CHAPTER 12

HARMONIZING PERFORMANCE STANDARDS UNDER THE UNIFORM COMMERCIAL CODE AND THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS: A ROLE FOR UNCITRAL?

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I WARRANTIES AND THE ORIGINS OF MODERN COMMERCIAL LAW

Over a period of about three centuries after the collapse of the Roman Empire in Western Europe and the splitting of the cultural unity of the Mediterranean region with the rise of Islam, long-distance trade withered almost to the vanishing point.[1] Along with this decline came the virtual disappearance of the highly developed system of Roman law formerly prevalent in Western Europe.[2] In this world, there was little need for developed forms of commercial law and little knowledge of where one might find such law. When trade did gradually revive in Western Europe, merchants began to look for effective legal mechanisms for ordering their businesses. The merchants, however, did not turn to the rediscovered Roman law or the widespread Germanic customary law. Instead they established their own

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1 See, eg, John Pryor "The Mediterranean Breaks up: 500-1000" in David Abulafia (ed) *The Mediterranean in History* (Thames & Hudson, London, 2003) 155-82; see generally Fernand Braudel *The Mediterranean and the Mediterranean World in the Age of Philip II* (1st ed, French, 1949).

2 Peter Stein *Roman Law in European History* (Cambridge University Press, 1999) 29-42.

courts and laws in towns and at trade fairs.[3] This customary law of merchants (*lex mercatoria*, known as the Law Merchant in the English sources) seems to have originated in the Italian towns where the revival of trade developed most quickly.[4] Merchants from these towns spread their customs (and their vocabulary) across Western Europe, creating more or less unified practices followed by merchants of every kind across Europe beginning as early as the Eleventh Century.[5]

While the *lex mercatoria* was never fully unified,[6] its concepts and procedures did exhibit a high degree of similarity across the continent.[7] The concepts embodied in the *lex mercatoria* were much less formal and rigid than Roman-based law, the common law, or other forms of Germanic customary law.[8] This body of law was applied in merchant courts elected by town guilds or by the merchants gathered in trade fairs, and enforced through informal sanctions (primarily the threat of boycott).[9] Eventually, the *lex mercatoria* was absorbed into the national legal systems. In France, for example, this was done by Jean-Baptiste Colbert with the *ordonnonce sur le commerce* (1673) (also known as the *Code Savary*);[10] in England, by Lord Mansfield in a series of precedents in the later eighteenth century.[11]

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3 See Mary Elizabeth Basile et al *Lex Mercatoria and Legal Pluralism: A Late Thirteenth-Century Treatise and its Afterlife* (Ames Foundation, Cambridge, Mass, 1998).

4 See generally Roberto Sabatino Lopez *The Commercial Revolution of the Middle Ages* (Prentice Hall, 1971).

5 Peter J Leeson "Contracts without Government" (2003) 18 Journal of Private Enterprise 35; Paul R Milgrom, Douglass C North, and Barry R Weingast "The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs" (1990) 2 Economic & Politics 1.

6 See Charles Donohue, Jr, "Medieval and Early Modern Lex Mercatoria: An Attempt at the Probatio Diabolica" (2004) 5 Chicago Journal of International Law 21; Emily Kadens "Order within Law, Variety within Custom: The Character of the Medieval Law Merchant" (2004) 5 Chicago Journal of International Law 39.

7 See John H Baker "The Law Merchant and the Common Law before 1700" (1979) 38 The Cambridge Law Journal 295; Leeson, above n 5.

8 See, eg, Wyndham Beawes *Lex Mercatoria: Or, A Complete Code of Commercial Law* (1752); Gerard Malynes Consvetvdo, Vei Lex Mercatoria, Or The Ancient Law Merchant (1622); see also Basile et al, above n 3.

9 Bruce L Benson "Law Merchant" in Peter Newman (ed) *The New Palgrave Dictionary of Economics and the Law* (1st ed, Palgrave Macmillan UK, 1998) 500.

10 *Édit du roi servant de règlement pour le commerce des négociants et marchands tant en gros qu'en detail, Ordonnance De 1673* available at <http://partages.univ-rennes1.fr/files/partages/Recherche/Recherche%20Droit/Laboratoires/CHD/Textes/Ordonnance1673.pdf>.

