Article 1 establishes the standard for all Articles except Article 5.71 Parties must perform contracts and duties and enforce contracts and rights honestly and adhere to reasonable commercial standards of fair dealing.72 This definitional standard of good faith broadens the prior merchant standard of Article 2 by removing the limitation that the commercial standards of fair dealing must only conform to those of the relevant trade.73 Case law developed interpreting “fair dealing” in the context of a given trade remains relevant for developing the jurisprudence of the principle even though the revised definition does not limit fair dealing to the trade. Now, prevailing community standards of fair dealing as well as the relevant trade should be applicable.

Good faith is defined as honesty in fact and adherence to reasonable commercial standards of fair dealing.74 U.S. domestic courts view the honesty in fact prong as one of pure hearted conduct even if the conduct reflects an empty head or unreasonableness. It is the second prong, fair dealing, that has proven elusive for courts. Distinguished in the commentary from ordinary care as:

71 But see Sons of Thunder, 690 A.2d at 587 (applying the Article 1 standard and supplementing in with the common law definition of good faith rather than applying the merchant standard of Article 2 for this goods transaction).


74 “[T]he definition of “good faith” in this section merely confirms what has been the case for a number of years as Articles of the UCC have been amended or revised-the obligation of “good faith,” applicable in each Article, is to be interpreted in the context of all Articles except for Article 5 as including both the subjective element of honesty in fact and the objective element of the observance of reasonable commercial standards of fair dealing.” UCC 1-201, cmt. 20.
a broad term that must be defined in context . . . it is concerned with the fairness of
conduct rather than the care with which an act is performed. This is an entirely different
concept than whether a party exercised ordinary care in conducting a transaction. Both
concepts are to be determined in the light of reasonable commercial standards, but those
standards in each case are directed to different aspects of commercial conduct. 75

Courts appear to treat conduct constituting ordinary care 76 as satisfying the fair dealing
requirement. 77

Fair dealing centers on preventing unfair advantage taking or unfair disregard for the
rights and privileges of another involved in the transaction 78 or the contractual relationship 79 or
the asserting of an unfounded position regarding the performance of a duty or the enforcement of
rights. 80 “[E]vasion of the spirit of the bargain, lack of diligence and slacking off, willful

75 UCC 1-201, cmt. 20.

76 UCC 3-103 (a)(7) “‘Ordinary care’ in the case of a person engaged in business means
observance of reasonable commercial standards, prevailing in the area in which the person is located, with
respect to the business in which the person is engaged.”

77 See, e.g., Travelers Cas. and Sur. Co. v. Citibank (South Dakota), N.A., 2007 WL 2875460
(M.D. Fla. 2007). Here the court holds that adhering to custom or reasonable commercial standards is fair
dealing because banks often accept an employer's checks for employee’s accounts because there are a
number of legitimate reasons for employers to pay the credit card debt of its employee. The discussion
suggests that the care taken by the bank was consistent with reasonable commercial standards.

78 See, e.g., Maine Family Fed. Credit Union v. Sun Life Assurance Co of Canada, 37 U.C.C.
Pep. Serv.2d 875, 727 A.2d 335 (Me. 1999).

79 The meaning of “fair dealing” will depend upon the facts in the particular case. For example,
suppose an insurer tenders a check in settlement of a claim for personal injury in an accident clearly
covered by the insurance policy. The claimant is necessitous and the amount of the check is very small in
relationship to the extent of the injury and the amount recoverable under the policy. If the trier of fact
determines that the insurer was taking unfair advantage of the claimant, an accord and satisfaction would
not result from payment of the check because of the absence of good faith by the insurer in making the
tender. UCC 3-311, cmt. 4.

80 “Another example of lack of good faith is found in the practice of some business debtors in
routinely printing full satisfaction language on their check stocks so that all or a large part of the debts of
the debtor are paid by checks bearing the full satisfaction language, whether or not there is any dispute
with the creditor. Under such a practice the claimant cannot be sure whether a tender in full satisfaction is
or is not being made. Use of a check on which full satisfaction language was affixed routinely
pursuant to such a business practice may prevent an accord and satisfaction on the ground that
rendering of imperfect performance, abuse of a power to specify terms, and interference with or
failure to cooperate in the other party's performance” illustrate conduct that the fair dealing prong
was designed to discourage.\textsuperscript{81} A depositary bank’s failure to place a customary hold on a large
check drawn on an out-of-state bank constituted unfair dealing by the bank as to the indorsers
who were being defrauded by the bank’s customer.\textsuperscript{82} Observe here that although the bank does
not owe a non-customer, the indorsers, a duty of care, it must engage in conduct that is fair with
respect to all parties to the instrument. A debtor’s placing of printed satisfaction language on its
check stock so that its debts were paid with checks bearing an explicit condition of full
satisfaction whether a dispute existed or not with the payee-creditor is unfair dealing.\textsuperscript{83} The
existence of a good faith dispute is a condition precedent to the creation of an accord and
satisfaction by tendering a check bearing a statement of satisfaction. Therefore, tendering the
check with the preprinted statement of satisfaction is an attempt to gain an advantage in the event
of a later developing dispute and is unfair. A lender may fail to achieve the status as holder in
due course because of its failure to engage in a lien searching tailored to discover if its pending
transaction with the debtor violated the rights of a senior secured party.\textsuperscript{84} Its failure would be
inconsistent with reasonable commercial standards of fair dealing.\textsuperscript{85}

\textsuperscript{81} Restatement (Second) of the Law of Contracts § 205, cmt. d (1979).

Serv.2d 875, 727 A.2d 335 (Me. 1999).

\textsuperscript{83}UCC 3-311, cmt. 4, see the text of n.____, supra.

