NONCONFORMITY IN THE SALE OF GOODS BETWEEN THE UNITED STATES AND CHINA: THE NEW CHINESE CONTRACT LAW, THE UNIFORM COMMERCIAL CODE, AND THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

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I. INTRODUCTION

The evolving strategic and economic relationship between the United States and China represents one of the defining issues of the early twenty-first century. In 2005, trade between the two nations exceeded $285 billion, a 23% increase over the prior year.[1] Among major trading partners, excepting the oil producing nations of OPEC, the largest growth for United States exports and imports during the past five years has been to and from China.[2] All indications suggest that this trend will continue well into the future.

U.S.-China trade brings with it important legal considerations. After all, not far behind international trade follow international trade disputes. Historically, conformity of delivered goods has been a significant focal point for such litigation and arbitration.[3] The current exchange between the United States and China involves primarily moveable goods,[4] and results

1. FOREIGN TRADE DIV., U.S. CENSUS BUREAU, TRADE (IMPORTS, EXPORTS AND TRADE BALANCE) WITH CHINA, *at* www.census.gov/foreign-trade/balance/c5700.html. *See also* WHITE HOUSE, ECONOMIC REPORT OF THE PRESIDENT TOGETHER WITH THE ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISORS 184 (2005) (For most of the period since China's [World Trade Organization] accession, U.S. exports to China have been growing at a rate faster than its imports from China (from 2002 to 2003, U.S. goods exports to China grew by 28% while imports from China grew by 22%), but this export growth is occurring from a much smaller base and so the bilateral trade deficit has grown).

2. *See* WHITE HOUSE, *supra* note 1, at 331.

3. A useful benchmark is the number of cases involving conformity in the Convention on Contracts for the International Sale of Goods, a treaty to be discussed in-depth in this Essay that relates to international trade of this sort. UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, Apr. 11, 1980, 1489 U.N.T.S. 3, S. Treaty Doc. No. 98-9 (1983), *available at* http://cisgw3.law.pace.edu/cisg/text/text.html (last visited Dec. 23, 2005) [hereinafter CISG]. For instance, unofficial but widely recognized and comprehensive database on the CISG lists, out of 1691 total decisions, 248 touching upon the primary conformity provision, article 35, and another 234 and 354 on, respectively, the examination and notice provisions, articles 38 and 39. *See* Electronic Library on International Trade Law and the CISG, CISG Annotated Table of Contents, *available at* http://cisgw3.law.pace.edu/cisg/text/cisg-toc.html (last visited Dec. 23, 2005) (providing a computer generated list of cases for each article in the convention). *See also* CISG-Advisory Council Opinion No. 2, Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39, § 5.1 (Eric E. Bergsten, Rapporteur, 2004), *available at* http://cisgw3.law.pace.edu/cisg/CISG-AC-op2.html [hereinafter Advisory Council Opinion] (the provisions governing the buyer's obligations to examine the goods and to give notice of any alleged non-conformity are among the most litigated matters in the CISG).

4. *See* Andrew Browne, *Economic Changes Pressure Beijing to Let the Yuan Float*, WALL ST. J., May 2, 2005, at A2 (noting that during "the first two months of this year combined, the U.S. trade deficit with China widened about 50% from the year earlier to $29 billion"); *China Textile*

in an ongoing concern regarding the conformity of such goods once delivered for the parties involved in such trade.

In the United States, sale of goods, including issues of conformity, is typically governed by article 2 of the Uniform Commercial Code (UCC), as adopted by the states.[5] Since 1999, the equivalent law in China has been the new Chinese Contract Law (CCL).[6] Absent party agreement, however, neither law applies to transactions involving the trade of moveable goods between Chinese and American parties. Rather, the United States and China share the same default law, the U.N. Convention on Contracts for the International Sale of Goods (CISG).[7]

Under the Supremacy Clause of the U.S. Constitution,[8] the CISG preempts state laws because it is a treaty; therefore the CISG preempts the UCC.[9] "China also follows the principle that where there is a conflict

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Exports to US Rise 39.3% to $360M in March, DOW JONES NEWSWIRES, Apr. 26, 2005 (reporting that "China's textile exports to the U.S. totaled $360 million in March, up 39.3% from the same month last year . . . [and that] China's exports of apparel to the U.S. rose 48.8% in one year to $740 million"); Fareed Zakaria, *The Wealth of Yet More Nations*, N.Y. TIMES, May 1, 2005, § 7, at 10 (in 2004 Wal-Mart imported $18 billion worth of goods from its suppliers in China; as a retailer, all or nearly all of these were moveable goods). *See also* Ned Baker, *U.S. Trade with China: Expectations vs. Reality*, FRONTLINE, *at* http://www.pbs.org/wgbh/pages/frontline/shows/walmart/china/trade.html (2005) (last visited Dec. 23, 2005) (reporting that China's "growing infrastructure has been a boon for companies like Caterpillar, which produces tractors and other heavy equipment . . . [and that] [l]ast year, China bought $2.9 billion worth of soybeans—the top U.S. export crop to China," which in both cases constitute presumptive moveable goods).

5. Article 2 of the UCC has recently been revised. Although the revisions have yet to be fully adopted, it is anticipated that they will be. Therefore, as this Essay seeks to provide forward looking guidance, all references to article 2 in the present essay are to the amended version. *See* RONALD J. MANN ET AL., 2004 COMPREHENSIVE COMMERCIAL LAW STATUTORY SUPPLEMENT xi (Aspen Pub. 2004) (noting the revised article 2 and anticipating some hurdles to its adoption).

6. Zhonghua Renmin Gongheguo Fagui Huibian [Contract Law of the People's Republic of China], 9th Nat'l People's Congress, 2d Sess. (1999) [hereinafter CCL], *translated in* http://www.cclaw.net/download/contractlawPRC.asp (last visited Dec. 23, 2005).

7. CISG, *supra* note 3. According to article 101 of the CISG, the six official texts, including those in Chinese and English, are equally valid. For purposes of this Essay, all references are to the official English text. *See generally* William S. Dodge, *Teaching the CISG in Contracts*, 50 J. LEGAL. ED (Mar. 2000) (discussing U.S. lawyers' general lack of familiarity with the CISG).

8. U.S. CONST. art. VI, § 2.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties* made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id. (emphasis added).

9. *See* Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1028 (2d Cir. 1995); Schmitz-Werke GmbH & Co. v. Rockland Indus., Inc., 37 Fed. Appx. 687, 691 (4th Cir. 2002); BP Oil Int'l,

between a provision in the treaty and a domestic provision, then the treaty prevails."[10] Given the CISG's incorporation into both nation's legal systems, it automatically applies to contracts for the sale of goods involving parties with their places of business in two different contracting states,[11] for example, in the United States and China.[12]

The CISG addresses the international sale of moveable goods[13] and encompasses a wide range of transactions and related matters,[14] including

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Ltd. v. Empresa Estatal Petroleos de Ecuador (PetroEcuador), 332 F.3d 333, 337 (5th Cir. 2003); Genpharm, Inc. v. Pliva-Lachema a.s., 361 F. Supp. 2d 49, 8-13 (E.D.N.Y. 2005); Caterpillar, Inc. v. Usinor Industeel, Inc., U.S. Dist. LEXIS 6355, at *32-*43 (N.D. Ill. Mar. 30, 2005); *see* HENRY GABRIEL, CONTRACTS FOR THE SALE OF GOODS: A COMPARISON OF DOMESTIC AND INTERNATIONAL LAW, 26-27 (2004) (citing Dodge, *supra* note 7, at 72; David Frisch, Commercial Common Law, *The United Nations Convention on the International Sale of Goods, and the Inertia of Habit*, 74 TUL. REV. 495, 503-04 (1999)).

