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Contract Formation and Performance Under the UCC and CISG: A Comparative Case Study

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The great object of the law is to encourage commerce.[1]

I. Introduction

A contract for the sale of goods is often the end product of extensive negotiations between the parties, and it embodies their expectations and sets out the details of their agreement. If a dispute arises, the contract will be the starting point for determining the rights and liabilities of the parties. Moreover, the law that governs the agreement will determine whether a valid contract exists, how it will be interpreted, and what remedies are available for its breach. Contracts for the sale of goods in the United States are governed by the Uniform Commercial Code (UCC) in every state but one.[2] When one of the parties to the contract is based in another country, however, the conflict of laws principles that will determine which country's law governs the transaction can be confounding.[3] In addition, the commercial laws and

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[1] Beale v. Thompson, 3 Bos. & Pull. 405, 421, 127 Eng. Rep. 221 (C.P. 1803).

[2] Unif. Commercial Code Sections 1–3B U.L.A. (2002) [hereinafter U.C.C.]. The U.C.C. has been adopted in some form by all fifty states, the District of Columbia, as well as Puerto Rico, Guam, and the U.S. Virgin Islands. Louisiana has adopted it with the exception of Article 2. All references in this article are to the 2002 version of the U.C.C.

[3] "The rights and duties of the parties as to a contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties." Restatement (Second) of Conflicts of Law § 188(1) (1971).

practices of other cultures are sometimes quite different than those found in the United States. Fortunately, when it comes to contracts for the sale of goods, these concerns can be overcome due to the accession of the United States to the United Nations Convention on Contracts for the International Sale of Goods (CISG).[4]

The CISG is intended to promote international trade by harmonizing the commercial laws among countries and bringing greater certainty and predictability to contracts involving the international sale of goods.[5] The CISG is a self-executing treaty of the United States that entered into force on January 1, 1988.[6] It has been adopted by over seventy countries, accounting for more than 75 percent of all international trade.[7] Like the UCC, the CISG provides a uniform set of rules for international sales contracts.[8] When questions of interpretation and enforcement of such contracts arise, the CSIG displaces national law and obviates the need for courts to engage in often unpredictable conflict of laws analyses to determine which country's law applies.[9]

An increasingly globalized economy makes it imperative for businesses, and the lawyers who advise them, to understand the CISG and how it differs from the UCC.[10] The failure to realize when the CISG applies to a contract, and how it affects the rights and liabilities of the parties, can lead to an unfortunate surprise. For lawyers, it may be tantamount to malpractice. One means

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[4]United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF. 97/18 (1980), *reprinted in* S. Treaty Doc. No. 9, 98th Cong., 1st Sess. [hereinafter CISG].

[5]CISG pmbl.

[6]*See* Delchi Carrier S.p.A. v. Rotorex Corp., 71 F.3d 1024, 1027 (2d Cir. 1995).

[7]John E. Murray, Murray on Contracts § 13 (5th ed. 2011) [hereinafter Murray on Contracts]; *see also* Ralph H. Folsom et al., International Business Transactions 2–8 (2d ed. 2001).

[8]"Caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code ("U.C.C."), may also inform a court where the language of the relevant CISG provisions tracks that of the U.C.C. However, U.C.C. caselaw 'is not per se applicable.'" Delchi Carrier S.p.A. v. Rotorex Corp., 71 F.3d 1024, 1027 (2d Cir. 1995).

[9]The CISG is concerned with contract formation and does not address issues of contract validity such as capacity, legality, and consent. Those issues remain the subject of national law. *See* Rice Corp. v. Grain Bd. of Iraq, 2009 WL 3489916 (E.D. Cal. 2009).

[10]For a discussion of the importance of teaching the CISG in legal education, see William S. Dodge, *Teaching the CISG in Contracts,* 50 J. Legal Educ. 72 (2000); Burt A. Leete, *Teaching the Convention on the International Sale of Goods,* 12 J. Leg. Stud. Educ. 19 (1994). For a comparison of the U.C.C. and CISG rules discussed in this article, see Appendix infra.

for accomplishing the goal of educating law and business students about the differences between the UCC and the CISG is the use of a case study as a pedagogical tool. This case study, written for use in commercial and business law courses, explores various contracts law issues from the standpoints of the UCC versus the CISG. Although the issues presented for discussion are relatively straightforward, the main focus is comparative so as to allow students to understand how application of the UCC or CISG can lead to divergent outcomes.

Because it is a case study, the emphasis is less on the theory of the law and more on its practical application in context. In Part II, a hypothetical fact scenario is presented for consideration. Part III provides a set of questions to prompt and direct a discussion and analysis of numerous issues presented by the hypothetical case. An overview of applicable CISG and UCC contracts law is provided in Part IV. Instructors may wish to supplement these materials with textbook readings and additional cases that will assist students in analyzing the issues. Finally, the teaching notes in Part V outline the pedagogical objectives and suggestions for use of the case, including a detailed analysis of the issues raised by the questions in Part III.

II. The Case Study

"A Taste of Beer" is a chain of upscale beer tasting bars solely owned by Matthew Bynum and based in California. Each bar provides patrons with an opportunity to sample selected tastings of a large variety of craft beers. In a continuing effort to provide quality craft beers at his tasting bars, Bynum surveyed his patrons regarding their interest in alcohol-free beers. The survey results revealed that there was considerable interest in a crafted alcohol-free beer, but patrons also wanted the taste of the alcohol-free beer to be the same as that of a full strength beer.

With these survey results in mind, Bynum attended the Annual Craft Brewers Convention and Exposition in Munich, Germany. The convention boasted of having over five hundred exhibits featuring the latest and best products and services that industry brewers and vendors had to offer. In his tour of the exposition, Bynum was attracted to Rudolf Verkauferbrauer's exhibit. A native of Austria who now operates a brewery in Belgium, Verkauferbrauer had an excellent reputation as a master brewer of craft beers. Bynum, who was familiar with many of Verkauferbrauer's beers, stopped to examine what brews he had to offer.

Bynum and Verkauferbrauer discussed Bynum's interest in offering alcohol-free beers at his tasting bars. Bynum told Verkauferbrauer about "A Taste of Beer" and the interest of many of his patrons in his offering alcohol-free beers. Bynum indicated that he would like to provide a choice of alcohol-free beers to his patrons but that the beers had to have the same quality and taste as a full-strength beer. Verkauferbrauer stated that although he had never produced an alcohol-free beer, he understood that the process for producing alcohol-free beer was not much different from producing a full-bodied beer and involved brewing a normal strength beer and then carefully heating the brew to evaporate the alcohol.

Bynum asked how much it would cost to produce such a beer. Verkauferbrauer said that he did believe there would be any additional cost over the cost of producing a normal-strength beer, and if there was, any additional cost would be nominal. Bynum inquired further regarding the quality of the resulting product. Would the beer have the same quality and taste as a full-strength beer? Verkauferbrauer assured Bynum that there was no reason why it would not. Bynum asked Verkauferbrauer for his business card and thanked him for the information.

On February 15, two weeks after returning home from the convention and having thought more about his conversation with Verkauferbrauer, Bynum telephoned Verkauferbrauer at his brewery in Charleroi, Belgium, to discuss the brewing and final production of an alcohol-free lager. The conversation dealt mainly with the style of beer that Bynum wished to be brewed. Bynum told Verkauferbrauer that he wanted a beer that was totally free of alcohol, that was light in color, well-balanced, medium in body, and mildly assertive, with a simple citrusy aroma and taste. Verkauferbrauer indicated that it would be possible to satisfy Bynum's request. Verkauferbrauer explained that it would take some time to determine what specific barleys, hops, and yeast would be needed to make the beer to Bynum's specifications. Verkauferbrauer indicated that he would brew several different small batches of beers and send samples to Bynum so he could taste the beers and determine which he believed met his requirements.

In addition, Bynum told Verkauferbrauer that he needed to have a label designed to place on the bottled beer. Verkauferbrauer said that he could have his design department work on several labels and forward the designs to Bynum for his approval. Most importantly, Bynum wished to know how much the brewing, bottling, labeling, and shipping would ultimately cost. Verkauferbrauer asked Bynum what quantity of beer he had in mind. Bynum indicated that he would like thirty kegs of thirty liters each and 2400 bottles of

twelve ounces each. Verkauferbrauer stated that it would take a little time to do the calculations to determine the final cost, and asked Bynum if he could e-mail the information to Bynum later that day. Bynum told Verkauferbrauer that he understood and was anxious to receive Verkauferbrauer's e-mail. However, before terminating the call Bynum again stressed that the final product was to be a beer that was free of alcohol. Verkauferbrauer replied that the final product would meet Bynum's specifications.

Later in the day on February 15, Bynum received an e-mail proposal from Verkauferbrauer stating that he would "create and brew an alcohol-free Belgian-style beer," the final cost of which would be €10,000 (approximately $13,000). The e-mail also stated that he would expect Bynum to make an initial payment of €5,000 (approximately $6,500) before Verkauferbrauer would start the project, a payment of €2,500 (approximately $3,250) upon notification that the beer was ready for shipment, and a final payment of €2,500 due upon delivery. His proposal also contained a provision stating that if any disputes resulted that could not be resolved mutually, then the disputes would be submitted for arbitration in Belgium. He added that the price quote was good for one hundred days.

After receiving Verkauferbrauer's proposal, Bynum e-mailed an order acknowledgment on February 21 that stated: "Your proposal is accepted subject to the Standard Conditions of Sale contained in this acknowledgment. Receipt of this acknowledgment by you without prompt written objection thereto shall constitute an acceptance of these terms and conditions." The Standard Conditions of Sale contained the following clause: "Seller agrees that this acknowledgment constitutes the entire agreement between the parties, superseding all negotiations, prior discussions, and preliminary agreements, whether written or oral." This clause was not contained in Verkauferbrauer's February 15 proposal. On the same day that Bynum e-mailed the order acknowledgment, he sent Verkauferbrauer, via electronic bank transfer, an initial payment of €5,000. Verkauferbrauer did not raise any objections to Bynum's order acknowledgment.

About six weeks after Bynum's e-mail confirmation, Verkauferbrauer sent Bynum six different samples of beers that had been brewed to meet Bynum's requirements. In addition, Verkauferbrauer sent five bottle label designs for Bynum's approval. Bynum chose the sample beer that he felt met his specific requirements. He also selected one of the bottle label designs and notified Verkauferbrauer of his selections. Following Bynum's selection of beer and bottle label, matters proceeded smoothly. Not long afterward, Verkauferbrauer notified Bynum that the beer was ready for shipment.

Bynum responded that Verkauferbrauer should ship the beer and sent Verkauferbrauer a payment of €2,500, again by electronic bank transfer.

The beer was shipped and delivered to Bynum's refrigerated warehouse as agreed. Following the delivery and acceptance of the shipment, Bynum opened one of the boxes containing the bottled beer. He was pleased with the label design that he had chosen. However, in a close reading of the label, he noted that the label stated that the beer "Contains Less Than 0.5% Alcohol by Volume." Concerned about the statement on the label, Bynum called Verkauferbrauer and inquired about the alcoholic content of the beer. Bynum reminded Verkauferbrauer that he wanted a beer that was completely free of alcohol. Verkauferbrauer responded that in the industry alcohol-free beer is understood to contain a small amount of alcohol. Bynum was not satisfied with this explanation and indicated that he would not be sending his final payment and would be consulting his attorney as to how to proceed.