\textsuperscript{84} In re Jersey Tractor Trailer Training Inc., 580 F.3d 147 (3rd Cir 2009) (lender met the good
faith requirement for holder in due course because it conducted a series of UCC searches tailored to
determined the existence of a senior secured party; court did not discuss whether the failure to include
“Inc,” a part of the debtor’s name in those searches, was an lack of care).
b. Good Faith and the CISG

Unlike the foregoing domestic principles, the Convention does not recognize as a general requirement an implied duty of good faith and fair dealing in the performance and enforcement of contracts as an obligation of the parties.86 The obligation under various domestic regimes of observing good faith in negotiation, formation, interpretation and performance by the parties was rejected by the delegations.87 Article 7 of the Convention imposes as a rule of interpretation to guide courts, arbitration panels, and tribunals seeking to “ascertain the meaning and the legal effects to be given”88 to the individual articles of the Convention that the interpretation must encourage the observation of good faith in international trade. The court or tribunal must consider the impact of the “observance of good faith in international trade”89 on the meaning of

---

85 See also Cugnini v. Reynolds Cattle Co., 687 P.2d 962 (Colo. 1984) (Addressing the good faith requirement for buyer in the ordinary course in the cattle trade, the reasonable commercial standards of fair dealing in the cattle trade required buyer to acquire a brand inspection certificate and to reject an inadequate bill of sale).


88 Bonell § 2.2.

the provisions. Article 7's good faith interpretative goal is designed to create a body of law that reflects and establishes international behavioral norms for contracting parties in transactions subject to the Convention. Courts giving attention to the observation of good faith in international trade as an interpretative guideline have defined the rights and obligations imposed by the Convention in a manner that minimizes fraudulent conduct, unfair conduct, and deliberate conduct contrary to the essential purposes or terms of the agreement.\footnote{Case No. 53, France, 22.02.1995.} Such conduct has been held to be contrary to good faith in international trade and, thus, does not satisfy the requirements imposed by the Article being addressed. Similarly, courts should not interpret the provisions of the Convention to authorize conduct that would be undesirable in international trade.

Courts have interpreted good faith in international trade to include a duty to cooperate and to provide information, especially if one party seeks to impose on the other party a standard term purportedly included in an offer. This duty to cooperate and to provide information requires that the seller disclose the content of standard terms to the buyer rather than merely making standard terms accessible on a website.\footnote{See, e.g., Case No. 13 W 48/09, Germany, 24.07.2009; Case No. 10 O 74/04, Germany, 03.08.2005; Case No. VIII ZR 60/01, Germany, 31.10.2001.} Good faith has been held as the basis for asserting a waiver of rights despite the absence of an express basis for asserting a waiver in the text of the Convention.\footnote{Case No. 1 U 280/96, Germany, 25.06.1997, (reversed on other grounds), Case No. VIII ZR 259/97, Germany, 25.11.1998 (http://www.unilex.info/case.cfm?id=356). But see text and \url{www.cisg.law.pace.edu/cisg/biblio/loo7.html} (positing that the “distinction between good faith interpretation and good faith performance is proving to be more apparent than real”).} Good faith may require the seller to wait a reasonable time after a
payment becomes due before bringing an action to compel the buyer to pay the price pursuant to Article 62. A buyer’s avoidance of a contract without awaiting the results of the seller’s attempts to cure would violate the international principle of good faith. Consequently, courts have employed the interpretative guideline of observance of good faith in international trade as a gap filler giving the courts the opportunity to extend, to develop, and to mollify or soften the terse provisions of the Convention by imposing a standard of conduct that is consistent with reasonable commercial behavior and to give effect to the rights available in the Convention. However, resort must not be made to domestic law but rather to the general conduct and custom of international trade for determining the nature, manner, and scope of good faith. Unlike the approach employed by Civil Law jurisdictions, the scope of the Convention bars the use of good faith as an interpretative tool applicable to negotiations that preceded an offer. Good faith

nn, infra., at n.__, discussing the analogical development of the Convention through gleaning the treaded policies of the Convention, including estoppel.

93Case No. __, Italy, 25.02.2004.

94Case No.__, Italy, 13.12.2001 (seller argued buyer delayed in giving notice of avoidance; court upholds the buyer’s giving of notice until seller’s attempts at cure failed).

95See generally Peter Schlechtriem, Uniform Sales Law – The UN – Convention on Contracts for the International Sale of Goods, Part IV, A (1986) (“the principle of good faith, as embodied in the Convention, concerns only the interpretation of the Convention and not the conduct of the parties in the formation and performance of the contract or the interpretation of their intentions”).

interpretation becomes relevant only if the conduct constitutes an offer or the parties have otherwise commenced the process of contract formation.\textsuperscript{97} Unlike civil law that imposes good faith in the context of negotiations, Article 7 should not be interpreted to impose good faith obligations in the pre-formation stage of the parties’ relationship. By its terms, Article 7 (1) addresses the interpretation of the Convention and its focus is twofold—formation and the obligations resulting from the contract formed.

Unlike the interpretation of good faith in the Principles of European Contract Law, good faith as interpretative tool of the Convention should not be used to override the express terms of the parties’ agreement.\textsuperscript{98} Parties are empowered by Article 6 of the Convention to vary or derogate from any or all of its provisions.\textsuperscript{99} This right supports a conclusion that express terms have primacy over a general doctrine of reasonableness or estoppel that might be imposed through an interpretation of the Convention.

Some have argued that the distinction between good faith as an interpretative tool and the implied duty of good faith performance is more “apparent than real.”\textsuperscript{100} When compared with the good faith obligation required by the Code, the parameters of good faith in the Convention is

\textsuperscript{97}CISG Art. 4. This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract.

\textsuperscript{98}See generally Harry Flectner, Comparing The General Good Faith Provisions of the PECL and the UCC: Appearance and Reality, 13 Pace Int'l L. Rev. __ (2001) (distinguishing the good faith obligation of parties pursuant to the PECL and the UCC and recognizing that the PECL authorizes the imposition of an obligation that exceeds that imposed by the express terms).

\textsuperscript{99}CISG Art. 6: The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions

\textsuperscript{100}Lookofsky, \textit{supra}, n.____.
narrowed to the perspective of the judge or arbitrator as informed by the requirements and needs of international trade. In contrast, however, the requirements imposed on domestic parties by U.S. domestic law are informed by trade and industry custom, local custom, the course of dealings between the parties, common law precedent, and the terms of the parties’ agreement.

II. UNIFORM COMMERCIAL CODE

A comparative assessment of the principles of interpretation for the UCC and Convention requires an evaluation of the processes of interpretation that are mandated by the nature and form of the relevant legal regime. The character of the UCC substantially impacts the processes domestic courts must follow.