10. ZHONG JIANHUA & MARK WILLIAMS, FOREIGN TRADE CONTRACT LAW IN CHINA 16 (1998) (of course "except in the case of clauses to which China has declared a reservation"). *See also* PAUL T. VOUT ET AL., CHINA CONTRACTS HANDBOOK 31 (2000) (finding that where "an international treaty (relating to a contract) which China has concluded or acceded to has provisions that differ from the law of the Peoples' Republic of China (PRC), the provisions of the treaty shall apply"); CCL art. 123 ("Where another law provides otherwise in respect of a certain contract, such provisions prevail."); *id.* art. 126 (given that "[w]here parties to the foreign related contract failed to select the applicable law, the contract shall be governed by the law of the country with the closest connection thereto," the CISG, as the more specific law of both China and of the United States, should be applied under this article.).

11. CISG art. 10.

12. CISG art. 1(1)(a). Both the United States and China made reservations under CISG article 95, opting out of CISG article (1)(b) (allowing the CISG to apply "when the rules of private international law lead to the application of the law of a Contracting State"). U.N. COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL), STATUS: 1980—U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS CONVENTIONS AND MODEL LAWS, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Dec. 23, 2005). *See also, e.g.*, China International Economic and Trade Arbitration Commission Mar. 30, 1994, [hereinafter CIETAC (Cow's Liver Fungus Case)], *available at* http://cisgw3.law.pace.edu/cases/940330c1.html (last visited Dec. 23, 2005) [trans. Zheng Xie] (applying the CISG where parties from two signatory states have not otherwise chosen a governing law in contracting for the international sale of goods); CIETAC, Shenzhen No. 1138-1 (Indonesian Round Logs Case), Dec. 29, 1999, *available at* http://cisgw3.law.pace.edu/cases/ 991229c1.html (last visited Dec. 23, 2005) [trans. Yanming Huang] (as a matter of Chinese law, applying the CISG where both parties are from two different contracting states).

13. *See* Franco Ferrari, *The CISG's Sphere of Application: Articles 1-3 and 10*, *in* THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 75-79 (Franco Ferrari et al. eds., 2004) [hereinafter THE DRAFT UNCITRAL DIGEST AND BEYOND].

14. See *generally id.* at 58-79; *Id.* at 58-61 (covering sales contracts); *id.* at 61 (covering contracts modifying international sales contracts); *id.* at 63 (covering single contracts executing distribution agreements); CISG art. 3(1) (covering contracts where buyer supplies some but less than a "substantial part" of the materials for production); Ferrari, *The CISG's Sphere of*

conformity. Within the realm of international trade, the CISG excludes only a few specific types of types of sales agreements:[15] "goods bought for personal, family or household use,"[16] goods sold "by auction"[17] or "on execution or otherwise by authority of law,"[18] as well as the sale "of stocks, shares, investment securities, negotiable instruments or money,"[19] "of ships, vessels, hovercraft or aircraft,"[20] and "of electricity."[21] The CISG's broad reach further increases its importance to U.S.-China trade.[22]

Despite the CISG's ubiquity, most American and Chinese parties enjoy greater familiarity with their respective domestic law. Knowledge of the CISG itself, as well as of the domestic law of the respective counterparty, is necessary for four reasons. First, as noted, the CISG governs absent party agreement to the contrary.[23] Second, since the CISG allows parties to exclude its application or "derogate from or vary the effect of any of its provisions,"[24] any decision to do so should be made on an informed basis. Third, the parties will invariably try to understand the CISG through the prism of their own domestic laws. Fourth, by agreement[25] or as a matter of

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Application: Articles 1-3 and 10, in THE DRAFT UNCITRAL DIGEST AND BEYOND, *supra* note 13, at 65-70 (covering same); CISG art. 3(2) (covering contracts involving supply of labor or other services less than the "preponderant part" of the seller's obligations); Ferrari, *The CISG's Sphere of Application: Articles 1-3 and 10, in* THE DRAFT UNCITRAL DIGEST AND BEYOND, *supra* note 13, at 70-74 (covering same). The Convention does not necessarily govern distribution agreements. *Id.* at 62-63). It does not cover barters. *Id.* at 63. It does not cover leasing contracts. *Id.* at 64. It only covers the sale portion of sale and lease-back contracts. *Id.* at 65.

15. *See* CISG art. 2. *See also id.* art. 3. *See generally* Ferrari, *The CISG's Sphere of Application: Articles 1-3 and 10, in* THE DRAFT UNCITRAL DIGEST AND BEYOND, *supra* note 13, at 79-95.

16. CISG art. 2(a) (excepting that the Convention would still apply when "the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use").

17. *Id.* art. 2(b).

18. *Id.* art. 2(c).

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

20. *Id.* art. 2(e).

21. CISG art. 2(f).

22. The relevance of the CISG is anecdotally illustrated by the volume of U.S.-China trade disputes involving laws that have been arbitrated in China. Among a collection of 117 translated decisions referencing the CISG, the national origins of both parties are known for 112 cases. Of these 112 cases, 39—over a third in all—involve disputes between American and Chinese parties. *See* Electronic Library on International Trade Law and the CISG, CISG Annotated Table of Contents, *available at* http://www.cisg.law.pace.edu/cisg/text/casecit.html#china (last visited Dec. 23, 2005) (providing access to all 117 translated CIETAC cases).

23. *See, e.g.*, Trib. di Padova [Padova District Court], 31 Mar. 2004, n.40466, ¶ 6 (Italy), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040331i3.html (last visited Dec. 23, 2005) [trans. Joseph Gulino, ed. Francesco G. Mazzota].

24. CISG art. 6.

25. *Id.*

gap filling,[26] the domestic laws of China or the United States may apply in whole or in part.

Given these observations, the CISG, the CCL, and the UCC merit comparative study. This Article seeks to provide an analysis of the relevant provisions of the CISG, CCL, and UCC that deal with the conformity of delivered goods. As previously mentioned, conformity constitutes an important matter for American and Chinese parties engaged in trade with one another. This importance is heightened because, as a matter of law, non-conformity leads to potentially grave consequences. Under the CISG, the CCL, and the UCC, nonconformity is a breach of contract by the seller,[27] while failure to provide notice of such nonconformity may deny the buyer the right to rely upon such breach.[28]

Part II of the Article compares the relevant provisions from the CISG, the CCL, and the UCC that relate to conformity. Part II uses the CISG as a guide to review five major provisions related to conformity that deserve scrutiny, definition conformity, passage of risk, seller's cure, examination, and notice. Part III of the Article analyzes two critical issues regarding conforming goods, how the three laws comparatively define quality and convey effective notice.

II. COMPARING PROVISIONS FOR CONFORMITY IN THE CISG, THE CCL, AND THE UCC

The comparative analysis in Part II follows the structure of the CISG to address conformity issues since the CISG serves as the default law between parties in the United States and China. The CISG framework presents five types of issues regarding conformity common to the CISG, the CCL, and the UCC: defining conformity as a matter of law and party

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26. For example, the Convention does not govern "the validity of the contract or of any of its provisions or of any usage." *Id.* art. 4(1). The Convention also "does not apply to the liability of the seller for death or personal injury caused by the goods to any person." *Id.* art. 5.

