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REASONABLE STANDARDS FOR CONTRACT INTERPRETATIONS UNDER THE CISG

Donald J. Smythe[*]

[*] Donald J. Smythe, B.A., M.A., Carleton University; M.Phil., Ph.D., Yale University; J.D., University of Virginia. Professor of Law, California Western School of Law.

ABSTRACT

The United Nations ("UN") Convention on Contracts for the International Sale of Good ("CISG") offers the promise of harmonizing international sales law and facilitating international trade and global commerce. But there is a "homeward trend bias" that may encourage domestic courts to construe the gaps in the CISG broadly and fill them with non-uniform domestic legal rules. Questions about contract interpretation under the CISG raise the same concerns about a homeward trend bias as questions about the interpretation of express CISG provisions. The CISG has express provisions governing contract interpretation but their application may not provide an unambiguous interpretation. This presents two risks. One is that courts might reinterpret questions to be about the validity of contracts rather than their interpretation; in that case the CISG will not apply and courts will therefore apply domestic legal rules to answer the questions. The other possibility is that courts might rule that the interpretive questions are not governed by the CISG and might therefore use private choice of law rules to identify domestic legal rules to answer the questions. Neither of these possibilities should be welcomed. Courts that use non-uniform domestic laws to answer questions about the interpretation of CISG contracts will undermine the intent and purpose of the CISG no less than courts that answer other questions about matters that should be governed by the CISG using non-uniform domestic laws. All questions about contract interpretation under CISG contracts should therefore be governed either by the CISG's explicit provisions or by the CISG's general principles. This essay provides an analysis of the CISG's express contract interpretation provisions and illustrates how they can result in ambiguities. It argues that when there are ambiguities, the general principles on which the CISG is based imply that courts should interpret the contracts to promote reasonable commercial standards of fair dealing in the trade.

I. INTRODUCTION

The United Nations ("UN") Convention on Contracts for the International Sale of Good ("CISG" or "the Convention") offers the promise of harmonizing international sales law and facilitating international trade and global commerce. But it is a promise that appears elusive because of a "homeward trend bias" that may encourage domestic courts to construe the gaps in the CISG broadly and fill them with non-uniform domestic legal rules. Scholars have not surprisingly, therefore, devoted considerable thought to the appropriate interpretation

of the CISG's provisions and principles. They have, however, devoted considerably less thought to a closely related problem: how to interpret the terms of a contract to which the CISG applies. Questions about contract interpretation under the CISG raise some of the same problems as questions about the interpretation of express CISG provisions. Courts that use non-uniform domestic laws to answer interpretive questions under CISG contracts will undermine the intent and purpose of the CISG no less than courts that answer other questions about matters that should be governed by the CISG using non-uniform domestic laws.

This essay offers an analysis of contract interpretation under the CISG and argues that all questions about contract interpretation under CISG contracts should be governed either by the CISG's explicit provisions or by the CISG's general principles. The CISG thus should have a broad preclusive effect on domestic legal rules of contract interpretation. Since the CISG's express provisions governing contract interpretation create some significant ambiguities, this will place a considerable burden on the CISG's general principles in interpreting ambiguous contract terms. This essay argues, however, that the CISG's general principles and are robust enough to bear that burden and, in fact, imply that when the CISG's express provisions result in ambiguities courts should interpret ambiguous contract terms to promote "reasonable commercial standards of fair dealing in the trade." Thus, the CISG's general principles imply standards for contract interpretation that are similar to the commercial standards for contract interpretation that are typically applied in most well-developed domestic legal systems. Nonetheless, it is important for the coherence and unification of international sales law that the rules of contract interpretation be developed and applied under the CISG and not under non-uniform domestic legal systems.

The next section of this essay provides some background on the CISG. Section III analyzes the CISG's express rules governing contract interpretation and explains how they may create important and confounding ambiguities. It also analyzes the general principles governing contract interpretation under the CISG, and argues that, if the application of the CISG's express rules results in ambiguities, the CISG's general principles require ambiguous contract terms to be interpreted in a manner that promotes reasonable commercial standards of fair dealing in the trade. The last section summarizes and offers some concluding comments.

II. THE CISG

The CISG is the most important body of law governing international sales. As of December 15, 2015, it has been adopted by 84 nation states, including the United States and most of the world's major trading nations.[1] In the United States, the CISG applies to most international sales transactions with the full force of federal law[2] whenever a court determines that United States law applies to a contract for the sale of non-household[3] goods between parties with places of business in different "Contracting States," meaning nation states that have adopted the CISG.[4] The CISG was the product of negotiations between representatives from many nations with diverse legal systems and traditions, not to mention different languages.[5] Since it was difficult for the representatives to make compromises on some issues, they chose to leave some important gaps in the CISG rather than fail to agree on a final draft.[6] Moreover, because they needed to reach compromises in all six working languages of the United Nations, in some cases the CISG's provisions can seem particularly terse. As a consequence, the CISG's rules are quite spare by comparison to the Uniform Commercial Code ("UCC") or other nations' domestic sales laws and it generally does not use the same commercial law terms.[7]

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[1] *See* United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1983), 1489 U.N.T.S. 3 [hereinafter "CISG"], *available at* http://www.cisg.law.pace.edu/cisg/text/treaty.html. The United States Senate ratified the CISG in 1986 giving it the force of federal law when the Convention came into effect on January 1, 1988. *See CISG: Table of Contracting States*, PACE L. SCH. INST. OF INT'L COM. L. (Jan. 8, 2016), *available at* http://www.cisg.law.pace.edu/cisg/countries/cntries.html.

[2] Since the CISG has the force of federal law, under the 'Supremacy Clause' of the United States Constitution, it trumps any conflicting state laws. Thus, when the CISG applies to a contract, it displaces the UCC.

[3] CISG, *supra* note 1, art. 2(a) (essentially exempts "goods bought for personal, family or household use"); *see also supra* art. 2(a)-(f) (exempts goods bought by auction, or by authority of law, as well as stocks, shares, investment securities, negotiable instruments, money, ships, vessels, hovercraft or electricity).

[4] *Id.* arts. 1(a), 2(a) (in some Contracting States the CISG might apply even if the parties do not have places of business in different Contracting States); *see also id.* art. 1(b) (the United States has declared a reservation to CISG art. 1(b) - however, under CISG art. 95, art. 1(b) does not apply within the United States). *But see id.* art. 6 (CISG allows parties to contract around its own rules in favor of others).

[5] For an overview of the drafting process, *see* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 3-10 (4th ed. 2009).

[6] *See, e.g.*, CISG arts. 2, 4-5 (these exclude from the scope of the CISG most contracts for consumer goods, as well as any legal claims relating to the validity of the contracts or contact terms, and any legal claims related to death from personal injury).

[7] For example, the English version of the CISG does not make any reference to "usage of trade," "warranty," or "consequential damages," even though such terms are commonly used in

The spare structure of the CISG's rules and its unfamiliar terms inevitably raise questions of interpretation. What should courts do when they face questions that the CISG's express provisions do not explicitly answer, at least in terms with which they are familiar? The 1969 Vienna Convention on the law of Treaties does not apply, since it is concerned only with the interpretation of treaty obligations of nation states and the CISG creates obligations between private parties.[8] The CISG itself, however, offers some guidance: Under Article 7(1) courts are directed to interpret the CISG's provisions in a manner that promotes uniformity in its application and good faith in international trade.[9] Article 7(2) indicates that when confronted with an apparent gap in the CISG's express provisions, courts should first look to the general principles upon which the CISG is based to determine whether they answer the question, and, if they do not, they should then select the domestic laws applicable under private choice of law rules and answer the question with a domestic legal rule.[10]

Unfortunately, Article 7(2) invites controversy. It encourages parties to find gaps in the CISG's rules so that they may argue for the application of domestic laws that work to their advantage.[11] To the extent that courts are susceptible to these arguments, the scope of the CISG is narrowed and non-uniform domestic laws displace uniform international laws in the adjudication of international sales disputes. The purpose of the CISG is thus undermined.