11 See, eg, *Alderson v Temple*, 98 Eng. Rep. 165 (KB 1768); *Carter v Boehm*, 97 Eng Rep 1162 (KB 1766); *Miller v Race*, 97 Eng Rep 398 (KB 1758); see generally S Todd Lowry "Lord Mansfield

The early dominance of the Italian traders gave rise to a heritage of names and ideas. Thus the center for banking and finance in London is still called "Lombard Street" (or "Lombard-street") after the north Italian gold smiths, bankers, and merchants who once lived and worked there.[12] They also provided the basic ideas and the vocabulary of commercial law and practice across Europe.[13] Perhaps the most important concept the Italians gave us, for example, was negotiability.[14] One of the important word the medieval Italians gave us was *guaranti* (pronounced "warrantee" in Italian) which survives in modern Italian as the word *guarantire*, meaning to promise or pledge. *Guaranti* established required performance standards in a commercial contract. The word survives in two forms in English in both legal usage and in every-day language: guaranty (sometimes spelled "guarantee"); and warranty. One more or less keeps the original spelling, and the other more or less keeps the original pronunciation, but both still convey the same meaning.

The ideas of warranty (or guaranty) continue as a prominent aspect of the American law governing the sale of goods, having been codified in the Uniform Sales Act of 1906 ("Uniform Sales Act")[15] and the Uniform Commercial Code of 1962 ("UCC").[16] Neither term "guaranty" nor "warranty" appear in the UN Convention on the International Sale of Goods of 1980 ("CISG"),[17] but the CISG does contain performance standards. The standards set by the UCC warranty provisions and the CISG's performance standards are not entirely identical, but, as we shall see, those familiar with the one system of legal rules or the other seem often to assume that they are.[18] Identifying the differences, how they originated, and why they persist is the subject of this chapter. The chapter will close with a few words about how the resulting confusions could be resolved or prevented, and

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and the Law Merchant: Law and Economics in the Eighteenth Century" (1973) 7 Journal of Economic Issues 605.

12 See generally Mary Irene Borer *The City of London: A History* (1st ed, D McKay Co, 1978).

13 Scott B MacDonald and Albert L Gastman *A History of Credit and Power in the Western World* (Transaction Publishers, 2004) at 73-92.

14 See, eg, *Smallwood v Woods*, 4 Ky (1 Bibb) 542 (1809); *see generally* Emily Kadens "Pre-Modern Credit Networks and the Limits of Reputation" (2015) 100 Iowa Law Review 2429.

15 National Commissioners of Uniform State Laws, Uniform Sales Act (1906) ("Uniform Sales Act").

16 Permanent Editorial Board, The Uniform Commercial Code (1962) ("UCC").

17 Final Act of the United Nations Conference on Contracts for the International Sale of Goods, Apr 10, 1980, UN Doc A/Conf. 97/18, with Annex ("CISG").

18 See the text below at n 70-72.

the possible role of UNCITRAL in bringing about a reconciliation between the two sets of rules.

II THE ROLE OF WARRANTIES IN AMERICAN LAW

The common law, ostensibly based on the *lex mercatoria*, embraced the standard of *caveat emptor* – "let the buyer beware."[19] By this theory, a buyer took all risks about deficient products unless the seller provided an express "warranty" – an explicit guaranty of the quality or qualities of the goods being sold.[20] American courts slowly evolved a supplemental set of performance standards that came to be called "implied warranties,"[21] although courts were often unclear as to whether they were basing the implied warranties on the actual or presumed intent of the parties to the contract of sale or upon a "constructive intent," ie, what the parties should have intended regardless of whether they actually intended the implied warranty or not.[22] These uncertainties were largely resolved by efforts to create nationally uniform commercial law through state legislation. The result is a pair of "uniform laws" that are law in a particular state only to the extent that they are enacted by the state's legislature. Thus the law on these topics in the United States is seldom entirely uniform, but thanks both to the uniform laws and some other unifying institutions, there are general patterns which apply in most cases and for which the uniform laws provide a more than adequate summary.

Real progress on the unification of the law of warranties in the United State came with the widespread enactment of the Uniform Sales Act, which was adopted by the National Commissioners of Uniform State Laws in 1906.[23] The Uniform Sales Act was enacted in thirty-four states of the then forty-eight states.[24] Later

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19 William S Holdsworth *A History of English Law* (2nd ed, 1937) at 69-70; Charles T LeViness "Caveat Emptor *vs* Caveat Venditor" (1943) 7 Maryland Law Review 177 at 182.

20 One of the classic statements of the doctrine of *caveat emptor* in the sale of goods context is found in *Barnard v Kellogg*, 77 US 383 (1870).

