COMMENT

ACHIEVING A UNIFORM LAW GOVERNING INTERNATIONAL SALES: CONFORMING THE DAMAGE PROVISIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND THE UNIFORM COMMERCIAL CODE

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1. INTRODUCTION

In 1980 the United Nations Commission on International Trade Law ("UNCITRAL") prepared and finalized the United Nations Convention on Contracts for the International Sale of Goods ("CISG"),[1] which went into effect on January 1, 1988.[2] The CISG provides a uniform text of law for countries involved in the international sale of goods. Only thirteen countries, including the United States, joined the CISG when it entered into force in 1988.[3] Today there are more than sixty member countries.[4]

Although the United States is a party to the CISG, the United

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1 Matt Jamison, Comment, *The On-Sale Bar and the New U.C.C. Article 2: Arguments for Defining a Commercial Offer for Sale Pursuant to the United Nations Convention on Contracts for the International Sale of Goods*, 5 N.C. J.L. & TECH. 351, 361 (2004).

2 Joanne M. Darkey, *A U.S. Court's Interpretation of Damage Provisions Under the U.N. Convention on Contracts for the International Sale of Goods: A Preliminary Step Towards an International Jurisprudence of CISG or a Missed Opportunity?*, 15 J.L. & COM. 139, 139 (1995).

3 *Id.*

4 Clayton P. Gillette, *The Law Merchant in the Modern Age: Institutional Design and International Usages Under the CISG*, 5 CHI. J. INT'L L. 157, 171 (2004).

States has also developed the Uniform Commercial Code ("U.C.C."). The National Council of Commissioners on Uniform State Laws and the American Law Institute created the U.C.C. to address U.S. domestic sales law.[5] The U.C.C. has become the primary source of domestic statutory law, and, because of its preeminence, the U.C.C. has been adopted by every state except Louisiana, although sometimes in modified form.[6]

Significant differences exist between the CISG and the U.C.C. For example, the CISG lacks a provision providing for the time and place for measuring damages, while the U.C.C. contains a single section that controls for both. Moreover, the CISG and the U.C.C. contain different tests for foreseeability. In addition to the differences between the CISG and the U.C.C., both are missing a provision providing either a specific interest rate on damages or the applicable method to calculate the interest rate.

The differences between the CISG and the U.C.C. become important because parties to a contract that is controlled by the CISG can contract out of or around provisions of the CISG and can decide to be bound by another source of law such as the U.C.C.[7] This Comment focuses specifically on the damage sections of the CISG and recommends that parties to a contract governed by the CISG should either include additional damage-related provisions in their contract to respond to the sections missing in the CISG or decide to be bound by another source of law such as the U.C.C. Furthermore, this Comment analyzes how legislators should try to conform the CISG and the U.C.C. so that the CISG's goal of a uniform international sales law will become a reality.

Section 2 will provide background to the CISG, including its application and scope. Section 3 will discuss the implications of the CISG's failure to specify a time or a place for measuring damages. Section 3 will also compare the CISG to the U.C.C. as the U.C.C. contains a section providing the time and place for measuring the loss. Section 4 will compare the subjective and objective tests for foreseeability contained in the CISG with the objective test for foreseeability in the U.C.C. and the *Restatement (Second) of Contracts*. Section 5 will examine the lack of an interest rate calculation

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[5] Jamison, *supra* note 1, at 357.

[6] *Id.*

[7] United Nations Convention on Contracts for the International Sale of Goods art. 6, Apr. 10, 1980, 19 I.L.M. 671 (entered into force Jan. 1, 1988) [hereinafter CISG].

provision or fixed interest rate in both the CISG and the U.C.C. Section 6 will discuss whether buyers and sellers should subject themselves to the CISG defaults or whether they should choose to be bound by another source of law, such as the U.C.C., either partly or entirely. Section 6 will also look at whether buyers and sellers should include other related damage provisions in their contract. Section 7 will advise how the CISG and the U.C.C. can potentially be changed to increase international conformity.

2. BACKGROUND AND SCOPE OF THE CISG

2.1. Background of the CISG

The CISG is a multilateral treaty that went into effect in 1988; current contracting parties include the United States and more than sixty other countries.[8] However, the International Institute for the Unification of Private Law ("UNIDROIT") made the decision to unify the law governing the international sale of goods in 1930.[9] UNIDROIT began preparation for a draft document in 1934,[10] and by 1936 UNIDROIT had completed a draft uniform law on international contracts.[11] The initial work "reflected the concepts of the comparative law prevailing at that time in the Western World."[12] However, the Second World War led to an interruption of UNIDROIT's work.[13] After the war ended, work resumed on the uniform international sales law and in 1964 a diplomatic conference at the Hague led to the creation of the Uniform Law on the International Sale of Goods ("ULIS") and the Uniform Law on the Formation of Contracts for the International Sale of Goods

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[8] Gillette, *supra* note 4, at 171.

[9] Suthiphon Thaveechaiyagarn, An Evaluation of the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Third World Perspective 5 (1993) (unpublished S.J.D. dissertation, University of Pennsylvania) (on file with Biddle Law Library, University of Pennsylvania Law School).

[10] E. Allan Farnsworth, *Formation of International Sales Contracts: Three Attempts at Unification*, 110 U. PA. L. REV. 305, 306 (1962).

