

Uniform Interpretation of CISG

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The United Nations Convention on Contracts for the International Sale of Goods (CISG), which became U.S. law in 1990, provides that “[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade”.¹ There are few cases in which the international character of CISG or promoting the observance of good faith influences interpretation.² For many cases, uniformity is the sole criteria that is relevant. This paper argues that uniformity in application is nearly impossible and certainly impractical—but is nonetheless a goal worth seeking—and describes how a second judge should seek uniformity.

Part I argues that uniform interpretation is unlikely because the convention has six official languages; decisions about it are rendered in a variety of languages by a variety of courts and arbitral bodies; there is no way to be certain that one has accessed all of the publicly available decisions, and many decisions are not publicly available; sources of law under different legal systems (common law, civil law, socialist law, Islamic law) are different, making the evaluation of decisions difficult; there is no Supreme Court of CISG available to resolve conflicts of interpretation; and there is a continuing tension between interpreting CISG to be consistent with the remaining body of domestic law and interpreting it on its own, autonomously. Part II sets forth an example showing how a judge might approach uniform interpretation.

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1. U.N. COMM’N ON INT’L TRADE LAW, UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, art. 7(1), U.N. Sales No. E.10.V.14 (2010). The problem is discussed generally at JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 117 – 33 (Harry M. Fletchner ed., 4th ed. 2009); PETER SCHLECHTREIM & INGEBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 121 – 26 (Ingeborg Schwenzler ed., 4th ed. 2016); CLAYTON P. GILLETTE & STEVEN D. WALT, THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: THEORY AND PRACTICE 10 – 19 (2d ed. 2016).

2. For a case that should have considered the internationality of the contract but did not, see Landgericht Frankfurt am Main [LG] [District Court Frankfurt (Main)] Apr. 11, 2005, 12/26 O 264/04 (Ger.), <http://cisgw3.law.pace.edu/cases050411g1.html> (Ugandan buyer precluded from remedy by strict German inspection standards when German seller shipped worthless shoes).

Part III argues that despite the difficulties, uniform interpretation is nonetheless desirable because it reduces the incentive for forum shopping for favorable substantive law and details recent restrictions on forum shopping. Also, the very purpose of CISG was to create a uniform international commercial law which would be undermined by non-uniform interpretation.

I. Difficulties of Uniform Interpretation

A. SIX OFFICIAL LANGUAGES OF THE CONVENTION

The convention is written in six different languages, each of which is expressed to be official.³ This creates two different problems.

A provision may actually be different in different languages. For example, in the English version, a contract to make goods is considered the sale of goods (and thus covered by CISG) “unless the party who orders the goods undertakes to supply a substantial part of the materials necessary,” while the French version changes the word “substantial” to “essential.”⁴ This is clearly a different standard, as “substantial” calls for a quantitative test, while “essential” requires a qualitative test.

One might suggest a majoritarian solution: simply count how many of the languages opt for one meaning or the other and adopt the majority interpretation. But doing that would mean that each language is not equally official.

Likewise, one Swiss court has suggested that, in case of doubt, one should recur to the working languages of CISG’s negotiation, which were primarily English and, secondarily, French.⁵ A careful common lawyer, however, would note that the entire linguistic discussion in the Swiss case was dictum, as the language version that was urged on the court was German, which is not one of the six official languages. As a result, the German version clearly yields to any of the six official languages.

The second problem is summed by the Italian proverb “*tradurre é tradire*,” which means “to translate is to betray.” It notes the difficulty of making a perfect translation because words in different cultures have different shades of meaning. In the Swiss case, the court points out that both the English and the French versions could be translated into German as “precisely describe” (as it was), but equally acceptable translations would be “describe” or “indicate.”⁶ This means that the French and English versions, which

3. The penultimate paragraph reads as follows: “DONE at Vienna . . . in a single original, of which the Arabia, Chinese, English, French, Russian and Spanish texts are equally authentic.” U.N. COMM’N ON INT’L TRADE LAW, *supra* note 1, art. 101.

4. *Id.* art. 3(1).

5. Bundesgericht [BGer] [Federal Supreme Court] Nov. 13, 2003, 130 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 258 (Switz.), <http://cisgw3.law.pace.edu/cases/031113s1.html>, last visited 21 June 2018.

6. *Id.*

clearly have different meanings, might well have the same meaning in German.

Some translations are easy. Many translations are difficult. Translating legal concepts encounters special pitfalls. Not all legal systems contain the same legal concepts, and attempting to translate a legal concept into a language of a country whose legal system does not contain that concept is especially hazardous. The civil law term “cause” is not adequately captured by rendering it in English as “consideration,” though most legal dictionaries will do so. To adequately describe the differences would require considerably more words than are available for practical purposes.⁷

B. TOO MANY TRIBUNALS

The number of tribunals deciding CISG cases is too great. At latest count, there were eighty-nine Member States of CISG.⁸ Each has a court system that can make decisions based on CISG. In most of those countries, there are trial courts, courts of appeal, and a supreme court. The volume of cases varies from country to country and even within countries. For the most part, cases are brought in the defendant’s country because that is the place where it is easiest to establish jurisdiction over the defendant. Also, if a judgment needs to be executed in that country, there will be no argument about whether that judgment should be recognized.

The cases available as precedent are not representative of the range of countries adhering to CISG. The table of cases of a major one-volume treatise on CISG cites ninety-four Austrian appellate cases, ten from the People’s Republic of China, 105 appellate and eight trial court cases from France, several hundred cases from Germany, and five from Russia. That does not convey an accurate picture of CISG cases decided. The leading countries are Germany (534), China (432), Russia (305), Netherlands (268), Switzerland (212), and the United States (183), according to the Pace website.⁹

While each of those courts may render opinions, those opinions may or may not be published. If the decisions are published, they may not be widely disseminated or available on electronic services.

Most difficult is the problem that each opinion will be rendered in the language of the court. This means that access to the opinion will depend not

7. See JEAN BALEYTE ET AL., *DICIONNAIRE JURIDIQUE [LEGAL DICTIONARY]* 53, 93 (Navarre ed., 1984) (cause is defined as consideration, but consideration is defined as a “counter-part which, in virtue of a fundamental principle of the common law, should be provided to assure the validity of a contract. In effect, gratuitous cause of French law does not exist in Anglo-American law.”) (author’s translation).

8. Status: *United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)*, U.N. COMM’N ON INT’L TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Mar. 30, 2019).

9. *CISG Database: Country Case Schedule*, PACE INST. OF INT’L COMMERCIAL LAW, <http://www.cisg.law.pace.edu/cisg/text/casescit.html> (last visited Mar. 30, 2019).

only on whether it is published and widely disseminated but also on the linguistic ability of the readers.

UNCITRAL has attempted to mitigate both these problems by collecting CLOUT cases. CLOUT stands for Case Law On UNCITRAL Texts.¹⁰ While these cases should be collected in full, what is published (irregularly)¹¹ is the abstract of the case drawn up in one of the six official languages. UNCITRAL should eventually translate that abstract into each of the remaining five official languages of the treaty. It is not possible to predict when an abstract will appear. The issue published on February 9, 2018, included four abstracts of cases decided in 2017 and an equal number decided in 2010.¹² The issue published on December 1, 2016, contained abstracts of one case each from 2006, 2009, 2012, 2013, and 2016 and two cases each from 2014 and 2015.¹³ In short, there is no guarantee that CLOUT abstracts will be published promptly.

