

HARD CASES UNDER THE CONVENTION ON THE INTERNATIONAL SALE OF GOODS: A PROPOSED TAXONOMY OF INTERPRETATIVE CHALLENGES

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*Words gain their fluctuating meanings from the fluctuating contexts in which people put them.*¹

INTRODUCTION

All judges, Frank Easterbrook observes, follow at least one simple rule of interpretation: “when the statute is clear, apply it.”² Although Judge Easterbrook makes this observation about the domestic interpretation of statutes, it is a fair bet that he would concede its general applicability to the interpretation of legal documents around the world. Certainly, with respect to the interpretation of the United Nations Convention on Contracts for the

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1. Richard Rorty, *The Spirit of France's Great Revolutionary Lives On*, TIMES HIGHER ED. SUPPL., Nov. 12, 2004, available at <http://www.timeshighereducation.co.uk/story.asp?storyCode=192401§ioncode=26>.

2. Frank H. Easterbrook, *Text, History and Structure in Statutory Interpretation*, 17 HAR. J.L. & PUB. POL'Y 61, 61 (1994). Judge Easterbrook adopts, then, at least a soft formalist distinction between what HLA Hart described as a “core of certainty” and a “penumbra of doubt” or a “fringe of vagueness.” See H.L.A. HART, *THE CONCEPT OF LAW* 119–20, 123–26, 128 (1961). As the spatial metaphor suggests, the determinacy of a given legal norm is a matter of degree. Nevertheless, Judge Easterbrook, like Hart, seems to believe that, at least as a general matter, particular cases can be located in one metaphorical space or the other. See *id.* at 123, 132. For purposes of this Article, I too assume that some significant number of cases can be said, at least for many practical purposes, to fall into a “core of certainty” and thus can be said to be “easy cases” of interpretation.

International Sale of Goods (“CISG”),³ Judge Easterbrook’s rule seems to hold true.⁴

Beyond this simple rule, however, little consensus exists about the interpretation of the CISG in hard cases—cases where a CISG provision is vague either on its face or in its application.⁵ Because the CISG contains numerous vague provisions⁶ and applies to a transactionally-diverse range of deals,⁷ hard cases are not unusual. In fact, “[e]xamples of divergences in

3. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1984), 1489 U.N.T.S. 3 [hereinafter CISG or the Convention] available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html.

4. See, e.g., United Nations Vienna Convention on the Law of Treaties, art. 31, ¶ 1, May 23, 1969, 1155 U.N.T.S. 331, available at http://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01p.pdf (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

The CISG is interpreted and applied not only by the domestic courts of each member state but also by arbitral panels. For the sake of simplicity, and following the lead of Professor John Honnold, a “giant in the field” of CISG scholarship, see Harry Fletcher, *Article 79 of the United Nations Convention on the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods*, 19 PACE INT’L L. REV. 29, 30 & n.5 (2007) (“Professor Honnold served as secretary of the United Nations Commission on International Trade Law (UNCITRAL) during the time in which the CISG was developed and led the U.S delegation to the 1980 Vienna diplomatic conference at which the final text of the Convention was approved.”), I will generally use the term “tribunal” when referring to the courts and arbitral panels interpreting and applying the CISG. See JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES, 1 (1989) (“The Convention, faute de mieux, will often be applied by tribunals (judges or arbitrators) . . .”).

5. I borrow the term “hard cases” from Ronald Dworkin. According to Ronald Dworkin, “hard cases” exist primarily for two reasons: “[s]tatutes and common law rules are often vague and must be interpreted before they can be applied to novel cases. Some cases, moreover, raise issues so novel that they cannot be decided even by stretching or reinterpreting existing rules.” Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058 (1975).