[11] E. Allan Farnsworth, *Formation of Contract, in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS § 3.02 (Nina M. Galston & Hans Smit eds., 1984).

[12] U.N. GAOR, 35th Sess., 12th plen. mtg. at 4, U.N. Doc. A/CONF.97/SR.12 (Apr. 11, 1980).

[13] *United Nations Convention on Contracts for the International Sale of Goods: Note by the Secretariat*, 1988 Y.B. COMM'N ON INT'L TRADE L. 109, U.N. Doc. A/CN.9/307.

("ULFC").[14] ULIS was designed to regulate the international sale of goods, whereas ULFC's purpose was to regulate the formation of international sales contracts.[15]

Although UNIDROIT attempted to achieve worldwide participation in the development of ULIS and ULFC, essentially the only participating countries were within western Europe.[16] As a result of the limited geographic regions that participated in the development of ULIS and ULFC, the two conventions fell short of their expectations.[17] In fact, the United States and France never ratified either ULIS or ULFC.[18] The conventions remain in force, but even today most of the contracting states are from western Europe.[19]

Thus, although ULIS and ULFC have their own value, it soon became apparent that a single worldwide convention governing the international sale of goods was necessary.[20] This realization resulted in the establishment of UNCITRAL, whose purpose was "to promote 'the progressive harmonization and unification of the law of international trade.'"[21] After soliciting feedback on ULIS and ULFC from governments,[22] UNCITRAL set up a working group,

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14 AMERICAN BAR ASS'N SECTION OF INT'L LAW AND PRACTICE, THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS: A HANDBOOK OF BASIC MATERIALS 3 (Daniel Barstow Magraw & Reed R. Kathrein eds., 2d ed. 1990).

15 PAUL VOLKEN & PETAR SARCEVIC, INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 2 (1986).

16 JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 50 (2d ed. 1991); *see also* U.N. GAOR, 35th Sess., 12th plen. mtg. at 4, U.N. Doc. A/CONF.97/SR.12 (Apr. 11, 1980). ("After the Second World War, decolonization and the appearance on the scene of a number of socialist States had given world-wide scope to the question of unified law, but the Western States had still played a predominant role in preparing the Uniform Law on the International Sale of Goods (ULIS) . . . .").

17 *See United Nations Convention on Contracts for the International Sale of Goods: Note by the Secretariat*, *supra* note 13, at 109. ("Almost immediately upon the adoption of the two conventions there was wide-spread criticism of their provisions as reflecting primarily the legal traditions and economic realities of continental Western Europe, which was the region that had most actively contributed to their preparation.").

18 PETER SCHLECHTRIEM, UNIFORM SALES LAW: THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 18 (1986).

19 VOLKEN & SARCEVIC, *supra* note 15, at 2.

20 HANS VAN HOUTTE, THE LAW OF INTERNATIONAL TRADE 125 (1995).

21 HONNOLD, *supra* note 16, at 50.

22 John Honnold, *Draft Convention on Contracts for the International Sale of Goods: An Overview*, 27 AM. J. COMP. L. 223, 225 (1979). Many countries felt ULIS and Uniform Law on the Formation of Contracts for the International Sale of Goods ("ULFC") "were unacceptable because of serious technical flaws

composed of countries that represented different regions in the world, whose purpose was to determine what modifications to ULIS and ULFC would result in greater acceptance of the conventions by countries outside western Europe.[23] UNCITRAL decided to draft a single new convention whose purpose would be to regulate the formation of international sales contracts while also providing the substantive rules of international sales law.[24]

The first draft of the new convention was finished in January of 1976 and was ratified in June of 1977.[25] The draft convention was deliberated in 1978 and incorporated into the substantive sales law as the 1978 Draft Convention.[26] The 1978 Draft Convention then formed the basis for the work of the United Nations Conference on Contracts for the International Sale of Goods,[27] which was attended by representatives of sixty-two countries and eight international organizations.[28] Finally, in April of 1980, the CISG was adopted, and on January 1, 1988, the Convention went into effect.[29]

Unlike ULIS and ULFC, which were adopted primarily by a limited number of western European countries, the CISG currently has more than sixty member countries throughout the world.[30] One possible explanation for this wider acceptance is that countries from various regions were involved in the drafting of the CISG, so the CISG can be seen as an attempt at reconciling different legal

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with respect to policy and clarity." *Id.*

[23] C.M. BIANCA ET AL., COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 5-6 (1987); *see also* Thaveechaiyagarn, *supra* note 9, at 6 (explaining that the United Nations Commission on International Trade Law ("UNCITRAL") decided to reexamine ULIS and ULFC "in order to make them both globally acceptable").

[24] VAN HOUTTE, *supra* note 20, at 125. The decision to create a single convention came after the working group separately revised ULIS (embodied in a Draft Convention on the International Sale of Goods) and ULFC (embodied in a Draft Convention on the Formation of Contracts for the International Sale of Goods). *See also* Honnold, *supra* note 22, at 226 (stating that the Commission reviewed and combined the two separate drafts of ULIS and ULFC into a single Draft Convention that dealt with both sales contract formation and contractual parties' substantive rights).

[25] SCHLECHTRIEM, *supra* note 18, at 19.