A. ITS CHARACTER

In the design of our system of federal and state governments, private law was left in the domain of state law and the development of state law governing contracts and commercial law was relegated to judges who created a diverse and varied system of commercial rules and principles among the several states. Consequently, the laudable commercial goals of predictability and uniformity of results were lacking, frustrating planning and the assessing of risk by commercial parties. These two goals are foundational policies that drive the construction of the Uniform Commercial Code. Although distinguishable from civil codes, the UCC

---

101 Uniform Commercial Code Series §1.

design fits the paradigm of a code that necessitates a methodology of construction that is distinguishable from the processes employed for other statutory enactments. "[J]udges construing it [the UCC] [should] recognize that it is a true code, imposing upon them a methodology aimed at getting a fair degree of certainty and uniformity . . . .."**103**

A ‘code’ . . . pre-empts the field and . . . is assumed to carry within it the answers to all possible questions. . . . [W] hen a court comes to a gap or an unforeseen situation, its duty is to find, by extrapolation and analogy, a solution consistent with the policy of the codifying law . . . . When a ‘statute’ . . . has been interpreted in a series of judicial opinions . . . the meaning of the statute must now be sought not merely in the statutory text but in the statute plus the cases . . . decided under it. A ‘code,’ on the other hand, remains at all times its own best evidence of what it means: cases decided under it may be interesting, persuasive, cogent, but each new case must be referred for decision to the undefiled code text.**104**

Code methodology necessitates: 1) the use of analogy rather than ‘outside' law to fill code gaps; 2) increased reliance on the decisions of other code states; and 3) according less permanent precedential value to one's own decisions.**105** Both Revised and former Articles One mandate the use of code methodology. Official Code commentary directs that the provisions are

---

(a) [The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions . . . and (3) to make uniform the law among the various jurisdictions.

103Id. at § 1-102:9, pp. Art.1-48.


to be construed consistent with it purposes and policies\textsuperscript{106} and that the UCC is to be its "own machinery for expansion of commercial practices."\textsuperscript{107} Courts must develop and extend the law embodied in the Uniform Commercial Code when confronted with an unforeseen or new commercial practices rather than amended or repealed the UCC or resort, in the first instance, to extraneous law.\textsuperscript{108} Revised Article 1 reinforces the use of a code methodology by stating a rule of preemption for determining the relationship between other sources of authority, particularly common law and equity, when these principles are inconsistent with the provisions of the UCC or its purposes and policies.\textsuperscript{109} Commentary in former section 1-103 clouded for some the essential nature of the relationship between the UCC provisions and common law and equity.\textsuperscript{110} This cloud has been removed by the reorganization of sections 1-102 and 1-103 and the straightforward language of the Official Comments to revised section 1-103.

Although no change in language occurs, coupling Sections 1-102 and 1-103 by physically combining the contents of both sections ‘reflect[s] both the concept of supplementation and the concept of preemption.’ No longer will Sections 1-102 and 1-103 stand as separate legislative mandates of equal weight and significance, but rather supplementation of the U.C.C. with common law and equitable

\textsuperscript{106}U.C.C. Rev. 1-103, cmt 1.

\textsuperscript{107}U.C.C. 1-102, cmt 1.

\textsuperscript{108}Id.

\textsuperscript{109}U.C.C. Rev. 1-103, cmt 2.

\textsuperscript{110}See U.C.C. 1-103, cmt 1; Sarah Howard Jenkins, Preemption & Supplementation under Revised 1-103: The Role of Common Law & Equity in the New U.C.C., 54 SMU L. Rev. 495 (2001).
principles becomes one of several policy goals that must be balanced by the courts.  

Supplementation, however, is secondary to code methodology established by the guidelines for interpreting and construing the UCC.

The final characteristics of code methodology, increased reliance on the decisions of other code states and according less permanent precedential value to one's own decisions, are achieved through the stated construction guideline of "making uniform the law among the various jurisdictions." Code methodology dictates that the code is the primary source of authority; the answer is to be found in the code itself, in its purposes and policies, even if analogical development or extension of the provisions is necessitated by an unforeseen circumstance or some innovative practice. Sound case authority from sister jurisdictions is persuasive authority and is the preferred authority above the common law precedent of the adjudicating jurisdiction.


112U.C.C. § 1-102 (1) (c) (1999); U.C.C. 1-103 (a) (3) (2001).

113See, e.g, B & W Glass, Inc. v. Weather Shield Mfg., Inc., 829 P.2d 809, 18 U.C.C. Rep. Serv. 2d 1 (Wyo. 1992) (court follows sister jurisdictions' approach to the promissory estoppel exception to Statute of Frauds); but see Empire Gas Corp. v. American Bakeries Co., 840 F.2d 1333 (7th Cir. 1988) (following Illinois common law for determining if the statutory
In employing a code methodology, the official comments to former 1-102 (1) and Revised 1-103 (a) direct the liberal construction and liberal application of the Act to promote its underlying purposes. Both sections list three identical foundational purposes or policies. But, these are not the sole purposes or policies that impact the court's construction and application, whether that construction is broad or narrow. Rather, courts must consider the purposes and policies of the individual rule and principle under consideration and the purposes and policies of the Act as a whole. The specific purposes and policies of a particular section govern the general purposes and policies of the Act stated in former section 1-102 and Revised section 1-103. If, however, specific purposes and policies are absent or cannot be discerned then the general purposes and policies of the Act should drive the construction and application of the UCC.114

B. CISG – UCC: Assessing the Differences and Similarities

The UCC is an orderly, authoritative, comprehensive expression of commercial law, addressing the various components of commercial transactions in goods, whether for sale or mere use and possession, and three payment methods, a negotiable instrument,115 a letter of credit,116 or a wire fund transfer,117 for acquiring the goods, securities, or services. Article 7

---


115 UCC Article 3.

116 UCC Article 5.
addresses documents of title for the carriage, storage or other bailment of the goods and Article 9, the credit enhancement device of a security agreement to protect the creditor's interest in the subject matter of the transaction – whether that personal property is goods, instruments, accounts, or other personal property. Article 4 addresses the bank/customer relationship and Article 8 uncertificated investment securities. Finally, the general provisions of Article 1 provide a common language and common frame of reference for all aspects of the commercial transaction that are governed by the UCC. The coordination among the various components of the UCC enhances the provisions of the Sales article, Article 2, that is comparable to the Convention. The development of Article 2 rests, in part, from its coordination with Articles 7, Documents of Title, and Article 9, Security Agreements. In contrast, the Convention has a single focus, the international sale of goods and governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from the contract.118