27. Harry Flechtner, *The Draft UNCITRAL Digest on the United Nations Convention on Contracts for the International Sale of Goods (1980)*, *in* The DRAFT UNCITRAL DIGEST AND BEYOND, *supra* note 13, ¶ 2, at 627-28 [hereinafter Flechtner, *The Draft UNCITRAL Digest*]. The Convention differentiates a simple or mere breach from fundamental breach, the distinction being the type and extent of remedies and options made available to the non-breaching party. *Id.* ("In general, a failure by the seller to deliver goods that meet the applicable requirements of Article 35 constitutes a breach of the seller's obligations . . . [it can also] in proper circumstances rise to the level of fundamental breach . . . and thus justify the buyer in avoiding the contract."). *See, e.g.*, CCL art. 111 (made applicable to sales contracts specifically by CCL article 155). Under the UCC a buyer may reject tender in whole or in part if it fails to conform. UCC § 2-601.

28. CISG 39(1); CCL art. 158; UCC § 2-607(3)(a).

agreement [A], the effect of passage of risk on non-conformity [B], a seller's cure [C], examination of the goods [D], and notice of non-conformity [E].

A. *Conformity of the Goods*

Under the CISG, as well as the domestic law of China and the United States, conforming goods are defined in terms of two sets of expectations, those of the party's contractual agreement and those of the applicable law. Of the three laws, only the UCC applies these through common law notions of warranty. The results are similar although not always consistent between the three laws.

1. Conformity Under the CISG

Under the CISG, "the overriding source for the standard of conformity is the contract between the parties."[29] Article 35(1) CISG, the provision that "sets out the basic obligations of the seller for the quality of the goods,"[30] adheres to this by requiring that "[t]he 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."[31] Conformity therefore consists of four elements derived from the contract, quantity,[32] quality, description, and packaging.

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29. Secretariat Commentary to the 1978 Draft United Nations Convention on Contracts for the International Sale of Goods, art. 33 (equivalent to CISG art. 35), ¶ 4 [hereinafter SECRETARIAT COMMENTARY], *available at* http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-35.html (last visited Dec. 23, 2005). The Secretariat Commentary is the closest equivalent to an official commentary on the final convention, as no commentary accompanied the final version of the Convention. *See also* CISG art. 35(1).

30. GABRIEL, *supra* note 9, at 119. *See also* CIETAC (Cysteine Case) § 6(1), Jan. 7, 2000, *available at* http://cisgw3.law.pace.edu/cases/000107c1.html (last visited Dec. 19, 2005) [trans. Alison Ng & Hoi-Yan].

31. CISG art. 35(1). *See also* CIETAC (Shirts Case) § IV(1), Jan. 4, 1995, *available at* http://cisgw3.law.pace.edu/cases/950104c1.html (last visited Dec. 23, 2005) [trans. Gang Chen].

32. In excess, as well as a deficiency, in quantity amounts to a nonconformity under CISG article 35(1). In this situation, CISG article 52(2) states that:

> If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

Id. art. 52(2).

Absent party agreement to the contrary, article 35(2) provides that goods must meet four default standards in order to conform.[33] First, goods must be "fit for the purposes for which goods of the same description would ordinarily be used."[34] Second, the goods must be "fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract" unless the buyer did not or could not reasonably have relied "on the seller's skill and judgement . . . ."[35] Third, the goods must "possess the qualities of goods which the seller has held out to the buyer as a sample or model."[36] Fourth, the goods must be "contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods."[37]

These four requirements are cumulative, though the first and fourth requirements, articles 35(2)(a) and (d) respectively, "apply to all contracts unless the parties have agreed otherwise," while the other two "are triggered only if certain factual predicates are present."[38] In order to avoid potential unfairness between the parties, the CISG excludes the application of these requirements when "the buyer knew or could not have been unaware of such lack of conformity" at the time of the contract's conclusion.[39]

2. Conformity Under the Contract Law

The principle of conformity under the CCL is articulated by article 8 CCL, which states that "[t]he parties shall perform their respective obligations in accordance with the contract, and neither party may arbitrarily amend or terminate the contract."[40] Although the CCL, like the CISG, starts with the principle of party autonomy, it defines conformity in a distinct manner. The CCL does not contain a single counterpart to article 35 CISG. Rather, several provisions combine to provide a roughly similar scheme.

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33. *Id.* art. (2).

34. *Id.* (2)(a).

35. *Id.* (2)(b).

36. CISG art. 2(2)(c).

37. *Id.* (2)(d). *See also, e.g.*, CIETAC (Cow's Liver Fungus Case), *supra* note 12 (noting that under this provision the seller "shall bear the liability of non-conformity of condition of the shipping and storing").

38. Flechtner, *The Draft UNCITRAL Digest, in* THE DRAFT UNCITRAL DIGEST AND BEYOND, *supra* note 13, ¶ 6, at 630.

39. CISG art. 35(3). This does not extend to CISG art. 35(1). SECRETARIAT COMMENTARY, *supra* note 29, ¶ 14 (noting that "[t]his rule does not go to those characteristics of the goods explicitly required by the contract").

40. CCL art. 8.

The CCL requires that "[t]he terms of a contract shall be prescribed by the parties, and [shall] generally include,"[41] among other things, "quantity,"[42] quality,"[43] "subject matter,"[44] and "time, place and method of performance."[45] These are general obligations, therefore these provisions are not mandatory as to their specifics, i.e. a party does not have to specify quality. However, it must be noted that these categories approximate the CISG's definition of the seller's conformity obligations in terms of quantity, quality, description, and packaging.[46] Thus, to the extent that the parties choose to define terms covering the same substance as article 35 CISG, the seller must provide goods conforming to such specifications in accordance with the general obligation to perform contractual obligations.[47]

The CCL contains more explicit provisions that directly governing both quality and a subset of the description category than those set forth in article 35(1) CISG. Specifically, article 153 CCL mandates that "[t]he seller shall deliver the subject matter in compliance with the prescribed quality requirements [and that goods] shall comply with the quality requirements" given, if any.[48] The CCL also requires that "[t]he seller shall deliver the subject matter packed in the prescribed manner" by the contract.[49] Other than the reference to quantity in article 12(iii) CCL, the CCL does not directly address quantity as a conformity issue, though it does so implicitly.[50]

Absent party agreement, the CCL contains provisions that resemble article 35(2)(a), (c), and (d) CISG, although they do not exactly match.[51]

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41. *Id.* art. 12.

42. *Id.* art. 12(iii). The CCL treats delivery of excess goods in a manner similar to the Convention's approach. *Compare* CISG art. 52, *with* CCL art. 162 (Where the seller delivered the subject matter in a quantity greater than that prescribed in the contract, the buyer may accept or reject the excess quantity. Where the buyer accepts the excess quantity, it shall pay the price based on the contract rate; where the buyer rejects the excess quantity, it shall timely notify the seller.).

43. CCL art. 12(iv).

44. *Id.* art. 12(ii).

45. *Id.* art. 12(vi).

46. CISG art. 35(1).

47. CCL art. 8.

48. *Id.* art. 153.

49. *Id.* art. 156 CCL (this provision specifically applies to contracts for the sale of goods).

50. *See, e.g., id.* arts. 158, 162.

51. CISG art. 35(2), (2)(b). These articles do not have direct counterparts in the Contract Law. *See* John S. Mo, *The Code of Contract Law of the People's Republic of China and the Vienna Sales Convention*, 15 AM. U. INT'L L. REV. 209, 236 (1999) (finding that "the Code [CCL] does not regard fitness of the goods as an issue of conformity, but the Convention treats fitness for 'special purpose' as one of the issues of conformity").