That, however, only begins to describe the problem with CLOUT. An abstract is not the opinion of the court. It may present a distorted view of what the court said. It might completely omit an important issue because it seems less significant than other issues in the case. The best example of the problem posed by the difference between an abstract and the full opinion is the Swiss Supreme Court case discussed above on the perils of translation.¹⁴ Reading the abstract, one has no idea that the court will discuss translation problems.¹⁵ That part of the opinion is not mentioned in the abstract.¹⁶

UNCITRAL has also attacked the problem of access by periodically publishing a digest of cases.¹⁷ That is helpful, but it appears that a new digest is made available only every four years. Because this is an online digest as well as print digest, it is difficult to see why the online version cannot be kept current.

10. U.N. Comm'n on Int'l Trade Law, Case Law on UNCITRAL Texts (CLOUT), User Guide, U.N. Doc. A/CN.9/SER.C/GUIDE/1/Rev.3 (Jan. 15, 2018).

11. Publication is irregular because CLOUT cases are produced by volunteer national correspondents appointed by each country who send the full text of opinions and a summary in one official language to the Secretariat, which then translates the summary into the other five official languages. The Secretariat does not have an unlimited budget. See FRANCO FERRARI & MARCO TORSELLO, INTERNATIONAL SALES LAW—CISG IN A NUTSHELL 11 – 12 (2nd ed. 2018); JOHN O. HONNOLD, *supra* note 1, at 131 – 32 n.41.

12. U.N. Comm'n on Int'l Trade Law, Case Law on UNCITRAL Texts (CLOUT), Abstract, U.N. Doc. A/CN.9/SER.C/ABSTRACTS/188 (Feb. 9, 2018).

13. U.N. Comm'n on Int'l Trade Law, Case Law on UNCITRAL Texts (CLOUT), Abstract, U.N. Doc. A/CN.9/SER.C/ABSTRACTS/176 (Dec. 1, 2016).

14. BGer Nov. 13, 2003, 130 BGE III 258 (Switz.).

15. U.N. Comm'n on Int'l Trade Law, Case Law on UNCITRAL Texts (CLOUT), Abstract, U.N. Doc. A/CN.9/SER.C/ABSTRACTS/87 (Aug. 21, 2009).

16. See *id.*

17. *Digests*, U.N. COMM'N ON INT'L TRADE LAW, http://www.uncitral.org/uncitral/en/case_law/digests.html (last visited Mar. 30, 2019).

Private organizations also maintain databases to make CISG cases available. UNILEX is based in Italy;¹⁸ Pace Institute of International Commercial Law is based in New York;¹⁹ CISG-online is a product of the University of Basel in Switzerland.²⁰ Each is a laudable attempt to provide information about decisions from all countries, but none has escaped the problem of delay. Insufficient resources are devoted to making CISG decisions available; the cost of doing this is not trivial.

C. NON-PUBLIC DECISIONS

Even if all publicly available decisions were made available, there remains the problem of non-public decisions. Non-public decisions fall into two categories: court decisions that are not published and arbitration opinions.

Every country that is a CISG signatory does not publish its court decisions. One can distinguish three kinds of countries. In one, every court decision is published. In a second, some court decisions are designated as unpublished, meaning that they are not precedential. But in those countries, private services sometimes publish the decisions, and they can therefore be consulted. In a third set of countries, decisions are unpublished.²¹ In those countries, the results and the reasoning are known only to a small group of lawyers who work in the field and those with whom they have shared the opinions.

Then there is the problem of arbitration opinions. Arbitrations are largely the creatures of the parties to the contracts that establish them. The classical position is that both the arbitration proceedings and the awards are confidential unless the parties or the rules of the arbitration seat provide otherwise.²² That proposition has been successfully challenged at the instigation of one of the parties or the court in some cases. It is nonetheless safe to say that arbitration awards are not systematically made available to the public, though some arbitration centers publish summaries.

18. UNILEX ON CISG & UNIDROIT PRINCIPLES, <http://www.unilex.info/> (last visited Mar. 30, 2019).

19. *CISG Database*, INST. OF INT'L COMMERCIAL LAW, <http://iicl.law.pace.edu/cisg/cisg> (last visited Mar. 30, 2019).

20. *About CISG-online*, CISG-ONLINE, <http://www.cisg-online.ch/index.cfm?pageID=28> (last visited Mar. 30, 2019).

21. Judicial opinions are not published in Saudi Arabia, which at this writing is not a Member State. Sharif Saced Ahmed Alghamdi, *The Compatibility of Saudi Domestic Law with the Buyer's Obligations Under Vienna Convention (CISG)*, at 21 (2018) (unpublished dissertation) (on file with author).

22. For general discussion, see NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 124 – 35 (6th ed. 2015); see also, e.g., Int'l Chamber of Commerce [ICC], *Arbitration Rules & Mediation Rules*, at 44, ICC Pub. No. 880-4 ENG (Mar. 1, 2017), <https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf>.

In short, all decisions about CISG are not available to even the most diligent counsel and certainly not to every judge that needs to rule on a CISG problem.

D. TOO MANY SOURCES OF LAW

When we speak about interpretation, we must ask what an interpretation might be. Different legal systems will have different views of interpretation, as well as the weight to be accorded to it. This is generally called the source of law. CISG has been ratified by states whose legal systems are based on common law, civil law, socialist law, and Islamic law.

In the common law world, the text of the law is a source of law, but that usually is not helpful because it is the text that is being interpreted. The legislative history may help in theory, but often not in practice. Usually, the reason there is a litigated dispute about interpretation is that neither the text of the law nor the legislative history is clear. Sometimes it is confused on the point at issue; most often it is silent because no one in the legislative process foresaw the problem. Regulations might interpret some laws (mostly public laws), but no governmental body would have occasion to interpret CISG. The other source of law is a decision by a court. The views of scholars have an ambiguous position in common law jurisdictions. Scholars are not considered sources of law and are never binding precedent. Realistically, the views of scholars are clearly considered for their persuasive value and occasionally even cited.²³

The civil law world holds quite different views. For it, law is the text of the law, regulations promulgated under it, and custom, as explained by distinguished jurists who are mostly professors.²⁴

The addition of writings about the law as a source of law greatly expands the research requirements of a busy court because publishing books and articles explaining CISG has become an industry. As an example, the bibliography section of a treatise on CISG covers 103 pages, each page having roughly twenty-five entries for a total of more than 2,500 references.²⁵ Previously decided cases are usually not considered a source of law, though there is a doctrine that an accumulation of cases (*jurisprudence constante*) should be given weight.²⁶

One implication of scholarly writings being a source of law is that collective scholarly writings might be an even better source of law. The CISG world is filled with what we would call soft law. A group of self-

23. *E.g.*, *NLRB v. Noel Canning*, 573 U.S. 513, 578 (2014) (citing my colleague, Michael Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487 (2005)).

24. JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 24 – 25, 39 – 47, 56 – 60, 80 – 85 (3d ed. 2007). Whether this is an accurate description of what actually happens, or just theory, is beyond the knowledge of your author.

