

Rolling Contract Formation Under the UN Convention on Contracts for the International Sale of Goods

Rob Schultz*

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Introduction

The rolling contract¹ is a relatively new paradigm common to the licensing of software.² Characteristically, the rolling contract forms pursuant to terms on a licensor's standard form, which the parties do not negotiate.³ In fact, the licensee generally does not even have an opportunity to read the licensor's terms until after she pays for the software and takes it home from the store or receives it in the mail.⁴ Only then will she find the terms printed on the box or sealed inside the packaging.⁵ For this reason, authorities often call the rolling contract a "box-top license"⁶ or "shrinkwrap" agreement.⁷

Shrinkwrap forms typically assert that by opening the package, using the software, and failing to return it within a specified time, the licensee accepts the licensor's terms.⁸ In this way, they prescribe acceptance by silence or inaction.⁹ Noting that traditional contract theorists in the United States disfavor acceptance by silence under such ambiguous circumstances, one scholar characterizes the communication between the parties making a rolling contract as dysfunctional.¹⁰

Like these traditionalists, international commercial law also disfavors acceptance by silence without more. Specifically, the UN Convention on Contracts for the International Sale of Goods (CISG)¹¹ expressly prohibits acceptance by silence or inactivity "in itself."¹² For this reason, examining the formation of a rolling contract under the CISG provides an opportunity to explore the purpose and limits of its prohibition as well as the nature of the silent acceptance shrinkwrap forms prescribe.

1. "Rolling contract" is one descriptive name for shrinkwrap agreements. See, e.g., Robert A. Hillman, *Rolling Contracts*, 70 *FORDHAM L. REV.* (forthcoming 2002).

2. James J. White, *Autistic Contracts*, 45 *WAYNE L. REV.* 1693, 1706-10 (2000).

3. *Id.* In a leading article on standard form contracts, Professor Kessler explained that parties with greater bargaining power can use form contracts to impose their terms on the weaker party. The weaker party has only two alternatives: to take the terms or leave them. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 *COLUM. L. REV.* 629, 631-33, 640-41 (1943).

4. See, e.g., *Hill v. Gateway 2000*, 105 F.3d 1147, 1148 (7th Cir. 1997); *ProCD v. Zeidenberg*, 86 F.3d 1447, 1449, 1450-53 (7th Cir. 1996).

5. White, *supra* note 2, at 1706-10.

6. See, e.g., *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 94 (3d Cir. 1991).

7. See, e.g., *ProCD*, 86 F.3d at 1449.

8. See, e.g., *Hill*, 105 F.3d at 1148; *ProCD*, 86 F.3d at 1452-53; *Step-Saver*, 939 F.2d at 97.

9. White, *supra* note 2, at 1706-10.

10. See *id.* at 1693, 1710-11.

11. U.N. GAOR, 33d Sess., Supp. No. 35 (A/33/35), Annex 1, at 217, U.N. Doc. A/Conf/97/18 (1080); 52 Fed. Reg. 40, 6262-6280 (Mar. 2, 1987), reprinted in 19 I.L.M. 668-99 (1980) [hereinafter CISG].

12. *Id.* art. 18(1).

Drawing its conclusions on the CISG's text, scholarly writings, and international case law, this Note argues that the CISG's prohibition on acceptance by silence or inactivity in itself will not prevent the parties from forming a rolling contract if they so intend. Provided the buyer solicits the seller's standard shrinkwrap form, that form can constitute a binding offer or an enforceable contract modification. Nevertheless, the CISG's prohibition on acceptance by silence or inactivity in itself will help¹³ to prevent a seller from imposing a rolling contract on a buyer who did not solicit it.

Part I of this Note provides background on the CISG. Part II creates two hypothetical scenarios based on the leading cases in the United States, where courts applying the Uniform Commercial Code (U.C.C.) have split in their approaches to rolling contract formation.¹⁴ Part II also summarizes the U.S. courts' approach to each case and then explores how the CISG's rules of contract formation would apply to the facts. Finally, because this Note remains suspicious of the potential for unfairness to the buyer in a shrinkwrap sale, Part III addresses the policing of rolling contracts under the CISG and applicable domestic law.

I. The UN Convention on Contracts for the International Sale of Goods

Synthesizing civil code and common law traditions from around the world, the UN Commission on International Trade Law (UNCITRAL) drafted the CISG¹⁵ as an attempt to unify the international law of commercial contracts for the sale of goods.¹⁶ The Contracting States approved this treaty in Vienna during 1980.¹⁷ The CISG became legally effective on January 1,

13. The prohibition on acceptance by silence or inactivity in itself will not always apply, because the CISG permits certain usages of the trade to dictate the ways parties can form a contract. Discussion *infra* Part II.C.

14. Courts applying the Uniform Commercial Code (U.C.C.) in the United States have split in their approach to enforcement of rolling contracts. Revised Article 2, section 2-207 of the Uniform Commercial Code, Comment 3 says:

The section omits any specific treatment of terms on or in the container in which the goods are delivered. Revised Article 2 takes no position on the question whether a court should follow the reasoning in *Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir. 1997) (Section 2-207 does not apply to such cases; the "rolling contract" is not made until acceptance of the seller's terms after the goods and terms are delivered) or the contrary reasoning in *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991) (contract is made at time of oral or other bargain and "shrink wrap" terms or those in the container become part of the contract only if they comply with provisions like Section 2-207).

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, REVISION OF UNIFORM COMMERCIAL CODE ARTICLE 2 (SECTION 2-207, CMT. 3.) – SALES (WITH PREFATORY NOTE AND REPORTER'S NOTES) DRAFT FOR DISCUSSION ONLY 48 (2000).

15. Maria del Pilar Perales Viscasillas, "Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles, 10 PACE INT'L L. REV. 97, 99 (1998); Claire M. Germain, *The United Nations Convention on Contracts for the International Sale of Goods: Guide to Research and Literature*, at <http://www.lawschool.cornell.edu/library/guides/cisg/sales.html> (last visited Oct. 13, 2001).

16. CISG, *supra* note 11, prmlb.

17. Viscasillas, *supra* note 15, at 99; Germain, *supra* note 15.

1988.¹⁸ The current list of Contracting States numbers sixty, soon to be sixty-one when Israel officially becomes a Contracting State.¹⁹ In all, the CISG is law in the nations that together generate more than two-thirds of the world's trade.²⁰

The CISG applies to international contracts for the sale of goods²¹ between parties who do business in respective Contracting States, or when the rules of private international law lead to its application.²² Where it applies, the CISG supersedes domestic sales law; for example, the CISG preempts the U.C.C.'s Article 2 in the United States for international contracts between merchants for the sale of goods.²³

18. Burt A. Leete, *Contract Formation Under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code: Pitfalls for the Unwary*, 6 *TEMPLE INT'L & COMP. L.J.* 193, 194 (1992); Germain, *supra* note 15.

19. The current list of Contracting States includes: 1. Argentina, 2. Australia, 3. Austria, 4. Belarus, 5. Belgium, 6. Bosnia-Herzegovina, 7. Bulgaria, 8. Burundi, 9. Canada, 10. Chile, 11. China, 12. Colombia, 13. Croatia, 14. Cuba, 15. Czech Republic, 16. Denmark, 17. Ecuador, 18. Egypt, 19. Estonia, 20. Finland, 21. France, 22. Georgia, 23. Germany, 24. Greece, 25. Guinea, 26. Hungary, 27. Iceland, 28. Iraq, 29. Italy, 30. Kyrgyzstan, 31. Latvia, 32. Lesotho, 33. Lithuania, 34. Luxembourg, 35. Mauritania, 36. Mexico, 37. Moldova, 38. Mongolia, 39. The Netherlands, 40. New Zealand, 41. Norway, 42. Peru, 43. Poland, 44. Romania, 45. Russian Federation, 46. Saint Vincent & Grenadines, 47. Singapore, 48. Slovakia, 49. Slovenia, 50. Spain, 51. Sweden, 52. Switzerland, 53. Syria, 54. Uganda, 55. Ukraine, 56. United States of America, 57. Uruguay, 58. Uzbekistan, 59. Yugoslavia, and 60. Zambia. Pace University, *Electronic Library on International Trade Law and the CISG*, at <http://cisgw3.law.pace.edu/cisg/countries/cntries.html> (last visited Oct. 13, 2001).

20. Albert H. Kritzer, *The Convention on Contracts for the International Sale of Goods: Scope, Interpretation and Resources*, in *REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 147, 148 (Cornell Int'l L.J. ed., 1995).

21. This Note is about contract formation. It simply assumes that the transactions described below are generic sales of goods rather than software licenses.

Dr. Schlectriem wrote that the CISG will recognize software as goods. PETER SCHLECTRIEM, *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* 23 (1998) [hereinafter SCHLECTRIEM, *COMMENTARY*] (citing OLG Köln RIW 1994, 969). Even so, whether the CISG applies to software licenses is an undecided question that may merit exploration elsewhere. See, e.g., Marcus G. Larson, *Applying Uniform Sales Law to International Software Transactions: The Use of the CISG, Its Shortcomings, and a Comparative Look at How the Proposed UCC Article 2B Would Remedy Them*, 5 *TUL. J. INT'L & COMP. L.* 445, 452 (1997) (asserting that the CISG's "sphere of application seems to allow for application to computer software and, in the alternative, the Convention appears flexible enough to allow for such coverage even if software was found to be outside the CISG's scope.").