First, article 62(i) CCL generally correlates with article 35(2)(a) CISG.[52] It provides that when the "quality requirement was not clearly prescribed, performance shall be in accordance with the state standard or industry standard, [or absent such a standard,] in accordance with the customary standard or any particular standard consistent with the purpose of the contract."[53] Some confusion may arise because article 61 CCL, described as "not well drafted,"[54] because it states that when a term "was not prescribed or clearly prescribed, after the contract has taken effect, the parties may supplement it through agreement."[55] Absent agreement, "such term shall be determined in accordance with the relevant provisions of the contract or in accordance with the relevant usage."[56] However, the scope of article 62(I) CCL is limited because it references party agreement and trade usage,[57] which guides factual analysis. In addition, article 154 CCL, requires that article 62(i) CCL should govern because it is the more specific provision.

Second, as with article 35(2)(c) CISG, article 168 CCL requires that, where a sample is used, the goods "shall comply with the sample as well as the quality specifications."[58] It also states that "[i]n a sale by sample, the parties shall place the sample under seal, and may specify the quality of the sample."[59] With regard to defective samples, the CCL further requires that "[i]n a sale by sample, if the buyer was not aware of a latent defect in the sample, the subject matter delivered by the seller shall nevertheless comply with the normal quality standard for a like item, even though the subject matter delivered complies with the sample."[60]

Third, like article 35(2)(d) CISG, article 156 CCL concerns packaging methods. Where such a "method was not prescribed or clearly prescribed" by the contract,[61] and where it cannot be under article 61 CCL,[62] which

52. CISG art. 35(2)(a) (requiring that goods be "fit for the purposes for which goods of the same description would ordinarily be used").

53. CCL art. 62(i). *See also id.* art. 154 (reiterating that CCL art. 62(i) applies to sales contracts).

54. GUANGHUA YU & MINKANG GU, LAWS AFFECTING BUSINESS TRANSACTIONS IN THE PRC 26 (2001).

55. CCL art. 61.

56. *Id.*

57. YU & GU, *supra* note 54, at 25.

58. CCL art. 168.

59. *Id.*

60. *Id.* art. 169.

61. *Id.* art. 156.

62. *Id.* art. 61 (If a term such as quality, price or remuneration, or place of performance etc. was not prescribed or clearly prescribed, after the contract has taken effect, the parties may supplement it through agreement; if the parties fail to reach a supplementary agreement, such term

governs indeterminate terms and supplementary agreements, goods are to "be packed in a customary manner, or, if there is no customary manner, in a manner adequate to protect the subject matter."[63]

Some commentators argue that the CCL "does not regard fitness of the goods as an issue of conformity, [while] the [CISG] treats fitness for a 'special purpose' as one of the issues of conformity," specifically in article 35(2)(b) CISG.[64] While it is true that there is no direct equivalent, article 62(i) CCL references something similar to the "particular purpose" contained in article 35(2)(b) CISG. As noted previously, when the "quality requirement was not clearly prescribed" by the contract, article 62(i) CCL enumerates default standards, the last consisting of performance "in accordance with the customary standard *or any particular standard* consistent with the purpose of the contract."[65] Conformity under the CCL to a "particular standard consistent with the purpose of the contract"[66] will sometimes coincide with the CISG's fitness "for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract."[67]

3. Conformity Under the UCC

As with the CCL and the CISG, the UCC imposes on the seller a number of obligations related to the conformity of the goods, as defined by both the parties' contractual expectations and as a matter of law. The UCC does so in a manner distinct from its two counterparts because its origins are different. Specifically, the UCC utilizes basic common law terminology, with the seller's obligations for the quality of the goods

shall be determined in accordance with the relevant provisions of the contract or in accordance with the relevant usage.).

63. CCL art. 156; *id.* art. 62(v) (a gap filling provision, arguably also touches on the periphery of the packaging issue). It provides that "[i]f the method of performance was not clearly prescribed, performance shall be rendered in a manner which is conducive to realizing the purpose of the contract." To the extent that packaging involves other issues related to the "method of performance," then it might bear relevance. Otherwise, as the more specific provision, CCL article 156 governs.

64. Mo, *supra* note 51, at 236-37.

65. CCL art. 62(i) (emphasis added).

66. *Id.*

67. CISG art. 35(2)(b).

designated as "warranties."[68] Contracted expectations amount to express warranties,[69] while legal requirements constitute implied warranties.[70]

Similar in effect to article 35(1) CISG and to the CCL, express warranties bind the seller as they relate to "[a]ny affirmation of fact or promise made by the seller, . . . [a]ny description of the goods, [or] [a]ny sample or model [that is] part of the basis for the bargain."[71] Express warranties exist to protect contracted expectations. Under amended article 2, UCC §§ 2-313A and 313B extend warranties, in the form of "obligations," to third party "remote purchasers" down the distribution chain.[72]

An express warranty does not rely upon the "use of formal words such as 'warrant' or 'guarantee' or upon the seller having a specific intention to make a warranty."[73] As the official commentary states, "[i]n practice affirmations of fact and promises made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on these statements need be shown in order to weave them into the fabric of the agreement."[74] Instead, such facts must be proven and thus "[t]he issue normally is one of fact."[75] However, not all statements amount to express warranties as "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";[76] common law "puffery," does not constitute a warranty.

As indicated, the UCC also incorporates implied warranties that may be compared to the approach taken by article 35(2) CISG. Absent exclusion or modification, such "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a

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68. GABRIEL, *supra* note 9, at 121.

69. *Id. See* UCC § 2-313; *see also id.* Official Comment. 2 ("'Express' warranties rest on 'dickered' aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms. . . . warranties of description and sample are designated 'express' rather than 'implied.'").

70. GABRIEL, *supra* note 9, at 121. *See* UCC § 2-314. *See also id.* § 2-313 Official Comment 2 ("'Implied' warranties rest so clearly on a common factual situation or set of conditions that no particular language or action is necessary to evidence them and they will arise in such a situation unless unmistakably negated.").

71. UCC § 2-313(2).

72. *Id.* §§ 2-313A, 313B.

73. *Id.* § 2-313(3).

74. *Id.* 2-313 Official Comment 5.

75. *Id.* In practice the difference between such statements and mere puffery may be difficult to ascertain. While "[c]ourts have uniformly adopted this principle in theory . . . the standards employed to distinguish promises and affirmations of fact from opinions are not uniform." GABRIEL, *supra* note 9, at 121.

76. UCC § 2-313(3).

merchant with respect to goods of that kind."[77] Under this section, goods must at the very least be merchantable as to:

> (a) pass without objection in the trade under the contract description;
> (b) in the case of fungible goods, are of fair average quality within the description;
> (c) are fit for the ordinary purposes for which goods of that description are used;[78]
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved;
> (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.[79]

These enumerated qualities of merchantability constitute a minimum standard.[80] In addition, "other implied warranties may arise from course of dealing or usage of trade."[81]

In keeping with article 35(2)(b) CISG, the UCC provides for implied warranties respecting fitness for a particular purpose:

> 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.[82]

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77. *Id.* § 2-314(1). *See id.* Official Comment 4 ("A person making an isolated sale of goods is not a 'merchant' within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply."). Thus, such a warranty does not apply "to sales by nonmerchant sellers who are merchants due to their skill and knowledge in their occupation." GABRIEL, *supra* note 9, at 125.

78. UCC § 2-314(2) Official Comment 1 ("The phrase 'goods of that description' rather than the language from the original Article 2 . . . [t]his change emphasizes the importance of the agreed description in determining fitness for ordinary purposes.").

79. *Id.* § 2-314(2).