21 LeViness, above n 19, at 184. This process has only recently been extended from the sales of goods context to the sale of homes context in many states of the US. See, eg, Donald V Campbell "Forty (Plus) Years after the Revolution: Observations on the Implied Warranty of Habitability" (2013) 35 University of Arkansas at Little Rock Law Review 793; Edward V Crites and Joseph C Blanner "Builders Beware: Strict Liability for Hidden Defects in New Homes" (2016) 72 Journal of the Missouri Bar 12.

22 See, eg, Jarrod Wong "Arbitrating in the Ether of Intent" (2012) 40 Florida State University Law Review 165 at 171. ("As suggested by its name, constructive intent does not reflect any actual intent of the parties but is intent that courts will deem parties to possess".)

23 Uniform Sales Act, above n 15.

24 Richard E Speidel "Introduction to Symposium on Proposed Revised Article 2" (2001) 54 SMU Law Review 787.

modifications to the Uniform Sales Act were enacted by a somewhat shorter list of states.[25]

As originally enacted, the Uniform Sales Act provided that any express description (or other representation) or promise regarding the goods would make an express warranty to the extent of the promise or representation.[26] The Uniform Sales Act also incorporated a limited set of implied warranties in section 15:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose

(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of a merchantable quality.[27]

These two provisions created implied warranties of fitness for a particular purpose and of merchantability (fitness for the usual purposes) without regard to the intent of the seller, but rather by operation of law. The sole limitation on these implied warranties was that they could be "negatived" or varied by express agreement of the parties, or by a course of dealing between the parties, or by a custom binding on both parties.[28] Over the years, the notion that a seller's power to disclaim implied warranties, in whole or in part, was too expansive came to predominate. As a result, in 1941 the National Commissioners of Uniform State Laws put forward modifications to the Uniform Sales Act after an attempt to enact a federal (national) sales had failed.[29] These modifications precluded negation or modification "by general language of a contract" if a reasonable buyer would, despite such general language, in fact rely on the merchantable quality of the goods or on their fitness for a particular purpose.[30] Still attempting to strike a balance between the interests of buyers and sellers, the National Commissioners put forward yet another change in 1944, allowing the exclusion or modification of all implied warranties by language like "as is," "as they stand," "with all faults," or

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25 Ibid.

26 Uniform Sales Act, above n 15 at § 1.

27 Uniform Sales Act, above n 15 at § 15.

28 Uniform Sales Act, above n 15 at § 71.

29 Spiedel, above n 24 at 787-88.

30 National Commissioners of Uniform State Laws, Revised Uniform Sales Act (1941).

other terms that would commonly call the buyers' attention to the exclusion of all warranties, including implied warranties.[31]

The developments under the Uniform Sales Act were overtaken by the UCC project that was begun by the American Law Institute in 1942 and which eventually became, as it remains, a joint project of the American Law Institute and the National Commissioners of Uniform State Laws.[32] The UCC includes an entire chapter on the law of warranties, producing a shopping list of warranties, their scope, and their limitation.[33] These include a warranty of title,[34] a definition of express warranties,[35] the implied warranty of merchantability,[36] and the implied warranty of fitness for a particular purpose,[37] as well as provisions regarding the exclusion or modification of warranties,[38] the accumulation of warranties,[39] and the extension of warranties to third-party beneficiaries.[40]

By the warranty of title, the seller warrants (guarantees) the he, she, or it, owns the thing being sold or licensed or is authorized by its owner to sell it.[41] If another party claims such ownership or that the sale or licensing was not authorized, the seller/licensor is obligated to defend the title or authorization and to compensate the buyer/licensee should the challenger prevail. While this warranty does sometimes come into play in pure title contexts,[42] it more often comes into play today because of a challenge based upon a claim of patent or copyright infringement.[43]

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31 National Commissioners of Uniform State Laws, Revised Uniform Sales Act (1944).

32 The emergence of the UCC perhaps explains why the some states that had enacted the Uniform Sales Act did not get around to enacting the 1941 and 1944 modifications.