[26] *Id.*

[27] *Id.*

[28] BIANCA ET AL., *supra* note 23, at 6.

[29] Jeffrey S. Sutton, Comment, *Measuring Damages Under the United Nations Convention on the International Sale of Goods*, 50 OHIO ST. L.J. 737, 738 (1989).

[30] Gillette, *supra* note 4, at 171.

traditions regarding the international sale of goods.[31] Regardless of the reason, the CISG has succeeded in accomplishing what ULIS and ULFC were never able to do—it regulates both the formation of international sales contracts and provides the substantive law governing international sales for over sixty nations in one concise document.

2.2. Scope of the CISG

The purpose of the CISG is to create a uniform international sales law.[32] Article 1(1) of the CISG sets out when the CISG applies: "This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State."[33] However, instead of creating a single court that would hear all cases arising under the CISG, the drafters decided that domestic courts or arbitration panels would interpret the provisions.[34] As a result of the numerous courts that interpret the CISG, the goal of a uniform international sales law has been somewhat hampered.

When a country decides to join the CISG, the CISG becomes part of its domestic law.[35] As a result, contracts between parties with businesses in different contracting countries are automatically covered by the CISG.[36] However, under article 6, parties to a contract governed by the CISG can decide to opt out or decide to be bound only by certain CISG provisions.[37] If parties to a contract opt out of part or all of the CISG provisions, they can decide to be governed by another set of rules, such as the U.C.C. However, the reverse is not true. Contracting parties whose contract is subject to the U.C.C. would not decide to be governed by the CISG because

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31 VAN HOUTTE, *supra* note 20, at 126.

32 FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION FOR THE INTERNATIONAL SALE OF GOODS 9 (1992).

33 CISG, *supra* note 7, art. 1, at 672.

34 Darkey, *supra* note 2, at 140.

35 Liu Chengwei, *Remedies for Non-Performance: Perspectives from CISG, UNIDROIT Principles & PECL* (Sept. 2003), *available at* http://cisgw3.law.pace.edu/cisg/biblio/chengwei.html.

36 *Id.*; *see also* Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1027 n.1 (2d Cir. 1995) (finding that the CISG applied because the contract was silent as to choice of law and both parties were in different contracting countries).

37 CISG, *supra* note 7, art. 6, at 673.

the CISG aims to standardize international trade rather than domestic trade.[38] Furthermore, along with the buyers' and sellers' ability to contract out of part or all of the CISG, common usages, either between the contracting parties or usages that a reasonable person would normally consider to be part of the contract under similar circumstances, take precedence over the CISG.

Generally under article 1(1)(b) of the CISG, the Convention applies whenever choice-of-law rules lead to the application of the law of a country that is a party to the CISG.[39] However, under article 95, a country has the power to prevent the CISG from applying simply because the rules of private international law point to the law of a member nation.[40] Therefore, when the United States joined the Convention, it decided that article 1 would not apply to contracts between a party with a United States place of business and another party with a place of business in a country that is not a party to the CISG.[41]

By its own language, the CISG governs only contracts for international sales of goods. It leaves countries "free to continue regulating purely domestic relations according to their own special needs."[42] Because of the United States Constitution's Supremacy Clause, the CISG "prevails over state sales laws in international transactions to which the [CISG] applies."[43] However, as the CISG only applies to international sales of goods, the U.C.C. still applies if the choice-of-law analysis leads to U.S. domestic law.[44]

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38 ENDERLEIN & MASKOW, *supra* note 32, at 16.

39 CISG, *supra* note 7, art. 1(1)(b), at 672.

40 VAN HOUTTE, *supra* note 20, at 128.

41 AMERICAN BAR ASS'N SECTION OF INT'L LAW AND PRACTICE, *supra* note 14, at 1.

42 Thaveechaiyagarn, *supra* note 9, at 7.

43 Sutton, *supra* note 29, at 737.

44 *See* Peter Winship, *Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners*, 29 INT'L LAW. 525, 527 (1995) (referencing the United States' decision not to be bound by the CISG provision requiring application of the Convention if choice-of-law analysis points to domestic law of a contracting state).

3. TIME AND PLACE FOR MEASURING THE LOSS IN THE CISG AND THE U.C.C.

3.1. The CISG

Within the CISG, article 74 states the general rule for calculating damages:

> Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.[45]

As article 74 is essentially identical to ULIS article 82,[46] cases decided under ULIS article 82 can be helpful in interpreting CISG article 74.[47] However, article 74 is only invoked if articles 75[48] or 76[49] of the CISG do not apply.[50]

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[45] CISG, *supra* note 7, art. 74, at 688.

[46] *Compare* Convention Relating to a Uniform Law on the International Sale of Goods art. 82, July 1, 1964, 3 I.L.M. 855 [hereinafter ULIS] ("Where the contract is not avoided, damages for a breach of contract by one party shall consist of a sum equal to the loss, including loss of profit, suffered by the other party. Such damages shall not exceed the loss which the party in breach ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which then were known or ought to have been known to him, as a possible consequence of the breach of the contract."), *with* CISG, *supra* note 7, art. 74, at 688 (containing nearly identical language).

[47] *See* ALBERT H. KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 477 (1989) ("Because these articles are so similar, ULIS article 82 precedents may be regarded as relevant to interpretations of CISG article 74.").