6. See, e.g., Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales Law*, 25 INT’L REV. L. & ECON. 446, 474 (2005) (“[V]ague standards pervade the CISG.”); Juana Coetzee, *Securing the Future of Electronic Sales in the Context of International Sales*, 11 VINDOBONA J. INT’L COM. L. & ARB. 11, 24 (2007) (“The CISG was drafted in terms that are often considered to be vague and that have to be interpreted.”); Larry A. DiMatteo, et. al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT’L L. & BUS. 299, 320 (2004) (“Many of the CISG articles provide very general, vague default rules tied to the concept of reasonableness.”); Craig M. Gertz, *The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Depeccage*, 12 NW. J. INT’L L. & BUS. 163, 174 (1991) (“There are . . . numerous examples of provisions in the CISG that offer mere vague and uncertain standards.”).

7. See, e.g., Adam M. Giuliano, *Nonconformity in the Sale of Goods Between the United States and China: The New Chinese Contract Law, The Uniform Commercial Code, and the Convention on Contracts for the International Sale of Goods*, 18 FLA. J. INT’L L. 331, 334 (2006) (“The CISG addresses the international sale of moveable goods and encompasses a wide range of transactions and related matters . . .”) (citations omitted); Steven Walt, *The State of Debate over the Incorporation Strategy in Contract Law*, 38 UCC L.J. 255, 264 (2006) (noting that the CISG applies to “a wide range

the [interpretation and thus] application of nearly all the provisions of the CISG abound.”⁸

Many commentators believe that the lack of interpretive consensus among the various tribunals applying the Convention threatens to undermine its express goal of establishing uniform rules to govern international commercial contracts and thus remove “legal barriers in . . . and promote the development of international trade.”⁹ Commentators supportive of the CISG seek to combat this threat by urging the development of “an international community” of tribunals that interpret the Convention’s provisions by looking to one another’s decisions and without regard to domestic laws or norms.¹⁰ Other commentators, who are more

of different types of contracts for the sale of goods”); Charles Sukurs, *Harmonizing the Battle of the Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods*, 34 VAND. J. TRANSNAT’L L. 1481, 1483 (2001) (“The CISG is a significant treaty because of the breadth of its application to a wide range of international contracts.”).

8. Camilla Baasch Anderson, *The Uniform International Sales Law and The Global Jurisconsultorium*, 24 J.L. & COM. 159, 162 (2005).

9. CISG, *supra* note 3, at pmbli.; *see, e.g.*, Aneta Spaic, *Approaching Uniformity in International Sales Law Through Autonomous Interpretation*, 11 VINDOBONA J. INT’L COM. L. & ARB. 237, 257 (2007) (“If domestic tribunals introduce divergent textual interpretations, the CISG will be unsuccessful in its goals and its existence will be threatened.”); John Felemegas, *Introduction to AN INTERNATIONAL APPROACH TO THE INTERPRETATION OF THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS (1980) AS UNIFORM SALES LAW 1, 7* (John Felemegas ed., 2007) (“The practical success of the Convention depends on whether its provisions are interpreted and applied similarly by different national courts and arbitral tribunals.”); Michael Joachim Bonell, *The CISG, European Contract Law & The Development of a World Contract*, 56 AM. J. COMP. L. 1, 4–5 (2008) (“The importance of the CISG has been questioned on the grounds . . . that in the absence of an international tribunal competent to make preliminary rulings on questions concerning its interpretation it . . . risks being applied differently in different parts of the world.”); Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 MINN. J. GLOBAL TRADE 105, 106 (1997) (stating that Article 7, which assures uniformity of interpretation, “is arguably the single most important provision in ensuring the future success of the Convention”); Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT’L L. 1, 7 (1993) (“Divergent interpretations of the Convention would lead back to the very uncertainties the Convention’s drafters intended to eliminate and would thereby increase the costs of international commerce.”).