33 UCC, above n 16 at §§ 2-313 to 2-318.

34 UCC, above n 16 at § 312.

35 UCC, above n 16 at § 313.

36 UCC, above n 16 at § 314.

37 UCC, above n 16 at § 315.

38 UCC, above n 16 at § 316.

39 UCC, above n 16 at § 317.

40 UCC, above n 16 at § 318.

41 UCC, above n 16 at § 312.

42 See, eg, *McCoolidge v Oyvetsky*, 874 NW 2d 972 (Neb 2016).

43 See, eg, *Pure Country Weavers, Inc v Bristar, Inc*, 410 F Supp. 2d 439 (WDNC 2006) (alleging a copyright infringement); *Greene Machine Corp v Allen Engineering Corp*, 145 F Supp 2d 646 (ED Pa 2001) (alleging a patent infringement); see generally David A Toy "Implied Non-

Express warranties are created by any affirmation, promise, description, or sample made the basis of the bargain.[44] If there is an express warranty, before delivery of the goods the buyer can sue for the cover price less the contract price, or the market price less the contract price, as appropriate.[45] After delivery, the buyer may only recover the difference between the value of the goods as warranted and the value of the goods as delivered.[46] In either case, the buyer also has the right to recover any incidental or consequential damages resulting from the breach.[47] Furthermore, a seller can disclaim or limit an express warranty, but only if such disclaimer or limitation is "reasonable." [48] Recognizing modern marketing techniques, the Permanent Editorial Board of the UCC proposed two additional means for creating express warranties in 2003. These would have included affirmations, promises, or descriptions made in the packaging of a product,[49] or made to the public in general (rather than to the specific buyer).[50] Because no state enacted, or seemed likely to enact, these or any of the other 2003 proposals, they were officially withdrawn by the Permanent Editorial Board in 2011.[51]

Every merchant (a person who deals in goods of the kind included in the contract of sale[52]) gives an implied warranty that the goods are of good, average quality for goods of the kind included in the contract.[53] This standard is measured

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Infringement and Ownership Warranties in Intellectual Property Agreements" (2012) 41 Colo Law 61.

44 UCC, above n 16 at § 313.

45 UCC, above n 16 at §§ 712, 713. "Cover" in the UCC refers to actual replacement of the defective or missing goods with substitute goods; if done reasonably, the buyer is free to recover the cover price-contract price differential even if it is more than the market price-contract price differential. Ibid at § 712.

46 UCC, above n 16 at § 714.

47 UCC, above n 16 at § 715.

48 UCC, above n 16 at § 316(1). See Kurt M Saunders "Can You Ever Disclaim an Express Warranty?" (2015) 9 The Journal of Business, Entrepreneurship & the Law 59 at 62-65.

49 UCC, above n 16 at § 313A.

50 UCC, above n 16 at § 313B.

51 The Permanent editorial board's memorandum on the withdrawal can be found at <http://entrepreneur.typepad.com/files/article-2-and-2a-memo.pdf>. See generally Scott H Burnham "Thoughts on the Withdrawal of Amended Article 2" (2011) 52 South Texas Law Review 519; Henry Deeb Gabriel "The 2003 Amendments of Article Two of the Uniform Commercial Code: Eight Years or a Lifetime after Completion" (2011) 52 South Texas Law Review 487; Fred H Miller "What Can We Learn from the Failed 2003-2005 Amendments to UCC Article 2?" (2011) 52 South Texas Law Review 471.

52 UCC, above n 16 at § 2-104(1).

53 UCC, above n 16 at § 2-314.

by trade usage, ie, by what other merchants in the kind of goods would accept as fitting the description of the goods in question.[54] A seller can disclaim the implied warranty of merchantability only by conspicuous written language that expressly mentions merchantability.[55] Absent an effective disclaimer, the merchant gives the implied warranty of merchantability by operation of law.[56] Remedies for breach of the implied warranty of merchantability are the same as for breach of an express warranty.[57]

An implied warranty of fitness for a particular purpose arises when a buyer indicates that he, she, or it is relying on the expertise of the seller to select the proper item for the buyer's particular purpose and the seller makes the selection.[58] This too arises by operation of law rather than because of the specific intent of the seller, although the seller can disclaim the implied warranty with conspicuous written language that a buyer would understand as excluding or modifying the implied warranty of fitness for a particular purpose[59] or by simply declining to make the selection on behalf of the buyer.[60] Again the available remedies would be the same as the remedies for breach of an express warranty.[61]

Sellers ultimately can exclude or modify a warranty by appropriate language in writing in the contract,[62] at the risk, of course, of losing the sale. There are, however, some state or federal statutes that preclude a seller from altogether disclaiming warranties on certain products.[63] Where a good is covered by more than one warranty, the buyer make advance claims under any or all relevant warranties, although the buyer, cannot recover more than full compensation for any injury.[64] In addition, under some circumstances, warranties cover injuries to

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54 Ibid.