80. *Id.* Official Comment 8 (noting that this subsection "does not purport to exhaust the meaning of 'merchantable' nor to negate any of its attributes not specifically mentioned in the text of the statute but that arise by usage of trade or through case law").

81. *Id.* § 2-314(e).

82. UCC § 2-315.

Under the UCC, the concept of a particular purpose "envisages a specific use by the buyer that is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question."[83] Unlike other implied warranties of merchantability, an implied warranty of fitness for a particular purpose does not require that the seller be a merchant of such goods.[84] It also differs by requiring that seller have knowledge of the particular purpose at the time of contracting and that the buyer actually relied upon the seller's knowledge.[85]

Under the UCC, in order "to exclude or modify the implied warranty of merchantability or any part of it" in a non-consumer contract,[86] like one of the type covered by the Convention,[87] "the language must mention merchantability and in case of a record must be conspicuous."[88] Similarly, "to exclude or modify the implied warranty of fitness, the exclusion must be in a record and be conspicuous."[89] In non-consumer contracts, "to exclude all implied warranties of fitness . . . the language is sufficient if it states, for example, that '[T]here are no warranties that extend beyond the description on the face hereof.'"[90] Finally, the UCC excludes implied warranties in three additional cases: when language such as "as is" or "with faults" is used that "makes plain that there is no implied warranty," when prior to contracting the buyer "examined the goods or the sample or model as fully," or refused to do so after the seller made clear that no implied warranty would cover defects that such inspection would reveal, and when the implied warranty has been "excluded or modified by course of dealing or course of performance or usage of trade."[91]

B. *Passage of Risk and Conformity*

Recognizing that the passage or risk might ordinarily operate to protect a seller delivering nonconforming goods, the CISG, CCL, and UCC all account for this possibility. The CISG clarifies that passage of risk does

83. *Id.* Official Comment 2.

84. GABRIEL, *supra* note 9, at 126.

85. *Id.*

86. UCC § 2-316 Official Comment 3("In a commercial contract, language that disclaims the implied warranty of merchantability need not be in a record, but if it is in a record it must be conspicuous.").

87. *See* CISG art. 2(a).

88. UCC § 2-316(2).

89. *Id.*

90. *Id.*

91. *Id.* § 2-316(3).

not protect a seller from the consequences of providing nonconforming goods. Under the CISG, and in accordance with the contract, a seller remains liable "for any lack of conformity which exists at the time when the risk passes to the buyer" even when this only becomes clear over time.[92] The seller also bears liability "for any lack of conformity which occurs *after* [this] time," when it is "due to a breach of any of his obligations."[93] This includes breaches of a guarantee that the goods "will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics" over a given period of time.[94]

The CCL offers similar assurance that a seller cannot avoid the risk of nonconforming performance through the passage of risk alone. Article 149 CCL specifically states that the "[b]uyer's assumption of the risk of damage to or loss of the subject matter does not prejudice its right to hold the seller liable for breach of contract if the seller rendered nonconforming performance." Likewise, though the UCC "does not have a similar provision to Article 36, the same result is implicit" as the seller must tender goods in accordance with its contractual obligations.[95]

C. *Seller's Cure of Nonconforming Goods*

The potentially serious repercussions for the seller of delivering nonconforming goods raise the question of whether, and under what circumstances, a seller may of its own volition attempt to cure a defect. The CISG as well as American and Chinese domestic law answer this question somewhat differently, giving the sellers a limited ability to cure.

Article 37 CISG allows that such sellers "may, up to that date [for delivery], deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered."[96] This right to cure is limited by two provisions, first, "that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense," and, second, that the buyer retains any right to claim damages as provided for in [the] Convention [CISG]."[97]

The CCL differs from the CISG in that "[t]he [buyer] may reject the [seller's] early performance, except where such early performance does

92. CISG art. 36(1)
93. *Id.* (2) (emphasis added).
94. *Id.*
95. GABRIEL, *supra* note 9, at 130 (citing UCC §§ 2-301, 507, 509 & 510).
96. CISG art. 37.
97. *Id.*

not harm the [seller's] interests."[98] Notably this extends to early tenders of both nonconforming and of conforming goods. In addition, the CCL requires the seller to bear "[a]ny additional expense[s] incurred by the [buyer] due to the [seller's] early performance."[99] To the extent that a deficiency in quantity constitutes a nonconforming performance under article 35(1) CISG, the CCL follows the same approach and allows a buyer to reject partial performance except "where it does not harm the [buyer's] interests."[100] In this situation, as with the early performance more generally, the buyer will be covered for any additional expenses incurred.[101]

Any seller's "right" to cure must fit within the confines of those situations where early performance or partial performance does not harm the buyer's interests. The view that the CCL favors the buyer in these situations, appears to conflict with article 112 CCL, which provides that, "[w]here a party failed to perform or rendered non-conforming performance, if notwithstanding its subsequent performance or cure of non-conforming performance, the other party has sustained other loss, the breaching party shall pay damages."[102] The reference to a seller's cure for nonconformity, even if it does not amount to a right as envisioned by the CISG, at the very least suggests a seller may attempt to cure and thus potentially avoid liability for losses that might otherwise result.

In the United States, the UCC's default rule allows a buyer to reject or accept goods, in whole or in part, "if the goods or the tender of delivery fail in any respect to conform to the contract."[103] The official commentary, however, recognizes that the buyer's "right of rejection . . . is also subject to the seller's right to cure."[104] This references the allowance "for a seller's right to cure prior to the time of performance."[105] Such a right becomes available when "the buyer rejects goods or a tender of delivery. . . [or] justifiably revokes acceptance . . . and the agreed time for performance has not expired."[106] Under these conditions, a seller that has performed in good faith, upon seasonable notice to the buyer and at the seller's own expense, may cure the breach of contract by making a conforming tender of delivery within the agreed time."[107] The seller's right to cure is always subject to

98. CCL art. 71.
99. *Id.*
100. *Id.* art. 72.
101. *Id.*
102. *Id.* art. 112.
103. UCC § 2-601.
104. *Id.* Official Comment 3.
105. GABRIEL, *supra* note 9, at 131 (citing UCC §§ 2-508(1)).
106. UCC § 2-508(1).
107. *Id.*

the requirement that it "shall compensate the buyer for all of the buyer's reasonable expenses caused by the seller's breach of contract and subsequent cure."[108]

D. *Examination of the Goods*

Closely tied to the issue of nonconformity is the examination of the goods in question.[109] Having provided rules for determining the conformity of goods delivered, examination by the buyer becomes a crucial issue. The CISG, CCL, and UCC each recognizes that some level of inspection must be required in order to ensure a fair balance between the buyer claiming nonconformity and the seller defending against such a claim.

1. Examining the Goods Under the CISG

Article 38 CISG defines the buyer's responsibilities with respect to making a timely examination of goods. Such examination is particularly important in relation to article 39 CISG, which states that the buyer loses the right to rely on a nonconformity "if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or *ought to have discovered it*."[110] According to the draft commentary, "[t]he time when the buyer is obligated to examine the goods under article [38] constitutes the time when the buyer 'ought to have discovered' the lack of conformity under article [39] unless the non-conformity is one which could not have been discovered by such examination."[111]

The default examination rule requires that "[t]he buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances."[112] This examination "is one which is reasonable in the circumstances," thus, a "buyer is normally not required to make an examination which would reveal every possible defect."[113] According to the draft digest, "the time for the buyer's examination as a rule begins to run upon delivery of the goods, which in general

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108. *Id.*

109. CIETAC (Jasmine Aldehyde Case), Feb. 23, 1995, *available at* http://cisgw3.law.pace.edu/cases/950223c1.html (last visited Dec. 23, 2005) [trans. Fan Yang] ("CISG Article 38 provides that the buyer must examine the goods, or cause them to be examined; within as short a period as is practicable in the circumstances").