Both legal regimes provide for gap-filling of its provisions. Both provide for the analogical development of their provisions, the Code with principles consistent with its purposes

117 UCC Article 4A.
118CISG Art. 4: This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold.
Similarly, the Convention authorizes the resolution of matters within the scope of the Convention but not settled, an "internal gap,"\textsuperscript{120} to be determined on the basis of its principles. If relevant principles are non-existent, the matter is to be settled by resorting to the applicable domestic law as determined by principles of private international law.\textsuperscript{121} For example, the Convention authorizes the recovery of interest on payments that are in arrears.\textsuperscript{122} However, the "matter" of the rate of such interest is not settled. Analogous to the UCC, the Convention rejects foreign domestic law, in the first instance, as the source of principles or norms for gap-filling.\textsuperscript{123} General principles may be gleaned from the threaded policies reflected

\textsuperscript{119}Here we distinguish gap-filling of the legal provision from gap-filling of the parties contract. Art. 2 permits parties to form the most barest of agreement. As long as intent by both to be bound is established and a reasonably certain basis for a remedy exists, a contract exists between the parties. See UCC § 2-104. The Article 2 default rules will add the details to the agreement.

\textsuperscript{120}Kröll, Mistelis, Perales, Viscasillas, UN Convention on Contracts for the International Sale of Goods 132 (2011).

\textsuperscript{121}CISG Article 7 (2): Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

\textsuperscript{122}CISG Article 78: If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article.

\textsuperscript{123}CISG Art. 7 (2): (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which
throughout the provisions of the Convention. General principles and policies such as: a duty to communicate;\textsuperscript{124} the protection of reasonable reliance,\textsuperscript{125} the duty to mitigate loss,\textsuperscript{126} the priority of the parties' agreement,\textsuperscript{127} and the obligation to act reasonably,\textsuperscript{128} or, as viewed by some, in good faith – the "functional equivalent" of reasonableness.\textsuperscript{129} At least one commentator posits that good faith is a threaded policy.\textsuperscript{130}

In addition to these generally threaded principles, the Convention's rules of interpretation also provide an expression of general principles upon which the Convention is based – its international character, the need to promote uniformity in its application, and the observance of good faith in international trade. Indeed, some courts have employed the "observance of good faith" because it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law (emphasis added).

\textsuperscript{124}Honnold, supra, n.__, citing, arts. 19 (2), 21 (2), 26, 39 (1), 48 (2), 65, 71 (3), 72 (2), 79 (4), & 88 (1).

\textsuperscript{125}Id., citing, arts. 16 (2) (b), 29 (2), & 47.

\textsuperscript{126}Id., citing, arts. 77 & 85.

\textsuperscript{127}Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Good 104 (2nd ed. 2005), citing, art. 6.

\textsuperscript{128}CISG Arts 39(1), 16 (2) (b), 8 (2).

\textsuperscript{129}Schlechtriem & Schwenzer, supra. n.4, at 104 & n.50 (the obligation to act in good faith derived from the provisions requiring parties to act reasonably).

\textsuperscript{130}See, John Klein, supra, n.____ at 124-125 ("implicit good faith provisions can be grouped according to three primary goals of good faith and fair dealing: 1) to promote full and frank exchange of relevant information; 2) to prevent parties from benefiting from conduct undertaken to frustrate their own contracts; and 3) to salvage agreements wherever possible and minimize damages resulting from failed transactions").
faith” as a tool for imposing an estoppel\textsuperscript{131} and a duty to communicate, cooperate, and provide information,\textsuperscript{132} thereby extending the obligations and rights under the Convention through the observance of good faith rather than extracting these general principles analogically.

2. Resort to Domestic Law

Both legal regimes establish a preference for the resolution of unforeseen or unsettled matter through the extension of the purposes, polices, or principles upon which the authority is based. Neither reflects a goal of completely occupying the field of it sphere of the law nor of being an exhaustive statement of the law. Both authorize resort to domestic or other law.

The UCC authorizes the application of principles of common law and equity as supplementary law to commercial transactions unless “the particular provisions” of the U.C.C., including its purposes and policies, displace them.\textsuperscript{133} Any supplementary law, whether common

\textsuperscript{131}Case No. 1 U 280/96, Germany, 5.06.1997.

\textsuperscript{132}Courts interpreting the obligation of good faith to include a duty to cooperate and to provide information that requires that the seller provide the content of standard terms to the buyer: Case No. VIII ZR 60/01, Germany, 31.10.2001; Case No. 10 O 74/04, Germany, 03.08.2005; Case No. 13 W 48/09, Germany, 24.07.2009. Duty to cooperate and to provide information requires that the seller provide the content of standard terms to the buyer. (Case No. VIII ZR 60/01, Germany, 31.10.2001; Case No. 10 O 74/04, Germany, 03.08.2005; Case No. 13 W 48/09, Germany, 24.07.2009).

\textsuperscript{133}U.C.C. 1-103, cmt. 2 (2001) (the proper scope of Uniform Commercial Code preemption . . . extends to displacement of other law that is inconsistent with the purposes and policies of the Uniform Commercial Code, as well as with its text).
law or equitable principles, is displaced to the extent it is inconsistent with the purposes and policies of both the specific provision of an article or the general, foundational purposes and policies of the Act.\textsuperscript{134} The UCC preempts local common law and equity to the extent that a jurisdiction has developed localized principles that are inconsistent with the UCC’s provisions including its purposes and policies.

Unlike the UCC, the Convention relegates specific issues to the applicable domestic law such as validity of the contract because of mistake, fraud, or unconscionability,\textsuperscript{135} the property interests of third parties in the goods purchased,\textsuperscript{136} and the availability of specific performance,\textsuperscript{137} the seller’s obligation regarding industrial or intellectual property claims of others,\textsuperscript{138} or the formalities necessary for the buyer’s performance of the obligation to pay the price\textsuperscript{139} These issues are not within the scope of the Convention and are issues for which harmonization of disparate authority was not sought. Likewise, unsettled issues may be resolved by domestic law if the Convention lacks principles for resolving the unsettled matter. If neither the threaded policies within the Convention nor the interpretative policies identified in Article 7 (1) provide a basis for determining the rate of interest, a court confronted with the resolution of that issue must then resort to the applicable domestic law of one of the parties selected by the application of the forum’s private international law or conflict of law rule.