10. *See infra* Part II.A; *see also, e.g.*, Andersen, *supra* note 8, at 162; Lisa M. Ryan, *The Convention on Contracts for the International Sale of Goods: Divergent Interpretations*, 4 TUL. J. INT’L & COMP. L. 99, 117 (1995) (“Unification of the law of the international community means subjecting people from all political, economic, and legal systems of the world to a uniform set of rules and principles . . . [and efforts at unification] are undermined by the divergent interpretations of the text by countries of different legal traditions.”); Spaic, *supra* note 9, at 238 (advocating for the “establishment of an ‘international legal practice’ consisting of the development of a strong and uniform international case law” in order to achieve uniformity of interpretive outcomes); Amy H. Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 63 WASH. L. REV. 607, 651 (1988) (“Courts and commentators should strive to develop an

skeptical of the CISG, suggest that non-uniform interpretations have, or soon will, completely undermine the Convention, rendering it at best an unwieldy obstacle that contracting parties have to avoid and at worst an impediment to the future development of a truly useful international sales law.¹¹

Whatever their stance on the merits of the CISG, however, these commentators tend to make the same basic assumption: the future of the CISG necessarily hinges on tribunals reaching uniform interpretive outcomes with respect to all vague CISG provisions. I contend that this assumption is flawed.¹² It stems from a narrow reading of Article 7 of the Convention, the article addressing interpretation of the CISG itself.¹³ This narrow reading recognizes only a binary distinction between vague

international jurisprudence of Convention interpretation which gives detailed content to the notion of internationalism in transnational trade law.”).

11. For instance, Clayton Gillette and Robert Scott contend that

In the case of the CISG, the lack of meaningful uniformity is exacerbated by the failure to create interpretive mechanisms that, over time, might have given substantive content to the vague default standards. The upshot is a treaty whose provisions are likely to become less and less useful as time goes on. Indeed, we predict that CISG ultimately will lose out in competition with alternative legal regimes.

Gillette & Scott, *supra* note 6, at 485; *see also* Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT’L L. 743, 744 (1999) (“I wish to sound a skeptical note. Much of the effort directed at unifying [contract laws] is unnecessary, and some produces rules that hinder rather than promote international business.”); Gilles Cuniberti, *Is the CISG Benefiting Anybody?*, 39 VAND. J. TRANSNAT’L L. 1511, 1516 (2006) (“[N]ot only do vague rules not provide precise answers and thus reduce legal certainty, but if contained in an international instrument, they are also likely to be interpreted differently by courts and thus jeopardize the actual harmonization of the field.”); James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law on International Sales*, 32 CORNELL INT’L L.J. 273, 276 (1999) (“[T]his article contends that the CISG is actually an obstacle to uniformity in the law of international sales.”).

12. A few other commentators agree and conclude that uniformity of interpretive outcomes is not required by the CISG. *See, e.g.*, Karen Halverson Cross, *Parol Evidence Under the CISG: The “Homeward Trend” Reconsidered*, 68 OHIO ST. L.J. 133, 138 (2007) (“More importantly, the language and drafting history of the Convention suggest that, notwithstanding Article 7(1), uniformity was not the exclusive goal of the CISG project.”). Professor Cross, for instance, argues that Article 7(1) requires, at least in part, that “the interpreter . . . be sensitive to the compromises that made adoption of the Convention possible.” *Id.* at 140; *see also, e.g.*, Peter M. Gerhart, *The Sales Convention in Courts: Uniformity, Adaptability and Adoptability*, in *THE INTERNATIONAL SALE OF GOODS REVISITED* 77, 80 (P. Šarčević & P. Volken eds., 2001) (arguing that the CISG’s goal of achieving uniform interpretive outcomes must be balanced against the need to ensure the acceptability of the Convention in the long term). Similarly, Larry A. DiMatteo has recognized that “[t]he fact that Article 7 prefaces its uniformity mandate with ‘regard is to be had’ implies that a standard below strict uniformity in application was envisioned.” LARRY A. DIMATTEO, LUCIEN J. DHOOGES, STEPHANIE GREENE, VIRGINIA MAURER & MARISA ANNE PAGNATTANO, *INTERNATIONAL SALES LAW: A CRITICAL ANALYSIS OF CISG JURISPRUDENCE* 11 (2005). While I share these commentator’s concerns, my argument differs somewhat from theirs in that my focus is not on the acceptability of the Convention to the member states, as such, but to the transacting parties whose deals are or may be governed by the Convention.