22. CISG, *supra* note 11, art. 1; SCHLECTRIEM, *COMMENTARY*, *supra* note 21, at 24-29. Dr. Schlectriem emphasizes that each party must actually know that the other party has its place of business in another contracting state. *Id.*

The rules of private international law lead to the CISG's application if the parties agree to adhere to the CISG, if one party to the contract does business in a Contracting State to the CISG, and if a rendering court would determine that the law of that Contracting State would apply to the case. Germain, *supra* note 15.

23. E. Allan Farnsworth, *Review of Standard Forms or Terms Under the Vienna Convention*, 21 *CORNELL INT'L L.J.* 439, 440 (1988). As a self-executing treaty, the CISG is federal law in the United States. With the force of a federal statute, the CISG appears in an Appendix to Title 15 of the U.S. Code. James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales*, 32 *CORNELL INT'L L.J.* 273, 276, 282 (1999).

In some countries, domestic law creates certain duties that will likely affect contractual obligations arising from a sale of goods.²⁴ In the spirit of uniformity, the CISG exempts some of those areas from its application.²⁵ For example, the CISG leaves questions regarding validity in the face of public policy and morals - and the policing of unfair terms - to domestic law.²⁶ The CISG also exempts consumer transactions, which it defines as sales for personal, home, or family use.²⁷

The parties have extensive rights to choose applicable law and to obviate or modify the CISG's default rules.²⁸ This right, which Article 6 states expressly, establishes freedom of contract as one of the central ideals of the CISG.²⁹ Furthermore, Contracting States have limited rights to exempt themselves from some CISG rules upon accession.³⁰ States wishing to do so may enter one of five reservations specifically available to them under the CISG's Articles.³¹

Article 7³² governs the ways in which courts must interpret the CISG's provisions.³³ Article 7 emphasizes the international character of the CISG³⁴ and relegates domestic law to merely a gap-filling function.³⁵ Even

24. PETER SCHLECHTRIEM, *UNIFORM SALES LAW: THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 28-31 (1986)* [hereinafter SCHLECHTRIEM, *UNIFORM SALES LAW*].

25. *See id.*

26. SCHLECHTRIEM, *COMMENTARY*, *supra* note 21, at 98-99; SCHLECHTRIEM, *UNIFORM SALES LAW*, *supra* note 24, at 32-33.

27. CISG, *supra* note 11, art. 2; SCHLECHTRIEM, *UNIFORM SALES LAW*, *supra* note 24, at 28-29. Note that at least some shrinkwrap contracts take place between merchants. *See, e.g., Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991).

28. SCHLECHTRIEM, *UNIFORM SALES LAW*, *supra* note 24, at 24, 35-36; Germain, *supra* note 15.

29. Germain, *supra* note 15.

30. *Id.*

31. Neither the United States nor Germany, the two Contracting States involved in this Note's hypothetical scenarios, has made a declaration that would concern this Note. Pace University, *Electronic Library on International Trade Law and the CISG*, at <http://cisgw3.law.pace.edu/cisg/countries/cntries.html> (last visited Oct. 13, 2001).

32. Specifically, Article 7(1) explains that in interpreting the CISG's provisions, "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." CISG, *supra* note 11, art. 7(1). When the CISG does not expressly answer questions about "matters governed by this Convention," Article 7(2) directs interpreters to settle them "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." *Id.* art. 7(2).

33. JOHN HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 136 (2d ed. 1991).

34. CISG, *supra* note 11, art. 7(1); HONNOLD, *supra* note 33, at 136.

35. CISG, *supra* note 11, art. 7(2); Robert A. Hillman, *Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity*, in CORNELL REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, *supra* note 20, at 22; Bruno Zeller, *The UN Convention on Contracts for the International Sale of Goods (CISG)—A Leap Forward Towards Unified International Sales Laws*, 12 PACE INT'L L. REV. 79, 104 (2000).

Apparently tempted by the common history of the U.C.C. and the CISG and their resulting similarity, at least two U.S. courts have written that it would be acceptable to apply the U.C.C.'s provisions to interpret the CISG's rules. *See Calzaturificio Claudia*

when the CISG does not expressly settle a question in dispute, courts should first try to solve the question by applying the CISG's general principles, including freedom of contract, the need to facilitate international transactions, uniformity for international commercial law, and good faith.³⁶ Thus, by the terms of Article 7, it would be a mistake to interpret the CISG according to domestic U.C.C. precedent, despite these two codes' similarities and common history.³⁷ When interpreting the CISG, courts should look instead to the language of the treaty itself,³⁸ international case law,³⁹ scholarly writing, and (when the other sources provide no answers) legislative history.⁴⁰

s.n.c. v. Olivieri Footwear, Ltd., 96 Civ. 8052, 13-15 (HB)(THK) (S.D.N.Y. 1998); *Delchi Carrier S.p.A. v. Rotorex Corp.*, 71 F.3d 1024, 1027-28 (2d Cir. 1995).

However, much international case law supports the view that courts should not apply domestic law when the CISG speaks expressly to an issue. See, e.g., *Corte di Appello di Milano*, Dec. 11, 1998, UNILEX; *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino, S.p.A.*, 144 F.3d 1384 (11th Cir. 1998); Case 12.97.00193, *Tribunale di Appello di Lugano, Seconda Camera Civile*, Jan. 15, 1998, UNILEX; Case 5, *Cour D'Appel de Paris, 1ère Chambre, Section D*, Jan. 14, 1998, UNILEX; Case VIII ZR 51/95, *Bundesgerichtshof*, Apr. 3, 1996, UNILEX.

The limitation of domestic law merely to gap-filling holds even in countries that have deemed it necessary to implement the CISG through domestic legislation. Zeller, *supra*, at 82, 104.

36. Robert A. Hillman, *Article 29(2) of the United Nations Convention on Contracts for the International Sale of Goods: A New Effort at Clarifying the Legal Effect of "No Oral Modification Clauses"*, 21 CORNELL INT'L L.J. 449, 456-58 (1988). Although the CISG includes specific mention of good faith, it imposes no affirmative duty on the parties. *Id.*

37. The CISG's drafters based their text in large part on the U.C.C., and now as the U.C.C. is undergoing a redraft of its Article 2, its re-drafters are looking back to the CISG for a guide. David A. Levy, *Contract Formation Under the UNIDROIT Principles of International Commercial Contracts, UCC, Restatement, and CISG*, 30 UCC L.J. 249, 251-52 (1998).

Others say that the U.C.C. re-drafters have more or less rejected the CISG as a guide. And rightly so, says one scholar, because the re-drafters are trying to rework the U.C.C. to modernize it and solve problems that have arisen under its application, where domestic law can best provide guidance. Henry D. Gabriel, *The Inapplicability of the United Nations Convention on the International Sale of Goods as a Model for the Revision of Article Two of the Uniform Commercial Code*, 72 TULANE L. REV. 1995, 2000-09 (1998). By contrast, the CISG introduces problems of varying legal systems (which may further confuse the law by conflating civil and common law principles), in addition to problems concerning differences in scope and substantive differences. *Id.* Moreover, the CISG is twenty years old and cannot provide the sought-after modernization. John E. Murray, Jr., *The Neglect of the CISG: A Workable Solution*, 17 J.L. & COM. 365, 373 (1998); Gabriel, *supra*, at 2000-09.

38. See, e.g., Case 405, *Tribunale di Vigevano*, July 12, 2000, UNILEX (filling a gap in the CISG with a general principle of that treaty); Case 1 Ob 74/99 K, *Oberster Gerichtshof*, June 29, 1999, UNILEX (extrapolating the meaning of an unclear CISG provision by looking to an analogous CISG Article).

39. Case 468, *Tribunale di Pavia*, Dec. 29, 1999, UNILEX; HONNOLD, *supra* note 33, at 137; Zeller, *supra* note 35, at 104; Germain, *supra* note 15. Another scholar adds that the CISG inspired these UNIDROIT principles, which function like an international restatement of sales. Viscasillas, *supra* note 15, at 103.

However, one scholar writes that courts must give international case law only persuasive weight. Franco Ferrari, *CISG Case Law: A New Challenge for Interpreters?*, 17 J.L. & COM. 245, 260 (1998).

40. HONNOLD, *supra* note 33, at 137.

II. Applying the Facts to the Law

A. Scenario A, Following the Facts of *ProCD v. Zeidenberg*⁴¹ and *Hill v. Gateway 2000*⁴²

1. *The Facts*⁴³

Hypothetical scenario A stipulates that a German merchant orders goods from a U.S. seller's catalog by e-mail. The seller's catalog states that the goods will arrive with her rolling contract (shrinkwrap) terms in the package, but the catalog does not permit the buyer an opportunity to read those terms until the goods arrive. The buyer arranges for payment in her e-mail, and the seller promises to ship the goods in an e-mail reply that does not mention the rolling contract.⁴⁴

The seller ships the goods with her shrinkwrap terms in the package. These terms purport to integrate the parties' dealings, to disclaim warranties, and to limit liability. The terms also assert that the buyer agrees to bind herself to the terms by opening the package and failing to return the goods.

2. *On Similar Facts, a U.S. Court Held the Shrinkwrap Form Was the Seller's Offer, Which the Buyer Accepted by Conduct.*

In *ProCD v. Zeidenberg*,⁴⁵ the U.S. Court of Appeals for the Seventh Circuit characterized the parties' rolling contract as an agreement that reserves the exchange of terms until after the exchange of consideration.⁴⁶ Under this approach, the contract did not form at the first purchase; it only formed when the buyer manifested acceptance of the seller's shrinkwrap terms⁴⁷ by using the software and failing to return it.⁴⁸ For legal authority, the

41. 86 F.3d 1447 (7th Cir. 1996) (Easterbrook, J.).