\textsuperscript{134}See, e.g., (citations after codification of revised 1-103).

\textsuperscript{135}CISG Art. 4 (a).

\textsuperscript{136}CISG Art. 4 (b).

\textsuperscript{137}CISG Article 28: \textit{If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement [sic] for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.}

\textsuperscript{138}CISG Art. 41 (a) & (b).

\textsuperscript{139}CISG Art. 54.
3. Uniformity of Interpretation – the new international common law.

Both sets of legal rules espouse a policy of uniformity of interpretation. Only the Convention requires uniformity of enactment. Six languages are the authorized textual languages of the Convention. Each is considered the functional equivalent of the others. Any lack of uniformity results from nuances inherent in the cultural understanding or meaning of the desired equivalent terms used. At least one German case reveals that the German court compares and contrasts the German and English language versions as part of its process of interpretation. In contrast, each codifying jurisdiction of the UCC has the freedom to alter, delete, or otherwise modify the terms of the promulgated uniform act as part of its enactment process. These non-uniform enactments defeat the goal of uniformity, predictability, and certainty the Code was designed to ensure.

III. APPLICABILITY OF THE CONVENTION

The Convention is applicable in three contextual settings. First, the Convention is applicable if both parties have their places of business in different contracting states; fundamentally, the transaction must be an international one. Article 1(1)(a) obviates the need for the forum court to engage in its Conflict of Laws analysis to determine the applicable law. If the transaction is an international one, both parties have their places of business in different

---


141Citation of German case.

contracting states, the Convention applies.\textsuperscript{143} An allegation of the applicability of the Convention with the identification of the parties’ places of business is a sufficient basis for the court to rule as a matter of law on the applicable law. Forum courts in contracting states have an international law obligation to apply the Convention if it is applicable.\textsuperscript{144} This resolution is, however, subject to several declarations by contracting states under articles 93,\textsuperscript{145} 94,\textsuperscript{146} and

\textsuperscript{143}CISG art. 1(1)(a).

\textsuperscript{144}Vladimir Pavic & Milena Djordjevic, \textit{Application of the CISG Before the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce - Looking Back at the Latest 100 Cases}, 28 J. L. & Comm. 1, 20-21 (Fall 2009).

\textsuperscript{145}CISG Article 93: (1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time. (2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends. (3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends. (4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

\textsuperscript{146}CISG Article 94: (1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the
Each of these Reservations has the potential to significantly alter the efficacy of Article 1 in producing uniformity and ease of determination of the applicable law. Each relevant Reservation must be addressed by the court if one of the parties has its place of business in the reserving state. The possible complication of multiple business locations by one or both of the parties also impacts the applicability of Article 1 (1)(a). It is that location that has the closest Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations. (2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. (3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

147CISG Article 95: Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.


149CISG Article 10: For the purposes of this Convention: (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract
relationship to the contract that is the relevant location for determining the applicability of the Convention.\textsuperscript{150}

The second contextual setting triggering the application of the Convention is a transaction between parties and only one of them has its place of business in a contracting state. Here, the Convention is only applicable if the application of the forum courts private international law rules, its conflict of law principles, the analysis points to application of the law of the contracting state. For example: a buyer with its place of business in the UK enters a contract for the purchase of goods with a seller from Germany. Although Germany is a contracting state to the Convention, the UK is not a contracting state. Both Germany and the UK are Member States of the EU. Consequently, the 17 June 2008 REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL On the Law Applicable to Contractual Obligations (Rome I)\textsuperscript{151} governs Conflict of Laws principles for Member States and must be applied to determine the applicable law. In a dispute between the parties with litigation in either the UK or Germany, the Convention is only applicable if pursuant to the Regulation, German law is the applicable law.\textsuperscript{152} Applying the provisions of the Regulation, if the parties have not agreed upon the applicable law, the law of the seller’s habitual residence provides the applicable and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract . . . .

\textsuperscript{150}See text and notes at nn.______, infra, for a discussion of the impact of multiple business locations.

\textsuperscript{151}Cited hereinafter as “the Regulation”.

\textsuperscript{152}Regulation, Art. 1 (1): 1. This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.
For a corporate or other business form whether or not incorporated, the habitual residence is defined as the place of central administration. In the hypothetical situation presented here, Germany. Consequently, the Convention is applicable to the transaction.

Assume, however, that the transaction is between a buyer from the UK and a seller from the U.S. In ratifying the Convention, the U.S. made an Article 95 Reservation. A contracting state may, at the time it deposits its instruments of ratification, accession, or approval, declare that it will not be bound by Article (1) (1) (b). In a dispute between the parties with litigation occurring in the UK, for example, in the absence of an agreement on choice of law, the law of the seller’s place of business, a state in the U.S., is the applicable law because the UK is an EU Member State subject to the Regulation. The U.S. made an Article 95 Reservation so that in litigation between parties with their places of business in the U.S. and a non-contracting state, Article (1)(1)(b) is inapplicable – the U.S. is treated as a non-contracting state – the UCC is applicable to the transaction.

---

153 Regulation, Art. 4 (1): 1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 [carriage of goods] to 8 [employment contracts], the law governing the contract shall be determined as follows: (a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence . . . .

154 Regulation, Art. 19: Habitual residence 1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.

155 The stated justification for the Article 95 Reservation by the U.S. was the concern for the more frequent displacement of U.S. domestic law rather than the foreign domestic law of another nation.