III. Discussion Questions

1. If there is an agreement between Verkauferbrauer and Bynum, does the CISG apply to this contract? If so, assume instead that the contract contains the following choice of law clause: "This contract shall be governed by the commercial law of the State of California." California has enacted the UCC. Does the CISG or the UCC apply to this contract?
2. Assuming that the CISG applies, did Verkauferbrauer make a valid offer to Bynum on February 15? If so and Verkauferbrauer later changed his mind, could Verkauferbrauer have withdrawn the offer on February 17? What result under the UCC?
3. Assuming that the CISG applies, is Bynum's reply on February 21 a valid acceptance of the offer? If so, what are the terms of the contract? What result under the UCC?
4. Assuming that a contract exists, is it possible for the parties to modify it if Verkauferbrauer and Bynum agree to change the date for delivery under the CISG? If Verkauferbrauer and Bynum had not included a date of delivery term in their contract, what would be the date for delivery? What result under the UCC?
5. If Bynum and Verkauferbrauer had instead concluded a final agreement during their telephone conversation on February 15, would the contract have been enforceable?

6. Assuming that a contract exists and the terms have been determined, has Verkauferbrauer created any warranties under the CISG? If so, suppose the contract includes the following clause: "SELLER DISCLAIMS ALL WARRANTIES, EXPRESS AND IMPLIED, AS TO THESE GOODS." Has Verkauferbrauer effectively disclaimed any warranties in the contract? What result under the UCC?
7. Has the contract been fully performed or has it been breached? If so, what are Bynum's remedies? What are the rights of Verkauferbrauer? What are the rights and remedies of Verkauferbrauer and Bynum under the UCC?
8. Assume instead that the container ship carrying the shipment of beer was hijacked by pirates off the coast of Somalia en route from Europe to the United States. As a result of prolonged storage at high temperatures during the time the ship was held by the pirates, the entire cargo of beer spoiled and became undrinkable by the time the ship was rescued. Can Verkauferbrauer be excused from performing the contract under the CISG and the UCC? If not, how could the parties have addressed a failure by one of the parties to perform due to the hijacking of the shipment?

IV. Overview of the Applicable Rules and Concepts

The purpose of this part is to primarily provide an overview of the law governing the sale of goods under the CISG with reference to the UCC. In addressing each of the main topics, we will make note of areas of similarity and identify key differences between the rules of the UCC and CISG. The CISG supersedes the UCC and the common law as to all international contracts for the sale of goods to which it applies.[11] In interpreting the CISG, courts are to give regard to "to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."[12]

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[11] *See* Am. Mint, LLC v. GoSoftware, Inc., 2005 WL 2021248, at *2–3 (M.D. 2005) (noting that "if the CISG applies to the contract at issue, it will pre-empt domestic sales laws that otherwise would govern the contract").

[12] CISG art. 7(1).

A. Applicability

The CISG applies to a commercial transaction when the contract involves a sale[13] of goods and is between parties whose places of business are located in different countries, known as contracting states, which have ratified the CISG.[14] The place of business requirement is based solely on location of the parties and has nothing to do with their citizenship or nationality.[15] In determining whether the place of business requirement is met, the focus is on where a party has its place of business at the time of contract formation.[16] If one of the parties has places of business in multiple countries, as might a multinational corporation, then the country with the closest relation to the contract and where it will be formed is considered to be the place of business for purposes of deciding whether the CISG applies.[17]

The CISG does not define "goods," although it can be inferred from what is excluded from the treaty that the meaning of "goods" is consistent with the UCC, which applies to tangible, movable things.[18] Article 2 provides that the CISG does not apply to sales of (1) goods sold for personal, family, or household use; (2) goods bought at auction; (3) goods sold on execution

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[13]Although the CISG does not define "sale," it specifies that the seller is to "deliver the goods . . . and transfer the property in the goods" and the buyer is to "pay the price." CISG arts. 30 & 54.

[14]CISG art. 1(1). When only one party to the transaction has a place of business in a contracting state, the CISG may govern the contract if conflict of laws principles direct that the law of the contracting state will apply. If not, then the national law of the other country applies. *See* CISG art. 1(1)(b). The United States made a reservation to this provision of the CISG. United Nations Convention on Contracts for the International Sale of Goods, Sept. 21, 1983, S. Treaty Doc. No. 98–9 (1983). Thus, the CISG is inapplicable to a contract for the sale of goods between a U.S. business and a business in a country that is not a contracting state. *See* Princesse D'Isenbourg et Cie, Ltd. v. Kinder Caviar, Inc., 2011 U.S. Dist. LEXIS 17281 (E.D. Ky. 2011).

[15]CISG art. 1(3). The drafting history of the CISG suggests that "place of business" means a permanent establishment, rather than a warehouse or agent's office. *See* John O. Honnold, Documentary History of the Uniform Law for International Sales 394 (1989). This means that a contract between two U.S. businesses, one based in the United States and the other in Canada, could be governed by the CISG. *See* Grace Label, Inc. v. Kliff, 355 F. Supp. 2d 965 (S.D. Iowa 2005).

[16]*Cf.* Novelis Corp. v. Anheuser-Busch, Inc., 559 F. Supp. 2d 877, 882 n.4 (N.D. Ohio 2008).

[17]CISG art. 10(a).

[18]*See* U.C.C. § 2–105(1) (defining goods as "all things (including specially manufactured goods) that are movable at the time of identification to a contract for sale").

to pay a judgment or a debt; (4) stocks, securities, negotiable instruments, or money; (5) ships, vessels, or aircraft; and (6) electricity.[19]

In addition, the CISG does not apply to contracts for the supply of goods to be manufactured or produced when the buyer is to provide a "substantial part of the materials necessary for such manufacture or production."[20] The criterion of "substantial part" refers to economic value so that the materials or components provided by the buyer ought to be higher in price as compared to those provided by the seller in order to exclude the CISG.[21] In essence, such a transaction may actually involve a contract for services in which the seller hires the buyer to make or assemble a product using materials or components entirely or mostly provided by the seller. On the other hand, a sale of specially manufactured goods is within the scope of the CISG when the buyer has not provided a substantial part of the materials necessary to produce the goods.[22]

Likewise, the CISG "does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services."[23] These are known as "mixed" or "hybrid" contracts in which the seller provides ancillary services, such as installation, training, or maintenance, in addition to the goods. Determining whether such a contract is governed by the CISG is based on whether the goods or services aspect of the contract predominates.[24] The word "preponderant" should not be quantified by predetermined percentages of values of

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[19] CISG art. 2. The CISG does not apply to contracts imposing liability on the seller for death or personal injury to any person caused by the goods. CISG art. 5. In addition, the CISG does not apply to joint venture agreements and exclusive distributorships because such agreements typically create a framework for future sales of goods but do not lay down precise price and quantity terms. *See* Gruppo Essenziero Italiano, S.p.A. v. Aromi D'Italia, Inc., 2011 WL 3207555 (D. Md. 2012) (distributorship agreement); Viva Vino Import Co. v. Farnese Vini, S.r.l., 2000 WL 1224903 (E.D. Pa. 2000) (exclusive dealership agreement).

[20] CISG art. 3(1).

[21] *See* CISG-AC Opinion no. 4, Contracts for the Sale of Goods to be Manufactured or Produced and Mixed Contracts (Article 3 CISG), § 2.6 (Oct. 24, 2004).

[22] *See* Susan J. Martin-Davidson, *Selling Goods Internationally: Scope of the U.N. Convention on Contracts for the International Sale of Goods,* 17 Mich. St. J. Int'l L. 657, 660–61 (2009).

[23] CISG art. 3(2).

[24] *See* Genpharm, Inc. v. Pliva-Lachema A.S., 361 F. Supp. 2d 49 (E.D.N.Y. 2005) (CISG applied since supply of services was merely incidental to sale of goods); Evolution Online Sys., Inc. v. Koninklijke Nederland N.V., KPN, 145 F.3d 505 (2d Cir. 1998) (CISG did not apply to sale of software where preponderant part involved services.).

each aspect of the transaction but on the basis of an overall assessment of the parties' agreement and intentions as expressed in the contract.[25] Similar to the CISG, a majority of courts employ a "predominant purpose" test in deciding the applicability of the UCC to hybrid contracts.[26]

When the CISG applies to a transaction, a country's domestic commercial law is preempted. Nevertheless, the parties to a contract that would otherwise be governed by the CISG may opt out of the CISG and choose to apply the commercial law of a particular country. According to Article 6, "[t]he parties may exclude the application of this Convention or . . . vary the effect of any of its provisions." However, a standard choice of law clause is not sufficient to exclude or modify the application of the CISG. Rather, the courts have held that an "opt out" must be stated in specific language that makes clear both parties' intent that the CISG does not apply to their contract.[27]

B. Writing Requirement and Contract Interpretation

The CISG takes a flexible approach to contract form. According to Article 11, a contract for the sale of goods "need not be concluded in or evidenced by writing and is not subject to any other requirements as to form."[28] Furthermore, the existence of a contract "may be proved by any means, including witnesses."[29] Since the CISG has no statute of frauds, oral contracts are enforceable. The UCC, however, incorporates a statute of frauds requiring all contracts for the sale of goods of $500 or more to be in writing.[30]

Article 8(1) instructs courts to interpret the "statements . . . and other conduct of a party . . . according to his [or her] intent" as long as the other

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[25] *See* CISG-AC Opinion no. 4, *supra* note 21, § 3.4. If the CISG applies to a mixed contract because goods are the preponderant part, it governs the services aspect of the contract as well.

[26] *See* William H. Lawrence, Understanding Sales and Leases of Goods § 1.03[C] (2d ed. 2009).

[27] *See* Asante Techs., Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001) ("merely choosing the law of a jurisdiction . . . [is] inadequate to effectuate an opt out of the CISG").

[28] CISG art. 11.

[29] *Id.*

[30] U.C.C. § 2–201(1).

party "knew or could not have been unaware" of that intent.[31] Thus, a party's subjective intent is relevant in interpreting a contract as long as the other party to the contract was aware of that intent.[32] The CISG contains no rule on the use of parol evidence in contract interpretation. In determining the intent of the parties, a court may consider "all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."[33] Likewise, the CISG allows for the use of industry custom, trade usage, and prior course of dealing between the parties in interpreting contracts.[34]

As such, courts may admit and consider parol evidence regarding the parties' negotiations to the extent such evidence reveals the parties' subjective intent, even if such evidence contradicts the written terms of the contract.[35] Although parol evidence is relevant, Article 6 of the CISG allows the parties to "derogate from or vary the effect of its provisions."[36] As a consequence, the parties may agree to include a "merger" or "integration" clause in their contract, for example, "This contract contains the entire agreement of the parties and supersedes any prior agreements, understandings, or negotiations, whether written or oral."[37] A merger clause only covers the agreements

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[31] CISG art. 8(1).

[32] When a party's intent is not clear or known to the other party, the court may consider the objective intent of the parties "according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances." CISG art. 8(2).

[33] CISG art. 8(3).

[34] *See* CISG arts. 8(3) & 9. When custom or trade usage of a term differs from that understood by the parties as a result of their course of dealing, the meaning of the term based on course of dealing should prevail. *See* Treibacher Indus., A.G. v. Allegheny Tech., Inc., 464 F.3d 1235 (11th Cir. 2006).

[35] *See* MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A., 144 F.3d 1384, 1389 (11th Cir. 1998) (applying Article 8(3) to admit evidence that the parties had an oral understanding that they would ignore the pre-printed terms on the order form).

[36] CISG art. 6.