25. SCHLECHTFEIM & SCHWENZER, *supra* note 1, at 1419 – 1521.

26. JOHN P. DAWSON, *THE ORACLES OF THE LAW* 416 – 31, 495 – 502 (1968).

appointed scholars calling themselves the CISG Advisory Council, from time to time, issues opinions interpreting CISG. There are the Unidroit Principles of International Commercial Contracts. Principles of European Contract Law have been drafted. There are others.²⁷

I do not mean to suggest that confining the research only to cases, as is more likely in the common law world, will solve the problem of source multiplicity. The Schlechtreim and Schwenger treatise has a table of cases that is sixty-nine pages long and lists cases from thirty-eight countries, two international courts, and a variety of arbitral tribunals.²⁸ There are probably an average of twenty-five cases on each page, which puts the number of decided cases at around 1,700.²⁹

Few litigants can afford to pay their counsel to examine the precedents; even fewer judges can spend the time required to locate the cases—much less read them—in keeping up with their calendars.³⁰

E. THERE IS NO CISG SUPREME COURT

One problem standing in the way of uniform international interpretation of CISG is that there is no official institution designated as a supreme interpreter. This is not true within national systems. The same hierarchical rules apply to interpretations of CISG as to other interpretations. In some countries, trial courts must follow the decisions of appeals courts to which the case must go, and appeals courts are bound by the decisions of their supreme courts. In others, the decision of a superior court may only be persuasive.³¹ Because there is no institution to resolve a CISG conflict, it is important that courts in different countries exercise restraint in seeking to avoid a conflict.

A group of distinguished scholars formed the CISG Advisory Council to attempt a uniform interpretation of selected provisions. While this is a voluntary, self-governing group, it has been accorded observer status at both UNCITRAL and UNIDROIT. It has thus far issued twenty opinions on

27. Christina Ramberg, *The Legal Practitioners' Problems in Finding the Law Relating to CISG – Hardship, Defect Goods and Standard Terms 2 – 4* (Stockholm Univ. Faculty of Law, Research Paper No. 55, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3105275.

28. SCHLECHTREIM & SCHWENGER, *supra* note 1, at xxxv – xcii.

29. *Id.*

30. The average Sixth Circuit full-time federal appeals court judge wrote fifty-nine opinions per year from 2010 to 2014: roughly one opinion every six calendar days. This seems like extraordinary production, even for well-trained judges assisted by four bright, eager-to-please law clerks. I spent most of the summer writing this article. See *Opinions: The Sixth Circuit's Most Active Authors*, SQUIRE PATTON BOGGS: SIXTH CIRCUIT APPELLATE BLOG (July 3, 2015), <https://www.sixthcircuitappellateblog.com/news-and-analysis/opinions-in-the-sixth-circuit-who-writes-the-most/>.

31. In France, the Cour de Cassation may nullify the opinion of one of the Cours d'Appel, but it cannot decide the case. For a final decision, the case must be sent to a different Cour d'Appel. That court is not bound by the initial decision of the Cour de Cassation.

the interpretation of various provisions of CISG and its accompanying limitations treaty.³² Its opinions have been both cited and ignored by courts.

F. AUTONOMOUS V. ANALOGOUS INTERPRETATION

Commentators constantly insist that CISG must be interpreted autonomously. That means that interpretation of analogous national law should not be allowed to govern the interpretation of provisions of CISG. CISG must be interpreted on its own terms. Interpreting CISG as though it were a comparable national law is not acceptable.

A picture is probably worth more than a thousand words. Here is the poster child. In *Raw Materials Inc. v. Manfred Forberich GmbH & Co.*,³³ defendant had promised to deliver tons of used railroad rail to plaintiff. The parties disputed whether the obligation was to deliver the rail to a U.S. port or to load the rail on a ship in St. Petersburg, Russia, bound for a U.S. port by the end of 2002.³⁴ Defendant did neither. Defendant-seller responded that it was unable to perform the contract because the port of St. Petersburg froze in December, making shipment impossible. Plaintiff-buyer moved for summary judgment.³⁵

The court begins its opinion by properly stating that whether defendant is excused from performing depends on whether it has complied with CISG article 79.³⁶ Then, prompted by the submissions of both parties, the court notes that no American court has construed article 79, and under those circumstances “caselaw interpreting the Uniform Commercial Code’s (“UCC”) provision on excuse provides guidance for interpreting the CISG’s excuse provision because it contains similar requirements as those set forth in Article 79.”³⁷

First mistake. CISG article 7(1) does not say that when there is no precedent in your country you look for your country’s precedents on rules

32. See *Opinions*, CISG ADVISORY COUNCIL, <https://www.cisgac.com/opinions/#op> (last visited March 21, 2019). The Advisory Council is limited to twenty active members. Emeritus members may participate in discussions, but do not vote. There are currently seventeen active members. All except one are professors, and the one judge spent most of his career as a professor. Three are from the United States. There are two from England and Switzerland. One member hails from Austria, Brazil, China, France, Italy, Japan, South Africa, Spain, Sweden, and Turkey, respectively. A quorum is one third of the members, which would be six. Majority voting is in effect. It is the custom of the Advisory Council to engage reporters who are not members to help study each subject taken up. The Council meets once or twice a year. Opinion #19, which is advertised to deal with the example used in this article, was approved in November 2018, but has yet to be published.

33. *Raw Materials, Inc. v. Manfred Forberich GmbH & Co.*, No. 03 C 1154, 2004 U.S. Dist. LEXIS 12510 (N.D. Ill. July 6, 2004).

34. *Id.* at *2.

35. *Id.* at *6.

36. *Id.* at *12; see U.N. COMM’N ON INT’L TRADE LAW, *supra* note 1, art. 79.

37. *Raw Materials*, 2004 U.S. Dist. LEXIS 12510 at *12; see U.C.C. § 2-615 (AM. LAW. INST. & UNIF. LAW COMM’N 2002).

containing “similar requirements.”³⁸ It says uniformity of interpretation is desirable, so look for interpretations by courts of other countries or by commentators.³⁹

Second mistake. The court does not say that CISG article 79 and UCC § 2-615 are identically worded. The court never quotes UCC § 2-615, neither in text nor in footnote. In fact, CISG article 79 reads:

A party is not liable for failure to perform any of his obligations if he proves that failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome its consequences.⁴⁰

The operative portion of UCC § 2-615 reads:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.⁴¹

Those provisions are not identical. Article 79’s four requirements are an “impediment,” “beyond his control,” “that he could not reasonably be expected to have taken” into account, and whose consequences he could not “have avoided or overcome.”⁴² By contrast, the UCC’s three requirements are that performance be made “impracticable” by a “contingency,” “the nonoccurrence of which was a basic assumption on which the contract was made.”⁴³

Also, there is no mention of article 79(3), which reads as follows: “The exemption provided by this article has effect for the period during which the impediment exists.”⁴⁴ This means that, regardless of which party’s interpretation of the contract is accepted or whose version of the facts is endorsed, as soon as the ice melts, delivery must be made.

This reference to the Uniform Commercial Code is especially puzzling because it was clear from the legislative history of CISG available at the time and from extant scholarship—both in English and both readily available in most law school libraries—that the draftsmen were wary of comparable domestic law provisions, variously entitled *force majeure*, frustration of purpose, impossibility of performance, Act of God, or failure of presupposed

38. See U.N. Comm’n on Int’l Trade Law, *supra* note 1, art. 7(1).

39. *Id.*

40. *Id.* art. 79.