[48] *See* CISG, *supra* note 7, art. 75 ("If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.").

[49] *See id.* art. 76 ("If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recover-

Thus, "[w]hereas Articles 75 and 76 apply only when the contract has been avoided, Article 74 applies whether or not the contract has been avoided."[51] If the contract has been avoided, then article 74 provides for the possibility of additional damages beyond those allowed under articles 75 and 76.[52]

Furthermore, article 74 by itself does not allow a claim for damages. Rather, it is applied when either article 45[53] (allowing the buyer to recover) or article 61[54] (allowing the seller to recover) establishes that the injured party is entitled to damages.

Article 74 is "designed to place the aggrieved party in as good a position as if the other party had properly performed the contract."[55] However, neither article 74 nor any other provision within the CISG provides a time and place for measuring loss. The absence of such a provision is likely to become an issue with transactions that involve goods whose prices fluctuate significantly.

Although there is no official commentary for the CISG and therefore no commentary about this problem, the Secretariat Commentary on the 1978 Draft Convention is often cited.[56] In fact, article 70 of the 1978 Draft is identical to the CISG's article 74.[57] Footnote 2 of the Secretariat Commentary on article 70 of the 1978 Draft Convention recognizes that no time or place for measuring the loss is specified in the article:

> Presumably it should be at the place the seller delivered the goods and at an appropriate point of time, such as the mo-

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able under article 74."). However, if "the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance." *Id.*

50 ENDERLEIN & MASKOW, *supra* note 32, at 300.

51 BIANCA ET AL., *supra* note 23, at 539.

52 *Id.*

53 CISG, *supra* note 7, art. 45 ("If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may . . . [c]laim damages as provided in articles 74 to 77.").

54 *Id.* art. 61 ("If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may . . . [c]laim damages as provided in articles 74 to 77.").

55 HONNOLD, *supra* note 16, at 503.

56 *See* KRITZER, *supra* note 47, at 2 ("[The Secretariat] Commentaries are the closest available counterpart to an Official Commentary on the Convention and, when they are relevant, constitute perhaps the most authoritative citations to the meaning of the Convention that one can find.").

57 *Id.* at 474.

> ment the goods were delivered, the moment the buyer learned of the non-conformity of the goods or the moment that it became clear that the non-conformity would not be remedied by the seller under article 35, 42, 43 or 44 [draft counterparts to articles 37, 46, 47 and 48, respectively], as the case may be.[58]

3.2. The U.C.C.

Although the CISG does not contain an article specifying the time and place for measuring damages, the U.C.C. does. U.C.C. § 2-713(1) provides for the time:

> Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach.[59]

U.C.C. §2-713(2) specifies the place: "Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival."[60]

3.3. Advice for Contracting Parties

Because of the lack of a time and place provision within the CISG, parties to a contract governed by the CISG should either

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[58] *Commentary on the Draft Convention on Contracts for the International Sale of Goods*, art. 70, cmt. 7 n.2, U.N. Doc. A/CONF.97/5 (Mar. 14, 1979) (*prepared by* The Secretariat).

[59] U.C.C. § 2-713(1) (2003); *see also* Kashi v. Gratsos, 790 F.2d 1050, 1056 (2d Cir. 1986) (finding that under New York commercial code § 2-713(1), a buyer of a breached contract can recover both the purchase price paid and "the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages"); Canusa Corp. v. A & R Lobosco, Inc., 986 F. Supp. 723, 731–732 (E.D.N.Y. 1997) (applying U.C.C. § 2-713(1) to show that if a buyer is a broker or reseller, consequential damages are recoverable).

[60] U.C.C. § 2-713(2) (2005).

choose to be bound by U.C.C. § 2-713 or draft a clause into the contract that specifies a time and place for measuring damages.

4. FORESEEABILITY TESTS OF THE CISG AND THE U.C.C.

4.1. The Subjective and Objective Tests of the CISG

Article 74 specifies that:

> [D]amages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.[61]

This statement contains both a subjective ("foresaw") and an objective ("ought to have foreseen") component. The foreseeability test of article 74 is a derivative of the common law rule from *Hadley v. Baxendale*.[62] The test "originates from the Anglo-American concept of the 'remoteness of damage.'"[63] The foreseeability portion of article 74 deals with the possibility that in some circumstances the losses may be extreme and unpredictable.[64] Thus, the party who breaches cannot be held liable for all damages resulting from his breach, but only for the damages he foresaw or should have foreseen.

The subjective component of article 74 becomes important when a party to a contract knows of unusual losses that might occur in the case of a later breach. Therefore, at the end of forming a contract, if a party feels "that breach of the contract by the other party would cause him exceptionally heavy losses or losses of an unusual nature, he may make this known to the other party with the result that if such damages are actually suffered they may be

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[61] CISG, *supra* note 7, art. 74.

[62] Hadley v. Baxendale, (1854) 156 Eng. Rep. 145 (Exch.) (describing a two prong test for damages: (1) a party always gets damages arising in the usual course of the contract that may have been reasonably foreseen at the time the contract was made; and (2) the party can also get unusual or special damages if the damages were brought to the attention of the other party at the time of contracting).

[63] VAN HOUTTE, *supra* note 20, at 146 n.23.