[37] In effect, such a clause adopts the parol evidence rule for the contract and confirms that the written contract is the final and complete agreement between the parties. It may be advisable "to add an express statement to such a clause that the parties have agreed to derogate from Article 8(3) and intend their contract to preclude any prior or contemporaneous evidence that either adds to or is inconsistent with the terms of the final and complete record of their agreement." Murray on Contracts, *supra* note 7, at § 85(7).

and understandings of the parties to the particular contract but will not prevent introduction of evidence of trade usage.[38]

Unlike the CISG, the UCC incorporates a parol evidence rule in Section 2–202.[39] The application of the rule prohibits the introduction of evidence of statements of promises or representations made prior to or during the creation of the writing for the purpose of supplementing, changing, or contradicting the applicable terms. However, the terms may be explained or supplemented by course of dealing, usage of trade, by course of performance, or by evidence of consistent additional terms.[40]

C. Contract Formation

1. Offers

Article 14 of the CISG defines an offer as "a proposal for concluding a contract" that is "sufficiently definite and indicates the intention of the offeror to be bound."[41] Because the parties' intent to be bound is measured subjectively, their prior course of dealing may be particularly relevant. An offer "is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price."[42] In some negotiations, the parties may fail to specify a price even though they have otherwise concluded a valid contract. This usually occurs when the price of the goods is subject to market fluctuations. According to Article 55, where the price is not fixed, the price will be that charged "for such goods sold under comparable circumstances in the trade concerned."[43] As such, the court will set the price based on the trade or market price of comparable goods.

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[38] *See* Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co., Ltd., 2011 WL 4494602, at *5 (S.D.N.Y. 2011).

[39] U.C.C. § 2–202.

[40] *Id.*; *see, e.g.*, C-Thru Container Corp. v. Midland Mfg. Co., 533 N.W.2d 542 (Iowa 1995) (usage of trade).

[41] CISG art. 14(1).

[42] *Id.* An offer must be "addressed to one or more specific persons." *Id.* Thus, advertisements, catalogues, price lists, and similar announcements addressed to the public are "considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal." CISG art. 14(2).

[43] CISG art. 55.

The offer remains open until it is accepted or rejected by the offeree or until it expires after a reasonable time. In addition, an offeror may make a firm or irrevocable offer by promising to hold open the offer for a specified time period. The CISG recognizes that an offer stating that it is irrevocable or that states a fixed time for acceptance is a valid offer.[44] There is no limitation on the time that an offer may be irrevocable.

An offer is effective when it is received by the offeree.[45] The offeror may withdraw or revoke the offer if the revocation reaches the offeree before or at the same time as the offer arrives.[46] After the offeree has received the offer, however, the revocation must reach the offeree before he or she has dispatched an acceptance.[47] By contrast, a firm offer cannot be withdrawn before the time fixed for acceptance and therefore remains irrevocable for the duration of that period of time.[48] Likewise, a firm offer cannot be withdrawn if it was reasonable for the offeree to rely on the offer as being irrevocable and there is evidence that the offeree has relied on this.[49]

The UCC requires the present intent to contract of both parties in order for a contract to be formed.[50] Whether the parties have objectively manifested such intent is based upon their words, actions, and the surrounding circumstances. A contract for the sale of goods will not fail for indefiniteness if the parties intend to make a contract and the courts have a reasonably certain basis for providing an appropriate remedy.[51] If terms are left open in a contract that nevertheless meets the standards of intent and ability to provide a remedy, then the open terms (or gaps) can be "filled" by the presumptions

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[44]CISG art. 16(2)(a).

[45]CISG art. 15(1).

[46]CISG art. 15(2).

[47]CISG art. 16(1). In effect, this means that the offeror's ability to revoke the offer ends once the offeree dispatches acceptance, even though the acceptance is not effective until received by the offeror.

[48]CISG art. 16(2)(a). In addition, an offer may not be revoked "if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer." CISG art. 16(2)(b).

[49]CISG art. 16(2)(b).

[50]U.C.C. § 2–204(3).

[51]U.C.C. § 2–204(3).

found in the UCC's "gap-filling" rules.[52] Finally, the UCC enables a merchant to make an irrevocable offer without consideration to support the promise not to revoke. The offer is irrevocable for the time stated or, if no time is stated, for a reasonable time not to exceed three months.[53]

2. Acceptance

A contract is formed when the offeree accepts the offer.[54] Acceptance occurs when the offeree manifests his or her intent to be bound by the terms of the offer. A "statement made by or other conduct of the offeree indicating assent to an offer is an acceptance."[55] If the parties have an established course of dealing between themselves, the offeree can accept by dispatching the goods or payment of the price without notifying the offeror.[56] However, the general rule is that "[s]ilence or inactivity does not in itself amount to acceptance."[57]

The offeror must receive an acceptance from the offeree within the time specified in the offer. If no time period is set, then the acceptance must be received within a reasonable time, but if the offer is oral, the acceptance must occur immediately, unless the circumstances indicate otherwise. If the offeror requests performance of an act rather than an indication of acceptance, then the acceptance is effective at the moment it is performed.[58] Moreover, the offeree may indicate acceptance at any time before the offer expires or is revoked. An acceptance is effective upon receipt by the offeror within the time set by the offeror.[59] Although the acceptance is not effective until it reaches the offeror, dispatch of the acceptance ends the offeror's right to

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[52] U.C.C. § 2–204(3) cmt.

[53] U.C.C. § 2–205.

[54] *See* CISG art. 23. The CISG has no requirement of consideration as an element of contract formation. *See* FOLSOM ET AL., *supra* note 7, at 28.

[55] CISG art. 18(1).

[56] *See* CISG art. 18(3).

[57] CISG art. 18(2). An exception to this rule may arise where there is a course of prior dealing between the parties that would encompass silence as a means of acceptance. *See* Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229 (S.D.N.Y. 1992).

[58] CISG art. 18(3).

[59] *Id.* Even a late acceptance can be effective "if without delay the offeror orally so informs the offeree or dispatches a notice to that effect." CISG art. 21(1).

revoke the offer.[60] An acceptance may be revoked if the revocation reaches the offeror before or at the same time the acceptance does.[61]

An acceptance, to be effective, must be definite and unconditional. As such, according to Article 19, a "reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer."[62] However, if the "additional or different terms . . . do not materially alter the terms of the offer [the reply] constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect."[63] If the offeror fails to "object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance."[64]

As to what constitutes a material alteration, Article 19(3) specifies such terms as "price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes," among others.[65] This list of terms found in Article 19(3) is not exclusive. It is probable that a term that derogates from the rules of the CISG, or one that would cause a reasonable person in the same position of the offeree to reject the offer, would be considered a material alteration. However, whether an additional or different term amounts to a material alteration is determined on a case-by-case basis.[66]

These rules are most relevant when the "battle of the forms" arises in the exchange of standard preprinted forms between the parties in business transactions. In the usual situation, the offeror will submit a purchase order to the offeree, who will reply with a confirmation form containing different or additional terms. Unless the offeror, without undue delay, objects orally to the additional or different terms, or sends a notice to that effect, the

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[60] *See* CISG art. 15(2). An acceptance "reaches" the offeror when it is made orally to him or her, or is delivered to the offeror personally or to his or her place of business or residence. CISG art. 24.

[61] CISG art. 22.

[62] CISG art. 19(1).

[63] CISG art. 19(2).

[64] *Id.*

[65] CISG art. 19(3).

[66] For a discussion comparing material terms, see Kevin C. Stemp, *A Comparative Analysis of the "Battle of the Forms,"* 15 Transnat'l. L. & Contemp. Probs. 243, 272–85 (2005).

acceptance is effective to create a contract, and the terms of the contract are those of the offer, along with the additional or different terms contained in the acceptance. If the offeror objects, there is no contract formed between the parties.

On the other hand, if the additional or different terms materially alter the offer, this reply is deemed to be a counteroffer and a rejection of the terms offer. No contract is formed between the parties unless the offeror accepts the counteroffer. For instance, assume that in reply to a purchase order offering to purchase a certain quantity of goods for immediate delivery, the offeree submits a confirmation form containing a different quantity term. The CISG treats this difference as a material alteration to the quantity term contained in the purchase order. As a result, the reply is a counteroffer and a rejection of the offer.[67] The offeror/counterofferee may choose to accept or reject the counteroffer.[68] Conversely, if the offeror accepts the counteroffer containing a materially different or additional term, then a contract is formed based on the offeree's terms.[69]

The UCC also recognizes the potential for a "battle of the forms" between the parties. According to Section 2–207(1), a "definite and seasonable expression of acceptance or written confirmation which is sent within a reasonable time operates as an acceptance," even though it contains additional or different terms from those in the offer, unless the terms of the acceptance made it conditional on the offeree's terms.[70] The presumption of Section 2–207(1) is that the parties have formed a contract when the offeree's response to the offer is timely and indicates an intent to form a contract, even if it contains additional or different terms. If, on the other hand, the offeree responds with an acceptance that is expressly conditioned on the offeror's agreeing to the additional or different terms, then the offeree has not accepted and no contract is formed.[71]

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[67] Even where a different or additional term is not material, the offeror may exclude it by objecting to it without undue delay. CISG art. 19(2). If the offeror does not so object, then the term becomes part of the contract.

[68] *See* Hanwha Corp. v. Cedar Petrochemicals, Inc., 760 F. Supp. 2d 426 (S.D.N.Y. 2011).

[69] *See* Norfolk S. Ry. Co. v. Power Source Supply, Inc., 2008 U.S. Dist. LEXIS 56942 (W.D. Pa. 2008).

[70] U.C.C. § 2–207(1).

[71] *Id.* In effect, this is a rejection. *See* Egan Mach. Co. v. Mobil Chem. Co., 660 F. Supp. 35, 36 (D. Conn. 1986).

If both parties are merchants and have formed a contract due to the offeree's definite and seasonable expression of acceptance, the additional or different terms automatically become part of the contract, *unless* (1) the offer expressly limits acceptance to its terms,[72] (2) the terms "materially alter" the contract,[73] or (3) the offeror objects to the terms within a reasonable time after receiving the offeree's acceptance.[74] In other words, when both parties are merchants, the offeror may remain the "master of the offer" by including a statement or term in the offer that rejects any additional or different terms that might be included in any acceptance, or subsequently objecting in a seasonable manner to any additional or different terms that are contained in an acceptance.

Even if the offeror fails to exercise either of these options, the offeree's proposed additional or different terms will not become part of the contract if they would materially alter the offer. Whether an additional or different term is material rests upon whether the term would result in "surprise of hardship" upon the buyer.[75] If the additional or different terms are determined to be "nonmaterial," then the terms will be included as terms in the contract.

Finally, if the writings of the parties do not lead to the formation of a contract, it is still possible that the conduct of the parties will allow the court to conclude that a contract between them does in fact exist.[76] In such an instance, the terms of the contract will "consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under the gap-filling provisions of" the UCC.[77]

3. Modifications

Once a contract for the sale of goods has been formed between the parties, either orally or in writing, it "may be modified or terminated by the mere agreement of the parties."[78] Any modification must be by the mutual

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[72]U.C.C. § 2–207(2)(a).

[73]U.C.C. § 2–207(2)(b).

[74]U.C.C.§ 2–207(2)(c).

[75]U.C.C. § 2–207 cmt. 4.

[76]U.C.C. § 2–207(3).

[77]U.C.C. § 2–207(3) & cmt. 6.

[78]CISG art. 29(1).

agreement of both parties.[79] The modification requires no additional consideration to be binding. Although a contract need not be in writing, the CISG recognizes that the parties to a written contract may agree that any modifications must be in writing.[80] Even when the contract contains such a provision, however, oral modifications may be enforceable if a party has relied on it to its detriment.[81]

Like the CISG, the UCC does not require any consideration in order for a modification to become binding.[82] However, unlike the CISG, the UCC statute of frauds "must be satisfied if the contract as modified is within its provisions."[83]

D. Warranties of Quality

The seller must deliver conforming goods to the buyer. More specifically, this means 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."[84] Thus, the seller must comply with any express promises as to the quality of the goods, much like express warranties under the UCC.[85] In addition, the CISG requires that the goods conform to certain implied representations. These express and implied representations are similar to the express and implied warranties of quality recognized by the UCC.