The United States . . . stated that ratification subject to the Article 95 reservation was contemplated. This position, recommended by the American Bar Association, will promote maximum clarity in the rules governing the applicability of the Convention. The rules of private
Finally, although not addressed by the terms of Article 1, the Convention is applicable in yet another context. If neither of the parties have their places of business in a contracting state but the application of the forum court's private international law rules points to the application of the law of a Contracting State as the place with legislative jurisdiction, the Convention is applicable. Legislative jurisdiction is the principle that an event is governed by the law of the place where the event occurs. The authority of a sovereign is defined by its territory; within that domain, the sovereign’s authority is absolute and exclusive within that domain. Is the Convention applicable? Consider the following facts: a buyer from the UK and a seller from the U.S. meet in Austria and negotiate a contract for the sale of goods. The buyer makes an offer to

international law, on which applicability under subparagraph (1)(b) depends, are subject to uncertainty and international disharmony . . . .

A further reason for excluding applicability based on subparagraph (1)(b) is that this provision would displace our own domestic law more frequently than foreign law. By its terms, subparagraph (1)(b) would be relevant only in sales between parties in the United States (a Contracting State) and a non-Contracting State. (Transactions that run between the United States and another Contracting State are subject to the Convention by virtue of subparagraph (1)(a).) Under subparagraph (1)(b), when private international law points to the law of a foreign non-Contracting State the Convention will not displace that foreign law, since subparagraph (1)(b) makes the Convention applicable only when “the rules of private international law lead to the application of the law of a Contracting State.” Consequently, when those rules point to United States law, subparagraph (1)(b) would normally operate to displace United States law (the Uniform Commercial Code) and would not displace the law of foreign non-Contracting States.

If United States law were seriously unsuited to international transactions, there might be an advantage in displacing our law in favor of the uniform international rules provided by the Convention. However, the sales law provided by the Uniform Commercial Code is relatively modern and includes provisions that address the special problems that arise in international trade.


156 Citations.
purchase goods and the seller accepts. The buyer takes delivery in Austria. Later, a dispute arises between the parties and the buyer sues the seller in the U.S. in State X, a state that adheres to the First Restatement of the Law of Conflict of Laws that provides that the law of the place of the performance of a contract governs questions of breach.\textsuperscript{157} The buyer alleges that a contract was formed in Austria and that Austrian law applies. The buyer’s place of business is in a non-contracting state – the UK – and the U.S. has made an Article 95 Reservation and, therefore, it is treated as a non-contracting state. Pursuant to the First Restatement of the Law of Conflict of Laws, the law of the place of the making of the contract governs the validity of the contract, Austria,\textsuperscript{158} and the law of the place of performance, Austria, govern issues of performance.\textsuperscript{159} Austria is a contracting state to the Convention. The Convention provides that in a transaction between parties and neither are contracting states, the law applicable as a result of the application of the law of the place of the making of the contract,

\begin{footnote}{157}{\textit{Restatement} (First) of the Law of Conflict of Laws § ____ [hereinafter “\textit{Restatement}”]:

The duty for the performance of which a party to a contract is bound will be discharged by compliance with the law of the place of performance of the promise with respect to:(a) the manner of performance; (b) the time and locality of performance; (c) the person or persons by whom or to whom performance shall be made or rendered; (d) the sufficiency of performance; (e) excuse for non-performance.

\textit{The reference to the law of Austria would be to its internal law that would not include it’s private international law principles, the Conflict of Laws rules. The First Restatement of the Law of Conflict of Laws limited Revoir, the reference to the whole law of a jurisdiction to several discrete issues none of which are relevant here. Similarly, the Regulation rejects the applicability of Revoir. See Regulation, Article 20.}}

\textsuperscript{159}{\textit{Restatement} § ____ .}


of private international law rules governs the transaction. Here, it is the law of Austria. Austria is a contracting state and consequently, the Convention is applicable. The relevant language of Article 1 (1) (b) states: “when the rules of private international law lead to the application of the law of a Contracting State” the Convention is applicable.

1. Reservation 93: The Federal State Clause

Intriguing questions regarding the applicability of the Convention were raised after June 30, 1997, when United Kingdom transferred sovereignty over Hong Kong to People's Republic of China (“PRC”) in fulfillment of the December 19, 1984, treaty between China and the United Kingdom. Similarly, sovereignty over Macao, a Chinese territory administered by Portugal from 1979, was restored to PRC in 1999. The PRC ratified the Convention in 1986, eleven years before the restoration of these territories to the PRC. Neither of the former sovereigns, the United Kingdom and Portugal, nor these territories, Hong Kong and Macao, are contracting states under the Convention. In 2009, Hong Kong merchandise trade with the United States alone exceeded $660 billion. Of concern is the effect of China's ratification of the Convention in 1986 on these territories after their restoration to the PRC. Article 93 of the Convention, the Federal State Clause included in the Convention at the request of Australia and Canada, provides that a contracting state with differing legal systems on issues within the scope of the Convention may declare the extent to which the Convention is applicable to its divergent territories at the time of its signature, ratification, acceptance, approval or accession. Although Canada originally

161 See Schroeter, supra, text at n.25.
made an Article 93 declaration regarding the scope of applicability of the Convention, the Convention now extends to all territories in both Canada and Australia.

Some have argued that the right to extend or limit the Convention’s applicability must be based on a "constitutionally" recognized limitation rooted in a difference in the legal systems that exists at the time the nation becomes a contracting state. One leading commentator suggests that the requirement of "constitutional" limitation is supported by the purpose and legislative history of the provision.

This interpretation is supported by both purpose and legislative history of the provision, which was intended to enable a State to accede to the CISG with respect to individual units, even if it is unable to do so for all of its territorial divisions as it lacks sufficient competence over the legal matters governed by the CISG. This standard obviates the fragmentation of accession by States that have sufficient competency over all its territorial possessions.\(^\text{163}\)

\(^{162}\)UNCITRAL, CISG – Status: Canada

Upon accession, Canada declared that, in accordance with article 93 of the Convention, the Convention would extend to Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island and the Northwest Territories. (Upon accession, Canada declared that, in accordance with article 95 of the Convention, with respect to British Columbia, it will not be bound by article 1, paragraph (b), of the Convention. In a notification received on 31 July 1992, Canada withdrew that declaration.) In a declaration received on 9 April 1992, Canada extended the application of the Convention to Quebec and Saskatchewan. In a notification received on 29 June 1992, Canada extended the application of the Convention to the Yukon Territory. In a notification received on 18 June 2003, Canada extended the application of the Convention to the Territory of Nunavut.