[64] HONNOLD, *supra* note 16, at 505.

recovered."[65]

With the objective portion of the foreseeability test of the CISG, the damages a reasonable person in the same situation would have anticipated become important.[66] Therefore, because of the objective component of the damages provision, a party who breaches a contract cannot avoid paying restitution by claiming that he did not foresee the damage.[67]

As article 82 of ULIS contains the same subjective and objective foreseeability rule, cases decided under ULIS may reveal what judges generally find to be foreseeable or not foreseeable. For example, the cost for substitute goods; the loss of resale profit; the additional costs for transportation, storage, and insurance; and the loss of clients by the buyer because of defective goods have all been found by courts to be foreseeable damages.[68] However, some courts have found that a reduction in the amount of currency received because of an exchange rate decline is not a foreseeable damage of a delay in payment.[69] Finally, the few United States courts that have applied the foreseeability test in article 74 of the CISG have generally been consistent with the holdings of the courts applying ULIS.[70]

4.2. The Objective Test of the U.C.C. and the Restatement (Second) of Contracts

In comparison to article 74 of the CISG, U.C.C. § 2-715(2)(a) is stated only in objective terms. Section 2-715(2)(a) provides that consequential damages from the seller's breach include "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise."[71] Similarly, section 351(1) of the *Restatement (Second) of Contracts* only

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[65] KRITZER, *supra* note 48, at 476–77.

[66] ENDERLEIN & MASKOW, *supra* note 32, at 301.

[67] *Id.* at 302.

[68] *Id.*

[69] *See id.* ("Only the loss suffered from a decline in the currency which occurred as a consequence of the delay in payment was predominately rejected as not foreseeable.").

[70] *See, e.g.*, Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1030 (2d Cir. 1995) (granting the buyer handling and storage costs incurred for storing defective compressors based on a finding that the expenses were foreseeable).

[71] U.C.C. § 2-715(2)(a) (2005).

allows for recovery for damages that the buyer or seller had "reason to foresee as a probable result of the breach when the contract was made."[72]

Thus, the extent to which consequential damages are allowed is foreseeable "probable" damages under the *Restatement*[73] and "any loss" under the U.C.C.[74] However, under the CISG, the extent to which consequential damages should be foreseen is as a "possible consequence of the breach."[75] One commentator believes that because of the language difference between the U.C.C. and the *Restatement*, the CISG and the U.C.C. are "closer in their textual standards."[76] However, even though the U.C.C. does not define "reason to know," in other statutory authority and certain restatements, the phrase has been defined as an "awareness of substantial probability."[77] In comparison, "[t]he Convention's standard can . . . be said to be awareness of possible consequences, rather than awareness of substantial probability."[78] Therefore, although the CISG and the U.C.C. are similar as to the extent to which consequential damages are allowed, they differ in their degree of required awareness with the CISG's approach arguably being easier for the injured party to meet.

4.3. Advice for Contracting Parties

Because of the subjective component of article 74's foreseeability test, parties to a contract governed by the CISG who could potentially have unusually large losses if the contract is breached may wish to make these dangers known to the other party so that the subjective prong will be implicated. However, some commentators feel that notifying the other party also creates objective fore-

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72 RESTATEMENT (SECOND) OF CONTRACTS § 351(1) (1981).

73 *Id.*

74 U.C.C. § 2-715(2)(a).

75 CISG, *supra* note 7, art. 74.

76 Eric C. Schneider, *Consequential Damages in the International Sale of Goods: Analysis of Two Decisions*, 16 U. PA. J. INT'L BUS. L. 615, 634 (1995) (citing E. Allan Farnsworth, *Damages and Specific Relief*, 27 AM. J. COMP. L. 247, 253 (1979) who compares the former version of article 74 (draft article 70) of the CISG to the RESTATEMENT (FIRST) OF CONTRACTS § 330 (1932) and the U.C.C. § 2-715(2) (1978) to find that although at first it appears that the language within the CISG casts a wider net then the *Restatement*, the "in light of the facts" language actually cuts back the scope to at least that of the U.C.C.).

77 KRITZER, *supra* note 47, at 479.

78 *Id.*

seeability, so that the difference between the subjective and objective tests of the CISG and the objective tests of the U.C.C. and the *Restatement* is minimized.[79]

5. CALCULATION OF INTEREST

5.1. The CISG Allows for Both Buyers and Sellers to Receive Interest Awards but Does Not Include an Interest Rate Calculation Formula

The CISG does not provide a specific method or fixed rate for calculating interest. Under article 78 of the CISG, "[i]f a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74."[80] Thus, article 78 allows for interest to be recovered, but does not provide a method for calculating the appropriate interest rate or a time when interest should be calculated from.[81]

The lack of an interest rate calculation method within either article 78 or the rest of the CISG has been an issue in many cases litigated under the CISG. One scholar found that this missing provision has been the subject of up to thirty percent of the total worldwide CISG cases.[82]

Article 58 of UNCITRAL's 1976 Working Draft of the CISG and its commentary provided a method for computing interest, but buyers were not entitled to pre-judgment interest on damages.[83] Although the current version of the CISG allows for interest recovery by both buyers and sellers,[84] the interest rate calculation within the 1976 Working Draft is informative. The interest awards for sellers allowed under the 1976 Working Draft were computed as

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[79] *See* Schneider, *supra* note 76, at 635 ("In situations where the breaching party knows of unusual losses which might occur in case of a later breach, there is minimal difference between the objective and the subjective standards."); Sutton, *supra* note 29, at 744 ("More likely than not . . . such notice would also create objective foreseeability today under the Uniform Commercial Code and Restatement, thus minimizing the differences between the article 74 and American view of foreseeability.").