42. 105 F.3d 1147 (7th Cir. 1997) (Easterbrook, J.).

43. In *ProCD*, a U.S. consumer bought (and paid for) software in a store. 86 F.3d at 1450-53. At the time of purchase, the box said on the outside that it contained a license. *Id.* But the consumer did not have the chance to read the terms of that license until after he paid for the goods and took them home. *Id.* Only then, when he opened the package, did he see a rolling contract stating that he bound himself to its terms by opening the package and using the software without returning it during a specified time. *Id.*

Naturally, the specific facts of this transaction create an unlikely scenario for an international contract between merchants for the sale of goods. Hypothetical scenario A attempts to factually adjust the transaction in *ProCD* while still preserving its essence.

The facts of another case, *Hill v. Gateway 2000*, in which a consumer ordered goods by telephone, differs slightly because the court did not find that the buyers, Rich and Enza Hill, had had any notice that the computers they ordered would come with a box-top license. See 105 F.3d at 1148.

44. The primary factor for determining the application of the CISG is whether the parties have their respective places of business in Contracting States. *Supra* note 22 and accompanying text. Therefore, scenario A presents no impediments to jurisdiction even if the parties contracted over the Internet.

45. 86 F.3d at 1447 (Easterbrook, J.).

46. *Id.* at 1449, 1450-53.

47. This was not a case of contract modification. *Hill*, 105 F.3d at 1150.

48. *ProCD*, 86 F.3d at 1449, 1452.

court cited U.C.C. section 2-204(1),⁴⁹ which allows the parties to contract by any conduct sufficient to demonstrate assent.⁵⁰

In articulating its rationale, the court reasoned that many transactions (including insurance contracts) permit payment first and terms later.⁵¹ The court explained, “the UCC consistently permits the parties to structure their relations so that the buyer has a chance to make a final decision after a detailed review.”⁵² Writing that the seller may find it impossible to notify the buyer of all terms at the time of purchase, the court concluded that such a contract may reduce transaction costs and economically benefit both seller and buyer.⁵³

In *Hill v. Gateway 2000*,⁵⁴ the same judge who wrote *ProCD*⁵⁵ considered a consumer transaction in which a buyer ordered goods by telephone.⁵⁶ Following the parties’ oral exchange, the seller shipped goods to the buyer that included a rolling contract in the package.⁵⁷ This standard form dictated that the buyer manifests acceptance of its contract by opening the package, using the goods enclosed, and failing to return them within a specified period.⁵⁸

Following *ProCD*,⁵⁹ the court explained:

The question in *ProCD* was not whether terms were added to a contract after its formation, but how and when the contract was formed – in particular, whether a vendor may propose that a contract of sale be formed, not in the store (or over the phone) with the payment of money or a general “send me the product,” but after the customer has had a chance to inspect both the item and the terms. *ProCD* answers “yes,” for merchants and consumers alike.⁶⁰

3. *Whether the CISG Permits Formation of the Rolling Contract Depends upon Whether the Buyer Solicited the Seller’s Form.*

The default rules of the CISG will only permit the formation of the rolling contract in scenario A if the buyer intended to solicit a shrinkwrap form from the seller. Then, the buyer would have taken an active part in the process of assent, and the CISG’s prohibition on acceptance by silence or inactivity in itself would not apply.⁶¹ The rolling contract terms could con-

49. Because the transaction involved only one form, the court set aside the U.C.C.’s battle of the forms section 2-207 aside as “irrelevant.” *Id.* at 1449, 1452.

50. *Id.* at 1452.

51. *Id.* at 1451.

52. *Id.* at 1447.

53. *Id.* at 1449, 1450-53.

54. 105 F.3d at 1147 (7th Cir. 1997) (Easterbrook, J.).

55. Judge Frank Easterbrook wrote both opinions for the court. *Supra* notes 41-42, 45, 54.

56. *Hill*, 105 F.3d at 1148.

57. *Id.*

58. *Id.*

59. *Id.* at 1148-51 (citing *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)).

60. *Id.* at 1150.

61. Discussion *infra* Parts II.A.3.b-c.

stitute either an offer pursuant to which the contract formed⁶² or an enforceable request for contract modification.⁶³

Conversely, if the buyer did not solicit the shrinkwrap form – that is, if the seller simply imposed her terms on the buyer – the shrinkwrap form will violate the CISG’s prohibition on acceptance by silence or inactivity in itself.⁶⁴ Under such circumstances, the parties’ original agreement would be binding, but the shrinkwrap form will stand as an unenforceable request for contract modification.⁶⁵

a. The seller’s catalog was merely an open door to buyers.

To constitute an offer under the CISG, a proposal must pass three tests.⁶⁶ First, the overture must “indicate[] the intention of the offeror to be bound in case of acceptance.”⁶⁷ (This intent to be bound is “basic criterion” for an offer under the CISG from which the next two tests follow.⁶⁸) Second, the overture must address particular persons.⁶⁹ If it does not, it will stand only as an open door to offers.⁷⁰ Third, the proposal must be “sufficiently definite.”⁷¹ In other words, it must “indicate[] the goods and expressly or implicitly fix[] or make[] provision for determining the quantity and the price.”⁷²

Finding the proposing party’s intent to be bound depends on the facts of each case.⁷³ Her actual intent will control only where the other party actually “knew or could not have been unaware what that intent was.”⁷⁴ Otherwise, the court must determine her intent by asking what a reasonable person in the other party’s position would think she meant to do under

62. Discussion *infra* Part II.A.3.b.

63. Discussion *infra* Part II.A.3.c.

64. Discussion *infra* Part II.A.3.d.

65. Discussion *infra* Part II.A.3.d.

66. CISG, *supra* note 11, art. 14(1); HONNOLD, *supra* note 33, at 194.

67. CISG, *supra* note 11, art. 14(1).

68. From a certain point of view, the next two criteria (the requirements that the offeror communicate the offer to specific persons and that the offer be definite) are simply definitions of what it means to express a desire to be bound. HONNOLD, *supra* note 33, at 194.

69. CISG, *supra* note 11, art. 14(1). The term “persons” in this context refers to legal persons including corporations. *Explanatory Documentation Prepared for Commonwealth Jurisdictions by Muna Ndulo in Association with the Commonwealth Secretariat, The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) § 1.37 (Oct. 1991).*

70. However, the offeror can make an offer to many people if she “clearly” indicates her intention to make an offer. CISG, *supra* note 11, art. 14(2). One example of such a situation might be an ad in a newspaper. FRITZ ENDERLEIN AND DIETRICH MASKOW, *INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS 83 (1992).*

71. CISG, *supra* note 11, art. 14(1).

72. *Id.*

73. HONNOLD, *supra* note 33, at 194-95. For a background on intent under the CISG, see generally SCHLECTRIEM, *COMMENTARY, supra* note 21, at 69-74.

74. CISG, *supra* note 11, art. 8(1).

the circumstances.⁷⁵ This reasonableness standard requires a court to evaluate the “full context” of the parties’ dealings.⁷⁶

Here, the seller’s catalog does not constitute an offer because it fails at least one out of the three tests (and maybe two).⁷⁷ By its nature, a catalog does not address one or more specific persons.⁷⁸ Even so – depending on the facts of the case – a catalog might make up for this deficiency by expressing clearly the seller’s intention to be bound.⁷⁹ But the catalog almost certainly fails on definiteness, because it probably has more items from which to choose than one, sells them in various quantities, and may even vary the price by bulk.⁸⁰

Because the seller’s catalog does not constitute an offer, the next question is whether the buyer made an offer when she placed her order.⁸¹ When she e-mailed the seller to order a particular quantity of goods at a certain price,⁸² the buyer probably satisfied the tests requiring her to address specific persons and also to be sufficiently definite.⁸³ But did she intend to be bound? As the reader is about to see, the factual finding regarding the buyer’s intent determines the enforceability of the seller’s terms.

- b. If the buyer did not intend to be bound until the arrival of the seller’s shrinkwrap form, then that form constitutes the offer, which the buyer can accept by silence.

If the court found as a matter of fact that the buyer’s e-mail did not express an intent to be bound upon the seller’s acceptance, it would not constitute an offer.⁸⁴ Then, the buyer’s e-mail would only be an invitation to the seller to make an offer. Likewise, if the seller did not intend to be bound by her e-mail reply, it would not be an offer, either.⁸⁵ (If the seller wanted to incorporate her shrinkwrap terms into the agreement, she probably did not intend to be bound by her e-mail reply.)

Therefore, the next candidate for the offer is the seller’s shrinkwrap form, which appears to pass all three tests. By prescribing the means by which a recipient can accept it,⁸⁶ the form states an intent to be bound on its face. By integrating the previous dealings of the parties, it sets the price,

75. *Id.* arts. 8(2)-(3).

76. HONNOLD, *supra* note 33, at 194; SCHLECHTRIEM, UNIFORM SALES LAW, *supra* note 24, at 39-40 (“The intent of a party or the understanding of a reasonable person depends on all of the facts and circumstances including those specially listed in the Convention, namely, negotiations, established practices between the parties, usages, and any subsequent conduct of the parties . . .”).

77. *See supra* notes 66-72 and accompanying text.

78. *Supra* note 69 and accompanying text.

79. *See* CISG, *supra* note 11, art. 14(2).

80. *See supra* notes 71-72 and accompanying text.

81. Discussion *supra* Part II.A.1.

82. Discussion *supra* Part II.A.1.

83. *See supra* notes 69, 71-72 and accompanying text.

84. *See supra* notes 66-72 and accompanying text.

85. *See supra* notes 66-72 and accompanying text.