Article 35 identifies four implied obligations of the seller as to the quality of the goods. The goods must be fit for the purposes for which they

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[79] *See* Chateau des Charmes Wines, Ltd. v. Sabate, 328 F.2d 528 (9th Cir. 2003) (contract may not be unilaterally modified by one party).

[80] CISG art. 29(2).

[81] *Id.*

[82] U.C.C. § 2–209(1).

[83] U.C.C. § 2–209(3).

[84] CISG art. 35. Goods that are subject to claims of a third party are nonconforming. CISG art. 41.

[85] *See* U.C.C. § 2–313. By making a promise or statement of fact about the goods, providing a description of the goods that is part of the basis of the bargain of the contract, or providing a sample or model that becomes part of the basis of the bargain, the seller creates an express warranty that the goods will conform to the description. *See* U.C.C. § 2–313(1)(b).

would ordinarily be used.[86] If the buyer expressly or impliedly informed the seller of any particular purpose for the goods, then the goods must be fit for that particular purpose.[87] In addition, the goods must "possess the qualities of goods which the seller has held out to the buyer as a sample or model"[88] and 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."[89]

There are two implied warranties of quality that may arise under the UCC, unless explicitly disclaimed: the warranty of merchantability and the warranty of fitness for a particular purpose. According to Section 2–314(1), an implied warranty of merchantability is "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."[90] To be merchantable an article for sale must be usable for the ordinary purpose it is made.[91] An implied warranty of fitness for a particular purpose arises when the buyers make their needs known to the seller and indicate that they are relying on the seller to select the best product to meet their needs.[92]

Under the CISG, goods that do not comply with these implied obligations and the express requirements of the contract are nonconforming goods.[93] When the seller makes delivery of the goods, the buyer is required

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[86]CISG art. 35(2)(a).

[87]CISG art. 35(2)(b); *see* Schmitz-Werke GmbH & Co. v. Rockland Indus., Inc., 37 F. App'x 687, 692–93 (4th Cir. 2002) (finding sufficient evidence that the buyer had reasonably relied on the seller's representations that the goods were fit for their particular purpose). However, this obligation does not exist "where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment." *Id.*

[88]CISG art. 35(2)(c).

[89]CISG art. 35(2)(d). Sellers are generally not obligated to supply goods that conform to public laws and regulations enforced at the buyer's place of business unless the seller knew or should have known about the regulations at issue due to special circumstances such as when the seller has a branch office in the buyer's location. *See* Med. Mktg. Int'l, Inc. v. Inte'l Medico Scientifica, S.r.l., 1999 WL 311945 (E.D. La. 1999).

[90]U.C.C. § 2–314(1).

[91] *See* Dale v. King Lincoln-Mercury, Inc., 676 P.2d 744, 746 (Kan. 1984).

[92]U.C.C. § 2–315.

[93]CISG art. 36. The nonconformity must exist at the time of delivery to the buyer. *See* Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc., 2009 U.S. Dist. LEXIS 25201 (S.D. Ohio 2009).

to inspect them as soon as practicable[94] and notify the seller of any nonconformity within a reasonable period of time after discovering the nonconformity or when he or she should have discovered it.[95] The reasonable time for giving notice after discovery of the nonconformity will vary as it depends on the circumstances of the transaction, and the determination of what period of time is "practicable" is a question of fact.[96] If the buyer fails to provide notice to the seller, he or she loses the right to sue for breach of contract.[97] Notice is important because the seller has the right to cure the nonconformity at his or her own expense if the seller can do so without unreasonable delay and when doing so would not unreasonably inconvenience the buyer.[98]

Nevertheless, the seller is not liable when the buyer knew or should have known of any nonconformity in the goods.[99] Likewise, the parties may agree to disclaim the implied representations of Article 35, which provides that the goods are nonconforming "[e]xcept where the parties have agreed otherwise."[100] Unlike disclaimers of implied warranties under the UCC, however, there are no requirements as to the form of the disclaimer or as to specific wording that must be used. Nevertheless, the enforceability of the disclaimer depends on whether the buyer was aware of it or would have purchased the goods had he or she known of the disclaimer.[101]

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[94]CISG art. 38. "The period for examining for latent defects commences when signs of the lack of conformity become evident." CISG-AC Opinion no. 2, Examination of the Goods and Notice of Non-Conformity Articles 38 and 39, § 1 (June 7, 2004).

[95]CISG art. 39(1).

[96]*See* Shuttle Packaging Sys., LLC v. Tsonakis, 2001 WL 34046276, at *9 (W.D. Mich. 2001) (the CISG intends that "buyers examine goods promptly and give notice of defects to sellers promptly" considering such factors as the complexity of goods, the method of delivery, contract provisions providing for training and repairs, and the skill of the buyer's employees).

[97]CISG art. 39(2). Alternatively, the buyer loses the right to sue for breach if he or she does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually delivered to the buyer, unless that would be inconsistent with a contractual warranty period. *Id.*

[98]CISG art. 48(1). However, the buyer retains the right to claim damages caused by the delay or nonconformity. *Id.*

[99]CISG art. 35(3).

[100]CISG art. 35(2). *See* Norfolk S. Ry. Co. v. Power Source Supply, Inc., 2008 U.S. Dist. LEXIS 56942 (W.D. Pa. 2008) (recognizing that Article 35 allows for disclaimers of warranties).

[101]*See* Supermicro Computer Inc. v. Digitechnic, S.A., 145 F. Supp. 2d 1147 (N.D. Cal. 2001).

Within specific limits, the UCC permits sellers to disclaim express and implied warranties on the goods they sell. In broad terms, the UCC provides that endeavors to disclaim express warranties should be construed reasonably and enforced unless doing so is determined to be unreasonable under the circumstances.[102]

As to disclaimers of implied warranties, the UCC is much more explicit in its requirements. If the seller is a merchant, the implied warranty of merchantability may be excluded or modified either orally or in writing.[103] An oral exclusion or modification of the implied warranty of merchantability "must mention merchantability."[104] The warranty may also be excluded or modified in writing, in which case the disclaimer must include the term "merchantability" and be conspicuous.[105] Along similar lines, the implied warranty of fitness for a particular purpose may be excluded or modified using general language that must be conspicuous and stated in writing.[106] The language used to exclude or modify the implied warranty of fitness for a particular purpose may be in general terms such as "There are no warranties which extend beyond the description on the face hereof."[107]

E. Performance and Remedies for Breach of Contract

1. Obligations of Seller and Buyer

The seller's primary obligations under the CISG are to deliver conforming goods and title to the buyer according to the terms of the contract.[108] If the contract does not specify how this is to be done, the CISG provides a set of gap-filling rules.[109] The place for delivery, unless otherwise agreed, is the first

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[102]U.C.C. § 2–316.

[103]The implied warranty of merchantability is only implied in a contract for the sale of goods if the seller is a merchant in the business of selling to goods that are the subject of the contract of sale. *See* U.C.C. § 2–314.

[104]U.C.C. § 2–316(2). The seller must keep in mind that the possibility of proving an oral exclusion or modification is subject to the parol evidence rule. *See* U.C.C. § 2–202.

[105]U.C.C. § 2–316(2) cmt. 3. *See* U.C.C. § 1–201(10) (defining "conspicuous").

[106]U.C.C. § 2–316(2) cmt. 4.

[107]U.C.C. § 2–316(2).

[108]CISG art. 30. The seller has the same obligations under U.C.C. Sections 2–301 and 2–312(1)(a).

[109] *See* U.C.C. § 2–503(1)(a)&(b).

carrier's place of business if the goods are to be transported, or the place where the parties knew the goods were located or were to be manufactured or produced.[110] If no date for delivery is fixed in the contract, then delivery must occur within a reasonable time after the contract is formed.[111] If a time for delivery is stated in the contract, the seller may deliver the goods at any time within that period, unless the buyer has the right to choose the time for delivery.[112]

The buyer's primary obligations are to pay the price for the goods and take delivery of them as required by the contract.[113] The buyer must pay the price for the goods at the time and place as specified in the contract or, if no time is specified, the buyer must pay when "the goods or the documents controlling their disposition" are delivered.[114] If no place for payment is specified in the contract, then the buyer must pay at the place of delivery, or if this is not specified, at the seller's place of business.[115] In any event, the buyer need not pay until he or she has had the opportunity to examine the goods.[116] The buyer's obligation to take delivery requires him or her to do all acts reasonably necessary to allow the seller to deliver the goods and then to take over the goods.[117]

According to Article 25, a fundamental breach occurs when a party is substantially deprived of what he or she is entitled to expect under the

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[110]CISG art. 31. U.C.C. § 2–308(a)&(b) contains similar provisions.

[111]CISG art. 33. Similar provisions are included in U.C.C. Section 2–309(1) comment 1.

[112]*Id.* In addition, the seller must turn over any documents relating to the goods at the time and place of delivery. *See* CISG art. 34.

[113]*See* CISG art. 53. The buyer has the same obligations under U.C.C. Section 2–301.

[114]CISG art. 58(1). "The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made." CISG art. 54. Unless otherwise agreed, the buyer, under the U.C.C., must pay for the goods at the time and place where the buyer is to receive the goods rather than at the point of delivery. *See* U.C.C. § 2–310(a) and cmt.1.

[115]CISG art. 59. *See* U.C.C. § 2–310(a) (buyer to pay for the goods at the place where the buyer receives the goods).

[116]CISG art. 58(3). U.C.C. Section 2–513(1) provides the same right to the buyer.

[117]CISG art. 60. Passage of risk, which defines the point in time when the buyer assumes responsibility for losses to the goods, occurs at the time agreed in the contract or according to the means used for transportation and delivery of the goods. *See* CISG arts. 67–69.

contract.[118] Factors relevant in assessing substantial deprivation include the monetary value of the contract and the harm resulting from the breach as well as the ability and willingness of the breaching party to cure the nonconformity. Also relevant is whether the parties have agreed that performance of a certain condition is essential to the contract. In addition, the substantial deprivation caused by the breach must have been reasonably foreseeable to the breaching party.[119] Foreseeability is best measured at the time of contracting when the parties become aware of each other's expectations and have agreed that they can perform as expected.

The elements of a breach of contract claim are alike under the CISG and UCC: the plaintiff must prove (1) the existence of a valid and enforceable contract containing both definite and certain terms, (2) performance by the plaintiff, (3) breach by the defendant, and (4) resultant injury to the plaintiff.[120] An important distinction between the CISG and the UCC, however, is the ability of the breaching party to request a reasonable extension of time in which to perform after a breach.[121] This extension of time is known as a "Nachfrist" period.[122] If the seller has not delivered the goods, or has delivered nonconforming goods, and the time for shipment or delivery has passed, the seller may request a Nachfrist period in which to correct or "cure" the nonconformity. If a Nachfrist period is granted, however, the buyer "may not, during that period, resort to any remedy for breach of contract."[123] Even so, the buyer does not lose the right to claim damages for the seller's delay in performance.[124] Moreover, if the breach is fundamental, the buyer is not obligated to grant a Nachfrist extension.