13. *See* CISG, *supra* note 3, at art. 7.

provisions involving gaps in coverage of the CISG—so called “internal gaps”—and vague provisions involving matters outside of the coverage of the CISG—so called “external gaps.”¹⁴ All internal gaps must, according to this view, be plugged in a uniform manner in order to preserve the stability and usefulness of the Convention. Only external gaps, in contrast, can be dealt with through recourse to domestic laws and thus handled in non-uniform ways. This conventional construction of Article 7 ignores a critical distinction in internal gap cases between CISG provisions that are intentionally vague—“open-textured standards”—and provisions that are vague because of drafting imperfections—what I will refer to as “unclear rules.”¹⁵

I contend that we need a more nuanced taxonomy of hard CISG cases. This more nuanced taxonomy would recognize that uniformity of interpretive outcomes is an improper goal in hard CISG cases involving open-textured standards.¹⁶ Such standards may provide value to contracting parties by allowing them to avoid the costs associated with bargaining ex ante for more precise rules,¹⁷ delegating, instead, to a future tribunal the task of deciding whether or not the standard was met.¹⁸ Contracting parties that accede to a CISG open-textured standard count on future tribunals to specify the metric by which compliance with the standard will be measured

14. *See infra* Part II.B.

15. *See infra* Part III.B.

16. *But see infra* Part III (noting that striving for uniform interpretive outcomes with respect to unclear CISG rules remains an important goal).

17. The “rules versus standards” debate has occupied the attentions of scholars for many years. *See, e.g.*, David L. Faigman, *Constitutional Adventures in Wonderland: Exploring the Debate Between Rules and Standards Through the Looking Glass of the First Amendment*, 44 HASTINGS L.J. 829, 830 (1993) (“[T]he amount of ink spilled over debating the virtues of rules versus standards would lead the reasonable observer to believe that something momentous was at stake.”). For good contemporary discussions of the distinction, see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–68 (1992) (viewing rules and standards for their economic efficiency); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 25 (2000) (“Rules establish legal boundaries based on the presence or absence of well-specified triggering facts.”); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (“Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere.”); FREDERICK SCHAUER, THINKING LIKE A LAWYER 13–29 (2009) (discussing the relative advantages and disadvantages of legal norms being articulated as rules or standards). *See generally* Jason Scott Johnston, *Bargaining Under Rules Versus Standards*, 11 J.L. ECON. & ORG. 256 (1995) (examining relative efficiency of two-party bargaining under rules and standards); Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT’L L. 1117 (1999). My goal is not to add substantively to this debate but instead simply to observe that both rules and standards can and do have value to contracting parties.

18. *See infra* Part III.

on a case-by-case basis, with the advantage of hindsight.¹⁹ This method of specification means that it is quite possible that a CISG open-textured standard will be interpreted to mean one thing in one case and a different thing in another. Such non-uniform interpretive outcomes are not only acceptable; they may be necessary in order to achieve the efficiency goals of the contracting parties.²⁰

A more nuanced taxonomy of hard CISG cases, in short, should recognize that, even with respect to so-called internal gaps, Article 7 mandates uniformity of interpretive methodology, not necessarily uniformity of interpretive outcomes.²¹ Such a taxonomy would then more accurately reflect the substantive design of the Convention, which aims primarily at respecting the freedom of contracting parties and reducing the costs of international contracting.²² As an ancillary benefit, by helping recalibrate expectations about interpretive uniformity, a more nuanced taxonomy of hard CISG cases would establish a framework for evaluating whether any remaining non-uniformity in the interpretation of unclear CISG rules undermines the CISG as a whole.

This article endeavors to develop such a taxonomy. It proceeds in three parts.

Part I starts by briefly chronicling the development of the CISG and outlining its substantive design. Part I contends that the predominate goal of the CISG is to help commercial parties maximize their gains from trade. The CISG's substantive design, which places almost no limits on the parties' ability to structure their deal and thus endorses a strong view of freedom of contract, rests on the assumption that parties are the best judges of how to achieve this maximization.

Part II turns to an examination of Article 7, which sets out the Convention's interpretive scheme.²³ Part II begins by analyzing the prevailing view of Article 7(1), which urges tribunals to adopt the so-called "autonomous" interpretive perspective, eschewing reliance on domestic law and striving, instead, to harmonize their decisions with those of other international tribunals applying the CISG. Part II then argues that most

19. *See infra* Part III.