This is hardly a theoretical problem. In fact, courts' inclinations to use domestic legal rules rather than the CISG to answer questions arising under the CISG are so strong and pervasive that the problem is commonly referred to as the "homeward trend bias."[12] While it would

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English speaking nations.

8 HONNOLD, *supra* note 5, at 103.

9 CSIG, *supra* note 1, art. 7(1) ("In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.").

10 *Id.* art. 7(2) ("Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.").

11 For discussions, s*ee, e.g.*, RICHARD FENTIMAN, FOREIGN LAW IN ENGLISH COURTS: PLEADING, PROOF, AND CHOICE OF LAW 29–30 (1998); OTTO KAHN-FREUN, GENERAL PROBLEMS OF PRIVATE INTERNATIONAL LAW 467 (1976); PETER MACHIN NORTH, ESSAYS IN PRIVATE INTERNATIONAL LAW 69 (1993); JUHA RATIO, THE PRINCIPLE OF LEGAL CERTAINTY IN EC LAW 114 (Francisco Laporta ed. 2003).

12 There are many references to a homeward trend bias in CISG jurisprudence in the literature. *See, e.g.*, LARRY DIMATTEO ET AL., INTERNATIONAL SALES LAW: A CRITICAL ANALYSIS OF CISG JURISPRUDENCE, 2-3 (2005); JOHN O. HONNOLD, DOCUMENTARY HISTORY

be a mistake to single out any particular reprobates for individualized criticism, American courts are certainly not above reproach. In fact, in several well-known cases American courts have declined to apply express provisions of the CISG, completely ignored precedents from foreign jurisdictions interpreting CISG provisions, relied on interpretations of analogous provisions of the UCC rather than interpretations of the CISG, or construed CISG provisions in an unreasonably narrow manner thus leaving wide gaps to be filled using United States law.[13]

The homeward trend bias raises the possibility that questions about contract interpretation arising under CISG contracts could be answered using domestic legal rules of contract interpretation. There are two distinct possibilities. One is that courts might face a dilemma because it is not clear whether the question is one about the interpretation of the contract or one about the validity of the contract. If a court considers the question to be about the validity of the contract rather than its interpretation, then the CISG will not apply at all and the court will be obliged to apply a domestic legal rule to answer the question. The other possibility is that courts might face a dilemma because it is not obvious that the CISG's express provisions provide an answer to a question of interpretation. For example, a contract term could be truly ambiguous either because it is not susceptible to any interpretation under the CISG's express provisions or because it is susceptible to alternative and inconsistent interpretations under the CISG's express provisions. In

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OF THE UNIFORM LAW FOR INTERNATIONAL SALES; Harry M. Fletcher, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187 (1998); *see also Guide to the CISG Article 7*, PACE L. SCH. INST. OF INT. COM. L. (Aug. 29, 2006), http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-07.html ("[I]t is especially important to avoid different constructions of the provisions of this Convention by national courts, each dependent upon the concepts used in the legal system of the country of the forum.").

[13] *See, e.g.*, Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., Inc., 993 F.2d 1178 (5th Cir. 1983) (the Fifth Circuit holds that the parol evidence rule would apply under the CISG, even though it does not); Schmitz-Werke GMBH & Co. v. Rockland Industries, Inc., 37 Fed. Apps. 687 (4th Cir. 2002) (the Fourth Circuit states that "Case Law interpreting provisions of Article 2 of the . . . [UCC] . . . that are similar to provisions of the CISG can . . . be helpful in interpreting the Convention" even though that contradicts the CISG); Caterpillar, Inc. v. Usinor Industeel 393 F. Supp. 2d 659 (U.S. Dist. Ct. N.D. Ill. 2005) (the Federal District Court for the Northern District of Illinois held that the CISG does not preempt promissory estoppel claims by downstream buyer under Illinois state law, even though it also held that the downstream buyer may not make claims under the CISG, and that there is a privity bar by downstream buyers under Illinois state law); Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024 (2d Cir. 1995) (the Second Circuit states that "Case law interpreting analogous provisions of Article 2 of the . . . UCC . . . may . . . inform a court where the language of the relevant CISG provisions tracks that of the UCC.").

such a case, a court might consider the interpretive question not to be governed by the CISG and might therefore use a domestic legal rule to answer the question.

Neither of these possibilities should be welcomed. The more that courts rely on domestic legal rules rather than the CISG to answer international sales questions, the less uniform international sales law will become, and the more the purpose of international legal codification will be compromised. The mandate in Article 7(1) to interpret the CISG to promote uniformity in its application and good faith in international trade implies that courts should construe the scope of the CISG as broadly as possible so that it precludes the application of any domestic legal rules of contract interpretation to CISG contracts, and that they should also limit the application of domestic legal rules that void contracts or contract terms.

III. CONTRACT INTERPRETATION UNDER THE CISG

By comparison to United States law, the CISG is exceptionally liberal about the interpretation of contracts. To begin with, there is no statute of frauds requirement, so a written memorial is not necessary to enforce a CISG contract. Article 11 unequivocally states that a CISG contract does not need to be "concluded in or evidenced by writing and, in fact, "may be proved by any means, including witnesses."[14] It is interesting to observe that the United States could have declared a reservation to Article 11 under Article 96, much as it declared a reservation to Article 1(1)(b) under Article 95, and thus ensured that a statute of frauds requirement would continue to apply whenever the CISG applied under United States law, but it did not.[15] Moreover, although some courts have held otherwise,[16] it seems quite clear to most scholars that the CISG does not justify applying a parol evidence rule or any other rules limiting the use of extrinsic evidence to prove the terms of a contract.[17] Article 8(3) states that "due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages

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[14] CISG, *supra* note 1, art. 11.

[15] HONNOLD, *supra* note 5, at 183 ("States who were concerned to preserve formality requirements . . . were free to do so by making a reservation under Article 96; those that failed to do so presumably were willing to forego such protections.").

[16] *See, e.g.*, Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., Inc., 993 F.2d 1178 (5th Cir. 1983).

[17] *See, e.g.*, HONNOLD, *supra* note 5, at 164-65; JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG, 43-44 (3d ed. 2008).

and any subsequent conduct of the parties."[18] This has been interpreted by most scholars and courts to allow almost any relevant extrinsic evidence to be used in proving the terms of a CISG contract.[19]

Article 9 of the CISG specifically authorizes the use of mercantile practices and customs in interpreting CISG contracts. Article 9(1) states that "[t]he parties are bound by . . . any practices which they have established between themselves."[20] In the commercial law terms used by the UCC, this would justify the use of courses of dealing and courses of performance. Under the UCC, a course of dealing is a pattern of conduct between the parties during pervious transactions; a course of performances is a pattern of conduct between the parties during their present transaction.[21] Article 9(2) states that the parties "are considered . . . to have impliedly made applicable . . . a usage of which they knew or ought to have known and which in international trade is widely known to . . . parties of the type involved."[22] In the terms used by the UCC, this allows usages of trade to be used in contract interpretation.[23] The CISG thus authorizes mercantile practices and customs that are essentially like courses of dealing, courses of performance, and usages of trade as they are understood under the UCC to be used to interpret CISG contracts, whereas the UCC limits them to, at most, explaining or supplementing the written terms when a written memorial of the parties' agreement is executed.[24]

The CISG's liberal rules have some important implications: First of all, the CISG accords extrinsic evidence as much weight as written

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18 CISG, *supra* note 1, art. 8(3).