[80] CISG, *supra* note 7, art. 78.

[81] SARCEVIC & VOLKEN, *supra* note 15, at 229–30.

[82] Tom McNamara, *U.N. Sale of Goods Convention: Finally Coming of Age?*, COLO. LAW., Feb. 2003, at 11, 19.

[83] Schneider, *supra* note 76, at 646 n.149.

[84] CISG, *supra* note 7, art. 78.

"the higher of either the official discount rate plus one percent in the country of the seller's principle place of business or the rate for 'unsecured short-term commercial credits' in that country."[85] Furthermore, the 1976 Working Draft's computation of interest is similar to the approach taken by ULIS article 83:

> Where the breach of contract consists of delay in the payment of the price, the seller shall in any event be entitled to interest on such sum as is in arrear at a rate equal to the official discount rate in the country where he has his place of business or, if he has no place of business, his habitual residence, plus 1%.[86]

One explanation for the lack of an interest rate calculation method in the final version of the CISG involves the large number of countries that participated in drafting the CISG. Many countries treat interest differently because of their different economic systems, with the greatest distinction being between capitalist and socialist countries.[87] In fact, some countries that have joined the CISG even bar interest recovery because of their religious rules.[88] When the CISG conference took place, "there were serious differences between the Western industrialized countries, where the amount of interest is formed in the market (naturally influenced by political measures) and had at the time reached considerable amounts, and most of the at the time called socialist countries where the interest

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[85] Sutton, *supra* note 29, at 749.

[86] ULIS, *supra* note 46, art. 83.

[87] Sutton, *supra* note 29, at 749.

[88] *Id.* For example, Middle Eastern countries, such as Saudi Arabia, Qatar, Oman, and North Yemen have strict prohibitions against awarding interest. Samir Saleh, *The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East, in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 340, 348–49 (Julian D.M. Lew ed., 1987). This ban on interest recovery is based on Islamic law which considers the charging of interest or *riba* to be an unearned or unjustified profit that is forbidden because "receiving something in exchange for nothing is immoral." Christopher Frank, *Turkey's Admittance to the European Union: A Keystone Between Continents*, CURRENTS: INT'L TRADE L.J., Summer 2002, at 66, 71. Additionally, Jewish law forbids interest, but if the transaction involves a non-Jewish party, then an interest award is allowed. T. S. Twibell, *Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) Under Shari'a (Islamic Law): Will Article 78 of the CISG be Enforced When the Forum is in an Islamic State?*, 9 INT'L LEGAL PERSP. 25, 27 (1997).

was fixed by law and relatively low."[89] Western industrialized countries pushed for the interest to be set according to the creditor's country, which "would have meant that debtors from those countries would have had to pay low interest to creditors from Eastern countries, but by contrast, debtors from the latter countries high interest."[90] "The differing political, economic and religious views made it impossible to agree upon a formula for the rate of interest."[91] Therefore, the drafters chose to simply allow for interest to be collected, but decided against including any specific rate or method of calculation within the CISG. Thus, article 78 "represents an uneasy compromise between those who were altogether opposed to an interest provision and those who wanted a statement, however bland, at least recognizing the right."[92]

The lack of an interest rate calculation formula can create problems for courts that must decide on a method for calculating the interest if an interest award is appropriate. Scholars and courts have advocated for and applied numerous approaches to deal with the missing provision. For instance, courts can decide to follow the method used in article 58 of UNCITRAL's 1976 Working Draft. However, because there is no interest rate calculation in the CISG and because article 58 of the Working Draft has no binding force, "the court may resort to conflict of law rules and determine the method for calculating interest with reference to the appropriate domestic law."[93] For example, in *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*,[94] the Northern District of Illinois decided to apply choice-of-law rules used by federal courts because the parties had provided insufficient information to address the interest rate issue and because courts applying the CISG did not use a single method of calculating the interest rate because of the provi-

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[89] ENDERLEIN & MASKOW, *supra* note 32, at 310.

[90] *Id.*

[91] Franco Ferrari, *Uniform Application and Interest Rates Under the 1980 Vienna Sales Convention*, 24 GA. J. INT'L & COMP. L. 467, 473–474 (1995). In addition to conflicting religious views regarding the payment of interest, some proposals at the 1978 Conference expressed concern that "a special provision on interest was unnecessary because the lost use of the capital could be recovered as damages." SCHLECHTRIEM, *supra* note 18, at 99.

[92] JACOB S. ZIEGEL & CLAUDE SAMSON, REPORT TO THE UNIFORM LAW CONFERENCE OF CANADA ON CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS art. 78, cmt. 1 (1981), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/articles/english2.html.

[93] Sutton, *supra* note 29, at 750.