86. Discussion *supra* Part II.A.1.

identifies the goods, and specifies their quantity, and satisfies the definiteness test.⁸⁷ Last, by sending these terms directly to the buyer in response to her e-mail order, the seller ensured that the shrinkwrap form addresses specific persons.⁸⁸

Because it passes all three tests, the shrinkwrap form will constitute an offer⁸⁹ unless there is some provision to prevent the parties from making an offer this way. Integrating all of the parties' prior communication into one offer poses no obstacle, because the CISG's drafters intended to leave room for flexibility by permitting offers to incorporate agreed usages.⁹⁰ Also, the CISG dispenses with any domestic requirements that the parties conclude or prove a contract in writing or according to any specific form.⁹¹ Still, a court applying the CISG would have to determine whether the buyer could accept the shrinkwrap form by the means it prescribes,⁹² because Article 18(1) prohibits the parties from prescribing acceptance by silence or inactivity in itself.⁹³

The rule against acceptance by silence or inactivity alone prevents the seller from imposing her terms on the buyer without the buyer's assent.⁹⁴ Professor Honnold explains that this restriction would prevent an offeror from writing an unsolicited offer such as: "This is such an attractive offer that I shall assume that you accept unless I hear from you by June 15."⁹⁵ Dr. Schlechtriem writes that the prohibition exists to prevent sellers from shipping "unordered goods . . . with an offer stating that by not returning the goods the offeree accepts the offer."⁹⁶

Nonetheless, if the parties agree to a particular usage under Article 9(1), the prohibition on acceptance by silence or inactivity in itself will not

87. Discussion *supra* Part II.A.1.

88. Discussion *supra* Part II.A.1.

89. Notably, Article 15(1) of the CISG says an offer becomes an offer when it reaches the offeree, not before. CISG, *supra* note 11, art. 15(1). This requirement is additional to the three tests enumerated in the text accompanying notes 66-72.

90. Professor Honnold makes clear that the CISG permits the use of offers that do not fit the traditional models of offer and acceptance. HONNOLD, *supra* note 33, at 192-93. Dr. Schlechtriem agrees. SCHLECHTRIEM, COMMENTARY, *supra* note 21, at 101-02.

91. CISG, *supra* note 11, art. 11; HONNOLD, *supra* note 33, at 192-93. Not only does Article 11 dispose of formal writing requirements, it also renders irrelevant the requirement of consideration. SCHLECHTRIEM, UNIFORM SALES LAW, *supra* note 24, at 44-47. The CISG permits Contracting States to make a reservation pursuant to Article 96 from the provisions of the Articles 11 and 12, so any Contracting State can require a contract to be made in writing. For purposes of this Note's hypothetical, the reader should know that neither the United States nor Germany has made a reservation pursuant to Article 96. Pace University, *Electronic Library on International Trade Law and the CISG*, at <http://cisgw3.law.pace.edu/cisg/countries/cntries.html> (last visited Oct. 13, 2001). Therefore, the U.S. states' modern day Statute of Frauds, U.C.C. section 2-201, will not apply to the contract. See HONNOLD, *supra* note 33, at 183; SCHLECHTRIEM, UNIFORM SALES LAW, *supra* note 24, at 44-47.

92. The rolling contract in scenario A prescribed that the buyer accept by using the goods and failing to return them within a specified time. Discussion *supra* Part II.A.1.

93. CISG, *supra* note 11, art. 18(1).

94. HONNOLD, *supra* note 33, at 219.

95. *Id.*

96. SCHLECHTRIEM, UNIFORM SALES LAW, *supra* note 24, at 54 (emphasis added).

prevent them from entering into a rolling contract.⁹⁷ More directly – according to Professor Honnold – if a buyer were to solicit an offer from a seller, permit the seller to set terms, and instruct the seller to consider she has accepted if she does not object within a specified time, then a contract will form pursuant to their agreed usage upon the passage of the agreed time.⁹⁸

One way to describe this transaction would be to say that the parties have agreed to derogate from the prohibition on acceptance by silence or inactivity in itself by binding themselves to a usage.⁹⁹ Another way to describe it would be to say that the prohibition on acceptance by silence or inactivity “in itself”¹⁰⁰ no longer applies because the buyer’s solicitation was not mere silence but silence *and* some affirmative action.¹⁰¹ For example, applying Articles 18(1) and 8(3), one court found a seller who had previously performed its buyer’s orders without formal acceptance could not rely on Article 18(1)’s prohibition on acceptance by silence to deny the existence of a contract formed the same way.¹⁰² There also are other instances when courts have found that silence combined with other activity will suffice to manifest acceptance under the CISG.¹⁰³

97. See HONNOLD, *supra* note 33, at 219-20; SCHLECHTRIEM, UNIFORM SALES LAW, *supra* note 24, at 54.

98. HONNOLD, *supra* note 33, at 219-20.

99. This derogation would occur under Article 6 pursuant to the parties’ agreement to apply the rolling contract as a usage under Article 9(1). HONNOLD, *supra* note 33, at 219-20.

100. CISG, *supra* note 11, art. 18(1); SCHLECHTRIEM, UNIFORM SALES LAW, *supra* note 24, at 54 (“The wording ‘in itself’ makes it clear, however, that silence in connection with other circumstances can be considered an acceptance, particularly on the basis of Article 8(3),” which permits acceptance by an act pursuant to the parties’ practices or usages).

101. SCHLECHTRIEM, COMMENTARY, *supra* note 21, at 130 (“Silence or inactivity can in principle also express an intention to accept. . . . However, for such conduct to indicate assent, there must be additional factors associated with the silence or inactivity.”). The CISG’s legislative history reveals that the drafters added “inactivity” to the 1978 draft Convention to emphasize the legal ineffectiveness of passive conduct in respect to acceptance. ALBERT H. KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 171-72 (1989).

102. Case 96J/00101, Cour d’Appel de Grenoble, Oct. 21, 1999, UNILEX.

103. One scholar claims that, under certain circumstances, silence and inactivity can constitute acceptance under the CISG; for example, when one party fails to object under Article 19(2) within an appropriate time. Maria del Pilar Perales Viscasillas, *Recent Development Relating to CISG: Contract Conclusion Under CISG*, 16 J.L. & COM. 315, 333 (1997). Also, one court sitting in the United States found that failure to object to the terms of a certain form despite the commencement of performance constituted an acceptance of those terms, in light of the previous practices of the parties according to the rules of interpretation contained in Article 8(3). *Filanto, S.p.A. v. Chilewich Int’l Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992). In another example, a German court found that the parties had tacitly agreed to termination of contract when the seller promised to resell nonconforming goods; although the buyer apparently did not expressly agree, the court inferred that the buyer had accepted from the fact that the buyer did not seek remedy under the CISG within a reasonable time. Case 22 U 202/93, Oberlandesgericht Köln, Feb. 22, 1994, UNILEX.

Another German court found that a buyer had accepted the contract under Article 18(1) through conduct by accepting goods after receiving a letter of confirmation con-

Still, there is one more potential impediment to the transaction. Professor Honnold theorizes that Article 18 requires the offeree to communicate acceptance to the offeror, even when the offeree accepts by conduct according to an agreed usage.¹⁰⁴ At first blush, the Professor's theory¹⁰⁵ seems to argue against rolling contract formation because the communication of the buyer's assent never *reaches* the seller. Only a rejection would *reach* the seller. But if that were true, then the Professor's communication theory would argue against his own thesis that a buyer can solicit an offer and accept it by merely failing to object.¹⁰⁶ Perhaps one can reconcile the Professor's two seemingly contradictory assertions with the facts of a rolling contract: The moment at which the buyer agrees to the usage by soliciting the offer is the same moment at which she communicates her intent to accept¹⁰⁷ (with an option to withdraw).¹⁰⁸

taining standard terms. Case 1 U 69/92, Oberlandesgericht Saarbrücken, Jan. 13, 1993, UNILEX. Dr. Schlechtriem argues that the legislative history of the CISG shows that the CISG's contract formation provisions will permit the parties to form a contract when one sends the other a letter of confirmation, to which the recipient simply fails to respond; Dr. Schlechtriem concludes that even if the CISG's contract formation provisions do not allow this, Article 9, paragraphs 1 and 2, do. SCHLECHTRIEM, COMMENTARY, *supra* note 21, at 100-01. Another scholar has suggested that the use of confirmation letters violates the CISG's contract formation provisions and only works under Article 9. Michael Esser, *Commercial Letters of Confirmation in International Trade: Australian, French, German and Swiss Law and Uniform Law Under the 1980 Sales Convention*, 18 GA. J. INT. & COMP. L. 427, 448 (1988). Indeed, Germany has very unique law relative to the practice of confirmation letters. Although others had predicted that Germany would favor letters of confirmation under the CISG, one scholar writes that German courts will not enforce agreements pursuant to letters of confirmation if that usage is not common to both parties. Martin Karollus, *Judicial Interpretation and Application of the CISG in Germany 1988-1994*, in REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, *supra* note 20, at 61.

104. Despite the abandonment of the requirement of "notice" in Article 18(3), Professor Honnold espouses a theory that — under all three paragraphs of Article 18 — the offeree must *communicate* assent to the offeror before a statement or action can constitute a valid acceptance. HONNOLD, *supra* note 33, at 219, 224-26. Professor Honnold notes particularly that each of the three paragraphs requires the accepting party to *indicate* assent—thus requiring communication. *Id.* According to Professor Honnold, the drafters chose the verb "to indicate" rather than "to state" because they did not want to require words, thus preventing contract formation by conduct, but they did want to preserve an explicit requirement to communicate intent. *Id.* at 219. For these reasons, Professor Honnold interprets Article 18(3)'s explicit rule providing that the offeree can indicate assent without notice to mean that the offeree need make no communication *additional* to an appropriate action constituting acceptance, which must *indicate* assent to the offeror, but he does not consider that 18(3) does away with the need for communication altogether. *Id.* at 225-26.