Contrary to the foregoing position taken by some, the better position is whether the contracting state lacked the competency to extend the applicability of the Convention to a subject territory at the time of the contracting state’s signature, ratification, acceptance, approval or accession. The issue should be one of the competency to act for the territory at the relevant time with the emphasis on the substance rather than formality. At its ratification of the Convention, China lacked the competency to act for either Macao or Hong Kong. The concern regarding fragmentation of accession does not arise if the contracting state lacks competency to act for a subsequently acquired or redefined territory. Moreover, such an interpretation of Article 93 is consistent with the mandate of Article 7 that regard is to be had to the Convention’s international character. In this age of realignment of people groups and redefinition of geographical and political boundaries, the need for flexibility in interpretation of Article 93 exists. A rigid rule that limits the applicability of Article 93 to territories not within the contracting states constitutional competency at the time of its ratification unduly restrict the Convention’s policy objectives of harmonizing of civil and common law jurisprudence to facilitate cross border commercial transactions and serving as a unifying force in international trade.

Hong Kong lacks the status of a “State” in international law and could not accede to the Convention, if it or PRC desired an extension. An inflexible reading of Article 93 promulgated by commentators who insist either that the Convention requires “independence of the ‘territorial unit' based on the State's constitution” or that the extension or limitation must occur at the time of accession restricts the ability of the State with the authority and power to

---

164 See Honnold, supra, ¶ 65 (substance rather than label is to be decisive).

165 See Basic Law, ____.

166 Schroder, supra, ____.
extend or to limit the applicability of the Convention when the State desires either uniformity in the law of the State or the lack thereof.

In despite of these varying perspectives on the applicability of the Convention, Article 93 (4) resolves the risk of any confusion on the extent of the territorial applicability of the Convention by allocating it to the Contracting State. Without a non-unitary declaration, Hong Kong and Macao are deemed covered by the Chinese ratification.167 Furthermore, only a choice of law clause designating the domestic law of Hong Kong as the applicable law should result in the application of Hong Kong Sales Law when the Convention would be otherwise applicable.168 Finally, China’s Article 95 reservation is effective for parties with their places of business in Hong Kong and Macao. Neither SAR has a right to express an independent declaration because neither is a “State” in the international arena; therefore, the declarations of the State, PRC, are effective and bind its territorial units.

2. Reservation 94: Same or Closely Related Law

Two or more Contracting States with the same or closely related legal rules may jointly or in reciprocal unilateral declarations provide that the Convention does not apply to the sale or the formation of contracts between parties with their places of business within these contracting

167CISG Article 93 (4): “If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.”

Similarly, a Contracting State may declare that the Convention is inapplicable in transactions with parties that have their places of business in non-contracting states with the same or closely related legal rules on matters within the scope of Convention.¹⁶⁹

Denmark, Finland, Norway and Sweden declared, in accordance with Article 92 (1) that they would not be bound by Part II of the Convention, contract formation principles.¹⁷⁰ These three nations are considered non-contracting states on matters within the formation principles, Articles 14 through 24¹⁷¹ but as Contracting States as to the balance of the Convention unless the transactions are between parties with their places of business Denmark, Finland, Iceland, Norway and Sweden. Each of these states also declared pursuant to Article 94 (1) and (2) that the Convention would not apply to contracts of sale if the parties have their places of business in Denmark, Finland, Iceland, Norway or Sweden. Iceland subsequently conformed it ratification

¹⁶⁹CISG Art. 94 (1).

¹⁷⁰CISG Art. 94 (2).

¹⁷¹UNCITRAL – CISG, Status:

¹⁷²UNCITRAL – CISG, Status: Iceland
Contracts between parties with their places of business in these Contracting States are not subject to the Convention. Private international law rules determine which of these closely related laws is applicable. In contracts between parties with their places of business in these Nordic states and other contracting states, for the purposes of provisions other than Articles 14 through 24, these Nordic states are contracting states.

3. Reservation 95: Article 1 (1) (b) Exclusion

Article 95 permits a Contracting State to declare that it will not be bound by Article 1 (1) (b), a secondary basis for the application of the Convention to contracts for goods if the parties have their places of business in different nations, whether contracting states or non-contracting states. If the forum court’s application of its private international law rules, conflict of laws principles, points to the application of the law of a Contracting State, the Convention is applicable even though neither of the parties have their place of business in a Contracting State. If, however, one of the parties place of business is in a Contracting State that has made an Article 95 Reservation, the nation is treated as a non-contracting state when its citizens are contracting parties with those who have their businesses in non-contracting states. Six nations, the United States, Slovakia, Singapore, Saint Vincent and the Grenadines, Czech Republic, and China, have


174See text and notes, supra., at nn. __ through __, for a detailed discussion of the Article 95 Reservation.
made an Article 95 Reservation. Of the six, four are substantial producers of cross border trade. The Article 95 Reservation provides an opportunity for the domestic law of these nations to be applied.

4. Multiple Places of Business Impact the Applicability of the Convention

The existence of multiple places of business is an additional factor that may impact the applicability of the Convention. Article 10 provides a default rule for determining the relevant location of a party’s businesses for the purposes of the Convention if a party has multiple locations.175 “Place of business” is pertinent for several key provisions of the Convention.176 The parties may, by employing Article 6 that gives them the right to derogate or vary any provision of the Convention, designate the applicable location or the desired effect if either or both have multiple locations. If the parties fail to do so, Article 10 provides a test for resolving the issue. Article 10 directs that the place of business with the closest relationship to the contract and its performance is the relevant place of business for the purposes of the Convention, including determining the applicability of the Convention. Circumstances known or

175 CISG Art. 10: For the purposes of this Convention: (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract. . . .

176 CISG Arts. 12 & 96 (effect of an Article 96 Reservation imposing a writing requirement); Art. 20 (2) (calculating the timeliness of an acceptance); Art. 24 (determining when an acceptance “reaches” the offeror); Art. 31 (c) (ascertaining the place of delivery); Art. 42 (2)(unless the parties contemplate that the goods will be resold or used in another state, determines the seller’s obligation to deliver goods free from any right or claim of a third party based on industrial property or other intellectual property); Art. 57 (1)(a) (defines the place of the buyer’s performance of the obligation to make payment); Art. 69 (2) (determination of the shifting of the risk of loss); and Art. 93 (effect of the Convention when it extends to some but not all of the territories of a contracting state).
contemplated by the parties “at any time before or at the conclusion of the contract” are relevant for identifying the location.