[94] 320 F. Supp. 2d 702, 717 (N.D. Ill. 2004).

sion missing from article 78.[95] Applying choice-of-law rules, the court applied Illinois law, which was the law of the forum state.[96] The court stated that "[u]sing the forum's interest rate is a common choice in CISG cases, notwithstanding its tension with the CISG's goal of promoting international uniformity."[97]

The statement made by the Illinois court demonstrates one of the main problems with the lack of an interest rate calculation method in the CISG. The goal of the CISG is to promote a unified legal approach for the international sale of goods.[98] However, because of the missing provision along with the lack of a single judicial body that hears CISG cases, buyers and sellers in similar situations can be awarded drastically different amounts of interest simply because their case is heard by courts in different countries that apply different methods to determine the applicable interest amount. Nevertheless, because of the tension between the member countries of the CISG regarding their differing views, the drafters essentially had no other option except to include the provision allowing for interest, but leave the interest rate calculation method up to the court applying the CISG.

Other proposed and implemented approaches to determining the rate of interest include applying the private international law of the forum that would govern the contract in the absence of the CISG,[99] applying the law of the creditor's place of business,[100] applying the law of the debtor's place of business,[101] applying the law of the currency in which payment of the purchase price was to be made,[102] and regulating by a usage widely known and regularly observed in international sales within the forum state.[103] Other possible methods include choosing an interest rate that fully com-

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95 *Id.* at 716.

96 *Id.*

97 *Id.*

98 ENDERLEIN & MASKOW, *supra* note 32, at 1.

99 Christian Thiele, *Interest on Damages and Rate of Interest Under Article 78 of the U.N. Convention on Contracts for the International Sale of Goods*, 2 VINDOBONA J. INT'L COM. L. & ARB. 3 (1998), *available at* http://www.cisg.law.pace.edu/cisg/biblio/thiele.html; *see also* ENDERLEIN & MASKOW, *supra* note 32, at 312 (stating that generally "the subsidiary law applicable to the sales contract" will apply when the parties have not agreed to the appropriate rate of interest).

100 Thiele, *supra* note 99.

101 *Id.*

102 *Id.*

103 *Id.*

pensates the aggrieved party by means of the aggrieved party's actual credit costs,[104] applying the law of the forum state to determine the interest rate in a specific case,[105] determining the appropriate interest rate based on the national law designated by the rules of private international law,[106] and finally following the UNIDROIT Principles article 7.4.9 calculation method[107]:

> The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.[108]

5.2. *The U.C.C. Does Not Have an Interest Rate Calculation Provision but Rather Looks to State Law for the Appropriate Interest Rate*

As with the CISG, the U.C.C. also does not contain a fixed interest rate or an interest rate calculation method. Under the U.C.C. the choice-of-law provision for article 2 is:

> (c) Except as otherwise provided in this section:
>
> > (1) an agreement by parties to a domestic transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State is effective, whether or not the transaction bears a relation

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104 *Id.*

105 *Id.*; *see also* Delchi Carrier, SpA v. Rotorex Corp., No. 88-CV-1078, 1994 WL 495787, at *7 (N.D.N.Y. Sept. 9, 1994) (awarding prejudgment interest based on the United States Treasury Bill rate as CISG article 78 does not provide for an appropriate rate).

106 THIELE, *supra* note 99.

107 *Id.*

108 INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 26 (2004), *available at* http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf.

> to the State designated; and
>
> (2) an agreement by parties to an international transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State or country is effective, whether or not the transaction bears a relation to the State or country designated.
>
> (d) In the absence of an agreement effective under subsection (c) . . . the rights and obligations of the parties are determined by the law that would be selected by application of this State's conflict of laws principles.[109]

Courts will either apply U.C.C. § 1-301 or will look to the agreement of the parties to determine the appropriate state and apply that state's fixed interest rate or method of calculating the interest. If a court decides to follow § 1-301, the court will apply the law of the state it determines to be appropriate based on conflict of law principles.[110] Therefore, individual state statutes generally provide the applicable rate of interest or interest calculation method, but the U.C.C. itself does not contain a provision.

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[109] U.C.C. § 1-301 (2005). It should also be noted that if one of the parties to the transaction is a consumer, which is defined in U.C.C. § 1-201(b)(11) (2005) to be "an individual who enters into a transaction primarily for personal, family, or household purposes," then two additional rules apply. First, "[a]n agreement referred to in subsection (c) [of U.C.C. § 1-301] is not effective unless the transaction bears a reasonable relation to the State or country designated." *Id.* § 1-301(e). Second, "[a]pplication of the law of the State or country determined pursuant to subsection (c) or (d) may not deprive the consumer of the protection of any rule of law governing a matter within the scope of this section, which both is protective of consumers and may not be varied by agreement: (A) of the State or country in which the consumer principally resides, unless subparagraph (B) applies; or (B) if the transaction is a sale of goods, of the State or country in which the consumer both makes the contract and takes delivery of those goods, if such State or country is not the State or country in which the consumer principally resides." *Id.*

[110] *See, e.g.*, Associated Metals & Minerals Corp. v. Sharon Steel Corp. 590 F. Supp. 18, 22 (S.D.N.Y. 1983) (applying U.C.C. § 1-105 (1978), the former version of U.C.C. § 1-301 (2005), and Pennsylvania law to find the applicable rate of interest to be six percent per annum).