19 *See* HONNOLD, *supra* note 5, at 165 (there is now a strong (although not unanimous) line of precedents in United States courts holding that the parol evidence rule does not apply under the CISG).

20 CISG, *supra* note 1, art. 9(1).

21 U.C.C. § 1-303(a) (AM. LAW INST. & UNIF. LAW COMM'N 2015) states that "a course of performance is a sequence of conduct between the parties to a particular transaction," and § 1-303(b) (AM. LAW INST. & UNIF. LAW COMM'N 2015) states that "a course of dealing is a sequence of conduct concerning previous transactions between the parties to a particular transaction. . . .").

22 CISG, *supra* note 1, art. 9(2).

23 U.C.C. § 1-303(c) (AM. LAW INST. & UNIF. LAW COMM'N 2015) ("[A] usage of trade is any practice or method of dealing having such regularity of occurrence in a place, vocation, or trade as to justify the expectation that it will be observed. . . .").

24 *See* U.C.C. § 2-202 (AM. LAW INST. & UNIF. LAW COMM'N 2015) ("Terms with respect to which the confirmatory memoranda of the parties agree or otherwise set forth in a writing intended by the parties as a final expression of their agreement may not be contradicted . . . but may be explained or supplemented (a) by course of performance, course of dealing, or usage of trade; and (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.").

evidence in the interpretation of contract terms.[25] Moreover, the CISG has no statute of frauds, and so there is no requirement that there be a written memorial of the parties' contractual obligations. Even if there is a written memorial of the agreement there are no restrictions on how extrinsic evidence may be brought to bear on contract interpretations.[26] This is in contrast to the UCC, which only allows extrinsic evidence at most to be used to explain or supplement the terms of a written memorial.[27]

Second, the CISG allows almost any extrinsic evidence to be used to prove the terms of a contract. There is no parol evidence rule, and so oral evidence as well as evidence about courses of dealing, courses of performance, and usages of trade may all be brought to bear on the interpretation of a CISG contract. Moreover, unlike the UCC, the CISG does not specify any hierarchy of authority between the kinds of evidence that might be used; they all carry the same weight.[28] Thus, oral evidence and evidence about mercantile practices and customs carry the same weight as the evidence provided by a written memorial, and may not only explain or supplement the written evidence but may also contradict it.

The overarching implication of the CISG's rules is that they create the potential for considerably more ambiguity about the interpretation of contract terms than the UCC. It is particularly significant that the UCC's rules generally limit the admissibility of contradictory evidence, whereas the CISG's rules do not. Thus, courts are more likely to have to interpret contract terms using contradictory evidence under the CISG than they are required to do under the UCC. This has the potential to make courts' interpretations less predictable and possibly even inconsistent. The difficult interpretive challenges may also increase courts' temptation to rely on domestic legal rules to resolve interpretive problems when the CISG's rules do not appear to provide sufficient guidance.[29] It would be a mistake, however, for courts to succumb to

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25 HONNOLD, *supra* note 5, at 164-65.

26 *Id.*

27 U.C.C. § 2-202 (AM. LAW INST. & UNIF. LAW COMM'N 2015).

28 HONNOLD, *supra* note 5, at 164-65.

29 Scholars have recognized that this is a serious problem. *See, e.g.*, LOOKOFSKY, *supra* note 17, at 43 (the author writes, "Although Article 8 clearly governs the (very large) matter of (sales) contract interpretation, we could hardly expect these few lines of text to serve as a replacement for the mountain of jurisprudence accumulated elsewhere on this important subject. For this reason, courts and arbitrators sometimes apply more specific, yet widely accepted principles – such as *contra proferentem* – to supplement the black letter law in Article 8; to provide justification (authority) . . . they can either divine a CISG general principle . . . or they might look outside the Convention, to *lex mercuratoria* and the like." The latter course is a great danger to

the temptation. The CISG's express rules and general principles governing contract interpretation provide sufficient guidance to resolve almost all interpretive problems in a reasonably predictable and consistent manner without recourse to domestic legal rules.

A. The CISG's Express Contract Interpretation Provisions

Article 8(1) of the CISG states that statements made by and other conduct of a party are to be determined by the party's subject intent where the other party knew or could not have been unaware what that intent was.[30] Thus, in *MCC Marble*,[31] where a Florida buyer signed a written form with terms stated in Italian that he did not understand, and agents of the Italian seller provided affidavits attesting that he did not mean to be bound by those terms, the Eleventh Circuit held that the lower court erred by excluding the affidavits providing evidence of the buyer's subjective intent.[32] The affidavits, together with the buyer's own testimony, might have been sufficient to prove that the buyer did not subjectively intend to be bound by the Italian terms, even though the court was moved to express its incredulity that an experienced business person could be so reckless about signing a written form in a footnote to the opinion.[33] Unfortunately, Article 8(1) will rarely apply since there will rarely be evidence that is not only sufficient to prove a party's subjective intent but is also sufficient to prove that the other party knew or could not have been unaware of that subjective intent.

Article 8(2) is therefore likely to govern most contract interpretations under the CISG. Article 8(2) states that where Article 8(1) does not apply, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.[34] What is perhaps most interesting about Article 8(2) is

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the uniformity of international sales law and should be discouraged. The main purpose of this essay is to argue that all questions of contract interpretation under the CISG should be answered using the CISG and the jurisprudence it spawns and to suggest how that may be done).

30 *See* CISG, *supra* note 1, art. 8(1) ("[S]tatements made by and or other conduct of a party are to be determined by his intent where the other party knew or could not have been unaware what that intent was.").

31 MCC-Marble Ceramic Ctr. v. Ceramica Nuova d'Agostino, 144 F.3d 1384 (11th Cir. 1998).

32 *Id.* at 1391.

33 *Id.* at 1387 n.9 ("We find it nothing short of astounding that an individual, purportedly experienced in commercial matters, would sign a contract in a foreign language and expect not to be bound simply because he could not comprehend its terms.").

34 CISG, *supra* note 1, art. 8(2) ("[S]tatements made by and or other of a party are to be determined according to the understanding that a reasonable person of the same kind as the other

not that it uses a reasonableness standard, but the way it uses a reasonableness standard – that is, by implying that a party's statements should be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had under the same circumstances. As the discussion below will elaborate though, this particular use of a reasonableness standard has the potential to create some ambiguities.

Article 8(2) appears to imply that if one of the parties drafts a written memorandum for a contract and there is a dispute about the interpretation of one of the terms, a court should interpret the term in the same way that a reasonable person of the same kind (presumably meaning in the same trade and/or from the same culture) as the other party would have done under the same circumstances.[35] The implication appears to be similar to that of the *contra proferentem* rule that is commonly used to resolve contract interpretation disputes in the United States,[36] although it may not disfavor the drafter quite so much as it favors the reasonableness of the interpretation, and it certainly does not justify applying the *contra proferentem* rule from any domestic laws to a CISG contract. Nonetheless, since contract terms are commonly drafted by the party with more resources and experience,[37] the rule seems both reasonable and fair. It also obviates the need for a court to apply the *contra proferentem* rule under any domestic law.[38]

This is not to say, however, that the application of Article 8(2) to statements made by a single party can never result in ambiguities. It is significant that Article 8(2) uses the indefinite article in stating the reasonableness standard for interpreting a party's statements. Perhaps reasonable people may disagree, and perhaps they might also interpret the party's statements or conduct in different ways even under the same circumstances. In other words, there may be more than one understanding of a party's statement that could be imputed to a reasonable person of the same kind as the other party in the same circumstances. In such a case, of course, Article 8(2) would not provide an unambiguous interpretation of the party's statement. As Joseph

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party would have had in the same circumstances.").