Article 10 is problematic. First, it imposes the resolution of a factual determination and, thereby, the burden of proving that a proffered location is a place of business, “[a] place where the business is actually and chiefly run, which requires stability as well as a certain independent sphere of authority,” and that the proffered place of business has the “closest connection.” Had the Convention rather established a fixed, easily ascertainable standard such as the place of business that concluded the contract or a party’s principal place of business a litigation point would have been eliminated and the cost of resolving disputes minimized.

Second, standing alone in Article 6, the use of the phrase “at the conclusion of the contract” appears to refer to two different points in time. Does “at the conclusion of the contract” mean the point of contract formation – when the acceptance is effective -- or does it refer to the point in time when performance of the contract is completed? If the latter is intended, a broad swath of time exists for considering what was “know or contemplated” by the parties. Fortunately, the phrase “at the conclusion of the contract” reoccurs throughout the Convention and refers to that point in time when the contract is formed. Circumstances known or contemplated by the parties ex ante but not ex post are relevant. Although the Convention states a preference for the subjective intent of a party, a party’s subjective

\[\text{177 Id.}\]
\[\text{178 Case No. 5 U 118/99, Germany: Oberlandesgericht Stuttgart, 5. Zivilsenat, 28.02.2000 (German seller delivered flooring to a Spanish buyer).}\]
\[\text{179 Shlechtriem , Art. 10, ¶ 4 at 156 & n. 12c (location of the place of business that concluded the contract is the preference of scholarly commentary).}\]
\[\text{180 See, e.g., CISG Arts: 1 (2), 2 (a), 31 (c), 32, 33 (c), 35 (2)(b), 35 (3)(c), 38 (3), 42 (1), 42 (1)(a), 42 (2) (a), 55, 57 (2), 68, 71 (1), 73, 74, 79 (1).}\]
\[\text{181 PETER SCHLECHTRIEM & INGEBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION SALE OF GOODS (CISG), Article 10 ¶4, at 157 (2nd ed. 2005).}\]
understanding of the existence of the other’s place of business is only relevant if the other person knew or could not have been unaware of that subjective understanding. Consequently, a party’s subjective intent regarding its understanding of either its location with the closest connection or the other party’s relevant location is likely to be irrelevant. Circumstances such as the visits to or inspection of facilities; the working location of those officers or employees who are conducting the negotiations or with whom the contract is concluded; the business location, not including temporary lodgings such as hotels or suites used during the negotiations; the language used by the parties in the contract or other transactional documents; the place from which transactional documents are generated; and the aggregation of transactional activity in one locale are relevant factors for determining which of several locations has the closest relationship to the contract and its performance. The scant case authority applying Article 10

____________________________

182 CISG Art. 8 (1): For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

183 Case No. T.171/95, Switzerland: Bezirksgericht der Saane, 20.02.1997 (Austrian buyer concluded a contract with the Swiss branch of a Liechtenstein company; the Swiss location, a contracting state, had the closest connection to the contract rather than Liechtenstein, a non-contracting state).


185 Case No. A.R. 1079/99, Belgian Tribunal of Commerce, S.A. Isocab France v. E.C.B.S. (1999) (court determines that U.S. buyer’s place of business with the closest connection was the Belgian location, Dutch-speaking Flanders, because the seller’s invoice was in Dutch).

186 Case No. ____, France--Cour d'Appel de Colmar, 24.10.2000, S.a.r.l. Pelliculest /S.A. Rhin et Moseille v. Morton International GmbH / Société Zurich Assurances S.A. (even if the orders had been received by a French agent of the German seller, the confirmations of the delivery orders, the issuance of the invoices and the delivery of the goods were from the seller’s German place of business, which had the closest relation to the contract with a French buyer).

187 Case No. C 01-20230 JW, USA--U.S. District Court, N.D., California, Asante Technologies, Inc. v. PMC-Sierra, Inc., 27.07.2001 (U.S. buyer purchased computer parts from a Canadian seller, who had offices in the U.S. and who used a U.S. distributor who was not the seller’s agent, manufactured and shipped the goods from Canada, made representations that were allegedly breached in Canada; Canada had the closest connection); Case No. 034305BLS, USA--Superior Court of Massachusetts (Court of First Instance), Vision Systems, Inc. et.v. EMC Corporation, 28.2.2005 (the U.S. buyer's initial contact with the Australian seller was with an employee of the seller's U.S. subsidiary, that employee remained the seller's principal contact with the buyer; all price quotations to the buyer were provided by the U.S. subsidiary, all sales to the buyer were F.O.B. Massachusetts, and the buyer submitted all orders to the seller's U.S. office).
suggests that the language of the contract and the geographic location of the transactional acts, whether the manufacturing the goods, producing the contract documents or initiating the transaction, are primary consideration for determining the closest relation. If, however, transactional activity occurs at more than one location of a party, the language of the contract will likely determine the place with the closest relationship.

III. CONCLUSION

For the global entrepreneur, the Convention offers an autonomous set legal rules without bias towards any legal regime, the opportunity to assess and fix his or her risk assumption when contracting with businesses located within contracting states without offending local sensibilities or imposing “foreign” principles on the counterparty. The provisions of the Convention are different from those the UCC in subtle ways that may prove deceptive given the similarity of the language with that in U.S. domestic law. Understanding and appreciating the differences between the Convention and the UCC are challenges that the Model Rules of Professional Conduct mandate that lawyers must acquire. Without doing so, the attorney cannot fulfill her role as advisor. She must understand the legal effects of, the benefits, and the risks of the

---

188 See, e.g., Case No. 034305BLS, USA—Superior Court of Massachusetts (Court of First Instance), Vision Systems, Inc. et.v. EMC Corporation, 28.2.2005.

189 See, e.g., American Bar Association, Model Rules of Professional Conduct, Rule 1.1 Competence: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

190 American Bar Association, Model Rules of Professional Conduct, Rule 2.1: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.”
applicable legal regimes. The place to commence that journey is with Article 7 and its principles of interpretation.