55 UCC, above n 16 at § 316(2).

56 UCC, above n 16 at § 314.

57 See the text, above n 43-45.

58 UCC, above n 16 at § 315.

59 UCC, above n 16 at § 316(2).

60 UCC, above n 16 at § 315.

61 See the text, above n 43-45.

62 UCC, above n 16 at § 316.

63 See, eg, Magnussen-Moss Warranty Act-Federal Trade Commission Improvement Act, 15 USC §§ 2301-2312; *Parrott v Daimler-Chrysler Corp*, 130 P.3d 530 (Ariz, 2006); *Ryan v American Honda Motor Co*, 896 A.2d 454 (NJ 2006). Magnussen-Moss has had less of an impact than might have been expected. See, eg, Janet W Steverson "The Unfulfilled Promise of the Magnussen-Moss Warranty Act" (2014) 18 Lewis & Clark Law Review 155.

64 UCC, above n 16 at § 317.

persons who are not parties to the contract, although the rule on how far warranties extend is not uniform in the United States.[65]

III PERFORMANCE STANDARDS UNDER THE CISG

As the foregoing discussion indicates, American law (and the common law system generally) has elaborated the performance standards under sales contracts through a highly developed, and often highly technical, law of warranties.[66] On the other hand, one will search in vain for the word "warranty" in the CISG. This by no means indicates a lack of attention to performance standards in the CISG. Rather it indicates a number of interrelated concerns that caused the drafters to avoid the term "warranty." Fist, in a convention that strives for universal acceptance, use of a term that not all legal systems employ was to be avoided—particularly if the term's meaning might vary significantly even among those legal systems that use the term.[67] Second, use of the term "warranty" would have been interpreted, at least by some courts, as importing into the convention all the technical encrustations the term had attracted over the centuries.[68] And there could have been other concerns as well—not least that the CISG is based more on civil law models than on the common law.[69]

Instead of speaking in terms of warranties, the CISG chose to speak directly in terms of performance standards. As we shall see, in many respects performance standards in the CISG are similar to the warranties under the UCC,[70] so much so that some American judges, lawyers, and legal scholars claim that the two sets of

65 The drafters of the UCC were unable to reach agreement on the third-party reach of warranties, and thus provided three options for states to select among. Id, § 318. Some state legislatures crafted their own statute in this regard.

66 For just how technical the law of warranties has become, see Asa Markel "American, English, and Japanese Warranty Law Compared: Should the U.S. Reconsider Her Article 95 Declaration to the CISG?" (2009) 21 Pace International Law Review 163.

67 Ibid; Ingeborg Schwenzer and Lina Ali "The Emergence of Global Standards in Private Law" (2014) 18 Vindobona Journal of International Commercial Law and Arbitration 93 at 96-97.

68 Frank Diedrich "Maintaining Uniformity in International Uniform law via Autonomous Interpretation: Software Contracts and the CISG" (1996) 8 Pace International Law Review 303. ("describing a 'homeward trend' in judicial interpretation"); see also Francis A Mann "Uniform Statutes in English Law" (1983) 94 Law Quarterly Review 376; Markel, above n 66, at 193-204.

69 Diedrich, above n 68 at 311; Markel, above n 66 at 196.

70 Saunders, above n 48 at 71 n 89.

rules are virtually identical, and call both "warranties." under the CISG.[71] In fact, they are not the same,[72] so referring to them as warranties risks introducing significant confusions. In this section, we will explore the performance standards under the CISG. In the next section, we shall consider more closely the similarities and differences of the performance standards under the CISG from the warranties under the UCC.

The CISG provides obligations to convey good title and to defend against patent or copyright infringement claims,[73] much like the UCC.[74] The CISG also provides that the goods delivered by the seller to the buyer must conform to any promise, description, or sample,[75] much like the express warranties under the UCC.[76] Sellers also must provide goods that are fit for their ordinary uses,[77] more or less analogously to the UCC's warranty of merchantability.[78] Sellers might also be under an obligation to ensure that goods are fit for a particular purpose,[79] much like the UCC warranty of fitness for a particular purpose.[80] Unlike the UCC's general provision on the limitation or exclusion of warranties,[81] however, the only provision in the CISG that speaks to the exclusion or modification of a