35 HONNOLD, *supra* note 5, at 252-53.

36 *Id.*

37 *See, e.g.*, Friedrich Kessler, *Contracts of Adhesion: Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943) (exploring the implications of unequal bargaining power for the contractual writings drafted by the parties).

38 This essay disapproves of the application of *contra proferentem* unless it is developed and applied under the authority of the CISG. This has typically not been the case. *See, e.g.*, LOOKOFSKY, *supra* note 17, at 43.

Lookofsky has suggested,[39] it might be tempting for courts to resolve the ambiguity by appealing to domestic legal rules. Unfortunately, that would undermine the purpose of the CISG.

Although it may not be obvious, Article 8(2) also applies to contract interpretations when both of the parties negotiate and draft – or at least execute—the contract terms in a written memorial of their agreement. In fact, Article 8(2) appears to imply that courts should apply the same standard in interpreting contract terms that were jointly drafted or executed, although they should apply the standard separately and independently to each of the parties. Thus, each of the parties should be treated as having made a statement expressing the terms, and each party's statement of the terms should be interpreted according to the understanding that a reasonable person of the same kind as the other party would have under the same circumstances.[40] Since an interpretation of a contract term that can be considered reasonable from each of the opposing parties' sides can be described as "mutually reasonable," Article 8(2) appears to direct courts to interpret jointly drafted contract terms to be mutually reasonable.[41]

B. Ambiguities Under the CISG's Express Contract Interpretation Provisions

Unfortunately, the application of Article 8(2)'s reasonableness standard may not be as simple as it initially appears.[42] If the parties have a genuine interpretive dispute, it may be possible that, relative to each of them, a reasonable person of the same kind as the other party could have an understanding of a written contract term under the same circumstances that is not only different from their own but also different from that of a reasonable person in their own position under the same

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39 *Id.*

40 *See* CISG, *supra* note 1, art. 8(2) (the language of Article 8(2) refers to "statements . . . and other conduct" of a party. Presumably, a written contract term that is drafted or even simply executed by a party should be treated as a statement by that party and should, therefore, be subject to Article 8(2). This was certainly the approach taken by the Eleventh Circuit in MCC-Marble Ceramic Ctr. V. Ceramica Nuova d'Agostino, 144 F.3d 1384 (11th Cir. 1998)).

41 This should not be surprising. A reasonableness standard is stated in several CISG provisions. Indeed, one distinguished commentator has claimed that a reasonableness standard is one of the general principles on which the CISG is based. *See* PETER SCHLECHTRIEM, UNIFORM SALES LAW – THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 38 (1986) ("[T]hat the parties must conduct themselves according to the standard of the "reasonable person," which is expressly described in a number of provisions and, therefore, according to Article 7(2), must be regarded as a general principle of the Convention.").

42 The analysis in this part clarifies and extends the analysis in Donald J. Smythe, *Clearing the Clouds on the CISG's Warranty of Title*, N.W. J. INT'L L. & Bus. (forthcoming 2016).

circumstances. This possibility has been apprehended by at least some scholars but has not been widely explored and certainly not resolved.[43] In fact, since reasonable persons of the same kind can disagree about their understandings of statements or conduct even under the same circumstances, it may be possible that, relative to each of the parties, a reasonable person of the same kind as the other party could have had more than one - perhaps even several - understandings of a contract term under the same circumstances.[44] In other words, Article 8(2) might imply a set of multiple understandings (or perhaps to phrase this more felicitously, "a set of multiple reasonable interpretations") that a reasonable person of the same kind as the other party might have had under the same circumstances. In fact, since the CISG places no limitations on the use of extrinsic evidence, the written evidence might be supplemented by considerable additional extrinsic evidence, some of which may contradict the written term. As a general matter, therefore, the CISG's liberal rules about the admissibility of extrinsic evidence only add to the number of possible understandings (in other words, the "number of reasonable interpretations") of a contract term that could be imputed to a reasonable person of the same kind as the other party under the same circumstances.

The possibility that different and/or multiple reasonable interpretations of a contract term could be imputed to reasonable persons of the same kind as the parties under the same circumstances complicates the application of Article 8(2). Some simple set theory helps to clarify the issues. Consider a contract dispute between two

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[43] *See, e.g.*, Gyula Eorsi, *General Provisions*, *in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALES OF GOODS 2-18 (Galston & Smit ed., 1984). According to Professor Eorsi, a similar problem was apprehended during the drafting of the UNIDROIT principles on the validity of contracts. Professor Eorsi explains that "the two parties to the contract are in different situations and consequently two "reasonable persons" might well have the same disagreement over the interpretation of the contract as the parties themselves." In Professor Eorsi's view, this would be a "nightmare" and might result in a question about the validity of the contract. *See also* E. Allen Farnsworth, *Article 8*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 96-7 (C.M. Bianca & M.J. Bonell eds., 1987). The famous contract scholar Allen Farnsworth also anticipated the problem above, and suggested that it might make the contract invalid. The view here is obviously that an interpretive conundrum like this one should be addressed under the CISG as a matter of contract interpretation.

[44] CISG, *supra* note 1, art. 8(2) (the language of Article 8(2) seems to overlook this possibility, since it uses the definite article when it refers to "the understanding that a reasonable person . . . would have had in the same circumstances." But it also uses the indefinite article in referring to "a reasonable person." Since reasonable people can disagree, they could in principle have different understandings of a contract term under the same circumstances. Thus, in applying Article 8(2), a court could contemplate the different understandings that different reasonable persons could have had of a contract term under the same circumstances.).

parties over the interpretation of a specific contract term. Suppose that, given all of the available evidence, a set of the reasonable interpretations of the term that could be imputed to each party is defined for both parties.[45] Article 8(2) implies that the correct interpretation of the contract term should be one that is "mutually reasonable" – that is, it should be one that could be imputed to be a reasonable interpretation by both parties. In other words, it would have to lie in the intersection of the sets of reasonable interpretations that could be imputed to each of the parties.

Unfortunately, the matter is more complicated than it might seem. There are actually three distinct possibilities.[46] The intersection of the sets of reasonable interpretations defined under Article 8(2) could (1) identify a unique mutually reasonable interpretation of the term,[47] (2) identify a set of more than one mutually reasonable interpretations of the term,[48] or it (3) might not identify any mutually reasonable interpretations of the term.[49] If Article 8(2) identified a unique mutually reasonable interpretation, then that arguably would be the one that a court should apply to the contract term. But what if Article 8(2) did not identify a unique mutually reasonable interpretation? There are two ways in which that could happen. First, there might be no mutually reasonable interpretation at all. In other words, there might not be any reasonable interpretation that could be imputed to both parties. Second, there might be more than one mutually reasonable interpretation. In other words, there might be more than one reasonable interpretation that could be imputed to both of the parties. In both scenarios, the application of Article 8(2) would result in ambiguity about the interpretation of the contract term.

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45 The reference to "a set of the reasonable interpretations of the term that could be imputed to each party" means the set of possible understandings that reasonable persons of the same kind as the other party could have had under the same circumstances.

46 Readers who are so inclined may like to conceptualize the alternatives in set-theoretic terms. To that end, let P1 denote the set of reasonable interpretations that could be imputed to the first party, and let P2 denote the set of reasonable interpretations that could be imputed to the second party.