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[118] CISG art. 25. The U.C.C. applies the "perfect tender" rule, which recognizes a breach "if the goods or the tender of delivery fail *in any respect* to conform to the contract." U.C.C. § 2–601 (emphasis added). However, either party's ability to pursue his or her remedies is conditional upon there having been a repudiation of the contract (U.C.C. § 2–610), a failure of performance (U.C.C. § 2–301), a rejection of the goods (U.C.C. § 2–601), or a revocation of the acceptance of the goods (U.C.C. § 2–608).

[119] *See* CISG art. 25.

[120] *See* Magellan Int'l. Corp. v. Salzgitter Handel, GmbH, 76 F. Supp. 2d 919, 924 (N.D. Ill. 1999).

[121] CISG. art. 47(1).

[122] The Nachfrist concept is borrowed from German commercial law. *See* Ericson P. Kimbel, *Nachfrist Notice and Avoidance Under the CISG,* 18 J. L. & Com. 301 (1999).

[123] CISG art. 47(2).

[124] *Id.*

In the event of a fundamental breach, the CISG provides for certain remedies for the buyer and seller, as well as remedies available to either party. Remedies for the buyer and seller are cumulative and immediate, meaning that a court may not grant the breaching party a grace period when the other party sues for breach of contract.[125] Moreover, a party does not lose the right to recover damages even if he or she exercises the right to any other available remedy.[126]

2. Buyer's Remedies

When the seller has committed a fundamental breach of contract by failing to perform any obligation, the buyer has the right to "avoid" or cancel the contract.[127] Avoidance of the contract is allowed when the seller fails to deliver the goods, or fails to deliver them within any Nachfrist period granted by the buyer, or when the seller states that he or she will not deliver the goods within that period.[128] When the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he or she does so within a reasonable time after delivery or after discovering that the goods are nonconforming.[129] The buyer must notify the seller that he or she has avoided the contract and return the goods for a refund of the purchase price or file an action for breach of contract.

If the buyer chooses to sue for breach of contract, he or she is entitled to recover damages. If substitute goods are purchased, the measure of damages is the difference between the price of substitute goods purchased and the contract price of the goods.[130] If substitute goods are not purchased, then the measure of damages is the difference between the market price and the contract price.[131] Damages consist of a "sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach."[132]

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[125] *See* CISG arts. 45(3) & 61(3).

[126] *See* CISG art. 45(2) & 61(2).

[127] CISG art. 49(1). The buyer has the same right under U.C.C. Section 2–711(1).

[128] CISG art. 49(2). The buyer has the same right under U.C.C. Section 2–711(1).

[129] CISG art. 49(3). The buyer has the same right under U.C.C. Section 2–608(2).

[130] CISG art. 75. The measure of damages is the same under U.C.C. Section 2–712(2).

[131] CISG art. 76. The measure of damages is the same under U.C.C. Section 2–713(1).

[132] CISG art. 74. "Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and

In addition, to consequential damages, the buyer may recover incidental damages[133] as well as interest.[134] When he or she chooses to sue for damages, the buyer "must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach."[135] If the buyer fails to take such measures, the seller "may claim a reduction in the damages in the amount by which the loss should have been mitigated."[136]

As an alternative remedy, the buyer may opt for a price reduction to reflect the value of the goods delivered. Price reduction may be invoked regardless of whether the breach is fundamental. This remedy allows the buyer to retain the nonconforming goods and reduce the price of those goods by withholding part of the purchase price in proportion to the reduced value of the goods due to the nonconformity.[137] A buyer who uses price reduction may still sue for damages. However, the remedy of price reduction is not available if the seller already has remedied the breach at his or her own expense by delivering substitute goods,[138] or if the buyer has refused to allow the seller to attempt to remedy the nonconformity.[139]

Finally, the buyer may seek specific performance of the contract. This remedy allows the buyer to demand that the seller perform his or her obligations under the contract.[140] If the seller delivered nonconforming goods,

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matters of which he then knew or ought to have known, as a *possible* consequence of the breach of contract." *Id.* (emphasis added). This standard is broader than that applied under the U.C.C., which limits damages to the probable consequence of the loss. *See* Murray on Contracts *supra* note 7, at § 121(1).

[133]CISG art. 74. The buyer may recover consequential and incidental damages under U.C.C. Sections 2–712(2) or 2–713(1). U.C.C. Section 2–715(1)(2)(a)(b) describes which damages are included as incidental and consequential.

[134]CISG art. 78.

[135]CISG art. 77.

[136]CISG *See* Delchi Carrier S.p.A. v. Rotorex Corp., 71 F.3d 1024, 1029–31 (2d Cir. 1995) (allowing the buyer to recover damages for its expenses incurred in attempting to remedy the nonconformity).

[137]CISG art. 50. The amount of the reduction is based on the value of the nonconforming goods delivered in proportion to the value of the goods as warranted in the contract at the time of delivery. *Id.* The buyer may seek similar recovery under U.C.C. Section 2–714.

[138]CISG art. 48.

[139] *See* CISG art. 37.

[140]CISG art. 46(1).

the buyer may demand that the seller furnish substitute goods[141] or repair the nonconformity as long as it is reasonable to do so.[142] However, the right to seek specific performance is limited if the action is brought in a country in which specific performance would not be granted "under its own law."[143] This is the case in common law jurisdictions, such as the United States, where the remedy of specific performance is limited to transactions involving goods that are unique or other exceptional circumstances.[144]

3. Seller's Remedies

Like the buyer, a seller may avoid the contract when the buyer has committed a fundamental breach. The CISG allows the seller to avoid the contract when the buyer fails to perform any of his or her obligations under the contract that would amount to a fundamental breach,[145] or when the buyer fails to take delivery of the goods or pay the purchase price.[146] If the seller chooses to avoid the contract, he or she is released from performance and may resell the goods and recover damages representing the difference between the contract price and the resale price.[147] If the goods are not resold, the seller may recover the difference between the contract price and the market price.[148] In addition,

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[141]CISG art. 46(2).

[142]CISG art. 46(3).

[143]CISG art. 28.

[144]U.C.C. § 2–716(1).

[145]CISG art. 64(1). The seller has the same right to avoid the contract under U.C.C. Section 2–703(f).

[146]CISG art. 64(2). The seller has the same right to avoid the contract under U.C.C. Section 2–703(f).

[147]CISG art. 75. The seller has the same rights under U.C.C. Sections 2–703(d) (resell and recover damages) and 2–706.

[148]CISG art. 76(1). The market price "is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods." CISG art. 76(2). The measure of damages is the same for a seller under U.C.C. Section 2–708(1).

the seller may bring an action for consequential damages, including lost profits[149] and interest.[150]

However, a seller who has not avoided the contract may demand specific performance by the buyer,[151] or recover damages, including consequential damages and interest.[152] As is required when the buyer sues for damages, the seller must take reasonable steps to mitigate any such damages. Finally, the seller may attempt to recover liquidated damages if the parties have agreed to include such a provision in their contract. Although the CISG does not prohibit limitation of remedies clauses[153] or the recovery of liquidated damages,[154] the enforceability of such provisions will be determined by the application of local law.

4. Anticipatory Breach and Avoidance

An anticipatory breach of contract occurs when, in the course of performing a contract, one party has reasonable grounds to believe that the other party to the contract will not substantially perform or will commit a fundamental breach. Pursuant to Article 71, the first party may suspend performance if he or she believes that the other party will not perform a substantial party of his or her obligations.[155] This may occur when it becomes clear that the other party will not perform his or her obligations under the contract or not pay for

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[149]CISG art. 74. Recovery of consequential damages is limited to those that were reasonably foreseeable as a result of the breach. *Id.* The seller may recover lost profits as provided in U.C.C. Section 2–708(2).

[150]CISG art. 78.

[151]*Id.* art. 62. The seller may require the buyer to pay the contract price and take delivery. As with the buyer, the seller's right to seek specific performance is limited by Article 28. The U.C.C. does not provide the seller with such a specific performance remedy.

[152]Article 74 provides the sole measure of damages when the nonbreaching party sues for breach of contract but when the contract is avoided, Articles 75 and 75 provide the measure of damages. *See* Semi-Materials Co. v. MEMC Elec. Materials, Inc., 2011 WL 134078, at *4 (E.D. Mo. 2011).

[153]*See* MSS, Inc. v. Maser Corp., 2011 WL 2938424 (M.D. Ten 2011).

[154]*See* CISG-AC Opinion no. 10, Agreed Sums Payable upon Breach of an Obligation in CISG Contracts, (Aug. 3, 2012). Under the U.C.C., liquidated damages must be "reasonable in light of the anticipated or actual harm caused by the breach." U.C.C. § 2–718(1); *see also* Jack Graves, *Penalty Clauses and the CISG*, 30 J. L. & Com. 153 (2012).

[155]CISG art. 71(1). *See, e.g.*, Doolim Corp. v. R. Doll, LLC, 2009 WL 1514913 (S.D.N.Y. 2009).

the goods.[156] The right to suspend performance ends when the other party provides adequate assurance that he or she will perform.[157] This remedy is available to either party.

If, before the date of performance, it becomes clear to one party that the other will commit a fundamental breach of contract, the first party may declare the contract avoided.[158] Avoidance of the contract means that it has been cancelled or repudiated; however, the party intending to declare the contract avoided must give reasonable notice to the other party to allow him or her to provide adequate assurance of performance.[159] The remedy is available as soon as it is clear that the other party "will commit a fundamental breach of contract."[160]

The UCC addresses anticipatory breach and avoidance of the contract as a "repudiation" of the contract. Under the UCC, the buyer or a seller may choose to repudiate a sales contract that has not yet been fully performed. The nonrepudiating party may take several courses of action if the repudiation and subsequent failure to perform will substantially impair the value of the contract to the nonrepudiating party. Similar to the CISG, the UCC courses of action include anticipate, for a commercially reasonable time, the performance of the repudiating party; suspend performance; or resort to remedies specified in the UCC for breach.[161]

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[156]CISG art. 71(1). If the seller seeks to avoid the contract and has already shipped the goods, he or she may halt delivery until the buyer provides adequate assurance of performance. CISG art. 71(2).

[157]CISG art. 71(3).

[158]CISG art. 72(1). In addition, the CISG allows a buyer to partially avoid the contract as to any nonconforming or undelivered goods if the breach of that part of the contract is fundamental or delivery does not occur within the time set by a Nachfrist notice. *See* CISG art. 51(1). Likewise, a party may avoid an installment of an installment contract if the other party has committed a fundamental breach as to that installment. CISG art. 73(1). When a breach of an installment provides a party with good grounds that a fundamental breach will occur as to future installments, he or she may avoid the rest of the contract if done within a reasonable time. CISG art. 73(2).

[159]CISG art. 72(2).

[160]CISG art. 72(1). If the buyer avoids the contract, he or she must return any goods that already have been delivered "substantially in the condition which he receives them" and must take reasonable steps to preserve them. CISG arts. 82(1) & 86.

[161]CISG art. § 2–610 (a), (b), & (c).

5. Excuse for Nonperformance

A party to a contract may be excused from performance and from liability for breach of contract when it would be commercially impracticable to perform. Article 79 delineates three requirements that must be met before a party will be excused from performing the contract.[162] First, the impediment must have been beyond his or her control. Second, the impediment must not have been foreseeable. Third, the party must have given notice to the other party within a reasonable time after learning of the impediment.[163] The impediment suspends performance during the time it exists, and does not entirely excuse a party from performing the contract, unless the impediment renders performance impracticable.[164] The party whose performance is made impracticable by the impediment must notify the other party or else remain liable for damages.[165]

Similar to the CISG, to be excused due to nonperformance under the UCC, the seller must establish (1) the occurrence of a contingency, (2) the nonoccurrence of the contingency was a basic assumption underlying the contract, and (3) the occurrence of the contingency made performance commercially impracticable.[166]

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[162]CISG art. 79(1).