105. Professor Honnold's theory is the majority theory under the CISG. Viscasillas, *supra* note 103, at 335. However, at least one scholar disputes it, citing to legislative history and failed efforts to require notice. *Id.*

106. *Supra* notes 97-98 and accompanying text.

107. SCHLECHTRIEM, COMMENTARY, *supra* note 21, at 130 (writing that "silence in conjunction with other circumstances can indeed indicate a declaration and, on the basis of Article 8(3) take effect as an acceptance without a statement to that effect having reached the offeror").

108. The CISG provides that "[a]n acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective." CISG, *supra* note 11, art. 22. Such a reading would be in keeping with the

Assuming the parties avoid the obstacles surrounding acceptance by silence, if the offer says so, or if the practices between the parties or a usage of the trade prescribes it,¹⁰⁹ the offeree may "indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror."¹¹⁰ That acceptance becomes effective at the moment the act is performed.¹¹¹ The contract would conclude at the same moment.¹¹² Provided the buyer solicited the rolling contract and permitted the specified time to pass without returning the goods, she has accepted according to the terms of the offer. Her acceptance would become effective upon the passage of the specified time,¹¹³ and the contract would conclude at the same moment.¹¹⁴

As we have seen, the CISG permits parties to incorporate their trade usages into its default contract formation rules.¹¹⁵ This flexibility permits the seller's shrinkwrap form to integrate the parties' prior dealings. Therefore, a court might relate the moment of contract formation back to the moment of the parties' first e-mail exchange. In this sense, the parties can agree to render academic (for most potential disputes) the precise time at which they formed their contract.

Despite such relation-back, the formation of the contract *only* upon the expiration of the form's specified time would mean the parties would have exchanged consideration without legal obligation until that time passes. I am referring to an unlikely circumstance in which one party timely objects to the other's failure - before the passage of the shrinkwrap form's specified time - to fulfill a promise made during the initial exchange. The seller, by permitting the buyer the chance to withdraw acceptance, has chosen to have no legal recourse against the buyer under such circumstances. But does that mean the buyer should have none against the seller?

A buyer's objection pursuant to the seller's terms should constitute conduct sufficient to indicate acceptance of those terms, including integration (or relation-back). After all, to make the contract as she wanted to - with the exchange of consideration preceding the delivery of her terms - the seller effectively required the buyer conditionally to agree to her terms sight unseen. Among those terms was the integration of all the parties'

adaptability of the CISG's rules of contract formation. See HONNOLD, *supra* note 33, at 192-93.

109. CISG, *supra* note 11, art. 18(3).

110. *Id.* Note that the language of the Article suggests an affirmative act; also note that Article 18(3) contains no other language to exempt it from the prohibition on accepting an offer by silence or inactivity in itself. See *id.* art. 18(1)-(3). A Swiss court has interpreted Article 18(3) to allow a party to accept through a third party, whereas Article 18(1) would not allow this form of acceptance absent an applicable usage of the trade or established practice between the parties. Case HG 940513, Handelsgericht des Kantons Zürich, July 10, 1996, UNILEX.

111. See CISG, *supra* note 11, art. 18(3).

112. See *id.* art. 23.

113. Discussion *supra* Part II.A.1.

114. *Supra* note 112 and accompanying text.

115. HONNOLD, *supra* note 33, at 192-93.

dealings during the initial exchange. Therefore, the buyer has the right to rely on a contract from that first exchange. But of course, had the parties made clear that they would have no legal obligation to each other during this time – that there would be no contract until the passage of the form’s specified time – their intent would control.

- c. If the buyer intended to be bound *and* to solicit a contract modification, then the seller’s form will be an enforceable contract modification.

Article 14 seems to suggest that an overture is either an offer if it meets all three tests or not an offer if it fails any one of them.¹¹⁶ But as we have just seen, the CISG’s drafters recognized that parties will require more flexibility than its contract formation rules provide on their face.¹¹⁷ Therefore, a court applying the CISG may recognize an intermediate possibility (between no intent to be bound and intent to be bound unconditionally) in which the buyer intended to be bound until the arrival of a contract modification by the seller’s terms. In other words, provided it also met the tests requiring it to be definite and to address specific persons,¹¹⁸ the court might rule the buyer’s overture was both an offer *and* a solicitation of a later contract modification.

If the seller does not actually know the buyer’s intent,¹¹⁹ then the court must consider all of the pertinent facts relating to the party’s dealings¹²⁰ – from the standpoint of a reasonable person in the seller’s position – to find the buyer’s intent.¹²¹ Among other things, the court would have to consider that the buyer made her overture pursuant to the seller’s catalog, which invites offers for sales of goods on the condition that rolling contracts would accompany those sales.¹²²

The next question is whether the seller accepted the buyer’s offer under the CISG’s rules of acceptance.¹²³ Article 18(1) says that the offeree

116. See CISG, *supra* note 11, art. 14.

117. *Id.*

118. *Supra* note 66-72 and accompanying text.

119. CISG, *supra* note 11, art. 8(1). On the facts provided, the seller would have a difficult time actually knowing what the buyer intended to do.

120. *Id.* art. 8(3).

121. *Id.* art. 8(2).

122. Discussion *supra* Part II.A.1.

123. Additionally, a court must consider whether the seller’s dispatch of the rolling contract initiated a battle of the forms. Under the CISG, the battle of the forms is something of a misnomer. Article 19 codifies the mirror image rule. HENRY GABRIEL, PRACTITIONER’S GUIDE TO THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) AND THE UNIFORM COMMERCIAL CODE (UCC) 59 (1994). The U.S. court concluded that the battle of the forms is irrelevant where there is only one form in *ProCD v. Zeidenberg*, 86 F.3d 1447, 1449, 1452 (7th Cir. 1996). But that holding has no bearing on the CISG. First, the U.C.C. and the CISG are altogether different bodies of law. *Supra* notes 32-40 and accompanying text. Second, there need not be any exchange of forms to trigger the CISG’s battle of the forms provisions under Article 19. For example, in a case where the buyer ordered goods and the seller sent a different quantity, a German court found that the shipment of a different quantity of goods constituted a counteroffer under the CISG’s Article 19 concerning the battle of the forms. Case 5 U

may accept by a statement or other conduct "indicating assent."¹²⁴ And as we have seen above, the CISG contains no requirement of form (or writing), so the parties can conclude and prove a contract without a signature.¹²⁵ Under these rules, the seller probably accepted the buyer's offer by promising to ship the goods by her terms.¹²⁶

If the parties have already entered into an enforceable contract, analysis of the shrinkwrap form's legal effect should turn to the CISG's provisions permitting the modification or termination of contracts "by the mere agreement of the parties"¹²⁷ – without consideration.¹²⁸ Article 29(1) permits the parties to reach agreement "by virtue of the offer or as a result of practices which the parties have established between themselves or of usage."¹²⁹

The key is that the parties must demonstrate agreement specifically to the modification.¹³⁰ As discussed above, if the buyer impliedly asks for the rolling contract, she has demonstrated agreement to that usage.¹³¹ Hers was not a passive role that the rule against acceptance by silence or inactivity in itself would strike down.¹³² Returning the goods would satisfy the seller's form on its face, so it would surely demonstrate mutual agreement to terminate the initial contract.

On its face, the seller's shrinkwrap terms purport to integrate the parties' prior dealings. Therefore, once they have mutually agreed to that modification, its terms should relate back to the moment of the initial e-mail exchange. However, in the unlikely event that the buyer should timely object to the seller's failure to comply with some obligation arising from that initial contract – like the seller's failure to send the goods – before the buyer ever receives the seller's terms, the buyer should be able to seek redress under the CISG's default rules. This additional flexibility suggests

209/94, Oberlandesgericht Frankfurt am Main, May 23, 1995, UNILEX (finding that a contract had formed when buyer accepted the counteroffer through conduct, which was taking delivery of the goods).

However, this Note argues that the CISG's battle of the forms cannot apply to the rolling contract. Discussion *infra* Part II.B.3.

124. CISG, *supra* note 11, art. 18(1).

125. *Supra* note 91 and accompanying text.

126. Discussion *supra* Part II.A.1. If the buyer did not actually know that the seller intended to accept her offer, the court would have to find the intent a reasonable buyer under these circumstances would have inferred from the seller's promise. See CISG, *supra* note 11, art. 8.

Of course, another possibility is that the seller accepted the buyer's offer by dispatching the goods, either as an act sufficient to manifest acceptance or as an expression of acceptance according to an agreed usage. See *id.* art. 18.

Yet another possibility would be that the rolling contract constituted acceptance of the buyer's offer. However, as discussed below, the rolling contract cannot be an acceptance because it requires that its recipient accept its terms by using the goods and failing to return them. Discussion *infra* Part II.B.3.

127. CISG, *supra* note 11, art. 29(1).

128. Hillman, *supra* note 36, at 457.

129. CISG, *supra* note 11, art. 18(3); HONNOLD, *supra* note 33, at 279.

130. HONNOLD, *supra* note 33, at 279.

131. See discussion *supra* Part II.A.3.b.

132. See discussion *supra* Part II.A.3.b.

that modification may be a better, fairer way to conceptualize the rolling contract paradigm under the CISG than the way described in Part II.A.3.b.