47 In other words, the intersection of P1 and P2 might consist of a single mutually reasonable interpretation. This would identify a unique mutually reasonable interpretation of the contract term.

48 In other words, the intersection of P1 and P2 might consist of more than one mutually reasonable interpretation. Under the application of Article 8(2), the contract term would thus be ambiguous.

49 In this case, the intersection of P1 and P2 would consist of the null set – that is, it might not identify any mutually reasonable interpretations. This is the "nightmare" scenario that Professor Eorsi discussed in EORSI, *supra* note 43, at 2-18. Under the application of Article 8(2), the contract term would also be ambiguous in this case.

C. Some Examples

1. No Mutually Reasonable Interpretation

Suppose the parties have each signed a written memorandum that purports to incorporate the seller's standard conditions of sale but does not attach the conditions to the written memorial and the conditions are not otherwise transmitted to the buyer in any way.[50] Should the seller's standard conditions of sale be incorporated into the contract? There is no easy answer to the question. A reasonable person in the position of the seller might interpret the contract to incorporate the standard conditions. A reasonable seller might think that the written memorial gave the buyer notice of the conditions and that the buyer could have asked to see them if it had wanted to. A reasonable person in the position of the buyer might interpret the contract not to incorporate the conditions. A reasonable buyer might think that the conditions would only have been incorporated into the contract if the seller had transmitted the conditions to the buyer in some way before the buyer signed the writing. It is possible, therefore, under the circumstances, that there might be no mutually reasonable interpretation of the contract.[51] In that case, under Article 8(2) alone, the term would remain ambiguous.

2. Multiple Mutually Reasonable Interpretations

Alternatively, suppose the written memorial of the contract terms includes a statement that the goods shall be delivered "as soon as possible."[52] Because the term "as soon as possible" is vague and probably means different things to different (but reasonable) people even under the same circumstances, a set of multiple reasonable interpretations of the term could probably be imputed to each of the parties. A reasonable person in the position of the seller under the same circumstances might understand the term to mean anywhere from one day to a week. A reasonable person in the position of the buyer under the same circumstances might also understand the term to mean anywhere from one day to a week. In other words, the set of multiple

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50 *See, e.g.*, Bundesgerichtshof [BGH] [Federal Supreme Court] Oct. 31, 2001 (Ger.), *available in English at* http://cisgw3.law.pace.edu/cases/011031g1.html.

51 This is professor Eorsi's "nightmare" scenario. *See* EORSI, *supra* note 43, at 2-18.

52 *See, e.g.*, Oberlandesgericht [OLGZ] [Higher Regional Court] November 12, 2001 (Ger.), *available at* http://cisgw3.law.pace.edu/cases/011112g1.html.

reasonable interpretations of the term that could be imputed to each of the parties could consist of anytime from one day to one week.

As the example illustrates, the sets of multiple reasonable interpretations that could be imputed to each of the parties could overlap significantly so that the term potentially defines multiple mutually reasonable interpretations of the term. In this example, the multiple mutually reasonable interpretations of "as soon as possible" would include every possible delivery time from one day to one week. In cases such as this where the application of Article 8(2) yields multiple mutually reasonable interpretations of a contract term, it seems clear that Article 8(2) alone could not possibly resolve the interpretive problem. Once again, under Article 8(2) alone the term would remain ambiguous.

D. Ambiguities Open the Door to the Homeward Trend Bias

It is not immediately obvious how the ambiguities that might result from the application of Article 8(2) should be resolved. Unfortunately, the ambiguities open the door to the homeward trend bias that threatens to undermine the intent and purpose of the CISG.

1. The Validity of the Contract

One possibility, that has been suggested for cases in which there is no mutually reasonable interpretation of a contract term, such as in the example about the incorporation by reference of standard contract terms, is that courts might treat the problem as one that raises a question about the validity of the contract term (or even the contract itself) rather than its interpretation.[53] This approach might have a superficial appeal since the apparent nonexistence of a mutually reasonable contract interpretation may raise a question about whether there was a sufficient meeting of the minds for a valid contract to have been formed.[54] Since Article 4 makes it clear that the CISG is not concerned with the validity of the contract,[55] this means that the CISG would not govern the matter

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[53] *See* Larry A. DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 N.W. J. OF INT'L L. & BUS. 299, 346 (2004).

[54] This is the approach, for example, that was taken by a court in France. Cour d'appel [CA] [regional court of appeal], December 13, 1995 [95-018179] (Fr.), *available at* http://cisgw3.law.pace.edu/cases/951213f1.html.

[55] CISG, *supra* note 1, art. 4 ("This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage.").

and an appeal to a domestic legal rule would be required. If United States law was applied, the doctrines of unconscionability or mistake might be applied to determine whether the contract term or even the contract itself was valid.

It is easy to understand why a difficult question about contract interpretation could be misconstrued as one about the validity of the contract. Under the common law there is a fine line between questions about contract interpretation and questions about unconscionability.[56] As Robert Hillman has suggested, an over-reaching interpretation of a contract term may go hand-in-hand with guile and deception during the negotiation of the contract, and an unconscionability claim by one party may be a response to a self-serving and over-reaching contract interpretation by the other party.[57] In fact, a careful reading of the cases cited in the Official Comments to UCC Section 2-302 to provide guidance about the application of the unconscionability doctrine reveals that none of them even mentions the word unconscionability and all of them can be construed as cases about contract interpretation.[58] Nonetheless, while this may make it easy to understand why courts might be tempted to reframe the question as one about the validity of the contract, it also suggests that it would probably be inappropriate for courts to do so.

Courts should exercise extreme caution before deciding to reframe a question about the interpretation of a contract term as one about the validity of the contract. As John Honnold explained, the domestic laws addressing the validity of contracts or contract terms generally fall into three categories: (1) those that invalidate contract terms because they have excessively harsh consequences for one of the parties, (2) those that deny the effect of standard contract terms or forms because they are used so pervasively that they interfere with the parties' freedom of contract, or (3) those that deny effect to standard contract terms and contract forms prepared by one of the parties (although presumably also executed by the other party) on the ground that the other party may not have understood the consequences.[59]

It is the third category of domestic law that appears relevant to addressing an ambiguity under the application of Article 8(2). It is

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56 For a discussion, *see* Donald J. Smythe, *Consideration for a Price: Using the Contract Price to Interpret Ambiguous Contract Terms*, 34 N. ILL. L. REV. 109, 113-15 (2013).

57 ROBERT A. HILLMAN, THE RICHNESS OF CONTRACT LAW 146-52 (Aleksander Peczenik & Frederick Schauer eds., 1997).

58 Smythe, *supra* note 56, at 126-32.

59 HONNOLD, *supra* note 5, at 159 (for the sake of the exposition here, the categories have been renumbered).

instructive, therefore, that Honnold observes that the first two categories "do not invade the area of interpretation occupied by Article 8,"[60] but he implies that the third does.[61] It is not difficult to understand why, since the third category of domestic laws that Honnold refers to is concerned with the parties' understandings of a contract term, which is central to its interpretation; since the CISG arguably should govern all questions of contract interpretation, it should preclude the application of any domestic legal rules that bear directly or indirectly on contract interpretation. The implication is that if courts reframe questions about the interpretation of contract terms as ones about the validity of the contracts or contract terms simply because the application of Article 8(2) yields an ambiguous interpretation they will allow domestic laws to invade the domain of the CISG.