[163]*See* CISG art. 79(4). The term "impediment" is not defined in the CISG and is therefore determined on the basis of the facts of each case. *See* Hilaturas Miel, S.L. v. Republic of Iraq, 573 F. Supp. 2d 781 (S.D.N.Y. 2008) (advent of war was an impediment to performance); Raw Materials, Inc. v. Manfred Forberich GmbH & Co., 2004 WL 1535839 (N.D. Ill. 2004) (freezing over of a port was an impediment to performance); Macromex, S.r.l. v. Globex Int'l, Inc., 2008 WL 1752530 (S.D.N.Y. 2008) (change in government import regulations was not an impediment to performance). Market price fluctuations, a party's financial difficulties or insolvency, or loss of funds for payment are generally not considered to be impediments to performance. *See* Folsom et al., *supra* note 7, at 51.

[164]CISG art. 79(3). "A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission." CISG art. 80. On the other hand, if a party's failure to perform is due to the failure of a third person whom the party has subcontracted, the party is excused only if the third person would be excused under Article 79(1) due to an unforeseeable impediment. *See* CISG art. 79(2).

[165]CISG art. 79(4).

[166]U.C.C. § 2–615(a). The use of the word "commercially" to describe the nature of the impracticability is not expressly used in this section. However comment 3 of this section explicitly refers to an additional test of "commercial impracticability" in order to excuse nonperformance.

V. Teaching Notes

A. Teaching Objectives

This case study is intended to direct students in learning about the differences between the CISG and the UCC as to the formation and performance of sales contracts. The main objectives for teaching the case are to challenge students to:

1. Appreciate the legal aspects of international commercial transactions;
2. Recognize the importance of assessing legal risk in business decisions;
3. Acquire a comparative understanding of the rules of the CISG and the UCC and the differences between them;
4. Identify legal issues involving international sales contracts;
5. Apply the relevant legal principles to a fact situation in order to reach a conclusion;
6. Explain or interpret the results of their analysis in a clear, concise, and correct manner.

B. Potential Uses of the Case

As a pedagogical tool, this case study can be used in courses on international business law[167] and to supplement introductory or advanced business law courses that include treatment of commercial sales transactions.[168] In addition, use of the case study will promote awareness of legal risk in business decisions and enhance the development of students' critical thinking and legal analysis skills.

C. Discussion

This section provides a legal analysis of the Discussion Questions posed in Part III. For some issues, the application of the CISG or UCC rules may not

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[167]The case study can be assigned for use with current international business law textbooks as a basis for class discussion. *E.g.*, Ray August et al., International Business Law 539–88 (6th ed. 2013); Richard Schaffer et al., International Business Law and Its Environment 108–49 (8th ed. 2012).

[168]In a general business law course, the case study can be used to supplement coverage of the U.C.C. in order to provide an international perspective and highlight differences with the CISG. In these courses, the material and Part IV should be assigned for reading prior to discussion of the issues.

lead to a definitive answer, or may require students to consider alternative arguments based on the facts.

1. *If there is an agreement between Verkauferbrauer and Bynum, does the CISG apply to this contract? If so, assume instead that the contract contains the following choice of law clause: "This contract shall be governed by the commercial law of the State of California." California has enacted the UCC. Does the CISG or the UCC apply to this contract?*

The CISG applies to contracts for the sale of goods when each of the parties has its place of business in different countries, each of which has ratified the treaty. The nationality of the parties is irrelevant; what is important is the primary location of the parties' establishments of business. In this case, Verkauferbraufer has his brewery in Belgium while Bynum is based in the United States. Belgium and the United States are contracting states to the CISG. Therefore, the first requirement is established. Whether this transaction involves a sale of "goods" is a more complicated question.

The contract at issue involves the purchase of beer, which is a tangible good, but the contract also requires Verkauferbrauer to design a beer that was alcohol free, light in color, well balanced, medium in body, and mildly assertive with a simple citrusy aroma and taste. Doing so also required Verkauferbrauer to design labels for the bottles. These aspects of the contracts are services. In determining whether a hybrid contract is governed by the CISG, we must assess whether the goods or services aspect is the preponderant part as measured by the parties' intent. Here, what motivated Bynum to initiate negotiations with Verkauferbrauer was the purchase of an alcohol-free beer to serve in his tasting bars. Although Verkauferbrauer had to create the beer, it was secondary to Bynum's main purpose in seeking the purchase of an alcohol-free beer. Furthermore, the additional cost of producing such a beer was nominal according to Verkauferbrauer. As such, it is reasonable to conclude that the preponderant part of the contract involves the sale of goods rather than services.[169]

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[169]If instead it is concluded that the preponderant part of the contract is services so that the CISG (and U.C.C.) does not apply, then the issue arises as to whether the contract is governed by the U.S. common law of contracts or Belgian commercial law if a dispute arises. This would require an analysis according to the prevailing and often unpredictable conflicts of laws rules as applied by a court of proper jurisdiction. Approaches to resolving choice of law issues differ among various countries.

Even if the design service aspect of the contract is considered to be significant, the contract can be viewed as involving the sale of a specially manufactured good. This analysis parallels that applicable to the UCC, which inquires as to the predominant purpose of the contract and focuses on the main reason why the parties entered the contract. The predominant purpose of this contract was for sale and purchase of beer, with the rendition of design services secondary to this purpose. Moreover, specially manufactured goods are specifically recognized as being within the scope of the UCC. Therefore, if the conclusion is that the CISG does not apply for other reasons, then Article 2 of the UCC would govern this transaction.

Even when the transaction involves a sale of goods and each party has a place of business in a different contracting state, the parties may opt out of the CISG pursuant to Article 6. An "opt-out" clause must be of sufficiently specific language that clearly states the parties' intent that the CISG does not apply. The second part of Question 1 assumes that the contract contains a choice of law clause stating that the contract "shall be governed by the commercial law of the State of California." Is this clause specific enough to supplant application of the CISG? The courts have held that a standard choice of law clause is insufficient to exclude the application of the CISG.

The clause here designates "the commercial law" of California, but because California is bound by the supremacy clause to the treaties of the United States, the commercial law of California includes the CISG.[170] If the parties choose to exclude the CISG, it is preferable to do so with specific language stating that the CISG does not apply and designating which law governs the contract instead, for example, "This contract is governed by the California Uniform Commercial Code and not by the United Nations Convention on Contracts for the International Sale of Goods." Such a clause would lead to the application of the UCC.

2. *Assuming that the CISG applies, did Verkauferbrauer make a valid offer to Bynum on February 15? If so and Verkauferbrauer later changed his mind, could Verkauferbrauer have withdrawn the offer on February 17? What result under the UCC?*

The CISG defines an offer as a proposal that is sufficiently definite and that indicates the offeror's intent to be bound. The offer must be directed

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[170] *See* Asante Techs., Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001) 0.

to a specific person and specify the goods, a quantity, and a price. Based on the facts, neither the conversation between Bynum and Verkauferbrauer at the Craft Brewers Convention, nor the telephone conversation on February 15, meets these requirements. Rather, they amount to an inquiry or a preliminary negotiation. The e-mail sent to Bynum later on February 15, however, contained a proposal directed to Bynum to supply a Belgian-style beer that was free of alcohol. The proposal stated a total price of €10,000 ($13,000) and the quantity Bynum desired of thirty kegs of thirty liters and 2400 bottles of twelve ounces each. Therefore, Verkauferbrauer made a valid offer on February 15.

Unless an offer contains a promise by the offeror to hold open the offer for a specified time period, the offeror may withdraw the offer at any time before the offeree dispatches an acceptance, as long as the withdrawal reaches the offeree before he or she dispatches the acceptance. The CISG imposes no other requirements to create an irrevocable offer other than to state that it will remain open for a specified period. The offer to Bynum contained a statement that it "was good for one hunderd days." This could amount to a promise that the price and other terms of the proposal will remain irrevocable for a certain period of time. If so, Verkauferbrauer could not have revoked his offer on February 17, even if the revocation had reached Bynum before he e-mailed his acceptance to the offer on February 21.

The analysis under the UCC is much the same. Verkauferbrauer's proposal of February 15 objectively manifested his intent to make an offer, and its terms were sufficiently specific to provide a reasonably certain basis for affording an appropriate remedy. Whether it constitutes a firm offer requires closer examination. Under Section 2–205, for an offer to be irrevocable, it must be made by a merchant in a signed writing and give assurance that it will be held open. Verkauferbrauer is a merchant because he regularly deals in the brewing and sale of beer. The e-mail containing the proposal satisfies the writing and signature requirements as explained above. Does the statement that the offer "was good for one hundred days" give assurance that it will be held open, or does it merely indicate a deadline for acceptance? If the latter, then the offer was not irrevocable, and Verkauferbrauer could have withdrawn it on February 17.

3. *Assuming that the CISG applies, is Bynum's reply on February 21 a valid acceptance of the offer? If so, what are the terms of the contract? What result under the UCC?*

An offeree makes a valid acceptance when he or she indicates assent to an offer by manifesting intent to be bound by the terms of the offer. The offeree can indicate acceptance at any time before the offer expires or is revoked, and is effective upon receipt by the offeror. In this case, Bynum responded to Verkauferbrauer's offer by mailing an acknowledgment on February 21 stating that the proposal was accepted. However, the acknowledgment also contained a merger clause that was not part of the offer. The merger clause stated that the written terms of the parties' agreement supersede "all negotiations, prior discussions, and preliminary agreements, whether written or oral."

According to Article 19 of the CISG, a reply to an offer containing additional or different terms that do not materially alter the terms of the offer is an acceptance, unless the offeror immediately objects to those terms. Assuming that the merger clause contained in Bynum's acknowledgment does not materially alter the terms of Verkauferbrauer's offer, then the acknowledgment was an acceptance and was effective to create a contract unless Verkauferbrauer, without undue delay, objected orally to the merger clause or dispatched a notice of objection to Bynum. The facts do not indicate that Verkauferbrauer did so; therefore, a contact would have been formed upon receipt of Bynum's acceptance.

On the other hand, if an additional or different term is a material alteration to the offer, then the reply constitutes a counteroffer and a rejection of the offer. Article 19(3) provides a list of terms that are considered material. Although merger clauses are not included, the list is nonexclusive. The main argument in support of concluding that such a term is a material alteration is that it deviates from the principle found in Article 8 of the CISG, which specifically allows courts to consider all evidence in determining the parties' intent. In essence, a merger clause is an agreed-upon parol evidence rule indicating that the written contract is the exclusive expression of the parties' understandings. Such an additional term would have the effect of excluding including oral negotiations, prior agreements, as well as evidence of course of performance, course of dealing, and usage of trade, that would contradict or supplement the terms of the contract.[171]

Given this discrepancy between Article 8 and the effect of a merger clause, such a term could be viewed as a material alteration. On the other

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[171] See E. Allan Farnsworth, *Article 19, in* Bianca-Bonell Commentary on the International Sales Law 182–83 (1987).

hand, it may be argued that such clauses are boilerplate commonly found in contracts involving U.S. businesses and would not cause a party in Verkauferbrauer's position to object. If the merger clause in Bynum's acknowledgment is a material alteration of Verkauferbrauer's offer, however, then Bynum's acknowledgment amounted to a rejection and a counteroffer, rather than an acceptance. Accordingly, no contract was formed between the parties, at least not initially. Nevertheless, Verkauferbrauer proceeded to perform the agreement by producing and delivering the beer to Bynum. In doing so, it could be reasonably concluded that he accepted Bynum's counteroffer by conduct. If so, then the terms of the contract include the terms of the counteroffer—the terms of Verkauferbrauer's offer, together with the merger clause contained in Bynum's acknowledgment.