110. CISG art. 39(1) (emphasis added). *See also* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 271 (3d ed. 1999).

111. SECRETARIAT COMMENTARY, *supra* note 29, art. 34 (equivalent to CISG art. 36), ¶ 2.

112. CISG art. 38(1).

113. SECRETARIAT COMMENTARY, *supra* note 29, art. 34 (equivalent to CISG art. 36), ¶ 3.

corresponds to the time risk of loss passed to the buyer."[114] However, "[w]here the lack of conformity is a hidden or latent one not reasonably discoverable in the initial examination . . . the period for conducting an examination to ascertain the defect does not begin to run until the defects reveal (or should reveal) themselves."[115]

Article 38 CISG also deals with two specific factual scenarios. First, "[i]f the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination."[116] Second, "[i]f the goods are redirected in transit or redispatched by the buyer without a reasonable opportunity for examination" and the seller knew or ought to have known of such a possibility at the time of contracting, "examination may be deferred until after the goods have arrived at the new destination."[117] However, the seller may not rely on article 38 CISG "if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer."[118]

2. Examining the Goods Under the CCL and the UCC

For the sale of goods, the CCL requires that "[u]pon receipt of the subject matter, the buyer shall inspect it."[119] In the first instance, inspection must occur within the period set by contract.[120] Absent such agreement, the buyer shall timely inspect the subject matter.[121] A timely period, though undefined, should correspond roughly to the Convention's "within as short a period as is practicable in the circumstances,"[122] possibly excepting its practicability limitation. The UCC affords buyers the right, as differentiated from the obligation under the CISG, to inspect goods that have been "tendered or delivered or identified."[123] Such must occur "before payment or acceptance" occurs.[124] However, in reality, a buyer should exercise the "right" to inspect.[125] This results because the UCC requires, where "a tender has been accepted," that "the buyer must within

114. Flechtner, *The Draft UNCITRAL Digest*, *in* THE DRAFT UNCITRAL DIGEST AND BEYOND, *supra* note 13, ¶ 12, at 630 (citations omitted).

115. *Id.*

116. CISG art. 38(2).

117. *Id.* (3).

118. *Id.* art. 40.

119. CCL art. 157.

120. *Id.*

121. *Id.*

122. CISG art. 38(1).

123. UCC § 2-513(1).

124. *Id.*

125. GABRIEL, *supra* note 9, at 134 (arguing that "[i]n effect then, the buyer must inspect the goods").

a reasonable time after the buyer discovers or should have discovered any breach notify the seller."[126] Failure to do so "bars the buyer from a remedy [but] only to the extent that seller is prejudiced by the failure."[127] Thus, to the extent identifying a nonconformity resulting in breach requires an examination of the goods, the buyer should inspect the goods or else risk not delivering timely notice to the seller.

E. *Effective Notice of Nonconforming Goods*

Given the existence of a nonconformity that is or should be discovered, the buyer's right to rely on a lack of conformity depends upon the timeliness of notice given to the seller. The CISG, CCL, and UCC approach the buyer's notice obligation with varying degrees of strictness.

According to article 39 CISG, the buyer loses this right when it fails to "give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it."[128] As noted, the period when the defect should have been discovered relates to the article 38 CISG examination period. Such notice must occur no later than "two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee."[129] As with article 38 CISG, the seller may not rely on this article where he "knew or could not have been unaware [of the nonconformity] and which he did not disclose to the buyer."[130] In addition, "the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice."[131]

The CCL generally adheres to the CISG's approach in dealing with notice of nonconformity. When an article 157 CCL inspection period has been set by the contract, "the buyer shall notify the seller of any non-compliance in quantity or quality of the subject matter within such inspection period."[132] Absent such notice, "the quantity or quality of the subject matter is deemed to comply with the contract."[133] In the alternative situation where no inspection period has been set, "the buyer shall notify the seller within a reasonable period, commencing on the date when the buyer discovered or should have discovered the quantity or quality non-

126. UCC § 2-607(3)(a).
127. *Id.*
128. CISG art. 39(1).
129. *Id.* art. 39(2).
130. *Id.* art. 40.
131. *Id.* art. 44.
132. CCL art. 158.
133. *Id.*

compliance."[134] Failure to do so within two years of receipt deems the quantity and quality of the goods in compliance, unless it is inconsistent with a warranty period.[135] Finally, as with the CISG when the "the seller knew or should have known the non-compliance of the [goods], the buyer is not subject to the time limits for notification."[136]

The UCC places upon buyers an obligation to notify the seller of a nonconformity that amounts to breach. When a buyer rejects or revokes acceptance of nonconforming goods, like goods with a "defect," the buyer must give notice or risk committing a breach itself in one of two situations.[137] First, the buyer loses the ability to rely upon the defect when "the seller had a right to cure the defect and could have cured."[138] Second, the buyer likewise bears this risk when "between merchants, if the seller has . . . made a request in record for a full and final statement in a record of all the defects on which the buyer proposes to rely."[139] Given these limitations, the penalties under the UCC for failure to notify a seller of a nonconformity may be less severe, and are less absolute, than the penalties applied by the CISG and the CCL. In addition to these provisions, as noted previously for accepted tenders, "the buyer must within a reasonable time after the buyer discovers or should have discovered any breach notify the seller."[140]

134. *Id.*
135. *Id.*
136. *Id.* art. 158.
137. UCC § 2-605(1).
138. *Id.*(1)(a)-(b).
139. *Id.*
140. *Id.* § 2-607(2)(a).

III. CRITICAL ISSUES REGARDING CONFORMING GOODS: DEFINING QUALITY AND CONVEYING NOTICE

Disputes involving the delivery of nonconforming goods may turn on any number of points covered by the framework described in Part II. Among these, two particularly important and complex sets of issues deserve further analysis both because they are resolved differently by different laws, and because they go to the heart of the conformity problem. These are the questions of how to define the quality standard to which goods are to adhere [A], and what constitutes effective notice of nonconformity [B].

A. *Defining the Quality of the Goods Delivered*

While the CISG, the CCL, and the UCC all hold a seller responsible to deliver goods of the contracted quality,[141] they differ as to the baseline quality standard that applies absent clear party agreement.

The CISG provides that, absent party agreement to the contrary, goods must be "fit for the purposes for which goods of the same description would ordinarily be used."[142] This standard "does not require that the goods be perfect or flawless, unless perfection is required for the goods to fulfill their ordinary purpose."[143] On the other hand, what the standard positively requires regarding the minimum acceptable quality level remains unresolved.[144] At least three standards have received support both from various courts and in academic literature; the standards are merchantable, average, and reasonable quality.[145] The first two standards depend upon standards and practices external to the parties, while the third standard relates in part to party expectations.

While uniformity does not exist regarding the applicable standard, the scope of this ambiguity is smaller than it appears. In most cases, the

141. *See* CISG art. 35(1); CCL art. 153; UCC § 2-313; CCL art. 156.

142. CISG art. 35(2)(a).

143. Flechtner, *The Draft UNCITRAL Digest*, *in* THE DRAFT UNCITRAL DIGEST AND BEYOND, *supra* note 13, ¶ 8, at 630 (citations omitted).