2. *The Scope of the CISG's Governance of Contract Interpretations*

Another possibility, which may be more relevant in cases in which there are multiple mutually reasonable interpretations of a contract term, such as a term like "as soon as possible," is that courts might (wrongly) deduce that because the CISG does not appear to resolve an interpretive ambiguity, the interpretive question is not governed by the CISG and they might therefore choose to apply private choice of law rules to identify the domestic legal rules that should be used to answer the question.[62] It has been suggested, for example, that in cases where courts have to decide on the interpretation of an ambiguous contract term they might simple apply a well-known domestic legal rule such as *contra proferentem* to provide an unambiguous interpretation.[63] Ironically, although it is clearly different in some important respects, Article 8(2) apparently has roots in the *contra proferentem* rule.[64]

It is easy to understand how courts might be tempted to apply a domestic rule of interpretation like *contra proferentem* that is so widely used across many domestic legal systems to resolve a difficult

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60 *Id.*

61 *Id.* at 160.

62 This is one of the possibilities suggested by LOOKOFSKY, *supra* note 17, at 43; *see also* HONNOLD, *supra* note 5, at 160 (warning of the temptation to apply domestic legal rules to resolve such an ambiguity; as Honnold observes, "the temptation to incorporate domestic law approaches under the 'reasonableness' rubric – what could appear more 'reasonable' that what one is accustomed to under familiar domestic law? – must be recognized and resisted." The approach taken by the German court in the case that provided the example is not entirely clear).

63 LOOKOFSKY, *supra* note 17, at 43.

64 HONNOLD, *supra* note 5, at 158.

interpretive problem.[65] Nonetheless, it would be a mistake. As a matter of form and substance, courts would better promote the uniformity and coherence of international sales law by construing the CISG to govern all questions about contract interpretation. If the CISG governs, then the application of a domestic legal rule is obviously inappropriate. If courts begin using domestic legal rules to resolve even only the thorniest interpretive problems, like the one posed by an ambiguous term such as "as soon as possible," they may set themselves on a course to use other domestic legal rules to resolve other interpretive problems. The habit of falling back on domestic laws might encourage them to take recourse to more familiar domestic rules even when it is easily possible to resolve interpretive problems under the CISG.[66]

3. *The Challenge*

If courts treat questions about contract interpretation under the CISG as questions about the validity of the contracts, or take recourse to domestic legal rules of contract interpretation to resolve difficult interpretive problems, they will undermine decades of efforts to unify international sales law.[67] Since the CISG clearly governs questions about contract interpretation, courts should find ways to resolve interpretive problems under CISG contracts using the CISG and not domestic legal rules about the validity or interpretation of the contracts. This is the only way to prevent non-uniform domestic laws from creeping into international sales law cases. There is no excuse for treating a question about contract interpretation as if it were one that is about the validity of the contract or for using domestic legal rules to answer a question about contract interpretation under the CISG simply because there is no obvious answer to the interpretive problem.[68] The challenge, of course, is to find a way to resolve the interpretive ambiguities arising from the application of Article 8(2) without using domestic legal rules.

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65 *Id.* at 160.

66 *Id.*

67 *See id.* at 3-12. The CISG was the product of almost fifty years of efforts to unify international sales law. The efforts were initially sponsored by the International Institute for the Unification of Private Law (UNIDROIT) and later by the UN Committee on International Trade Law (UNCITRAL).

68 *See* HONNOLD, *supra* note 5, at 160 (the argument here is in accord with the text). *But see* LOOKOFSKY, *supra* note 17, at 23 (arguing that whether a buyer is bound by a contractual disclaimer of liability is a question about the validity of the contract term that must be addressed under domestic laws).

E. Using the CISG's General Principles to Resolve Ambiguities

Article 7(2) provides the hierarchy of authorities for answering questions in cases governed by the CISG.[69] Under Article 7(2) courts are first supposed to apply the express provisions of the CISG to answer a question, if any express CISG provisions are applicable; if there are no applicable express CISG provisions, courts are supposed to look to the general principles upon which the CISG is based and use those to answer the question; if neither the express rules of the CISG or the general principles upon which it is based are availing, then courts are supposed to apply private choice of law rules, identify the domestic laws that apply, and use a domestic legal rule to answer the question.[70] Thus, if Article 8 is applied to all the evidence admissible under the CISG and it does not provide a clear answer to a question about contract interpretation, then Article 7(2) suggests courts should look to the general principles upon which the CISG is based to find an answer. This shifts the focus to identifying the CISG's general principles governing contract interpretation. Since the most persuasive scholarship and commentary concurs with the view that the general principles of the CISG should be "moored to premises that underlie specific provisions of the Convention,"[71] this presents a challenge.

Article 7(1) provides some important guidance.[72] In some important respects, Article 7(1) states the broadest, most overarching general principles upon which the CISG is based.[73] Article 7(1) directs courts to interpret the CISG with regard to its international character and the need to promote uniformity in its application and good faith in international trade.[74] Of course, on its face, Article 7(1) expressly governs only the interpretation of the CISG's own rules, not any contract terms that displace or supplement them. Nonetheless, Article 7(1)'s directive to interpret the CISG to promote uniformity in its

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69 *See* HONNOLD, *supra* note 5, at 117.

70 *Id.*

71 HONNOLD, *supra* note 5, at 146.

72 *See* CISG, *supra* note 1, art. 7(1) ("In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.").

73 *See* HONNOLD, *supra* note 5, at 127-30 (implying that Article 7(1) reflects "the very purpose of the CISG." The author describes Article 7(1)'s directive to interpret the CISG with regard to its international character, calling this "a most important consideration."); *see also* SCHLECTRIEM, *supra* note 41, at 37 (describing Article 7(1)'s directive to interpret the CISG to promote good faith in international trade as "one of the general principles that must be regarded in interpreting and extending uniform law.").

74 CISG, *supra* note 1, art. 7(1).

application and good faith in international trade reflects underlying principles of the CISG.[75] Since Article 7(1) directs courts to resolve questions concerning matters governed by the CISG by applying the principles on which it is based when the CISG does not expressly address the issue, the implication is that courts should interpret parties' contract terms to promote uniformity in international sales law and good faith in international trade in cases where Article 8 does not imply a unique mutually reasonable interpretation. To be more specific, when Article 8 either suggests multiple mutually reasonable interpretations or none at all, Article 7(1) directs that courts should interpret the CISG to resolve the contractual ambiguities in the manner that best promotes uniformity in the application of the CISG and good faith in international trade.

Most scholars and commentators appear to agree that courts should use Article 8 to interpret contract terms under the CISG,[76] but there is as yet very little commentary about whether Article 7(1) specifically implies principles that courts could use to interpret contract terms when their use of the express provisions in Article 8 fails to resolve difficult interpretive problems.[77] Nonetheless, many commentators have argued for construing the principles upon which the CISG is based broadly and some of them have implied that Article 7(1) does imply principles that can be used in contract interpretation. John Honnold, for example, emphasizes the importance of the character and texture of a body of rules, and characterizes most of the CISG's provisions, including Article 7(1),[78] as what others have referred to as "muddy standards"[79] in

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75 There is a long-standing debate about how liberal courts should be in construing the general principles on which the CISG is based. *See, e.g.*, HONNOLD, *supra* note 5, at 146-48 for a discussion; *see also* Joseph Lookofsky, *Walking the Article 7(2) Tightrope Between CISG and Domestic* Law, 25 J.L. & COM. 87 (2005), Camilla Baasch Andersen, *General Principles of the CISG—Generally Impenetrable?*, *in* SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES 13 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008), *and* André Janssen & Sörren Claas Kiene, *The CISG and Its General Principles*, *in* CISG METHODOLOGY 261 (André Janssen and Olaf Meyer, eds., 2009).