The analysis under Section 2–207 is similar, though a bit more complicated. Bynum's order acknowledgment to Verkauferbrauer's offer was timely and manifested a definite expression of acceptance. Since Bynum accepted Verkauferbrauer's offer, the parties have entered into an enforceable contract, and we must decide whether the merger clause as an additional term is included in their contract. Verkauferbrauer did not expressly limit Bynum's acceptance to the terms of his proposal. Since both Bynum and Verkauferbrauer are merchants, the merger clause becomes part of the contract unless one of the three exceptions of Section 2–207(2) applies. If one of the exceptions applies, the merger clause will be treated as being merely a proposal for addition to the contract and will not become part of the contract unless Verkauferbrauer assents. If none of the exceptions applied, then the merger clause becomes part of the contract.

Based on the facts, Verkauferbrauer did not object to the additional term after receiving Bynum's acceptance as provided for in Section 2–207(2)(c). Bynum's acceptance stated that Bynum's "proposal is accepted subject to the Standard Conditions of Sale contained in this acknowledgment." Does this mean that his acceptance was "expressly made conditional on assent to the additional or different terms" as provided for in Section 2–207(2)(a)? The conditional nature of the acceptance must be clearly expressed so as to place the offeror on notice that the offeree does not wish to form a contact unless the additional or different terms are in the contract. The courts have held that clauses stating that an acceptance is "subject to" do not unambiguously reveal that the buyer's acceptance was expressly conditional on the seller's assent to additional or different terms.[172]

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[172] *See* Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 1168 (6th Cir. 1972).

Finally, if the merger clause in Bynum's confirmation is deemed to be a material alteration, then it will be treated as a mere proposal for addition to the contract and is not included in the contract unless Verkauferbrauer expressly agreed to it. Does inclusion of a merger clause result in "surprise or hardship" to the offeree? A merger clause is a means for excluding inconsistent terms that modify or add to the terms in the written contract. In essence, it is evidence that the parties intend that the written contract is a complete record of their agreement, with an effect concurrent with that of the parol evidence rule. In addition, merger clauses are commonly included in commercial agreements.

In conclusion, it is doubtful that a merger clause would lead to surprise or hardship or constitute a material alteration to the terms of the offer. Based on this analysis, the terms of the contract would include the merger clause. Even if the merger clause materially altered the offer, there would still be an enforceable contract between Verkauferbrauer and Bynum on the basis of their conduct recognizing the existence of a contract. The terms of their contract will be those terms on which their writings agree, in addition to the UCC gap-filling terms.

4. *Assuming that a contract exists, is it possible for the parties to modify it if Verkauferbrauer and Bynum agree to change the date for delivery under the CISG? If Verkauferbrauer and Bynum had not included a date of delivery term in their contract, what would be the date for delivery? What result under the UCC?*

A modification is an agreement to change the terms of an existing contract. The CISG takes a liberal approach to modifications of contracts. Under Article 29(1), the parties may mutually agree, either orally or in writing, to modify the contract. Accordingly, Bynum and Verkauferbrauer could easily agree to change the date for delivery of the beer. The result is much the same under Section 2–209 of the UCC. As with the CISG, no additional consideration is required to support the modification of terms; however, the modification must be in good faith. Any legitimate commercial reason for changing the date of delivery will suffice.

A failure by Bynum and Verkauferbrauer to specify a date for delivery in their contract raises a possible issue of indefiniteness. The problem is not fatal, however, under either the CISG or the UCC due to their "gap-filling" provisions. Pursuant to Article 33 of the CISG, the seller must deliver the goods by the date or within the period fixed by the contract but, "in any

other case, within a reasonable time after the conclusion of the contract."[173] Similarly, if a term is left open in a contract that otherwise meets the standards of intent and ability to provide a remedy, the open terms can be filled by the UCC's gap-filling rules. Section 2–309 of the UCC provides that if the parties have not agreed on a time for delivery, it is to occur within a reasonable time. Whether a time is reasonable will depend on the nature, purpose, and circumstances of the transaction.

5. *If Bynum and Verkauferbrauer had instead concluded a final agreement during their telephone conversation on February 15, would the contract have been enforceable?*

Article 11 of the CISG explicitly states that "[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form."[174] Because there is no writing requirement, a purely oral contract of the kind that was formed between Bynum and Verkauferbruaer during their telephone conversation would be fully enforceable, assuming that it was otherwise valid.

The UCC, unlike the CISG, contains a Statute of Frauds provision requiring all contracts for the sale of goods in excess of $500 to be in signed writing.[175] The contract here is for an amount greater than this threshold amount, and therefore an oral agreement formed during a telephone conversation would need to be evidenced by a signed writing in order to be enforceable. If there had been a confirmatory memorandum setting forth the essential terms of the agreement and sent by one of the parties to the other, this would serve as written evidence of the contract. However, even if there is no writing, a contract may nevertheless be enforceable if one of the several exceptions to the Statute of Frauds applies.

The most promising of these exceptions in this case is that for specially manufactured goods. No writing is required if the seller specially manufactured the goods for the buyer, the goods are not for sale to others, and the seller has made a substantial beginning to manufacturing the goods before

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[173]CISG art. 33(c).

[174]CISG art. 11.

[175]On the facts of the case, the exchange of e-mails would suffice to fulfill the writing requirement of the Statute of Frauds. *See* E. Mishan & Sons, Inc., v. Homeland Housewares, LLC, 2012 WL 2952901 (S.D.N.Y. 2012).

receiving notice that the buyer has repudiated the contract. Here, Verkauferbrauer contracted to specially make a no-alcoholic beer not intended for sale to his other customers. Bynum did not attempt to repudiate the contract until after production of the beer had been completed and delivered. Therefore, any argument by Bynum that the contract was unenforceable because it was not in writing would fail.

6. *Assuming that a contract exists and the terms have been determined, has Verkauferbrauer created any warranties under the CISG? If so, suppose the contract includes the following clause: " Seller disclaims all warranties, express and implied, as to these goods." Has Verkauferbrauer effectively disclaimed any warranties in the contract? What result under the UCC?*

According to Article 35 of the CISG, the seller is obligated to deliver goods that are of the quantity, quality, and description as promised in the contract. Additionally, the CISG recognizes certain implied obligations on the part of the seller that the goods are fit for the purposes for which they are ordinarily used and for any particular purposes, if the buyer has informed the seller of any particular purpose for the goods. Similarly, the UCC recognizes the creation of an express warranty based on the seller's description, promises, and statements of facts concerning the goods. As a result of the sale, there is an implied warranty of merchantability that the goods will be fit for their ordinary use if the seller is a merchant. The UCC also allows for an implied warranty of fitness for a particular purpose, if the seller had reason to know of the buyer's purpose and that the buyer was relying on the seller in selecting the appropriate goods.

Goods that do not comply with these express or implied warranties of quality are nonconforming. In this case, Verkauferbrauer expressly promised to deliver beer to Bynum that was alcohol free but instead delivered beer that contained up to 0.5 percent alcohol by volume. Verkauferbrauer claims that it is understood within the industry that nonalcoholic beer can contain a small amount of alcohol. Under Article 8 of the CISG, the meaning of any statement in a contract is to be given the intended meaning of the party making the statement if the other party knew of or could not have been unaware of it. In their discussion at the Craft Brewers Convention and during phone conversation on February 15, Bynum stressed that the beer must be free of alcohol. Since the meaning of "free of alcohol" must be interpreted from the subjective standpoint of Bynum, and Verkauferbrauer was aware of this,

we can conclude that the beer is nonconforming under the terms of their agreement.

For the same reasons, Verkauferbrauer's representation in the contract that the beer would be alcohol free is a promise and a statement of fact rather than opinion or sales talk. This resulted in the creation of an express warranty, and the subsequent delivery of beer containing alcohol can be construed as a breach of express warranty. Although the beer was fit for its ordinary purpose, human consumption, it was not fit for the particular purpose of serving those of Bynum's patrons who wanted to consume a non-alcoholic beer. As a consequence, the beer is nonconforming as to this implied promise as well according to Article 35 of the CISG and, pursuant to the UCC, a breach of the implied warranty of fitness for a particular purpose.

What is the effect of a disclaimer of all express and implied warranties if the contract included such a clause? The CISG allows parties to disclaim implied representations with little formality, as long as the buyer was aware of the disclaimer at the time of contracting. Therefore, the effect of the clause may be to eliminate any liability due to the beer's lack of fitness for a particular purpose. It is less likely, however, that the clause will excuse Verkauferbrauer's failure to comply with his express promise to deliver beer that was totally free of alcohol. This is because it was the basis of Bynum's intent in entering into the contract and because the design and sale of an alcohol-free beer was the sole and essential purpose of the agreement.

As with express representations of quality under the CISG, it is nearly impossible to disclaim any express warranties under the UCC, particularly with a disclaimer containing such general language. This conclusion might differ if Verkauferbrauer made oral representations about the alcohol content of the beer during negotiations and the contract includes the merger clause as discussed above. If such representations were not included in the written contract, it could be problematic for Bynum to introduce such evidence due to the parol evidence rule. However, the contract as formed refers to "an alcohol-free Belgian-style beer," and a disclaimer would be inconsistent with this express statement of fact.

As to implied warranties, a disclaimer of the implied warranty of fitness for a particular purpose must be in writing and must be conspicuous. The UCC states that the following clause, if conspicuous, would be effective to disclaim this warranty: "There are no warranties which extend beyond the description on the face hereof." The warranty in this case is written, and assuming it is conspicuous based on the use of capital letters, may be sufficient to disclaim the implied warranty that the beer is fit (alcohol free) for

Bynum's purposes. However, the language of the disclaimer does not comply with the specific requirements under the UCC for disclaiming the implied warranty of merchantability because a disclaimer of this warranty must use the term "merchantability." Therefore, the clause will not negate any express warranties or the implied warranty of merchantability.

7. *Has the contract been fully performed or has it been breached? If so, what are Bynum's remedies? What are the rights of Verkauferbrauer? What are the rights and remedies of Verkauferbrauer and Bynum under the UCC?*

The parties to an agreement are required to substantially perform their duties according to the contract. When a party fails to perform, or his or her performance falls substantially short of what was promised, there is a fundamental breach of contract. Verkauferbrauer's duty under the CISG was to deliver conforming goods according to the terms of the contract, and Bynum's obligation was to pay the price and take delivery of the beer. Verkauferbrauer delivered nonconforming beer that contained a minute amount of alcohol. Whether this amounts to a fundamental breach of contract depends on the meaning of "alcohol free" and the role of the parties' intent and industry custom in interpreting contracts. According to Verkauferbrauer, "in the industry, alcohol-free beer is understood to contain a small amount of alcohol."

As noted above, the CISG expressly allows courts to consider all evidence of the parties' intent. Usage of trade in the beer industry is certainly relevant, though such evidence must be construed in a manner that is reasonably consistent with the terms of the contract. The express terms of the contract required Verkauferbrauer to design and produce a Belgian beer free of alcohol. This was Bynum's specific intent as expressed in his discussions with Verkauferbrauer, and it does not appear that Bynum was aware of any usage of trade that allows for an alcohol-free beer to contain trace amounts of alcohol. Because the production and delivery of a beer containing no alcohol was an essential condition to the agreement, there has been a fundamental breach because Bynum has been substantially deprived of what he expected under the contract.