71 See, eg, *Chicago Prime Packers Inc v Northam Food Trading Co*, 408 F 3d 894, 898 (7th Cir 2005); *Honey Holders I, Ltd v Alfred L Wolff, Inc*, 81 F Supp 3d 543, 561 (SD Tex 2015); *Travelers Prop Cas Co of Am v Saint-Gobain Technical Fabrics Can, Ltd*, 474 F Supp 2d 1075, 1084-85 (D Minn 2007); *Caterpillar, Inc v Usinor Industeel*, 393 F Supp 2d 659, 676 (ND Ill. 2005); *US Nonwovens Corp v Pack Line Corp*, 4 NYS 3d 868, 872 (NY Sup Ct 2015); William P Johnson "Analysis of Incoterms as Usage under Article 9 of the CISG" (2013) 35 University of Pennsylvania Journal of International Law 379 at 420 ("approximate equivalent"); Anne Morales Olazábal et al, "Global Sales Law: An Analysis of Recent CISG Precedents in US Courts 2004-2012" (2012) 67 Business Lawyer1351 at 1369-72; Steven D Walt "The Modest Role of Good Faith in Uniform Sales Law" (2015) 33 Boston University International Law Journal 37 at 62 n 191.

72 See, eg, Michael C Gibbons and Peter Gojcaj "Navigating the Legal Waters of International Commerce" (2011) 90 Michigan Bar Journal 30 at 31-32; Yoshimuchi Tanaguchi "Deepening Confidence in the Application of CISG to the Sales Agreements between the United States and Japanese Companies" (2013) 12 Richmond Journal of Global Law and Business 277 at 284-85.

73 CISG, above n 17 at arts 41, 42.

74 UCC, above n 16 at § 2-312.

75 CISG, above n 17 at arts 35(1), 35(2) (c).

76 UCC, above n 16 at § 2-313.

77 CISG, above n 17 at art 35(2) (a), (d).

78 UCC, above n 16 at § 2-314.

79 CISG, above n 17 art 35(2) (b).

80 UCC, above n 16 at § 2-315.

81 UCC, above n 16 at § 2-316.

performance standard is found in the chapter that applies only to the obligation to provide good title.[82] For any other disclaimer of the mandated performance standards, one must fall back on the general provision in the CISG about derogating from the provisions of the convention.[83] Nor is there any provision about the accumulation or conflict of performance standards or regarding third party beneficiaries of performance standards.[84] For these, recourse must be had, absent express provision in the contract of sale, to the general legal principles of the particular nation in which enforcement is sought.[85]

IV HOW DO THE TWO SETS OF PERFORMANCE STANDARDS DIFFER?

Despite the many obvious parallels between the performance obligations under the CISG and the warranties under the UCC, there are significant differences,[86] differences that might well be lost sight of if one insists on calling the performance standards under the CISG "warranties."[87] We can begin by noting the complete omission of certain warranty provisions in the UCC from the performance standards in the CISG. As already noted, there is no general provision in CISG specifically addressing the exclusion or modification of warranties.[88] The only provision in the CISG that expressly addresses the exclusion or modification of warranties relates to the obligation to provide good title.[89] The CISG also does not have a provision on the accumulation or conflict of performance standards or regarding third party beneficiaries of performance standards.[90] On these issues, courts will have to rely on the express provision in the contract of sale or on the general legal principles applicable in that court.[91]

More troubling, if only because more likely to generate confusion, is the fact that performance standards under the CISG upon a close reading disclose differences from the parallel UCC warranty provision. Thus while the obligation to

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82 CISG, above n 17 at art 41

83 CISG, above n 17 at art 6.

84 UCC, above n 16 at §§ 2-317, 2-318.

85 CISG, above n 17 at art 7(2).

86 Gibbons and Gojcaj, above n 71; Tanaguchi, above n 72.

87 See the authorities collected above n 71.

88 See UCC, above n 16 at § 2-316.

89 CISG, above n 17 at art 41

90 See UCC, above n 16 at §§ 2-317, 2-318.

91 CISG, above n 17 at art 7(2).

provide good title is pretty much the same under the CISG and the UCC,[92] the obligation regarding patent or copyright infringement is not the same. The UCC provides:[93]

> Unless otherwise agreed a seller who is a *merchant regularly dealing in goods of the kind* warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

The analogous provision under the CISG is much longer and differs in several important respects:

> (1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:[94]
>
> (a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or
>
> (b) in any other case, under the law of the State where the buyer has his place of business.
>
> (2) The obligation of the seller under the preceding paragraph does not extend to cases where:
>
> (a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or
>
> (b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

A close comparison of the two sections will find that the UCC limits this warranty to sellers who are merchants,[95] while the CISG contains no similar

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92 CISG, above n 17 at arts 41, 42; UCC, above n 16, at § 2-312.