144. *See, e.g.*, *id.* ¶ 8, at 630-31 ("One court has raised but not resolved the issue of whether article 35(2)(a) requires goods of average quality, or goods of merely 'marketable' quality.") (citing Entscheidungen des Bundesgerichtshofes, *in* Zivilsachen [BGHZ] [Supreme Court] 129, 75-86 (F.R.G.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/950308g3.html (last visited on Dec. 23, 2005).

145. *See* Netherlands Arbitration Institute, Case No. 2319, Oct. 15, 2002, ¶¶ 68-118, *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021015n1.html (last visited Dec. 23, 2005) (discussing at length these three possible standards).

question of fitness for an ordinary purpose represents a factual question;[146] in a given dispute, each of the possible quality standards might lead to the same conclusion. In the breach, the best guide to the appropriate quality level should be the parties' expectations.[147] For example, it has been argued that:

> [T]he role of Article 35(2) is to aid in *construing the agreement of the parties*. The question is this: What was the parties' understanding of the contract provision describing the goods? More precisely (in the language of Article 35(2)) what was their understanding of the 'purposes for which goods of the same *description* would ordinarily be used'? Since the problem concerns fitness for the 'ordinary' use of goods described in the contract, serious misunderstandings should be infrequent.[148]

The view that the parties' agreement cabins the quality standard under article 35(2)(a) CISG gains support both from the article's text, which references the goods' "description," and from the Secretariat Commentary to the draft convention. The Secretariat Commentary balances such party expectations with a kind of reasonableness level commensurate with a goods' ordinary use, stating that "[t]he standard of quality which *is implied from the contract* must be ascertained in the light of the normal expectations of persons buying goods of this contract description."[149]

Both the CCL and the UCC offer greater clarity respecting the baseline quality level to which goods must conform. The CCL sets forth a hierarchy of default standards, the state or industry standard, or with "the customary standard or any particular standard consistent with . . . the contract."[150] The reference to state or industry standards suggests something akin to a merchantable level of quality.

The concept of merchantability developed in the common law and was incorporated into the UCC.[151] As reviewed previously, the UCC applies implied warranties of merchantability to sellers that are "a merchant with

146. *See* HONNOLD, *supra* note 110, at 255-56. *See also* Netherlands Arbitration Institute, Case No. 2319, ¶ 72 ("Contrary to Article 35(2)(b) CISG, Article 35(2)(a) does not require that quality requirements are determined at the time of the conclusion of the contract. Thus, factual elements occurring after the conclusion of the contract may be taken into account to determine quality standards.").

147. Netherlands Arbitration Institute, Case No. 2319, ¶¶ 71-72, 118 (supporting the reasonableness standard).

148. HONNOLD, *supra* note 110, at 255. *See* UCC § 2-314.

149. SECRETARIAT COMMENTARY, *supra* note 29, ¶ 5.

150. CCL art. 62(i). *See id.* art. 154.

151. HONNOLD, *supra* note 110, at 254-55.

respect to goods of that kind."[152] By contrast, both the CISG and the CCL do not exclude the application of their equivalent provisions from cases where the seller is not a "merchant" of such goods. Beyond this limitation, the UCC provides a list of non-exclusive criteria for meeting the merchantable standard.[153]

The UCC requires that goods "pass without objection in the trade under the contract description, . . . in the case of fungible goods, are of fair average quality within the description, [and] are fit for the ordinary purposes for which goods of that description are used."[154] Thus, the UCC references trade practices as well as the "ordinary purposes," which may or may not coincide, as well as a distinct notion of "fair average quality," for example, "goods centering around the middle belt of quality,"[155] for fungible goods. Rather than the hierarchical approach of the CCL or the more ambiguous reference to ordinary use in the CISG, the UCC offers a layered definition for implied warranties of merchantability that require that goods meet all these standards.

The effect, however, should in most cases be similar to that of the other laws, especially the CISG, which requires "fit[ness] for the purposes for which goods of the same description would ordinarily be used."[156] This is because under the UCC "[g]oods delivered under an agreement made by a merchant in a given line of trade *must be of a quality comparable to that generally acceptable in that line of trade under the description or other designation of the goods used in the agreement.*"[157]

B. *Effective Notice of Nonconformity*

Under the CISG, the CCL, and the UCC, effective notification of nonconformity depends on two requirements, the content of the notice and the timing of such notice. These two elements represent an extremely important concern because the failure of either one can preclude a buyer from claiming against the effects of a nonconformity, even when nonconformity exists.[158] Overall, the Convention imposes relatively stricter

152. UCC § 2-314(1).

153. *Id.* § 2-314(2).

154. *Id.* (2)(a)-(c).

155. *Id.* § 2-314 Official Comment 9.

156. CISG art. 35(2)(a).

157. UCC § 2-314 Official Comment 3(b).

158. CISG art. 39(1) ("The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it"); CCL art. 158 (if the buyer does not deliver timely or sufficient notice, "the quantity or quality of the subject matter is

requirements upon the notifying buyer than the Contract Law and the UCC.

1. Content of an Effective Notice

As to the content of a notice of nonconformity, under the CISG such notice must be sufficiently specific regarding the "nature of the lack of conformity"[159] in order for the buyer to meet the burden.[160] Sufficiency in this respect is determined with the purpose of the notice in mind. As one commentator has suggested,

> [q]uestions as to what the notice must say should be answered with regard for the functions served by the notice . . . [and] the principal functions [under the CISG] are to give the seller an opportunity to obtain and preserve evidence of the condition of the goods and to cure the deficiency.[161]

This conclusion also accords with the draft commentary,[162] as well as with the draft digest.[163]

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deemed to comply with the contract"); UCC § 2-617(3)(a) ("failure to give timely notice bars the buyer from a remedy only to the extent that seller is prejudiced by the failure").

159. CISG art. 39(1).

160. Flechtner, *The Draft UNCITRAL Digest*, *in* THE DRAFT UNCITRAL DIGEST AND BEYOND, *supra* note 13, ¶ 4, at 630 ("There appears to be a consensus in reported decisions that the buyer bears the burden of proving that it gave the required Article 39 notice of non-conformity.").

161. HONNOLD, *supra* note 110, at 277-78. *See also* Fritz Enderlein, *Rights and Obligations of the Seller under the UN Convention Rights and Obligations of the Seller under the UN Convention*, *in* INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 171 (Petar Sarcevic & Paul Volken eds., 1996) (arguing that "[t]he buyer's notice should enable the seller to take the necessary steps to remedy the non-conformity[, thus f]or this reason, an exact description of the non-conformity is required").

162. SECRETARIAT COMMENTARY, *supra* note 29, art. 37 (equivalent to CISG art. 39), ¶ 4.

> The purpose of the notice is to inform the seller what he must do to remedy the lack of conformity, to give him the basis on which to conduct his own examination of the goods, and in general to gather evidence for use in any dispute with the buyer over the alleged lack of conformity. Therefore, the notice must not only be given to the seller within a reasonable time after the buyer has discovered the lack of conformity or ought to have discovered it, but it must specify the nature of the lack of conformity.

Id.

163. Flechtner, *The Draft UNCITRAL Digest*, *in* THE DRAFT UNCITRAL DIGEST AND BEYOND, *supra* note 13, ¶ 11, at 666-68 (citations omitted). Courts have held:

The CCL requires notice following either a contracted or implied inspection period.[164] Unlike the CISG, the CCL does not explicitly suggest the content of the notice in terms of specificity regarding the nature of the nonconformity. Rather, the CCL simply requires that "the buyer shall notify the seller" of the relevant "quantity or quality non-compliance."[165] The CCL, however, does suggest that the notice should convey the results of the buyer's inspection of the goods. The CCL does so both by the placement of the notice article,[166] the reference to the goods' inspection,[167] and the implication that notice must effectively convey the message that the goods are not quantity or quality compliant. The CCL assesses the adequacy of notice based upon the buyer's perspective. Specifically the CCL analyzes what the buyer could reasonably discover during examination. This approach is in contrast to the CISG, which analyzes adequacy from the seller's perspective, specifically what needs to be known to remedy or respond to a non-conformity claim.