41. U.C.C. § 2-615 (AM. LAW. INST. & UNIF. LAW COMM’N 2002).

42. U.N. COMM’N ON INT’L TRADE LAW, *supra* note 1, art. 79.

43. U.C.C. § 2-615 (AM. LAW. INST. & UNIF. LAW COMM’N 2002).

44. U.N. COMM’N ON INT’L TRADE LAW, *supra* note 1, art. 79(3).

conditions, and intentionally chose terms that did not appear in the legal systems of major trading countries to avoid interpretation by reference to domestic law.⁴⁵

I do not dispute that the court reached the correct result in denying summary judgment, as there was disagreement between the parties about the facts, and those facts would have been relevant under any interpretation of article 79.⁴⁶

I likewise believe that there is an argument that the parties opted out of CISG, which is permitted without limitation as to time, having *sub silentio* amended the contract by both arguing that the case should be governed by the UCC.⁴⁷ Had the court so held, none of this would have violated article 7(1)'s requirement of autonomous interpretation.

Nor should one suppose that the United States is alone in applying a "homeward trend" rather than interpreting CISG autonomously.⁴⁸ It is perfectly natural, especially in countries where precedent is important, to look for analogous precedent, even if the fit is not exact.

45. HONNOLD, *supra* note 1, at 476; Barry Nicholas, *Force Majeure and Frustration*, 27 AM. J. COMP. L. 231 (1979).

46. Joseph Lookofsky & Harry Flechtner, *Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?*, 9 VINDOBONA J. OF INT'L COM. L. & ARB. 199, 205 – 08 (2005) (suggesting that the legal analysis under CISG article 79 might have permitted defendant to prevail).

47. CISG article 6 provides that "[t]he Parties may exclude the application of this Convention." Article 29(1) says, "A contract may be modified or terminated by the mere agreement of the parties." A writing is not necessary unless the contract specifically requires that amendments be in writing, as article 11 provides as follows: "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." That provision would not be needed if the references to the UCC were in the written submissions of the parties. But the fact that both parties have argued the UCC does not necessarily mean that they have intended to amend the contract. It may simply mean that both were mistaken as to the governing law. See U.N. COMM'N ON INT'L TRADE LAW, *supra* note 1, arts. 6, 29(1), 11. It is certainly not good practice to rely on a court to find that you have opted out of CISG by conduct. Some courts will; others will not. The best practice is to agree with your counterparty on the law to apply and that CISG does not apply and to put that agreement in writing. GILLETTE & WALT, *supra* note 1, at 65 – 73. The CISG Advisory Council agrees. In CISG Advisory Council Opinion No. 16, point 5 states: "During legal proceedings an intent to exclude may not be inferred merely from failure of one or both parties to plead or present arguments based on the CISG." CISG Advisory Council Opinion No 16: Exclusion of the CISG under Article 6, PACE L. SCH. INST. INT'L COM. L., <http://www.cisg.law.pace.edu/cisg/CISG-AC-op16.html>. (last visited March 24, 2019).

48. For the sins of many other states on article 79, see CAMILLA BAASCH ANDERSEN, UNIFORM APPLICATION OF THE INTERNATIONAL SALES LAW: UNDERSTANDING UNIFORMITY, THE GLOBAL JURISCONSULTORIUM AND EXAMINATION AND NOTIFICATION PROVISIONS OF THE CISG 93 – 98 (2007).

II. What is Uniform Interpretation?

Uniform interpretation requires some system of precedent. If one pays no attention to other cases, interpretation is unlikely to be uniform. It does not require that precedent always be followed under every circumstance. That would be a system of *stare decisis* that might be appropriate in the relationship of a superior court to an inferior court in a common law country. It would place too much authority in the first court to consider the case. We are talking about persuasive precedent, not binding precedent.⁴⁹ Instead, the second court should attach a rebuttable presumption of correctness to the first case to be followed unless there appears to be a substantially better interpretation.

A. A TEST CASE – THE FACTS

Consider a real case. The question was whether the goods delivered conformed to the requirements of the contract. The contract called for the delivery of frozen New Zealand mussels by a Swiss seller to a German buyer.⁵⁰ The contract did not specify anything about the quality of the mussels. The mussels had a cadmium content above the limit recommended by German health officials for meat. There was no such limit for seafood. The cadmium content was not so high that the buyer would not be permitted to re-sell them in Germany. Buyer claimed that this was a fundamental breach entitling buyer to avoid the contract.⁵¹ No special use of the mussels was communicated to seller, so the question was whether the mussels were “fit for the purposes for which goods of the same description would ordinarily be used.”⁵² If they were not fit, the court would need to examine whether that lack of fitness constituted a fundamental breach.⁵³ The problem is that article 35(2)(a) stops prematurely. It should say “would ordinarily be used at its final communicated destination” or “would ordinarily be used at the buyer’s place of business” or “would ordinarily be used at the place of legal delivery,” but the provision adds none of those phrases that would have clarified the matter. The court says that “the absolutely prevailing opinion in the legal literature” is that compliance with

49. *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 320 F. Supp. 2d 702, 709 n.11 (N.D. Ill. 2004), *aff’d*, 408 F.3d 894 (7th Cir. 2005) (foreign cases discussed described in U.S. law reviews); Trib. di Vigevano, 12 luglio 2000, n. 405 (It.), <http://cisgw3.law.pace.edu/cases/000712i3.html> (discussing cases from seven countries and an arbitral tribunal).

50. Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 8, 1995, *REVUE SUISSE DE DROIT INTERNATIONAL ET DE DROIT EUROPEEN* [RSDIE] 43 – 44, 1996 (Ger.), <http://cisgw3.law.pace.edu/cases/950308g3.html>.

51. *See id.*

52. U.N. COMM’N ON INT’L TRADE LAW, *supra* note 1, art. 35(2)(a).

53. Defined by CISG art. 25 as “such detriment to the other party as substantially to deprive him of what he is entitled to except under the contract . . .” *Id.* art. 25.

“the not easily determinable public law provisions and/or administrative practices” of the buyer’s country or the country of use cannot be expected.⁵⁴

The court cites eight commentators in favor of its view and four against, including the foremost German scholar. It cites several as undecided. It also notes that it need not go that far because the regulations applied were extrapolated from regulations on meat and would not have prohibited the buyer’s resale of the mussels. It further states that even if the goods did not conform to the contract, the buyer lost the right to assert that fact by failing to give prompt notice of the nonconformity.⁵⁵

When the next case arises, how should the judge proceed? In the next case, *Internazionale Medico Scientifica (IMS) manufactures and delivers three mammography machines to Medical Marketing International (MMI) in the United States for resale pursuant to a contract giving MMI exclusive sales rights in the United States for this line of mammography machines. The U.S. Food & Drug Administration seizes the equipment because it does not comply with U.S. safety regulations.*⁵⁶ Assume that MMI sues IMS for breach of conformity of the goods under article 35(2)(a).

B. STRENGTH OF THE PRECEDENT

The judge might begin by analyzing the strength of the precedent set by the German Federal Supreme Court. Strength of the precedent might be approached in a number of different ways.