- d. If the buyer did not intend to solicit the seller's form, then the shrinkwrap form violates the prohibition on acceptance by silence or inactivity in itself, and its terms will drop out of the parties' agreement as an unenforceable request to modify the contract.

The court may find as a matter of fact that the seller actually knew, or that a reasonable seller under the circumstances would believe, that the buyer intended to be bound unconditionally to her own offer.¹³³ One can imagine the facts leading to this conclusion. Maybe nobody in that trade uses shrinkwrap forms. Maybe the seller should have known that old catalogs, which did not contain any notice that she uses shrinkwrap forms, were still circulating and that some buyers would not know about the usage. Or perhaps the notice in the seller's catalog was too oblique for anybody to understand it. In either case, the court may find that the buyer made an unconditional offer and that she did not solicit a rolling contract.¹³⁴ The court may also find that the seller accepted that offer by e-mail or by dispatching the goods such that the parties entered into a contract by e-mail.¹³⁵

After they enter into a contract, the CISG permits modification "by the mere agreement of the parties"¹³⁶ and without consideration.¹³⁷ But as discussed above, the parties have to agree to the modification, either expressly or by conduct.¹³⁸ Indeed, a French court held that under the CISG, performance of a preexisting contract does not indicate agreement to a contract modification.¹³⁹

Here, implicit in the court's finding of the buyer's unconditional intent to be bound would be the conclusion that she did not agree to the usage or practice of entering into a rolling contract modification. Because the parties had only one communication, there was no other evidence of agreement,¹⁴⁰ and as in the French case just mentioned,¹⁴¹ accepting the goods she had already bought would not demonstrate agreement to the modification.

133. CISG, *supra* note 11, art. 8.

134. *But see* discussion *supra* Parts II.A.3.b, II.A.3.c.

135. *See* discussion *supra* Part II.A.3.c.

136. CISG, *supra* note 11, art. 29(1).

137. Hillman, *supra* note 36, at 457.

138. Such agreement may be express, or by conduct under Article 18, or by usages developed among the parties according to Article 9. HONNOLD, *supra* note 33, at 279.

139. That court determined that the buyer did not accept the terms in a standard form the seller sent to the buyer (and to which the buyer did not respond) because the parties had already concluded a contract by the time the buyer received those terms. Case 95-018179, Cour d'Appel de Paris, Dec. 13, 1995, UNILEX.

140. *See* CISG, *supra* note 11, art. 9(1). The court may find that the seller actually knew or would have reasonably believed under the circumstances that the buyer intended to make an offer. *Id.* arts. 8(1)-(2). This conclusion would derive from the facts of the parties' dealings in their full context. *Id.* art. 8(3).

141. Case 95-018179, Cour d'Appel de Paris, Dec. 13, 1995, UNILEX.

It would eviscerate the prohibition on acceptance by silence or inactivity in itself if a court would permit the parties to formalistically sidestep that provision by imposing modifications on one another. When the buyer plays no affirmative role in soliciting the shrinkwrap form, its assertion that the buyer will accept its terms merely by opening the package and by failing to return the goods is nothing more than a prescription for silence or inactivity in itself. In fact, the seller's dispatch of the shrinkwrap form would precisely mirror Professor Honnold's and Dr. Schlechtriem's hypothetical scenarios in which the seller imposes her terms on the buyer without notice.¹⁴² For these reasons, such a modification request would be unenforceable owing to lack of agreement.¹⁴³

B. Scenario B, Following the Facts of *Step-Saver Data Systems, Inc. v. Wyse Technology*¹⁴⁴

1. *The Facts*¹⁴⁵

A German merchant and a U.S. seller have engaged in a contractual relationship for some time. Every now and then, the German buyer would e-mail an order for a specific quantity of particular goods at a certain price, and the U.S. seller – in a reply to the e-mail – would promise to ship them. Next, the German buyer would post a written order identifying the goods, their price, and the quantity, along with certain other terms relating to shipping and payment. In turn, the U.S. seller would ship a written invoice containing almost exactly the same terms as the buyer's written order, along with a shipment of goods in packages with terms on the box.

The terms on the box disclaim warranties, limit liability, and purport to integrate all the parties' dealings into the rolling contract, even though neither party mentioned the rolling contract's terms during their e-mails or in the other written invoices. The box-top terms also prescribe acceptance with the words:

Opening this package indicates your acceptance of these terms and conditions. If you do not agree with them, you should promptly return the package unopened to the person from whom you purchased it within fifteen days from the date of purchase and your money will be refunded to that person.¹⁴⁶

142. *Supra* notes 95-96 and accompanying text.

143. See CISG, *supra* note 11, art. 9(1).

144. 939 F.2d 91 (3d Cir. 1991).

145. The facts of this hypothetical follow *Step-Saver* except for three changes. First, the parties in the original case were both from the United States. Second, they made their initial contacts by telephone, not e-mail. Third, the seller's rolling contract terms also included a license. See *id.* at 95-96.

146. *Id.* at 97.

2. *A U.S. Court Applying the U.C.C.'s Battle of the Forms Held the Parties Had Formed a Contract Excluding the New and Different Terms on the Box-Top.*

In *Step-Saver*,¹⁴⁷ on the facts that inspired scenario B, the U.S. Court of Appeals for the Third Circuit wrote that the parties had established a contract by conduct, and the only question about that contract concerned its terms.¹⁴⁸ To decide what those terms were, the court applied U.C.C. section 2-207.¹⁴⁹ The court ruled that under 2-207, the box-top license would materially alter the terms to which the parties had both agreed and therefore drop out of the agreement.¹⁵⁰

The court declined to apply the U.C.C.'s section 2-209, which allows contract modification without consideration, to enforce the box-top license's terms.¹⁵¹ Despite the ongoing nature of the parties' relationship, the court found that they had not agreed to the licensor's terms through a course of dealing.¹⁵² In the court's view, the licensor's repeated dispatch of those terms demonstrated nothing more than its inability to get them by negotiation.¹⁵³

Explaining its conclusions, the court reasoned that to enforce the box-top license as a contract modification or otherwise would effectively countenance the so-called "last-shot" doctrine, which U.C.C. section 2-207 rejects.¹⁵⁴ Under the "last-shot" doctrine, every time the parties exchange a form that includes different terms, it kills the standing offer and creates a new offer.¹⁵⁵ In the world of the "last shot," when the other party accepts this offer, it forms a contract – but not before.¹⁵⁶ Thus, the contract follows the last exchange, allowing the party who fired off the last form to set the terms of the contract.¹⁵⁷

The court found this approach inconsistent with the U.C.C. because the drafters of section 2-207 believed that parties engaged in a battle of the forms mechanically exchange forms without trying to negotiate contract terms.¹⁵⁸ For this reason, the drafters wrote 2-207 to facilitate the parties' reliance on a contract, and 2-207 incorporates only the terms common to both parties' forms.¹⁵⁹

147. *Id.*

148. *Id.* at 98. *Contra* ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), cited in Hill v. Gateway 2000, 105 F.3d at 1147, 1150 (7th Cir. 1997) ("The question in ProCD was not whether terms were added to a contract after its formation, but how and when the contract was formed. . . .").

149. *Step-Saver*, 939 F.2d at 105-06.

150. *Id.*

151. *Id.* at 98.

152. *Id.* at 104.

153. *Id.*

154. *Id.* at 98-100. The CISG, on the other hand, embraces the last shot. HONNOLD, *supra* note 33, at 237-39; Leete, *supra* note 18, at 214.

155. *Step-Saver*, 939 F.2d at 99.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

3. The CISG's Battle of the Forms Does Not Apply to Rolling Contract Formation.

Unlike the U.C.C.,¹⁶⁰ the CISG takes the last shot approach to the battle of the forms.¹⁶¹ Codifying the mirror image rule,¹⁶² Article 19 says that a "reply to an offer which purports to be an acceptance"¹⁶³ is a counteroffer if it adds, limits, or modifies the terms of the offer.¹⁶⁴ The counteroffer kills the offer.¹⁶⁵ Nonetheless, Article 19 permits the offeree – unless the offeror objects – to add or change some terms of the offer in her reply if those added or changed terms do not "materially alter the terms of the offer."¹⁶⁶ If the change is not material and there is no objection, a contract will form pursuant to the reply's terms¹⁶⁷ – that is, pursuant to the last shot. Notably, last shot contract formation seldom happens under the CISG because the CISG's definition of materiality¹⁶⁸ is so broad that one scholar has characterized it as including practically every kind of reply.¹⁶⁹

Since Article 19 follows the last shot approach to the battle of the forms, the *Step-Saver* court's rationale for rejecting the rolling contract terms¹⁷⁰ does not apply to the CISG. But that does not mean that the CISG will permit the formation of the rolling contract under the battle of the forms.¹⁷¹ Indeed, it turns out that the CISG's battle of the forms provisions cannot apply to this rolling contract. Therefore, the box-top terms will not kill the offer, nor will they integrate any nonmaterial terms in a battle of forms.

Article 19 applies *only* to replies purporting to be acceptances.¹⁷² And the CISG defines acceptance as a "statement made by or other conduct of the offeree indicating assent to an offer."¹⁷³ By its very nature, the shrink-wrap form cannot be an acceptance because it requires its recipient to accept *its* terms by opening the packing, using the goods, and failing to return them.¹⁷⁴ Trying to fit the rolling contract into the CISG's rules describing acceptance produces absurd results.

160. Viscasillas, *supra* note 15, at 97-155.

161. HONNOLD, *supra* note 33, at 237-39; Leete, *supra* note 18, at 214.

162. GABRIEL, *supra* note 123, at 59.

163. CISG, *supra* note 11, art. 19(1)-(2). A reply that does not purport to be an acceptance, like a letter of inquiry, will not kill the offer. JOSEPH LOOKOFKY, UNDERSTANDING THE CISG IN THE USA 34 (1995).