The UCC's notice provision points to both the buyer's and the seller's perspectives as guides for determining the content of the notice. In relevant part, the UCC states that "the buyer must within a reasonable time after the buyer discovers or should have discovered the breach notify the seller, but failure to give timely notice bars the buyer from a remedy only to the extent that the seller is prejudiced by the failure."[168] On the one hand, as with the CCL, discovery alludes to examination and therefore notice reaching only those things that a party could or should reasonable ascertain about such goods. On the other hand, the reference to a failure to notify

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> that notice should be specific enough to allow the seller to comprehend the buyer's claim and to take appropriate steps in response, *i.e.*, to examine the goods and arrange for a substitute delivery or otherwise remedy the lack of conformity; that the purpose of the specificity requirement is to enable the seller to understand the kind of breach claimed by the buyer and to take the steps necessary to cure it, such as initiating a substitute or additional delivery; that notice should be sufficiently detailed that misunderstanding by the seller would be impossible and the seller could determine unmistakably what the buyer meant.

Id.

164. CCL art. 158.

165. *Id.*

166. The inspection CCL article 157 immediately precedes the notice CCL article 158.

167. "Where an *inspection period* was prescribed, the buyer shall notify the seller of any non-compliance . . ." and, absent such period, "the buyer shall notify the seller within a reasonable period, commencing on the date when the buyer *discovered or should have discovered* the quantity or quality non-compliance" discovery can best be understood from the reference point of inspection. CCL art. 158.

168. UCC § 2-607(3)(a).

bars remedies "the extent that the seller is prejudiced by the failure" points to the seller's interest. As with the CISG, the concern is that a lack of notice might prevent the seller from taking action to protect himself, for example, through an effort to cure. Thus, the notice's content should be judged with the same purpose in mind as under the CISG. The official commentary to the UCC highlights the balance between the two parties' interests sought by the article. The commentary states that:

> The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as is required for statements of defects upon rejection. . . . The notification which preserves the buyer's rights under this Article need only be one that informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.[169]

As the Commentary recognizes, the UCC differentiates the required content for a notice of nonconformity[170] from a notice of rejection or revocation associated with a particular defect.[171] In the former case "[t]he content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched,"[172] while in the later the buyer must state the "particular defect" on which it relies sufficient to allow the seller to cure.[173]

2. Timing and Delivery of an Effective Notice

Even where a notice of nonconformity effectively communicates its message to the seller, it can be rendered inconsequential by the buyer's delay in sending it. Recognizing this, the CISG conditions the loss of a buyer's right to claim nonconformity on delay in notice beyond a "reasonable time after he has discovered it or ought to have discovered it."[174] It is possible that the reasonable period may be determined in part by reference to the examination process contained in the prior article:

169. *Id.* § 2-607 Official Comment 4.
170. *Id.* § 2-607.
171. *Id.* § 2-605.
172. *Id.* § 2-607 Official Comment 4.
173. UCC § 2-605.
174. CISG art. 39(2).

> Article 38, in fixing the time when the buyer must inspect the goods, is useful in determining when the buyer "ought to" discover a non-conformity. Of course, the buyer is bound only to discover those defects that a normal examination would reveal. . . . The determination of the "reasonable period" for notice following the time when the buyer discovers (or ought to have discovered) the non-conformity would be influenced by a wide range of factors.[175]

Again, the purpose of the notice provision should be considered. In surveying decisions considering article 39 CISG, the draft digest found that the reasonable period has been construed as intending to promote "the rapid settlement of disputes," that it "is designed to promote flexibility, and [that] the period varies with the facts of each case."[176] Even where the facts require notice within a time period well under the two-year maximum,[177] The CISG allows a buyer to reduce the price or claim damages, except for lost profit, when it "has a reasonable excuse for his failure to give the required notice."[178] Likewise, "[t]he seller is not entitled to rely on [article 39] if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer."[179]

When a specific agreement exists regarding the inspection period, the CCL eliminates uncertainty by requiring that "the buyer shall notify the seller of any non-compliance in quantity or quality of the subject matter *within such inspection period.*"[180] Absent such agreement, the CCL mirrors the CISG in the use of the "reasonable period" standard.[181] In that case, "the buyer shall notify the seller within a reasonable period [being no more than two years], commencing on the date when the buyer discovered or

175. HONNOLD, *supra* note 110, at 279.

176. Flechtner, *The Draft UNCITRAL Digest*, *in* THE DRAFT UNCITRAL DIGEST AND BEYOND, *supra* note 13, ¶ 15, at 670 (citing Trib. Civ. di Cuneo [Cuneo Civil District Court] 31 Jan. 31 1996, n 45/96 (Italy)), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/960131i3.html (last visited Dec. 23, 2005); Oberlandesgericht Düsseldorf [OLG Düsseldorf] [Düsseldorf Provincial Court of Appeal] 17 U 136/93 (1993) (F.R.G.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/930312g1.html (last visited Dec. 23, 2005); Landgericht Düsseldorf [LG Düsseldorf] [Düsseldorf District Court] 40 O 91/91 (1991) (F.R.G.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/921204g1.html (last visited Dec. 23, 2005); Trib. di Vigevano [Vigevano District Court],12 July 2000 n. 856 (Italy), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/000712i3.html (last visited Dec. 23, 2005).

177. CISG art. 39(2).

178. *Id.* art 44.

179. *Id.* art. 40.

180. CCL art. 158 (emphasis added).

181. *Id.*

should have discovered the quantity or quality non-compliance."[182] Similar to the CISG, the CCL does not hold a notification failure against a buyer when "the seller knew or should have known the non-compliance of the subject matter."[183]

As with the CISG and the CCL, the UCC requires notice within "a reasonable time after the buyer discovers or should have discovered any breach."[184] In effect the UCC should reach largely the same results as under the CISG and the CCL's similar provisions. The only guidance given by the Commentary states that "[t]he time of notification is to be determined by applying commercial standards to a merchant buyer."[185] This suggests that both reasonable time, and especially those methods are to be surmised for assessing what should have been discovered, should be approached from the trade perspective.

IV. CONCLUSION

Trade between the United States and China, already valued at over $200 billion per year, continues to grow at a rapid pace. Unfortunately, lawyers recognize that as the volume of such imports and exports grows, so will the volume of related disputes. Consequently, practitioners should gain familiarity with the legal structures likely to guide such disputes. Familiarity will prevent disputes at the contracting stage, and help to resolve disputes during litigation or arbitration, if and when that becomes necessary.

The most likely area of contention between Chinese and American parties involved in the trade of moveable goods will be conformity of the goods. The CISG, which serves as the default rule for transactions between buyers and sellers from China and the United States, as well as the relevant domestic laws, each approach conformity in a somewhat different way. Some provisions, particularly those that define default quality standards and govern notice of nonconformity, deserve particular scrutiny. This Article has attempted to provide such a comparison between these laws and their relevant rules, to provide a starting point for individuals who need to consider the application of these laws to particular factual situations. It is only through comparison of the CISG, CCL, and UCC may the relative merits of these three approaches be understood.

182. *Id.*
183. *Id.*
184. UCC § 2-607(3)(a).
185. *Id.* § 2-607 Official Comment 4.