93 UCC, above n 16 at § 2-312(3) (emphasis added).

94 CISG, above n 17 at art 42.

95 UCC, above n 16 at § 2-312(3).

limitation, but requires that the seller knew or should have known of the violation of intellectual property rights (something not required under the UCC).[96] The CISG also indicates that only certain intellectual property rights are covered—those that arise under the law of the state of intended resale or use, or if there was no such intent then under the law where the buyer has a place of business.[97] Finally, the CISG also excludes claims where the buyer knew or should have known of the potential infringement claim when the contract was made.[98] Taken together, these differences make for a considerably different performance standard under the CISG than under the UCC.

The differences between the UCC provision on express warranties and the comparable provision under the CISG are not so many, but they are just as significant. The UCC provision on express warranties in its entirety reads:[99]

> (1) Express warranties by the seller are created as follows:
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> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes *part of the basis of the bargain* creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made *part of the basis of the bargain* creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made *part of the basis of the bargain* creates an express warranty that the whole of the goods shall conform to the sample or model.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

The comparable provision under the CISG reads:[100]

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96 CISG, above n 17 at art 42(1).

97 CISG, above n 17 at art 42(1) (a), (b).

98 CISG, above n 17 at art 42(2).

99 UCC, above n 16 at § 2-313(1) (a), (b), (c) (emphasis).

100 CISG, above n 17 at art 35(1), (2) (c), (3).

> (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
>
> (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: …
>
> (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model; ….
>
> (3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

The most important difference between these comparable provisions is that under the UCC express warranties apply only if they form "part of the basis of the bargain,"[101] while there is no comparable requirement under the CISG. Under the UCC, any representation about the goods to be sold becomes part of the basis of the bargain if the buyer relies on the representation.[102] This concern is not altogether absent from the CISG. After all, the CISG excludes liability if the buyer knew or should have known, when the contract was made, that the goods would not conform to the representation. That does not seem to weaken the seller's obligation toward the buyer so much as the requirement that the representation be part of the basis of the bargain.[103] Many U.S. courts ameliorate this difference by applying a rebuttable presumption of reliance[104] or even abandon any requirement of reliance altogether.[105] Other US courts, however, require the buyer to prove reliance on the representation to show that it was part of the basis of the bargain.[106] Still other US

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101 UCC, above n 16 at § 2-313.

102 See, eg, *Cipollone v Liggett Group, Inc*, 893 F 2d 541 (3d Cir, 1990), *rev'd on other grounds*, 505 US 504 (1992).

103 The contours of the CISG provision are explored in Djakhongir Saidov "Article 35 of the CISG: Reflecting the Present and Thinking about the Future" (2013) 58 Villanova Law Review 529.

104 See, eg, *In re MyFord Touch Consumer Litig*, 46 F Supp 3d 936, 972-74 (ND Cal 2014); *In re Shop-Vac Marketing & Sales Practices Litig*, 964 F Supp 2d 355, 362 (MD Pa 2013); see generally Saunders, above n 48, at 61-62.

105 See, eg, *Ashgari v Volkswagen Group of Am, Inc*, 42 F Supp 3d 1306, 1335-36 (CD Cal 2013); *Norcold, Inc v Gateway Supply Co*, 798 NE 2d 618, 622-24 (Oh Ct App 2003), *appeal not allowed.*

106 See, eg, *In re Gen'l Motors Corp Dex-Coool Prods Liab Litig*, 241 FRD 305, 322 n 8 (SD Ill, 2007).

courts treat lack of reliance as an affirmative defense.[107] In contrast with this uncertainty regarding the UCC "basis of the bargain," the comparable CISG provision seems rather clear.

In contrast with the deep uncertainty about the meaning and application of the UCC provision on express warranties, its provision on the implied warranty of merchantability is rather more fully developed. It reads:[108]

> (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is *a merchant with respect to goods of that kind.* Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
>
> (2) Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under the contract description; and
>
> (b) in the case of fungible goods, are of fair average quality within the description; and
>
> (c) are fit for the ordinary purposes for which such goods are used; and
>
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
>
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
>
> (f) conform to the promise or affirmations of fact made on the container or label if any.
>
> (3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

The comparable provision under the CISG is extremely brief:[109]

> (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
>
> (a) are fit for the purposes for which goods of the same description would ordinarily be used; …

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107 See, eg, *Felley v Singleton*, 705 NE 2d 930, 934 (Ill App Ct, 1999).