20. *See infra* Part III.

21. *See* DiMATTEO ET AL., *supra* note 12, at 19 ("CISG's interpretive methodology provides a template for addressing substantive gaps or issue of law not directly (expressly) dealt with by the CISG.").

22. *See infra* Part I.

23. Article 7 lays out interpretive principles applicable to resolve ambiguities in the text of the CISG. Article 8 also addresses interpretation, but it deals with interpretive principles applicable to resolve ambiguities in the parties' express contract. CISG, *supra* note 3, at arts. 7–8.

commentators pair Article 7(1)'s autonomous interpretation principle with a narrow reading of Article 7(2), which articulates a simple binary classification of interpretive challenges. The result is that most commentators conclude that tribunals should strive to reach uniform interpretive outcomes in all internal gap cases by relying on the precedent of other CISG tribunals.

Part III introduces the proposed new taxonomy of hard CISG cases. It begins by arguing that the conventional picture of CISG interpretation fails to recognize the value of open-textured standards. Relying on the conclusion reached in Part I that the CISG embraces a particularly strong vision of freedom of contract, Part III contends that contracting parties acceding to application of the CISG may well want tribunals to interpret open-textured CISG defaults in the context of the particular deal and without regard to the interpretations of those same defaults issued by other tribunals. Maximizing party welfare, in other words, may require that tribunals engage in *ex post*, context-dependent interpretation and specification of open-textured standards. Part III then turns to an articulation of the proposed new taxonomy of hard CISG interpretive cases. It observes that there are three—instead of two—broad types of hard CISG cases, each of which contains two subcategories. With respect to two of these subcategories, the goal of uniform interpretive outcomes is improper given the value of default standards to contracting parties.

I. AN OVERVIEW OF THE HISTORY AND DESIGN OF THE CISG

A remarkable achievement, the CISG represents the culmination of more than half a century of labor.²⁴ While a complete history of the CISG is well beyond the scope of this Article,²⁵ this Part begins by concisely recounting the CISG's development, highlighting some of the key rationales behind the creation of a uniform international sales law. In so doing, it will show that the perhaps the most fundamental premise of the Convention is that parties are the best judges of their welfare. Part I concludes by observing that the basic structure and contents of the Convention embrace a particularly robust conception of freedom of

24. See Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA J. INT'L & COMP. L. 183, 184–85 (1994); see also Joseph Lookofsky, *Digesting CISG Case Law: How Much Regard Should We Have?*, 8 VINDOBONA J. INT'L COM. L. & ARB. 181, 181 (2004) (arguing that the CISG stands as UNCITRAL's greatest achievement since it was established in 1966).

25. For more about the negotiating history of the Convention, see generally CESARE M. BIANCA & MICHAEL J. BONNELL, COMMENTARY OF THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION (1987); HONNOLD, *supra* note 4; Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265 (1984).

contract. This Part lays the foundation for my argument in Part III that a more nuanced taxonomy of hard cases will align more appropriately with the general principles of the CISG than the conventional view of interpretation.

A. Solutions through Compromises: The Genesis of a Uniform International Law of Sales

During the past two centuries, the world has become a much smaller place to do business. As the world of global commerce has shrunk, the desire for a uniform sales law has grown.²⁶ At the very least, hopeful prognostications about the viability or existence of such a uniform law have not been in short supply. More than 250 years ago, for instance, Lord Mansfield declared that “mercantile law . . . is the same all over the world. For from the same premises, the sound conclusions of reason and justice must universally be the same.”²⁷ The mercantile law Lord Mansfield referred to has often been called the *lex mercatoria*,²⁸ a practical body of customary law created by the merchants and commercial courts throughout Europe in the sixteenth century.²⁹ By the nineteenth century, however, whatever uniformity existed through the *lex mercatoria*³⁰ had given way to

26. See, e.g., Ronald Harry Graveson, *The International Unification of Law*, 16 AM. J. COMP. L. 4, 4 (1968) (“The international process of assimilating the diverse legal systems of various countries goes back into ancient history.”).