The CISG affords a buyer a range of remedies when the seller has committed a fundamental breach of contract. Because Verkauferbrauer has already delivered the goods, Bynum will lose the right to avoid the contract unless he does so immediately after discovering the nonconformity. If he wishes to avoid the contract, he must notify Verkauferbrauer and return the shipment of beer. He can request a refund of $9,750, representing the two

installments he has already paid toward the purchase price, or seek damages by filing an action for breach of contract.

Assuming Bynum chooses to sue for breach of contract, the measure of damages will depend on whether he decides to seek substitute goods. Damages consist of a sum equal to the loss, including lost profits. If Bynum is able to find another supplier of nonalcoholic Belgian beer, the measure of damages will be the difference between the price of the substitute beer and the contract price of $13,000. If Bynum does not purchase substitute goods, the measure of damages will be the difference between the market price for nonalcoholic Belgian beer and the contract price. In addition, Bynum may recover consequential and incidental damages as well as interest. He can recover any loss of profits due to the breach, though these may be speculative since nonalcoholic beer was a new and untried item on his tasting bar menu.

Alternatively, Bynum could retain the beer and seek a price reduction from Verkauferbrauer, and doing so would not preclude him from seeking damages as well. Article 50 provides that the buyer may reduce the contract price of $13,000 by multiplying it by a fraction where the numerator is the actual value of the goods at the time of delivery and the denominator is the value that the goods would have had at that time if they had been conforming. Bynum can pursue the remedy of price reduction whether or not he has paid the price or, since he has paid part of the price, he can seek a refund from Verkauferbrauer.

Note that Verkauferbrauer could request a Nachfrist extension of time in which to cure the nonconformity by producing another quantity of beer that contains no alcohol whatsoever. Assuming that Bynum inspected and discovered the nonconformity within a reasonable time after delivery, Verkauferbrauer has the right to cure the nonconformity at his own expense if it is possible to do so without unreasonable delay or inconvenience to Bynum. If Bynum grants such a request, he cannot pursue other remedies for breach during that period and can suspend his performance by not making the final payment, though he does not forfeit the right to later claim damages due to the delay in Verkauferbrauer's performance. Finally, Bynum could seek specific performance by demanding that Verkauferbrauer furnish conforming beer. In order to do so, however, Bynum will need to argue that the beer to be produced by Verkauferbrauer is unique and not easily substituted.

Under the UCC, a breach occurs when the nonbreaching party is deprived of the benefit he or she reasonably expected to receive from the nonperforming party. Here, Bynum expected to receive from Verkauferbrauer a shipment of Belgian beer containing no alcohol. As mentioned above, a

threshold issue arises as to whether beer containing a minute amount of alcohol in conformity with industry practice for nonalcoholic beer amounts to a breach of the contract. Given that Bynum was clear in expressing his intent to purchase beer that contained no alcohol, Bynum did not receive perfect tender of the goods that he expected to receive from Verkauferbrauer, and this can be viewed as a breach of the contract.

The remedies under the UCC for the buyer for breach of contract are based upon whether the seller has repudiated the contract or failed to perform on the contract, or whether the buyer has rightly rejected the goods or justifiably revoked its acceptance of the goods. Verkauferbrauer has attempted to perform, rather than repudiate, the contract, and Bynum has accepted delivery of the beer before discovering that it contained alcohol. In order to revoke acceptance, he must establish that the alcohol content presents a nonconformity that substantially impairs the value of the beer. Bynum's revocation of acceptance must occur within a reasonable amount of time after discovering the nonconformity and before any substantial change in the condition of the goods. Lastly, Bynum must establish that the nonconformity was either difficult to discover at the time the beer was accepted for delivery or that Verkauferbrauer had assured Bynum that the beer conformed to the required specifications. A potential problem for Bynum is that he accepted the beer without first reading the labels on the bottles and without any concurrent assurances from Verkauferbrauer until he later discovered that it contained alcohol.

A better course of action under the UCC for Bynum is to reject the beer. A buyer of goods is entitled to reject the seller's performance "if the goods or the tender of delivery fail in any respect to conform to the contract."[176] The buyer can reject the goods after a reasonable opportunity to inspect them and rejection must occur within a reasonable time of delivery to be effective. If Bynum promptly opened one of the boxes of bottled beer and discovered by reading the label that it contained alcohol, then he could opt to reject the shipment by giving Verkauferbrauer seasonable notice of the rejection and the reasons for doing so. Where a buyer rejects nonconforming goods that the seller reasonably believed would be acceptable, the seller has a right to cure by substituting conforming goods within a reasonable time and with prompt notice to the buyer.[177]

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[176]U.C.C. § 2–601.

[177]A seller's exercise of the right to cure following rejection by the buyer suspends the effectiveness of the buyer's rejection. *See* U.C.C. § 2–508(2).

Alternatively, following rejection, Bynum can "cover" by making a purchase of substitute goods within a reasonable time. If so, Bynum can recover the difference between what he paid for substitute beer and what he was supposed to pay to Verkauferbrauer under the contract, plus consequential and incidental damages, less any costs he may have saved. If Bynum does not cover by purchasing substitute beer, he may recover the difference between the contract price and the market price at the time he learned of the breach, in addition to consequential and incidental damages, minus any expenses saved.

If Bynum fails to, or is unable to, reject the beer, he may still seek damages for breach of implied warranty. Bynum must provide Verkauferbrauer with notice of the nonconformity of the goods within a reasonable time after he discovered the breach. The measure of damages would be determined by "the difference at the time and place of acceptance between the value of the goods as accepted and the value they would have had if they had been as warranted."[178] In addition, Bynum would be entitled to recover incidental and consequential damages. Finally, Bynum might consider seeking specific performance based on the uniqueness of the goods—that the beer is required to be 100 percent alcohol free in contrast to trade usage that allows nonalcoholic beer to contain a trace amount of alcohol. However, Bynum's success in pursuing this remedy will depend on how difficult it would be for him to obtain substitute goods.

8. *Assume instead that the container ship carrying the shipment of beer was hijacked by pirates off the coast of Somalia en route from Europe to the United States. As a result of prolonged storage at high temperatures during the time the ship was held by the pirates, the entire cargo of beer spoiled and became undrinkable by the time the ship was rescued. Can Verkauferbrauer be excused from performing the contract under the CISG and the UCC? If not, how could the parties have addressed a failure by one of the parties to perform due to the hijacking of the shipment?*

As to the first query, Verkauferbrauer will be excused under Article 79(1) of the CISG if the hijacking of the container ship and its cargo was an unforeseeable impediment that was beyond his control and he notified Bynum of the hijacking within a reasonable time after his learning of the hijacking. In this case, assuming that Verkauferbrauer notified Bynum within a reasonable time, the hijacking of the container ship and its cargo is an

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[178] *See* U.C.C. § 2–714(2).

impediment to performance that was beyond Bynum's control because it prevents the performance of the delivery of a palatable beer. Presumably, a substitute nonalcoholic Belgian-style beer was not readily available on the market.

However, was the hijacking an impediment that the seller should have taken into account under the circumstances? In other words, were there prior warnings or reports of piracy along the route that the ship would sail, and could Verkauferbrauer reasonably be expected to know of such information? If so, he could have shipped the beer on another ship, or the parties could have agreed on an alternative means of shipment. Moreover, once the hijacking took place, Verkauferbrauer could have produced another quantity of the beer and shipped it to Bynum even though this might have resulted in a late delivery and liability for related damages. In other words, performance was not impossible, even if it proved somewhat more costly. Even if Verkauferbrauer is excused from performance, however, this would not impair Bynum's right to avoid the contract and not pay the contract price, and Bynum is entitled to restitution of amounts already paid.

The analysis under UCC Section 2–615 is likely to lead to the same conclusion. Recall that a seller's nonperformance—delayed delivery or failure to deliver—is excused if the seller can prove (1) the occurrence of a contingency, (2) the nonoccurrence of the contingency was a basic assumption underlying the contract, and (3) the occurrence of the contingency made performance commercially impracticable. Here, the contingency was the hijacking of the ship, though it is not known whether recent incidents or warnings involving piracy along the route made it entirely unforeseeable. Assuming the hijacking was such an unexpected contingency, the safe passage of the ship from Belgium to the United States was certainly a basic assumption of the parties. However, it is unlikely that the hijacking made Verkaferbrauer's performance impracticable for the reasons outlined above. In addition, Verkauferbrauer was in a better position to purchase insurance for this contingency.

As to the second query, Bynum and Verkauferbrauer could have agreed to the inclusion of a force majeure clause in their contract. A "force majeure" is a superior force—such as a natural disaster, war, labor strike, transportation failure, government action, or the like—that may prevent performance by a party to a contract.[179] A force majeure clause allows the

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[179] *See* Murray on Contracts, *supra* note 7, at 717.

parties to suspend or excuse performance when such an event or occurrence transpires.[180]

Such clauses define the events or occurrences to which the parties mutually agree that will excuse or suspend performance, even if the event or occurrence is something that otherwise would not be considered an unforeseeable impediment beyond the party's control.[181] A party's performance is not excused entirely under such a clause but is merely suspended for the duration of the force majeure. Therefore, had Bynum and Verkauferbrauer expressly agreed that hijacking of the shipment would suspend or excuse performance, Verkauferbrauer's failure to deliver the beer as agreed would be excused, and he would not be liable for breach of contract.

VI. Conclusion

Even when the parties have an established business relationship, the potential for risk is higher in the international context due to the distance between the parties, currency exchange rates, and differences in language, cultures, and domestic economic conditions. The focus of this case study has been on identifying the differences between the rules of the UCC and CISG as they relate to contract formation and performance, and how these differences might, in some cases, result in dissimilar outcomes. See the Appendix for a comparison of UCC rules and CISG rules. For the unwary business owner, these differences may lead to an unfortunate surprise if a dispute arises.

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[180] *Id.* at 717–18.

[181] *See* Harriscom Svenska, AB v. Harris Corp., 3 F.3d 576 (2d Cir. 1993).

Appendix: Comparison of UCC and CISG Rules

Contract Issue	*Uniform Commercial Code*	*Convention on Contracts for the International Sale of Goods*
Writing Requirement	Contracts for sale of goods in excess of $500 must be in writing, unless both parties are merchants and one sends a written confirmation.	No writing required.
Parol Evidence	Parol evidence is not admissible.	Parties' subjective intent may be used for contract interpretation. Parol evidence is admissible.
Firm Offers	An assurance to hold open an offer must be made by a merchant in writing and signed. Limited to three months in duration.	An irrevocable offer stating a fixed time for acceptance. No writing required and no limit as to duration.
Effectiveness of Acceptance	Effective on dispatch by offeree.	Effective on receipt by offeree.
Acceptance Containing Additional or Different Terms	Reply to an offer containing materially different terms is an acceptance, and those terms will be included in the contract unless offeror objects.	Reply to an offer containing materially different terms is a counteroffer and rejection.
Modifications	No consideration required to be binding, but the parties must act in good faith.	Allowed by mere agreement of the parties. No consideration required.
Warranty of Title	Seller warrants that the title conveyed is good and the goods are free from security interests and liens	No requirements as to passage of title.
Disclaimers of Warranty	Must be conspicuous and include specific wording.	No specific wording or other requirements.
Notice of Non-conformity	Specific description of nonconformity not required.	Specific description of nonconformity required.
Breach of Contract	Breach must be material, but perfect tender rule applies	Fundamental breach required for most remedies. No perfect tender rule.
Extension of Time of Performance	No extension of time allowed unless specified in the contract.	Nachfrist period of additional time to perform the contract allowed upon notice to other party.
Remedies	Price reduction not a remedy for the buyer. Seller may request opportunity to cure if buyer rejects delivery of goods.	Buyer may seek a price reduction.