108 UCC, above n 16 at § 2-314 (emphasis added).

109 CISG, above n 17 at art 35(2) (a), (3)

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

Whether a court would or should read the brief requirement that the goods be fit for the purposes for which they would ordinarily be used to imply the specifics found in the UCC is at least debatable. The UCC, after all, includes fitness for ordinary uses as just one of a list of requirements that the goods must meet to satisfy the implied warranty of merchantability.[110] A court might reasonably conclude that the other items listed are different from fitness for ordinary uses and therefore should not be imported into the interpretation of the comparable provision of the CISG. The UCC, moreover, limits the warranty of merchantability to sellers who are merchants, something not required in for the comparable performance standard under the CISG.[111]

The UCC's requirement that goods be fit for the buyer's particular purpose is short and to the point, but in one respect significantly different from the comparable provision in the CISG. The relevant provision under the UCC reads:[112]

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the *buyer is relying on the seller's skill or judgment* to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

The comparable provision of the CISG reads:

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: …

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except *where the circumstances show that the buyer did not rely*, or that it was unreasonable for him to rely, on the seller's skill and judgement; ...

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the

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110 UCC, above n 16 at § 2-314(2) (c).

111 Compare CISG, above n 17 at art 35(2) (a), with UCC, above n 16 at § 2-314.

112 CISG, above n 17 at § 2-315 (emphasis added).

> conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

The big difference between these comparable provisions is that a buyer is presumed to rely on the seller's skill or knowledge under the CISG,[113] but not under the UCC. That presumption could be vitally important in some cases.

Finally, the UCC has significant limitations on the ability of a seller to exclude warranties,[114] but also provides ready formulas for doing so.[115] There is nothing comparable in the CISG. The closest one can come to an acknowledgement of a power to exclude or disclaim the performance standards in the CISG is a rather general provision allowing the parties to a contract to "derogate from or vary the effect of any of [the CISG's] provisions."[116]

V CAN UNCITRAL CONTRIBUTE TO FINDING A WAY FORWARD?

Business people are confused by the differences between the performance standards under the UCC and the CISG. In part, this reflects the reality that the differences sometimes are subtle, and in part because their legal advisors are confused.[117] This confusion creates unnecessary risks for businesses and lawyers alike. A business might conform its behavior to what it believes the law requires when the actual applicable law (either the UCC or the CISG) requires something else. A lawyer (or a judge or legal scholar) might construct an argument based on an erroneous understanding of the controlling law.

The most obvious beginning for addressing these confusions is for common law-trained lawyers to stop calling performance standards under the UCC "warranties." That alone will not erase the growing confusion about how the two sets of performance standards relate to each other, but it will open the way for clarification to begin. For the confusion to be eliminated, the legal professions involved will need to undertake a major continuing education effort for current judges, lawyers, and scholars, as well as ensure that more accurate teaching materials are made available for use in law schools in the United States and other

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113 CISG, above n 17 at art 35(2) (b).

114 UCC, above n 16 at § 2-316.

115 UCC, above n 16 at § 2-316 (3) (a) (allowing the disclaimer of all warranties through the use of phrases such as "as is" and "with all faults," etc).

116 CISG, above n 17 at art 6.

117 See the text above n 70-72.

common law countries. To a lesser extent, such educational efforts will need to reach into the business schools as well.

UNCITRAL could help in the effort to clarify these confusions in two ways. First, UNCITRAL could promote education activities in the legal communities and the business communities regarding performance standards and their variations. UNCITRAL already undertakes considerable efforts to educate relevant professionals in many countries about the requirements under the CISG. Significant resources should be devoted specifically to educating professionals in common law countries (and other countries were such confusions exist or might emerge) about the differences between performance standards under the CISG and the warranties under the UCC.

Second, perhaps UNCITRAL could draft revisions to the CISG to harmonize these differences. While I would not advocate revising the CISG performance standards to conform to the American system of warranties for that would not prevent or clarify confusions with other legal systems and might even exacerbate them, I would suggest that the sections on performance standards could be recast in a way that more closely parallels the structure of the UCC warranties so that lawyers and others could more readily identify the differences. Others might have better suggestions on how to harmonize the two bodies of law (UCC warranties and CISG performance standards). I suspect, however, that continuing education efforts will probably be more effective than redrafting to resolve the confusions identified in this chapter.