First, it is a ruling by the country’s highest court. It is therefore entitled to more deference than an intermediate appellate court ruling, which in turn would be tendered more respect than a trial court ruling. This would be true based solely on the ranking of the courts, but it is also due to the fact that judges of the Supreme Court are usually career jurists with many years of experience both at the trial and intermediate appellate level and are selected for the Supreme Court based on outstanding previous work.⁵⁷

54. BGH Mar. 8, 1995, RSDIE 43 – 44, 1996 (Ger.), <http://cisgw3.law.pace.edu/cases/950308g3.html>.

55. *See id.*

56. *Med. Mktg. Int’l, Inc. v. Internazionale Medico Scientifica, S.R.L.*, CIV. A. 99-0380, 1999 WL 311945 (E.D. La. May 17, 1999). The actual case is somewhat different. It was decided as a result of an attempt by Medical Marketing to confirm an arbitration award in its favor. The only question was whether the arbitrators exceeded their power by making an award in manifest disregard of the law. The court held that the arbitrators carefully considered the German Federal Supreme Court opinion and ruled in accord with it, though reaching an opposite conclusion by finding that defendant was obligated to comply with U.S. law under the third exception in the German opinion based on the special circumstances—presumably that seller was exporting to the United States.

57. In fact, there are more than ninety civil judges of the Bundesgerichtshof who sit on twelve different civil panels. The formal qualifications are that each judge must be at least thirty-five years old and qualified as a judge. Judges are appointed by the President on nomination by the Federal Minister of Justice in conjunction with the Judges Election Committee, composed of the Ministers of Justice of the sixteen federal states and another sixteen members selected by the German Parliament. *Judges*, BUNDESGERICHTSHOF, <https://www.bundesgerichtshof.de/EN/>

Second, the opinion on this point loses some strength because the point involved was not necessary to the decision of the case.⁵⁸ The court could simply have said that buyer had no remedy because his resale of the mussels would not have violated German law.

Third, the opinion on this point loses some strength because the court also decided that the buyer did not give the seller timely notice of the defect. Where a case could have been decided with the same result in either of two ways, neither way is as persuasive as if that were the only ground for decision.⁵⁹

Fourth, I want to read the precedents that the court cites to see if they are accurately described. This poses two problems: language and accessibility. Two are in English, three in French (one published in Switzerland), and the rest in German. I can read English and French but not German. The two English-language precedents are in our law school library. Of the three French precedents, WorldCat does not list one of them as present in any law library in the United States. The other two are secured by interlibrary loan within two weeks of my request. The English and French citations I examined conform precisely to the German court's description, though with varying degrees of specificity—three for its rule, and one against. Because all four of the precedents I examined conform, I have not checked the thirteen citations in German, nor have I tried to discover if they are in U.S. libraries so that they can be summoned by inter-library loans.

Fifth, I evaluate the persuasiveness of the German court's reasoning. The court's reasoning is brief and centers largely on reasonable expectations of the parties and who has superior knowledge:

Decisive is that a foreign seller can simply not be required to know the not easily determinable public law provisions and/or administrative practices of the country to which he exports, and that the purchaser, therefore, cannot rationally rely upon such knowledge of the seller, but rather, the buyer can be expected to have such expert knowledge of the conditions in his own country or in the place of destination, as determined by him, and, therefore, he can be expected to inform the seller accordingly.⁶⁰

Reading that clause as a negative pregnant, one might assume that the rule announced by the Federal Supreme Court only applies if the public law provision or administrative practice applied in the case are "not easily determinable."⁶¹ I question whether the court intended to have an inquiry in each case about whether the rules are easily determinable. Such a rule would lead to great uncertainty. On the other hand, if the law is easily

People/Judges/judges_node.html (last visited Mar. 30, 2019). Of the 95 persons listed on the website, 58 have doctorates, and 12 of those are professors.

58. This is what we call *dictum* in common law circles.

59. This is what we call an alternative holding in common law circles.

60. BGH Mar. 8, 1995, RSDIE 43 – 44, 1996 (Ger.).

61. *Id.*

determinable, it would permit subsequent courts to adhere to the rules laid down by the Federal Supreme Court without ever reaching the same result.

The court specifically says that it is not deciding whether there are exceptions to the rule of no seller responsibility. Specifically, it declined to opine on whether the seller would need to comply if the standards of the seller's country are the same as in the destination country; were pointed out by buyer to seller;⁶² or are known or should be known to the seller due to the particular circumstances of the case, such as a seller with a branch in the destination country or a seller who promotes the product there, exports the product there, or has a long-term business relationship with buyer.

So the reasoning of the court is that the person who can determine the legal standards to be applied to the goods at the least cost should be the person who bears the risk of noncompliance. This is consistent with the general view that CISG is supplemental law designed to be used when the parties have not otherwise agreed.⁶³ It is not mandatory law. It therefore will be most effective if its provisions replicate what the parties would have negotiated. Those are the provisions that impose the least costs on the parties⁶⁴ and that are fair between them.

Is the buyer the party who can discover and comply with the legal requirements at the least cost? One would initially think so. These are contracts between merchants, not consumer contracts.⁶⁵ The buyer is going to either resell or use the goods at the destination. Whether the buyer will use or resell the goods, the buyer has a strong interest in finding out what the legal rules might be for the ordinary use of the goods in the place where they are to be used. The buyer need make only one inquiry—at his place of use—whereas the seller, to be informed, must inquire about the legal rules of all the countries to which the seller will sell.

On the other hand, the seller may be either a manufacturer or a middleman. If the seller is also the manufacturer, the seller will have a much more detailed acquaintance with the properties of the goods than any buyer would. That would not be true if the seller were a middleman. In the New Zealand mussels case, the seller was not the manufacturer of the mussels.⁶⁶ We do not know whether the seller was the mussel gatherer or a middleman. In neither case would the seller have superior knowledge of the properties of

62. If pointed out by buyer, there would be an argument that the case moves from article 35(2)(a) to article 35(2)(b) as a particular use pointed out by buyer. There would also be a stronger argument based on intention of the parties. See *Med. Mktg. Int'l*, 1999 WL 311945, at *1 – 2.

63. Article 6 permits the parties to derogate from CISG or any part of CISG. See U.N. COMM'N ON INT'L TRADE LAW, *supra* note 1, art. 6.

64. GILLETTE & WALT, *supra* note 1, at 3.

65. U.N. COMM'N ON INT'L TRADE LAW, *supra* note 1, arts. 1(1), 2(a).

66. A jester might suggest that mussels are manufactured by muscle spasms. The New Zealand mussel, or green-lipped or green-shelled mussel (*Perna canaliculus*) is a bivalve mollusk living in relatively cold saltwater that is commercially farmed only in New Zealand. *Greenshell™ Mussels*, SEAFOOD NEW ZEALAND, <https://www.seafood.co.nz/show-species/green-shelltm-mussels/> (last visited Mar. 30, 2019).

the mussels, save for the fact that the seller has the mussels when the contract is signed, and the buyer does not. The seller was in a better position to test the mussels for cadmium before shipment but not in a better position to learn the legal requirements of the buyer's country.

We just assumed that the seller is a multi-country seller and the buyer is a single-country user. Those assumptions may not be correct. The buyer may, in fact, be a reseller. If the buyer is a wholesaler, some parts of the goods may be resold in country A, while others will be shipped to a customer in country B. So, the buyer may need to know the legal rules in more than one country, thereby raising the buyer's cost but for the fact that the decision of the German Federal Supreme Court protects the buyer from that because the buyer has now become a seller. At least the buyer knows what country's laws to examine. All the seller likely knows is the home country of the buyer and the place to which the goods are to be sent.