164. CISG, *supra* note 11, art. 19(1).

165. Such a reply "constitutes a rejection of the offer and constitutes a counteroffer." *Id.*

166. *Id.* art. 19(2).

167. *Id.*

168. *Id.* art. 19(3).

169. Leete, *supra* note 18, at 213.

170. *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 98-99 (3d Cir. 1991).

171. Of course it would be a mistake to interpret the CISG according to domestic law anyway, as discussed above. *Supra* notes 32-40 and accompanying text.

172. The text of Article 19(1) and 19(2) makes it plain that only "a reply to an offer which purports to be an acceptance" will fit the CISG's battle of the forms. CISG, *supra* note 11, arts. 19(1)-(2).

173. *Id.* art. 18(1).

174. *Supra* Parts II.A.1, II.B.1 and note 8 and accompanying text.

4. *Whether the CISG Permits Formation of the Rolling Contract Depends upon Whether the Buyer Solicited the Seller's Form.*

Although the dealings between the parties in scenario B are more complex than in scenario A, the analysis of the rolling contract's formation remains essentially the same. The important question is whether the buyer intended to solicit the seller's form, either as an offer or as a modification of a temporary contract. If yes, then the form's terms will be the basis for the parties' agreement.¹⁷⁵ If no, then the rolling contract will violate the CISG's prohibition on acceptance by silence or inactivity in itself, and the seller's standard terms will drop out of the agreement as an unenforceable request for contract modification.¹⁷⁶

- a. If the buyer intended to solicit the seller's form, then the box-top terms will constitute the offer, which the buyer can accept by silence.

The buyer's initial e-mail satisfies two of the three tests to constitute an offer under the CISG, because it addressed a specific person and made a definite proposal by ordering a specific quantity of particular goods at a certain price.¹⁷⁷ Therefore, whether it was an offer depends on whether she intended to be bound.¹⁷⁸ If the court found that the buyer intended to solicit the seller's form rather than to be bound, the seller's form will constitute the offer pursuant to an agreed usage, just like it did in scenario A.¹⁷⁹

The CISG rationale departs yet again from the U.S. *Step-Saver* court's treatment of the contract under the U.C.C.¹⁸⁰ As the reader will recall, the *Step-Saver* court concluded that the seller's repeated inclusion of the box-top form did not indicate agreement under the U.C.C.¹⁸¹ But the CISG is a very different body of law from the U.C.C., with fundamentally different views.¹⁸² For example, the CISG imposes a stricter duty to read than the U.C.C.¹⁸³ Moreover, the CISG establishes that the parties bind themselves to "any usage to which they have agreed and by practices which they have established between themselves."¹⁸⁴ If the parties engage in a pattern of behavior that induces expectations in the other party, they may have established such a practice between themselves.¹⁸⁵

Under Article 8, to determine whether the parties have established such a practice, the court must evaluate their conduct according to the

175. Discussion *infra* Part II.B.4.a-b.

176. Discussion *infra* Part II.B.4.c.

177. Discussion *supra* Part II.B.1.

178. See *supra* notes 66-68 and accompanying text.

179. Discussion *supra* Part II.A.3.b.

180. See *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 91 (3d Cir. 1991).

181. *Id.* at 104.

182. *Supra* notes 32-40 and accompanying text.

183. This difference in world view explains the two codes' different approaches to the battle of the forms. GABRIEL, *supra* note 123, at 60-63.

184. CISG, *supra* note 11, art. 9(1).

185. HONNOLD, *supra* note 33, at 175.

standard of a reasonable person in the other party's place and in the context of the whole course of their dealings.¹⁸⁶ Under the CISG's view of those dealings, one could imagine that the court might find as a matter of fact that the buyer knew the seller would dispatch a rolling contract, and she thus had solicited it pursuant to the long-time practices in which they had engaged.¹⁸⁷

As in scenario A, under a factual finding that the buyer solicited the seller's terms, the parties may either derogate from¹⁸⁸ – or render irrelevant by their active and mutual agreement¹⁸⁹ – the CISG's prohibition on acceptance by silence or inactivity in itself.¹⁹⁰ Acceptance would become effective and the contract would form at the moment the specified time elapses.¹⁹¹ The contract would therefore form around the seller's terms.¹⁹² Still, as this Note argued in Part II.A.3.b, it would be more realistic and fairer to loosely interpret the exact moment of contract formation, relating it back to the time of their first e-mail exchange.

- b. If the buyer intended to be bound *and* to solicit a rolling contract, then the seller's form will be an enforceable contract modification.

If the buyer intended to be bound to her e-mail offer, she would satisfy the three tests for an offer under the CISG.¹⁹³ But even if the buyer

186. *Id.* (citing CISG, *supra* note 11, art. 8(2)); *supra* notes 73-76 and accompanying text.

187. Discussion *supra* Part II.B.1.

188. *Supra* notes 99 and accompanying text.

189. *Supra* notes 100-03 and accompanying text.

190. CISG, *supra* note 11, art. 18(1).

191. Discussion *supra* Part II.A.3.b.

192. Discussion *supra* Part II.A.3.b.

193. One could spin out the parties' dealings extensively depending upon findings of fact. If the parties formed a contract pursuant to the buyer's e-mail offer, the subsequent exchange of forms may also have constituted a request for contract modification. The CISG allows contract modifications or terminations "by the mere agreement of the parties." CISG, *supra* note 11, art. 29(1). It requires no consideration. Hillman, *supra* note 36, at 456. Under Article 29(1), the parties can reach agreement by the same means provided for acceptance in Article 18, including express and implicit agreement by words or actions. HONNOLD, *supra* note 33, at 279. For example, one Dutch court applying the CISG held that the parties had bound themselves by a written, express modification to an oral agreement. Case 770/95/HE, *Gerechtshof's Hertogenbosch*, Nov. 19, 1996, UNILEX. In scenario B, the buyer sent a shipping order and the seller a sales invoice, each containing nearly identical terms. Discussion *supra* Part II.B.1. Because each form contained nearly identical terms, perhaps each intended to indicate assent to those terms. See CISG, *supra* note 11, art. 18(1).

Still, if the terms are different, new, or somehow limiting, they may kill an offer for contract modification. See *id.* art. 19(1). Because these forms contained some differences, the CISG's provisions for the battle of the forms may apply to the exchange of the order and the invoice, either pursuant to an offer for a contract or perhaps pursuant to a request for a contract modification. The CISG provides that "a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer" constitutes an acceptance of a contract by the reply's terms, unless the offeror objects "without undue delay," either orally or by dispatched writing. *Id.* art. 19(2).

But, as mentioned above, almost any changed or new term will materially alter the offer under the CISG's definition of materiality. *Supra* notes 168-69 and accompanying

intended to be bound to her offer, the court may nonetheless determine as a matter of fact that she also intended to solicit a seller's rolling contract form.¹⁹⁴ Then, the buyer would have expressed the requisite agreement to enter into a modification without consideration, pursuant to the terms prescribed by the form.¹⁹⁵ As mentioned above, the CISG's prohibition on acceptance by silence or inactivity in itself would not apply to this transaction, either because the parties had agreed to set the prohibition aside or because they both actively participated in the agreement.¹⁹⁶ As mentioned in Part II.A.3.c, it might be fairer to the buyer - and more in keeping with the buyer's intent - to consider the rolling contract as a modification instead of a contract that formed pursuant to the seller's box-top offer.

- c. If the buyer did not intend to solicit the seller's form, then the box-top terms violate the prohibition on acceptance by silence or inactivity in itself and drop out of the parties' agreement as an unenforceable request to modify the contract.

Even though the CISG incorporates some kind of duty to read,¹⁹⁷ the court might find (especially if the buyer could present more facts) that the buyer did not intend the rolling contract to be a part of the parties' practices.¹⁹⁸ Instead, she may have intended to be unconditionally bound to her own offer, and her e-mail (or perhaps her written invoice upon its arrival¹⁹⁹) would satisfy all three tests to constitute an offer. By promising to dispatch the goods in the e-mail (or by actually doing so), the seller would have accepted the offer.²⁰⁰ Then the parties would already have formed a

text. The CISG provides an illustrative list of such terms, including those "terms relating, among other things, to price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes." CISG, *supra* note 11, art. 19(3).

On the facts of this particular case, because the parties exchanged an invoice and order with nearly identical terms, these forms probably would not materially alter the offer for contract modification. But that, of course, is a factual inquiry. Assuming no term was material, and no party objected to the differences, then each accepted whatever slight difference there may have been. *Id.* art. 19(2). Therefore, like the parties in the Dutch case mentioned above, under these circumstances the parties could modify an oral contract in writing with these forms.

Still, a rolling contract can never fit the CISG's battle of the forms; as we have seen above, the seller's form does not and cannot purport to be an acceptance. Discussion *supra* Part II.B.3. It must be a separate request for contract modification. Discussion *infra* Part II.B.4.c.

194. See discussion *supra* Part II.A.3.c.

195. Discussion *supra* Part II.B.1.

196. The CISG's legislative history reveals that the drafters added "inactivity" to the 1978 draft Convention to emphasize the legal ineffectiveness of passive conduct in respect to acceptance. KRITZER, *supra* note 101, at 171-72.

197. See GABRIEL, *supra* note 123, at 60-63.

198. Article 9(1) depends on a factual finding pursuant to Article 8. *Supra* notes 73-76 and accompanying text. It may be that a reasonable seller should know that the buyer would not be aware of the rolling contract, because it was so oblique or because there was some defect that would lead a reasonable person to know the buyer would not understand it.