76 *See* CISG-AC Opinion no 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG (Oct. 23, 2004), Rapporteur: Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA.

77 Some scholars have suggested other principles of the CISG that could be used to aid in contract interpretation. For example, Dr. Peter Schlechtriem might argue that reasonableness is a sufficiently general principle of the CISG that it should govern contract interpretations when Article 8(2) is unavailing. *See* SCHLECHTRIEM, *supra* note 41. One of the problems, of course, is that the reasonableness principle is so vague. In fact, if the application of Article 8(2) results in an ambiguity, it may not be apparent what the reasonable interpretation of a contract terms should be. Should it be the reasonable interpretation of the buyer or the reasonable interpretation of the seller?

78 HONNOLD, *supra* note 5, at 150 (Honnold does not expressly state that Article 7(1)

contrast to "sharp-edged" rules.[80] As Honnold observes, "a code that lays down general principles to cover a wide variety of transactions and is expected to endure, calls for an approach very different from tax laws and similar legislation that is written in great detail and is subject to frequent legislative adjustment."[81] Thus, Honnold argues that the CISG's rules and principles should be construed broadly to help achieve the larger purpose of international legal codification and unification.[82] In fact, as Honnold and many other scholars agree,[83] the risk of construing the CISG and its principles narrowly is that this increases the likelihood that courts will take recourse to the gap-filling provision in Article 7(2) and use non-uniform domestic laws to resolve questions arising under the CISG, thus undermining the entire purpose of international legal codification and unification.[84]

Article 7(1) therefore implies that if the application of Article 8 does not provide an unambiguous interpretation of a contract term, courts should interpret the contract term in the manner that best promotes uniformity in the application of the CISG and good faith in international trade. Of course, this shifts the focus to addressing how the objectives of promoting uniformity in the application of the CISG and good faith in international trade help to choose or provide a contract

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provides more of a standard than a sharp-edged rule, but he does not list it among the rules that he describes as sharp-edged).

79 The classic article is Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

80 HONNOLD, *supra* note 5, at 150.

81 *Id.*

82 *Id.* at 151-52. Of course, not everyone agrees. Indeed, one scholar has argued that the goal of uniformity comes at the expense of other important values, and that a homeward trend bias, which would result from construing the principles of the CISG narrowly, might improve the legitimacy of the CISG over the long-term. *See* Karen Halverson Cross, *Parol Evidence Under the CISG: The "Homeward Trend" Reconsidered*, 68 OHIO ST. L.J. 133, 138 (2007).

83 HONNOLD, *supra* note 5, at 147; *see also* Michael Joachim Bonell, *General Provisions: Article 7*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION ¶ 2.2.1 (C.M. Bianca & M.J. Bonell eds., 1987) ("[T]he Convention . . . is intended to replace all rules in legal systems previously governing matters within its scope . . . . This means that in applying the Convention there is no valid reason to adopt a narrow interpretation."), *and* Bruno Zeller, *The UN Convention on Contracts for the International Sale of Good – A Leap Forward towards Unified International Sales Laws*, 12 PACE INT'L L. REV. 79, 105-06 (2000). Of course, not everyone agrees: *see, e.g.*, Cross, *supra* note 82.

84 Of course, not everyone agrees with the goal of achieving uniformity in international sales. For example, Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales Law* 2-4b (N.Y.U. Law & Economics Research Working Paper No. 05-02, 2005), argue that sophisticated parties will generally prefer to draft their own customized contract terms and choose the law that applies to their agreements, and that the CISG thus only offers a useful alternative if the transaction costs of drafting customized contract terms are very high, but in their view, the transaction costs are not that high.

interpretation. Courts will no doubt advance uniformity in the application of the CISG if and when they begin to look across national jurisdictions for foreign precedents interpreting and applying CISG provisions.[85] They will also help if they take seriously the scholarly commentary on the CISG, and take full advantage of collections and compilations of international legal materials that include the scholarly commentary.[86] This is especially important because some authoritative scholarly commentary has argued that reasonableness or the standards of behavior attributable to reasonable persons is one of the general principles upon which the CISG is based.[87] In fact, some scholars have suggested, therefore, that there is a connection between the concept of good faith in international trade and a reasonableness standard under the CISG.[88]

F. Reasonable Commercial Standards of Fair Dealing in the Trade

The linkage between good faith in international trade and a reasonableness requirement has further implications. As John Honnold has argued, "[w]hat is reasonable can appropriately be determined by ascertaining what is normal and acceptable in the relevant trade."[89] Professor Honnold went further[90] and observed that Article 9 of the CISG implies that, unless the parties otherwise agree, usages that are widely known in international trade and were known or ought to have been known by the parties are applicable to the parties' contract.[91] In

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85 HONNOLD, *supra* note 5, at 125-31 (discussing the successes and failures of courts in doing so. Sadly, American courts have not distinguished themselves in promoting uniformity in the application of the CISG. As Professor Honnold observes, they have often ignored foreign precedents altogether and relied almost exclusively on case law interpreting the U.C.C.).

86 *Id.* at 131-33.

87 *See, e.g.*, SCHLECTRIEM, *supra* note 41, at 38 (arguing that "the rule that the parties must conduct themselves according to the standard of the "reasonable person," which is expressly described in a number of provisions and, therefore, according to Article 7(2), must be regarded as a general principle of the Convention.").

88 *See, e.g.*, LOOKOFSKY, *supra* note 17, at 37 ("Significantly, good faith under Article 7(1) has been linked to the pervasive Convention standard of 'reasonableness' – a CISG standard capable of meeting a multitude of 'good faith' needs."); *see also* HONNOLD, *supra* note 5, at 136 (arguing that "Professor Schlectriem has suggested that 'good faith in international trade' should be construed in the light of the Convention's many references to standards of reasonableness – a standard that is so pervasive as to establish this as one of the general principles on which [the Convention] was based."); *see also* SCHLECTRIEM, *supra* note 41, at 38.

89 HONNOLD, *supra* note 5, at 136.

90 *Id.*

91 *See* CISG, *supra* note 1, art. 9(2) ("The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly

fact, Professor Honnold thus suggested there is a linkage between good faith in international trade and the observance of reasonable commercial standards of fair dealing in the trade, similar to the one in the UCC, under American law.[92] It is but a short step from there to saying that Article 7(1), in conjunction with Article 9(2) and the reasonableness principle of the CISG incorporated under Article 7(2), implies that when the application of Article 8 does not result in an unambiguous contract interpretation, the CISG should be interpreted to require the contract interpretation that best promotes reasonable commercial standards of fair dealing in the trade.

The argument can be summarized as follows: Some highly respected scholars and commentators have persuasively argued that a reasonableness standard is one of the most important and pervasive general principles of the CISG.[93] What is reasonable can usually be ascertained by what is acceptable in the relevant trade.[94] Moreover, Article 9 implies that, unless parties otherwise agree, usages that are widely known in international trade and that were known or ought to have been known by the parties are applicable to the parties' contracts.[95] The CISG therefore should be interpreted to promote good faith in international trade and reasonable commercial conduct as determined by what is acceptable in the relevant trade, assuming that usages widely known in international trade are applicable to parties' contracts. This is tantamount to a directive to interpret the CISG to promote reasonable commercial standards of fair dealing in the trade. Thus, if the CISG's express provisions do not provide an unambiguous interpretation of a contract term, the general principles of the CISG require the interpretation that best promotes reasonable commercial standards of fair dealing in the trade.

To be clear, this is not an argument that the CISG imposes a good faith obligation on the individual parties. The predominant weight of scholarly opinion is that the CISG does not impose a duty of good faith on the individual parties to a CISG contract.[96] That is not the same as

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observed by, parties to contracts of the type involved in the particular trade concerned.").