The German Federal Supreme Court suggests (but does not decide) that the seller is responsible for complying with the law of buyer's country when that law is the same as the law of the seller's country (or, presumably, when the law of the seller's country is stricter).⁶⁷ The reasoning seems to be that it is not unduly costly or burdensome to comply with the law of your own country, even if you are selling out of it. What is implied is that you must be selling some of your products within your home country, or else it would not be your home country. So, the additional discovery cost is nil.

The Court further suggests (but expressly refuses to decide) that the seller must comply with the buyer's law when special circumstances exist, such as when the seller has a place of business in the buyer's country, frequently exports to the buyer's country, affirmatively promotes products in the buyer's country, or has a long-standing relationship with the buyer.⁶⁸ The implication is that in each of those cases, the seller has sufficient interest (and sufficient sales to justify the investment) to discover the exact nature of the law in the buyer's country. I suggest that this is certainly true where the seller has a place of business in the buyer's country⁶⁹ because that is sufficient penetration of the buyer's country to subject him to the legal regime there.⁷⁰

67. Without citing the German Federal Supreme Court opinion in *New Zealand Mussels* (or any other authority), a Netherlands Appeals Court concluded that seller's wheat had to meet the standard of seller's (and buyer's) country's laws even though it was to be delivered to a third country that de facto did not adhere to the standards of either country for the quality of bread improver mixed into the flour. Hof's- Gravenhage 23 april 2003, NJ 2003, 713 (Rynpoort Trading & Transport/Meneba Meel Wormerveer) (Neth.), cisg3.law.pace.edu/cases/030423n1.html (wheat flour).

68. It also suggests responsibility on the seller if buyer provides seller with the legal rules, but that is covered by article 35(2)(b) as a "special purpose." U.N. COMM'N ON INT'L TRADE LAW, *supra* note 1, art. 35(2)(b).

69. But if that place of business has the closest relationship to the contract and its performance, CISG will not apply because they will not be merchants with places of business in different states. U.N. COMM'N ON INT'L TRADE LAW, *supra* note 1, arts. 1(1), 10(a).

70. There is an analogy to income tax treaties, which generally provide that a resident of one state is not taxed on business income from another state unless he has a permanent

The cost can be spread over a reasonable number of products. As to the other three criteria, it is only true that the seller is the lowest cost complier with legal requirements if the product that is the subject of the litigation is also a product that is either promoted, exported, or the subject of the long-standing relationship. Otherwise, it is still cheaper for the buyer to discover and communicate the legal regime with regard to this product than for the seller.⁷¹

On the other hand, the Federal Supreme Court's opinion has imported into article 35(2)(a) language that is not there. The Court says, "[T]he purchaser, therefore, cannot rationally rely upon such knowledge of the seller."⁷² A requirement of reasonable reliance appears in article 35(2)(b) on particular uses of the goods,⁷³ but it is not a requirement of article 35(2)(a) on purposes for which goods of the same description would ordinarily be used.⁷⁴

The Federal Supreme Court does not mention article 8. That article instructs us on how the statements and actions of the parties are to be construed. This is particularly important because one of the guiding principles of CISG is party autonomy. Parties are generally free to make whatever rules between them that they please. The rule of article 8 is that statements and actions are to be construed in accord with their objective meaning, unless one party has a subjective meaning that the other party understood.⁷⁵ The question raised by article 8 in this case is the objective meaning of ordering goods to be delivered to a foreign country. It seems to me that the ordering party intended that the goods comply with the legal requirements of the country in which the goods were to be used. The seller should have understood that. But I doubt that either buyer or seller would have intended seller to comply with non-binding prescriptions derived from analogous products whose application to the mussels in question could hardly be anticipated by either party.

establishment there. A permanent establishment is then defined as a branch, office, factory, workshop, mine, oil or gas well, quarry, or other place of extraction of natural resources and building or construction or installation project which exists for more than twelve months, as long as it does not confine itself to certain preparatory activities. *See, e.g.*, Convention Between the Government of the United States of America and the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains arts. 5, 7, U.S.-U.K., Dec. 31, 1975, 31 U.S.T. 5668.

71. Of the four sources consulted, only one was sufficiently sophisticated to realize that it is the contact of the product with buyer's country, as well as the contact of the seller with it, that is important in imposing responsibility on seller to comply with the law of buyer's state. KARL H. NEUMAYER & CATHERINE MING, *CONVENTION DE VIENNE SUR LES CONTRATS DE VENTE INTERNATIONALE DE MARCHANDISES: COMMENTAIRE* (François Dessemontet ed., 1993).

72. BGH Mar. 8, 1995, RSDIE 43 – 44, 1996 (Ger.).

73. U.N. COMM'N ON INT'L. TRADE LAW, *supra* note 1, art. 35(2)(b).

74. *Id.* art. 35(2)(a).

75. *Id.* art. 8.

Having decided that the German Federal Supreme Court was probably correct in its holding on the specific facts of the New Zealand mussels case, how do I decide the mammogram machine case? Is this a case where the rule of no seller responsibility applies, or is this a case where the seller is the least costly discoverer? Is this a case where the regulations are both mandatory and easily discoverable? Is this a case where the objective intent of the parties should prevail? It does not appear that the seller had a place of business in the United States.⁷⁶ The seller had not promoted any product in the United States, nor before the arrival of these three machines had the seller exported any product to the United States.⁷⁷ The seller's relationship with the buyer was not longstanding.⁷⁸ None of the possible exceptions engrafted by commentators on the German court's opinion seem to apply.

On the other hand, machines used to make mammograms are quite sophisticated. Their technical aspects must be difficult to master. The seller (whom I am assuming is the manufacturer) is surely much better versed on those technicalities than any buyer would be. Even better versed than this buyer, who is setting out to be the seller's exclusive distributor in the United States.⁷⁹

Furthermore, each machine carries a high price tag. That might justify imposing a duty to discover U.S. law on their use, though it is unclear on whom that duty should rest because both the manufacturer and the exclusive distributor will share in the profits from their sale.

Though there were only three machines in the United States at the moment the case was to be decided, both seller and buyer clearly contemplated that there would be many more imported, and the profits therefrom might support inquiry about U.S. regulation. Again, it is unclear in which direction that cuts, as seller and buyer share those profits. This analysis is also problematic because it appears that one result of the litigation is likely to be that the parties will terminate their exclusive dealership and neither will profit from any further imports of these machines.⁸⁰

I begin with the proposition that the requirement of uniformity of interpretation puts a thumb on the scale. While I am not bound to follow the previous opinion, I should have good reasons for establishing a different rule.

C. REALITY CHECK #1 – HOW DOES THIS RULE RELATE TO OTHER RULES?

Before making a final decision, one should compare this rule to other related rules.

76. *Med. Mktg. Int'l, Inc. v. Internazionale Medico Scientifica, S.R.L.*, CIV. A. 99-0380, 1999 WL 311945, at *1 (E.D. La. May 17, 1999).