199. See discussion *supra* Part II.B.1.

200. See discussion *supra* Parts II.A.3.c and II.A.3.d.

contract, and the seller's rolling contract form would be a request for modification.²⁰¹

But if the buyer did not solicit the box-top form, it is nothing more than the seller's attempt to force agreement on the buyer.²⁰² Therefore, the box-top form would offend the CISG's principle that modification requires the agreement of both parties, and it would violate the concern for fairness that produced the prohibition on acceptance by silence or inactivity in itself.²⁰³ The box-top terms in this situation would drop out of the parties' agreement as an unenforceable request for contract modification.²⁰⁴

C. A Usage of the Trade as Defined in Article 9(2) Will Bind the Parties Absent Agreement to the Contrary.

This Note has touched on the ways in which the parties can derogate from the express rules of contract formation by agreement or usage of trade.²⁰⁵ As we have seen, if the parties agree or establish a practice between themselves of entering into rolling contracts, the CISG requires some inquiry into the parties' actions or agreements to determine to what they have bound themselves.²⁰⁶

Additionally, the CISG *assumes* that the parties have incorporated international,²⁰⁷ "widely known" and "regularly observed" usages of their trade, provided they actually knew or should have known about that usage.²⁰⁸ (But the parties do have the right to agree to exempt themselves from such a usage.²⁰⁹) A usage of the trade as defined by Article 9(2) would obviate all of the default rules of the CISG, including the prohibition on prescribing acceptance by silence or inactivity in itself.²¹⁰

For example, under Article 9(2), a Dutch court incorporated the standard terms of the yarn industry into a contract even though the buyer never received those terms.²¹¹ The court concluded that the buyer could not have been unaware of this particular international usage of the yarn trade.²¹² Also, as one scholar wrote, even though letters of confirmation violate the CISG's rules of contract formation because they rely on acceptance by silence or inactivity alone, they would nevertheless be enforceable where they constitute an international usage of trade under Article 9(2).²¹³

201. Again, one might spin out the subsequent dealings of the parties extensively.

202. See discussion *supra* Part II.A.3.d.

203. *Supra* notes 94-98 and accompanying text.

204. See discussion *supra* Part II.A.3.d.

205. See CISG, *supra* note 11, arts. 6, 9; Germain, *supra* note 15; *supra* note 99 and accompanying text.

206. HONNOLD, *supra* note 33, at 179-80.

207. Domestic usages of the trade are irrelevant to the CISG. *Id.*

208. CISG, *supra* note 11, art. 9(2); SCHLECHTRIEM, UNIFORM SALES LAW, *supra* note 24, at 40-42.

209. CISG, *supra* note 11, art. 9(2); SCHLECHTRIEM, UNIFORM SALES LAW, *supra* note 24, at 40-42.

210. HONNOLD, *supra* note 33, at 220.

211. Case 456/95/HE, *Gerechtshof's Hertogenbosch*, April 24, 1996, UNILEX.

212. *Id.*

213. Esser, *supra* note 103.

Conclusions about what usages fit Article 9(2) are highly fact specific,²¹⁴ and they no doubt require more information than our hypothetical scenarios provide.²¹⁵ Perhaps these rules show that the CISG is a flexible tool to accommodate constant changes in the commercial world.²¹⁶ Perhaps they give too much power to economically powerful parties.²¹⁷ But because Article 9(2) only applies when the parties *should* have known about the usage in question,²¹⁸ a court would do injustice to allow the seller to impose a rolling contract on the buyer unless she at least has a fair warning.

III. Policing the Rolling Contract

This Note recognizes that standard form contracts are a well-established reality. Indeed, standard form contracts are the most common kind of contract.²¹⁹ Moreover, many highly respected authorities maintain that standard forms - and rolling contracts in particular - are a good thing because they promise economic efficiency.²²⁰

Even so, contracts professors have long recognized that standard forms are a tool for bargaining heavyweights to impose their terms on weaker parties.²²¹ Furthermore, in a practical sense, almost nobody receiving another party's standard form actually reads it.²²² This last may be even more true of shrinkwrap forms that come only after the exchange of consideration. Under these assumptions, this Note takes the view that shrinkwrap forms constitute a questionable kind of agreement, and require an elevated degree of scrutiny.

A. The CISG's Notion of Intent Provides a Flexible Means to Protect Unwary Buyers from Procedural Unfairness.

Since the analysis of rolling contract formation under the CISG turns on whether the buyer intended to solicit the seller's terms, courts applying the CISG can use intent to police a seller who tried to surprise a buyer with a rolling contract. As we have seen, where the seller did not know the buyer's actual intent, a court applying the CISG would have to determine her intent according to facts and the "full context" of the parties' dealings, as they

214. See SCHLECHTRIEM, *UNIFORM SALES LAW*, *supra* note 24, at 41.

215. This Note does not attempt to answer whether rolling contracts are a usage as Article 9(2) defines it.

216. See HONNOLD, *supra* note 33, at 192-93.

217. Professor Kessler wrote that the standard form typically allows economically powerful parties to impose their terms on weaker parties on a take-it-or-leave-it basis. Kessler, *supra* note 3, at 631-33, 640-41.

218. CISG, *supra* note 11, art. 9(2).

219. See W. David Slawson, *Standard Form Contracts and Democratic Control of Law-making Power*, 84 HARV. L. REV. 529, 529 (1971).

220. See, e.g., *Hill v. Gateway 2000*, 105 F.3d 1147, 1149 (7th Cir. 1997) (Easterbrook, J.).

221. Kessler, *supra* note 3, at 632.

222. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1179 & n.22 (1983).

would appear to a reasonable person in the seller's place.²²³

The CISG expressly directs courts to look at "all relevant circumstances of the case" including but not limited to negotiations, usages, and "any subsequent conduct of the parties."²²⁴ This flexible approach permits us to imagine a case where a court would conclude a reasonable person in the seller's position should have known an unsophisticated mom and pop buyer – *because* of their lack of sophistication – did not intend to solicit the seller's rolling terms, especially if the rolling contract usage is not common to the particular trade.

Of course, when considering intent, courts would have to be mindful of the duty that Article 9(2) creates to know about certain usages.²²⁵ But this Note urges courts to be just as flexible in determining what the parties *should* know about such usages.

B. Domestic Law Will Remain Available to Police Substantive Terms of the Contract.

If the shrinkwrap form's terms were sufficiently substantively egregious, a court applying the CISG might consider the buyer's failure to use her option to withdraw as *some* evidence (from the standpoint of a reasonable, nonexploitative seller) that she did not feel bound by the terms because she never solicited them. Still, because the CISG does not empower courts to police unfair terms,²²⁶ courts applying it can only use substantive unfairness if there are also other reasons to think that the buyer did not solicit the form.

Bending intent to police terms *for their substance alone* approaches the circular. Instead, the CISG leaves that to domestic law.²²⁷ Where possible, courts should use domestic law to strike out egregious terms. For example, were U.S. state law to apply to the parties' contract but for the CISG, unconscionability²²⁸ would be available to the court. Regrettably, some buyers may suffer where the applicable domestic law does not permit the policing of substantively unfair terms.

Also, the CISG permits domestic law to invalidate practices it would otherwise recognize.²²⁹ That is, if applicable domestic law invalidates a usage – like shrinkwrap forms – the contract formed pursuant to that usage would not stand.²³⁰ Such a law could strike down any usage,

223. *Supra* notes 73-76 and accompanying text.

224. CISG, *supra* note 11, art. 8(3).

225. *See* discussion *supra* Part II.C.

226. SCHLECTRIEM, COMMENTARY, *supra* note 21, at 98-99.

227. *Supra* note 26 and accompanying text.

228. U.C.C. § 2-302 (1977). Even unconscionability may require both procedural and substantive unfairness. Arthur Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

229. HONNOLD, *supra* note 33, at 179; SCHLECHTRIEM, UNIFORM SALES LAW, *supra* note 24, at 32-33.

230. SCHLECHTRIEM, UNIFORM SALES LAW, *supra* note 24, at 32-33; Esser, *supra* note 103.

whether agreed under Article 9(1) or imposed under Article 9(2),²³¹ including a rolling contract.

Conclusion

The CISG will permit the formation of a rolling contract if the parties so intend. Under the CISG, if the buyer solicits the seller's shrinkwrap form, that form can constitute an offer or an enforceable contract modification. However, if the buyer did not intend to solicit the seller's shrinkwrap form, the shrinkwrap terms would drop out of the parties' agreement as an unenforceable request for contract modification, in violation of the CISG's prohibition on acceptance by silence or inactivity in itself. Courts applying the CISG should interpret the buyer's intent with an eye to preventing unfair surprise.

Alternatively, unless the parties have agreed to exempt themselves, the CISG will incorporate certain international usages common to their trade, if they knew or should have known about those usages. If the court were to find that rolling contracts constitute such a usage, the parties may be bound to their rolling contract. Still, courts applying the CISG should not hold the parties accountable to any usage without fair warning.

Either way, the CISG affords a court flexibility to protect the parties from procedural unfairness. But unfortunately, the CISG does not protect against substantive unfairness alone. Therefore, where applicable, courts should liberally use domestic policing doctrines to prevent the seller from imposing egregiously unfair terms on the buyer. Last, it is important to keep in mind that some Contracting States may have domestic laws to invalidate the rolling contract paradigm, despite the CISG.

231. SCHLECHTRIEM, *UNIFORM SALES LAW*, *supra* note 24, at 33.