5.3. Drafting Advice for Contracting Parties

Because of the numerous potential methods courts and scholars have advocated for and applied to calculate the rate of interest under the CISG, parties to a contract governed by the CISG are advised to include within their contract a calculation method or a specific interest rate. Otherwise, if a breach of contract does occur, the parties may be subject to the will of the court in determining the amount of interest awarded.

6. BUYERS AND SELLERS SHOULD CONTRACT AROUND CERTAIN CISG PROVISIONS AND INCLUDE OTHER PROVISIONS IN THEIR CONTRACT

Because of the clauses missing from the damage articles within the CISG, buyers and sellers to a contract governed by the CISG should bargain for certain additional provisions to be included within their contract. With regard to the missing provision providing the time and place for measuring the loss, parties can eliminate the potential ambiguity by including a clause in their contract that specifies time and place reference points for measuring damages. Alternatively, parties could decide to be bound by the U.C.C.'s time and place for measuring the loss, as promulgated in U.C.C. § 2-713(1) & (2).

The differing foreseeability tests within the CISG and the U.C.C. also pose a potential problem. Because the CISG applies both to buyers and sellers whereas the U.C.C. only covers sellers, buyers are better protected under the CISG than the U.C.C. However, to implicate the subjective prong of the CISG, both buyers and sellers should disclose any special circumstances which could potentially cause unusually large damages.

Finally, because a large percentage of the cases litigated under the CISG involve the missing interest rate calculation, as a precautionary measure, parties should include an interest rate calculation provision within their contract. The buyer and seller should bargain to determine the applicable interest rate: whether it is based on the creditor's place of business, the debtor's place of business, or some other method. Alternatively, the parties could negotiate to determine a fixed interest rate that will govern their contract.

As parties to a contract generally want to be able to assess their potential exposure should they decide to or have to breach their contractual duties, by following the guidelines expressed above, a breaching party will lessen their uncertainty regarding their liabil-

ity.

7. CONFORMING THE CISG AND THE U.C.C.

The purpose behind promulgating the CISG was to create "a single uniform convention to govern the international sale of goods"[111] that would be adopted by more countries then those who adopted ULIS and ULFC.[112] However, the ability of buyers and sellers to contract around either part or all of the CISG can frustrate this purpose. Furthermore, because these contracting parties can decide to be bound by the U.C.C., differences between the CISG and the U.C.C. further prevent the uniformity desired by the CISG. Therefore, arguably, the provisions within the CISG and the U.C.C. should be conformed to achieve the CISG's purpose of a uniform international sales law.

As the U.C.C. contains a time and place provision for measuring loss within U.C.C. § 2-713,[113] amending the CISG to include a time and place provision similar to that within the U.C.C. would promote consistency between international sales contracts governed by the CISG and contracts that the parties have decided should be governed by the U.C.C.

Additionally, the different tests for foreseeability within the CISG and the U.C.C. can also cause problems in achieving a uniform international sales law. Because of the subjective component of the CISG, parties who breach a contract can be held liable for greater damages than those allowed under the objective foreseeability test of the U.C.C. Arguably, however, notifying the other party to implicate the subjective prong will also implicate the objective prong of the foreseeability test.[114] Regardless of whether the objective prong will be implicated, since the goal behind the CISG is uniformity, the subjective prong of the CISG should also be added to the U.C.C. Once the U.C.C. is changed, then buyers and sellers to a contract governed by either the CISG or the U.C.C. will be able to inform the other contracting party at the end of the formation of the contract about potentially large damages that might arise if the other party breaches.

Finally, a clause should be inserted in both the CISG and the

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111 Jamison, *supra* note 1, at 361.

112 BIANCA ET AL., *supra* note 23, at 5-6.

113 U.C.C. § 2-713 (2005).

114 *See supra* note 79 and accompanying text.

U.C.C. indicating which country or state's law will provide the appropriate interest rate. This clause should specify that the interest rate is to be calculated based on the seller's place of business or, if the seller has no place of business, the seller's domicile.

Furthermore, both the CISG and the U.C.C. should allow for this clause to be contracted around. This will of course affect uniformity. However, as both the CISG and the U.C.C. promote freedom of contract, conforming both documents should not interfere with the parties' ability to contract around provisions. Furthermore, when parties do not contract around this interest rate provision, there will be uniformity regardless of whether the CISG or the U.C.C. governs the contract.

Conforming these provisions within the CISG and the U.C.C. is just one change that is necessary to better implement the CISG's goal of uniformity. There are many other places where the CISG and the U.C.C. differ. However, by changing these provisions that specifically deal with damages, awards received by an injured party will be more similar regardless of whether the CISG or the U.C.C. applies.

8. CONCLUSION

Generally, there are significant differences between the CISG and the U.C.C. which can affect damage awards received by injured parties. Buyers and sellers who are parties to a contract governed by the CISG should be sure to include a specific provision within their contract whenever there is a discrepancy between the CISG and the U.C.C. Furthermore, contracting parties should bargain for a provision that provides the fixed interest rate or calculation method that will govern their contract. Finally, legislators and representatives should take steps to conform the CISG and the U.C.C. so that contracts for international sales of goods will be governed by similar legislation regardless of whether the CISG or the U.C.C. applies. By following these guidelines and implementing this advice, the CISG will finally accomplish the purpose that it was drafted for: uniformity of the law of international sales.