77. *Id.*

78. *Id.*

79. *Id.*

80. At least, that is, until the manufacturer modifies the machines to conform to U.S. law.

The general rule for conformity of the goods is that the goods must conform at the time and place they are delivered to the buyer.⁸¹ The default CISG rule is that delivery is made in the seller's country.⁸² The International Chamber of Commerce has promulgated a series of trade terms that permit delivery in various places, but the most commonly used terms, Free On Board (FOB) and Cost Insurance & Freight (CIF), both provide for delivery in the seller's country.⁸³

The rule announced by the German Federal Supreme Court does not appear to care where or when the goods are legally delivered, and we do not know from the court's opinion whether the mussels in that case were legally delivered in New Zealand, Switzerland, or Germany.⁸⁴

At first thought, the difference between the general rule that nonconformity must be judged at the time and place of delivery and the special rules for conformity with legal requirements, seems anomalous. Can it be justified?

It is not clear that the two rules are incompatible. If risk of loss is normally transferred in the seller's country and the seller only needs to comply with the legal requirements of his country, the rules are consistent with each other. The exceptions mentioned by the German court would be inconsistent, but the court only mentioned them and did not incorporate them into its rule.

Another question one might ask is whether this rule is strictly confined to legal restrictions. The buyer's country might be desert or so impossibly cold that a machine that was suitable for its ordinary purpose in the seller's country would not work at all in the buyer's country without modification. There is, as of yet, no reported decision on that question, but if I had no hesitancy in apportioning such a risk to the buyer on the grounds that he would be more likely to know how the machine would operate in his climate, there would be no inconsistency. On the other hand, there are two points of knowledge that come together here. First, the seller probably has superior

81. U.N. COMM'N ON INT'L TRADE LAW, *supra* note 1, art. 36(1); *see also, e.g.*, BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333 (5th Cir. 2003) (with CFR contract, risk of loss passed when the oil passed the ship's rail, so whether the oil had too much gum or insufficient gum inhibitor should be determined at that time and place).

82. U.N. COMM'N ON INT'L TRADE LAW, *supra* note 1, art. 31.

83. Eight of the eleven 2010 trade terms provide for delivery that usually occurs in seller's country. Int'l Chamber of Commerce [ICC], *Incoterms 2010: ICC Rules for the Use of Domestic and International Trade Terms*, at 87 – 94, 105 – 17, ICC Pub. No. 715E (2010). A good summary of the terms is found at RALPH H. FOLSOM ET AL., *PRINCIPLES OF INTERNATIONAL BUSINESS TRANSACTIONS* § 2.8, 2.10 (3d ed. 2003).

84. BGH Mar. 8, 1995, RSDIE 43 – 44, 1996 (Ger.). German courts go to great lengths to disguise the identities of the parties. In this case, we know that the mussels were physically delivered to a storage facility belonging to buyer and located in "G.G." We can deduce from other facts in the opinion that "G.G." lies in Southern Hesse. *Land Hessen* is one of federal Germany's states (*lander*), located in the west central part of Germany, whose largest city is Frankfurt am Main. But the question is not where the goods were physically delivered, but where they were legally delivered. That depends on the contract.

knowledge about the operation of the product. Second, the buyer has superior knowledge of the exact nature of the climatic conditions to be expected. Who should bear the loss if the buyer and seller have not sufficiently communicated with each other to allocate this risk?⁸⁵ Again, the problem of intention of the parties comes to the fore, and it was probably the intention of both parties that the product would work in the destination country.

D. REALITY CHECK #2 – WHAT ARE THE ALTERNATIVE RULES?

Law must be practiced in the real world, and cases must be decided based on rules. Sometimes one chooses a very good rule; sometimes a judge must choose the least bad of several unsatisfactory rules. The question is, what are the available options?

The rule set forth by the German court is that the goods need not comply with the difficult-to-ascertain legal requirements of the buyer's place of business or the destination of the goods.⁸⁶ Two alternate rules immediately present themselves. In one, the goods must comply with the legal rules at the buyer's place of business. In another, they must comply with the legal rules at the place of final destination. In both cases, the buyer is likely to be more familiar with the legal requirements. One assumes that the buyer deals in similar goods and the seller deals in similar goods. The buyer presumably deals in that type of goods both at the buyer's place of business and at the destination of the goods. There is no reason to believe that seller knows anything about legal rules in either jurisdiction. For that reason, the buyer can probably inform himself about legal regulation at less cost than seller can. For efficiency reasons, the rule of the German court is superior.

But it is more likely that the intent of the parties was that the goods would work in the place of final destination. A general rule that the goods must perform in the place of destination conforms more to that intent.

What of the exceptions hinted at, but neither adopted nor discussed, by the German court? We are looking for a point at which the costs of acquiring information about legal rules are roughly the same to the buyer and seller. That will tip the balance in favor of requiring the seller to comply with the applicable rules because most sellers have superior information about the qualities of the goods—at least, manufacturers will.

85. One case that might have answered this question did not because the expert found that the plants sold were fit for the climate at the place of delivery. Landgericht Coburg [LG] [District Court Coburg] Dec. 12, 2006, 22 O 38/06 (Ger.), <http://cisgw3.law.pace.edu/cases/061212g1.html>. The court stated that the buyer is unable to recover under art. 35(2) whenever his expertise is equal to seller's because of article 35(3), which states the seller is not liable for any lack of conformity if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity. I believe that takes article 35(3) far beyond its intended scope. A more realistic interpretation of article 35(3) came in *Smallmon v. Transport Sales Ltd.* [2011] NZCA 340 (N.Z.) (where buyers inspected the trucks and should have realized that they did not display the required compliance plates for use in Queensland).

86. BGH Mar. 8, 1995, RSDIE 43 – 44, 1996 (Ger.).

The tipping point is where the seller has already done business in identical goods, or goods sufficiently similar to be governed by the same regulation, in the destination country.

Alternatively, suppose you adopt the general rule that goods must conform to the legal rules of the destination state. You then might make an exception when the legal rules are exceptionally difficult to determine.

E. REALITY CHECK #3 – WHAT WILL PEOPLE DO WITH MY OPINION?

I have noted that scholars have taken the opinion of the Bundesgerichtshof, which is very limited, and constructed a grand edifice of legal rules in this area. Mindful of that and the fact that subsequent courts will also rely on my opinion, what should I do? I do not wish to endorse a general rule that sellers never must comply with the legal rules of the destination country unless specific exceptions exist. I do believe that the German court was correct on the facts of that case and that uniformity should be an important consideration. I could distinguish the New Zealand mussels case on the ground that the rule was not mandatory, but that would announce a different rule because the German court did not seem to believe it important whether the rule was mandatory or not.⁸⁷

More troubling is that the interpretations of the German court's decision have tended to make the rare occurrence where legal requirements are difficult to ascertain into a general rule. The more frequent cases, where there is no difficulty in determining the rules, then must find an exception to be covered.

F. SOME UNIFORMITY ACHIEVED

My opinion in my mammogram case would state that the general rule is that the seller must assure that the goods are fit for normal use, including meeting the legal requirements, in the country of destination. But the seller need not do so if those legal requirements are difficult to ascertain. This satisfies the requirement of uniformity and also guards against stretching the rule too far. My decision affirms the result of the German court and is consistent with its language. It adds a second justification—that of intention of the parties—that was not part of the German court's opinion. I have not dealt at all with the many exceptions read into the German court's decision by hopeful commentators,⁸⁸ but I think I have eliminated the need for many of them.