92 HONNOLD, *supra* note 5, at 136 ("A similar linkage among 'good faith,' reasonableness and trade usage is found in U.C.C. 2-103(1)(b). . . .").

93 SCHLECTRIEM, *supra* note 41, at 38.

94 HONNOLD, *supra* note 5, at 136.

95 *Id.*

96 But for an argument to the contrary, *see* Troy Keily, *Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)*, 3 VINDOBONA J. OF INT'L COM. L. & ARB. 15, 24-25 (1999). Professor Kelly makes a persuasive argument that the CISG should impose a general good faith requirement on the parties: "The CISG outlines rights and obligations of parties to an international sale of goods. Article 7(1) provides that the principle of

the argument here. The argument here is that the directive in Article 7(1) to interpret the CISG to promote good faith in international trade implies that when Article 8, in conjunction with the CISG's other express provisions governing contract interpretation, does not provide a clear, unambiguous answer to a question about the interpretation of a contract term, the CISG requires that courts should interpret the contract term in the way that best promotes reasonable commercial standards of fair dealing in the trade.

Reasonable commercial standards of fair dealing in the trade are usually required in some form under the laws of most commercially developed nations.[97] When the express provisions of Article 8 do not provide a clear unambiguous answer to an interpretive problem, interpreting the CISG to require the contract interpretation that best promotes reasonable commercial standards of fair dealing in the trade would thus result in contract interpretations that are coherent with the history and traditions of commercial law. Most important of all, it would create the potential for courts to develop a coherent body of international law governing the interpretation of CISG contracts' terms. Even if the jurisprudence failed to achieve its full potential, the outcome would be much better than if courts turned to domestic laws to resolve interpretive conundrums.

IV. CONCLUSION

This essay has argued that all questions about contract interpretation under contracts governed by the CISG should be answered by the CISG's express provisions or by the CISG's general principles. The CISG thus should have a broad preclusive effect on domestic legal rules of contract interpretation. The CISG's express rules governing contract interpretations have some important implications. First of all, the CISG has no statute of frauds, and there are no restrictions on how extrinsic evidence may be brought to bear on contract interpretations. Second, the CISG has no parol evidence rule, and so oral evidence as well as evidence about what under United States

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good faith should be used when interpreting these provisions. Surely it is not possible to interpret the CISG in good faith without also indirectly affecting the conduct of parties."

97 Reasonable commercial standards of fair dealing in the trade provide an important base line for commercial conduct under the UCC, the commercial laws of most common law nations, the Principles of European Contract Law, and the UNIDROIT Principles of International Commercial Contracts. *See* Mary E. Hiscock, *The Keeper of the Flame: Good Faith and Fair Dealing in International Trade*, 29 LOY. L.A. L. REV. 1059 (1996), for an overview of the standard's pervasiveness.

law are called courses of dealing, courses of performance, and usages of trade, may all be brought to bear on the interpretation of a CISG contract. Moreover, the CISG does not specify any hierarchy of authority between the different kinds of evidence that can be used in contract interpretation. In principle, written and oral evidence as well as courses of dealing, courses of performance, and usages of trade all carry the same weight.

The CISG's most important rules governing contract interpretation are in Article 8. Article 8(1) of the CISG states that statements made by a party are to be determined by the party's subject intent where the other party knew or could not have been unaware what that intent was. Unfortunately, Article 8(1) will rarely apply since there will rarely be evidence that is not only sufficient to prove a party's subjective intent but is also sufficient to prove that the other party knew or could not have been unaware of that subjective intent. Article 8(2) will therefore more commonly apply. Article 8(2) states that, statements made by a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. When there is no extrinsic evidence and one of the parties drafted a written memorial of the agreement, the application of Article 8(2) will often be redolent of the principle of *contra proferentum*. But it may also result in ambiguity since a reasonable person of the same kind as the other party could have interpreted a party's statements or conduct in more than one way even under the same circumstances.

When the parties have jointly executed a written memorial of their agreement the application of Article 8(2) may be even more complicated. In cases where a written memorial (and/or other admissible evidence) is jointly executed, Article 8(2) appears to require a court to contemplate relative to each of the parties how a reasonable person of the same kind as the other party and under the same circumstances would have understood their statements. It is possible that, relative to each of the parties, a reasonable person in the position of the other party under the same circumstances could have more than one – perhaps even several – reasonable interpretations of their statements. In other words, relative to each of the party's, Article 8(2) might imply a set of multiple reasonable interpretations that could be imputed to the other party. Article 8(2) implies that the correct interpretation of the contract term should be one that is mutually reasonable. There are actually three possibilities. The intersection of the sets of reasonable interpretations defined under Article 8(2) could (1) identify a unique

mutually reasonable interpretation, (2) identify a set of more than one mutually reasonable interpretations, or it (3) might not identify any mutually reasonable interpretations of the term. If the application of Article 8(2) resulted in multiple reasonable interpretations or no mutually reasonable interpretations the contract term would remain ambiguous.

The application of Article 8(2) may, therefore, result in ambiguities. The important question is how the ambiguities should be resolved. There are two ways in which courts might resolve the ambiguities inappropriately. One possibility is that courts might treat the conundrum as one that raises a question about the validity of the contract term (or even the contract itself) rather than its interpretation. In that case, the CISG would not apply and courts would be obliged to apply a domestic legal rule governing the validity of the contract term to answer the question. Another possibility is that courts might deduce that because the express provisions of the CISG do not resolve the interpretive ambiguity, there is a gap in the CISG and they must apply private choice of law rules to identify the domestic legal rules that should be used to answer the question. If courts took either of these approaches, they would undermine the intent and purpose of the CISG. Since the CISG governs questions about contract interpretation, courts should find ways to resolve contract interpretation problems using the CISG. If they do not, non-uniform domestic laws will creep their way into international sales cases.

Article 7(1) provides some appropriate guidance. Article 7(1) directs courts to interpret the CISG with regard to its international character and the need to promote uniformity in its application and good faith in international trade. This is important because there is a linkage between good faith in international trade and some of the most general principles upon which the CISG is based. One of those principles is a reasonableness requirement. What is reasonable can usually be ascertained by what is acceptable in the relevant trade. Moreover, Article 9 implies that, unless parties otherwise agree, usages that are widely known in international trade and that were known or ought to have been known by the parties are applicable to the parties' contracts. The CISG therefore should be interpreted to promote good faith in international trade and reasonable commercial conduct as determined by what is acceptable in the relevant trade, assuming that usages widely known in international trade are applicable to parties' contracts. This is tantamount to a directive to interpret the CISG's provisions to promote reasonable commercial standards of fair dealing in the trade. Thus,

when the application of the express rule in Article 8(2) provides an ambiguous interpretation of a contract term, the CISG should be interpreted to require that courts provide the contract interpretation that best promotes reasonable commercial standards of fair dealing in the trade.

This is not an argument that the CISG imposes a good faith obligation on the individual parties to a contract. It is an argument that when the express rule in Article 8(2) does not provide a clear, unambiguous answer to a question about the interpretation of a contract term, the general principles of the CISG imply that the contract term should be interpreted in the way that best promotes reasonable commercial standards of fair dealing in the trade. This should result in contract interpretations that are coherent with the history and traditions of commercial law. Most important of all, it should help to further the intent and purpose of international sales law codification as well as the coherence of international sales jurisprudence. Even if international sales jurisprudence fails to achieve its full potential, the outcome will be much better than if courts turn to domestic laws to resolve interpretive conundrums under CISG contracts.