87. *See id.*

88. It is not unusual for later courts or commentators to build a structure of rules that the first court did not decide based on statements in the opinion. In the first case most American law students read in first-year property courses, *Pierson v. Post*, Cai. R. 175, 1805 WL 781 (N.Y. Sup. Ct. 1805), the court held (over a dissent) that pursuing a fox on unowned land did not give the pursuer superior rights to a person who killed the fox knowing that it was being pursued. From this, other courts constructed a set of rules about when one does acquire rights to a wild

III. Conclusion: Why Uniformity?

One might well ask what is so great about uniformity. The answer normally proffered is that it avoids forum shopping. Parties will not choose to litigate in one jurisdiction because the substantive law is more favorable.

If forum shopping were as simple as choosing the jurisdiction with the most favorable law, one might be concerned. The seriousness of this problem is mitigated by a number of practical and procedural considerations that, in the real world, limit forum shopping.

In order to bring suit, one must gain jurisdiction over a defendant. While the United States used to have extensive jurisdiction based on “long-arm” statutes, those arms have been severely shortened by the Supreme Court.⁸⁹ Likewise, the Brussels I regulation has cut off many of the exorbitant bases for jurisdiction practiced in the European Union, but only when suit is brought against defendants domiciled in the European Union.⁹⁰ But while the U.S. changes apply to all defendants, the exorbitant jurisdiction of EU countries can still be asserted against defendants who are not domiciled in the European Union, opening up additional litigation choices against them.

There are other inconveniences.

In many civil law countries, the filing fees are determined as a percentage of what is claimed, so the filing fee may be prohibitive.⁹¹ The court may require that a bond be posted to cover court costs and attorney’s fees because in most countries the loser pays his own attorney’s fees and those of the winner.⁹² The leading U.S. case held that a party’s “damages” do not include his lawyer’s fees,⁹³ which means that if you litigate in the United States, even if you win the case, you will not be placed in the same position in which you would have been had the other party fully performed.

Discovery is usually much more limited in foreign forums than in the United States. The trial is usually the review of written evidence, rather than being based on oral presentations. One expert on a subject in dispute may be appointed by the court. There may be no right to have facts

animal and when one loses them. See *Mullett v. Bradley*, 24 Misc. 695, 53 N.Y.S. 781 (App. Term 1898); see also *E.A. Stephens & Co. v. Albers*, 81 Colo. 488, 256 P. 15 (1927). The court extended those rules to natural gas placed in the ground in *Hammonds v. Cent. Kentucky Nat. Gas Co.*, 255 Ky. 685, 75 S.W.2d 203 (1934), which was limited by *Texas Am. Energy Corp. v. Citizens Fid. Bank & Tr. Co.*, 736 S.W.2d 25 (Ky. 1987).

89. *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017).

90. Symeon C. Symeonides, *The Brussels I Regulation and Third Countries* (unpublished 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3231715.

91. See *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1192 (C.D. Cal. 2001), *aff'd*, 317 F.3d 954 (9th Cir. 2002), *aff'd* 541 U.S. 677 (2004) (where the Australian filing fee was at least \$130,000).

92. *Altmann*, 142 F. Supp. 2d at 1210.

93. *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 313 F.3d 385 (7th Cir. 2002).

determined by a jury. A party may be prohibited from presenting testimony.⁹⁴

Finally, even if you win, one must assess whether the foreign judgment is likely to be recognized and enforced in a jurisdiction where the defendant has assets that can be seized to satisfy the judgment. Whether for these reasons or not, an unscientific study of cases where the contract lacks a choice of forum clause indicates that the suit was usually brought in defendant's home country.⁹⁵

It is now possible to prevent forum shopping by inserting a clause in the contract choosing a forum for resolving any dispute between the parties.⁹⁶ One could choose the courts of seller's state, the courts of buyer's state, or the courts of a third state. More commonly than the parties choose a court, they may choose arbitration. In each case, the forum shopping problem disappears.⁹⁷ Despite the fact that forum shopping is a problem that can be reduced or eliminated by the parties, uniformity is still a goal to be sought.

94. For general differences between cases in common law and civil law countries, compare E. ALLEN FARNSWORTH, *AN INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES* 109 – 21 (1963), with MERRYMAN & PÉREZ-PERDOMO, *supra* note 24, at 112 – 24.

95. I looked at all the cases and arbitrations contained in JOHN A. SPANOGLÉ & PETER WINSHIP, *INTERNATIONAL SALES LAW* (2d ed. 2012). Of the fifty-nine cases in the book, eight were decided by arbitral tribunals as a result of clauses in the contract directing disputes to arbitration. Of the remaining fifty-one cases, thirty-one (61 percent) were brought in the country of defendant; three were brought in the country of both parties, usually as a result of an assignment; and sixteen (31 percent) were brought in plaintiff's country. Of the sixteen cases brought in plaintiff's country, two were brought in France and six in the United States, two countries that at the time had unusually generous provisions granting jurisdiction over foreign defendants that have now been curtailed—in France only with respect to defendants domiciled in other European Union countries. See *supra* notes 89 – 90. The Netherlands accounted for three cases; Switzerland two; and one case was brought each in Austria, Germany, and Spain. Your author is unaware of the nature of the jurisdictional provisions in those countries, and it appears that the jurisdiction was not challenged in any of them.

96. A choice of forum clause must be carefully drafted to demonstrate that it is intended to exclude dispute resolution in any other forum. For a case where the choice of forum clause was ineffective, see *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support*, 00 CIV. 9344 (SHS), 2001 WL 1875768 (S.D.N.Y. Dec. 5, 2001), *aff'd* 53 Fed. App'x 173 (2d Cir. 2002).

97. Choice of arbitration has been enhanced by the New York Convention's wide adoption (159 member states), which has made it easier to force a party to arbitration and to secure enforcement of arbitral awards. See *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)*, *supra* note 8, for member states and *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)*, N.Y. ARB. CONVENTION, <http://www.newyorkconvention.org/english> (last visited Mar. 30, 2019), for the text. There is now a Hague Convention on Choice of Court Agreements with thirty-two adherents, as well as signatures by the Ukraine, People's Republic of China, and United States, in none of which is the convention in force. *Status Table, HAGUE CONVENTION ON PRIVATE INT'L LAW*, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> (last visited Mar. 30, 2019). The text of the treaty is at *Convention on Choice of Court Agreements, HAGUE CONVENTION ON PRIVATE INT'L LAW*, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> (last visited Mar. 30, 2019). For further discussion of choosing courts or arbitration, see FOLSOM ET AL., *supra* note 83, §§ 30.5, 31.1.

For those of us who believe that the text conveys its meaning, it is enough that CISG calls for uniformity in interpretation. Uniform international interpretation is also more likely to fulfill article 7(1)'s commandment to consider the internationality of the subject matter, as uniformity will require the concurrence of judges from different countries. Another reason to seek uniformity is that it will inevitably require more trained judges to look at the same problem, which one hopes will produce a better result.

As demonstrated by part II of this paper, uniformity does not mean automatically following the first court or commentator to produce a pertinent result. The second court will assess the first precedent's importance and persuasiveness. There might well be a period of non-uniformity as competing views on the issue are aired. There may be competing lines of decision that are not immediately resolved because there is no Supreme Court of CISG. One hopes that those competing lines will eventuate in one line being the preferred view to which most courts will conform. Scholars and opinions of the CISG Advisory Council can help with this.