27. *Pelly v. Royal Exch. Assurance Co.*, 97 Eng. Rep. 342, 346 (1757).

28. “Lex Mercatoria” translates to “law merchant,” which is defined as “[a] system of customary law that developed in Europe during the Middle Ages and regulated the dealings of mariners and merchants in all the commercial countries of the world until the 17th century.” BLACK’S LAW DICTIONARY 966 (8th ed. 2004). For more on the history of the *lex mercatoria*, see THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 657, 657–70 (5th ed. 1956); Harold J. Berman & Colin Kaufmann, *The Law of International Commercial Transactions (Lex mercatoria)*, 19 HARV. L.J. 221, 225 (1978).

29. See Ferrari, *supra* note 24, at 184–85. Broadly speaking, there were at least five characteristics of the *lex mercatoria*:

Its special characteristics were that it was first of all transnational. Secondly, it was based on a common origin and a faithful reflection of the mercantile customs. Thirdly, it was not administered by professional judges but by merchants themselves Fourthly, its procedures were speedy and informal and finally fifthly, as overriding principles, it emphasized freedom of contract and decision of cases *ex aequo et bono*.

Gesa Baron, *Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?*, PACE DATABASE ON THE CISG AND INTERNATIONAL COMMERCIAL LAW pt. II(1) ¶ 3 (June 1998), <http://www.cisg.law.pace.edu/cisg/biblio/baron.html>.

30. There may be historically sound reasons to doubt whether the *lex mercatoria*, assuming that it existed at all, was as uniform as Lord Mansfield suggested. See, e.g., Sieg Eislén, *Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa*, 116 S. AFR. L. J. 323, 333 (1996) (“Whether the idea that the *lex mercatoria* of the Middle Ages formed a uniform sales code that was universally and consistently applied throughout Europe at the various fairs and markets is

contract laws promulgated by nations.³¹ Most countries had developed, or were developing, their own, often complex, internal laws governing both domestic and international contracting and sales.³² The result was that international sellers and buyers were, through application of conflict of law rules, subjected to an uneven and often unpredictable patchwork of domestic regulations.³³

By the close of the nineteenth century, this patchwork meant that goods were more expensive than they needed to be. Though international trade was expanding quickly, the potential for a true global economy was stymied by the costs associated with complying with these complex and frequently contradictory regulations.³⁴ A nostalgic yearning for a return to the uniform, if not always simple, rules of the *lex mercatoria* inspired reformers, at the end of the nineteenth century, to begin creating an international code governing sales.³⁵ The animating idea behind this code was to “overcome the nationality of [commercial] law.”³⁶

historically well founded is arguable.”); M.J. MUSTILL & S. BOYD, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND* 81 (2d ed. 1989) (expressing doubt about the existence of a *lex mercatoria*).

31. See, e.g., Noel Cox, *The Law of Arms in New Zealand*, 18 NZ U.L. REV. 225, 255 (1998) (“The decline of the Staple Courts, where the *lex mercatoria* or law merchant was administered, was largely due to Sir Edward Coke, who oversaw the acquisition by the common law Courts of most of the commercial litigation from the early part of the seventeenth century.”).

32. See CLIVE M. SCHMITTHOFF, *CLIVE M. SCHMITTHOFF’S SELECT ESSAYS ON INTERNATIONAL TRADE LAW* 25–26 (Jiarui Zheng ed., 1988).

33. Private international law at this point in history was considered to be complicated, abstract and had the reputation of being the “nuclear physics of jurisprudence.” Bruno Zeller, *Four-Corners – The Methodology for Interpretation and Application of the UN Convention for the International Sale of Goods* (May 2003) (unpublished Ph.D. dissertation, University of Melbourne), available at <http://www.cisg.law.pace.edu/cisg/biblio/4corners.html#15> (last updated May 19, 2003).

34. See, e.g., Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT’L L. 1, 5 (1993) (“The primary motive for the drafters’ toil . . . was their belief that the ‘diversity of municipal laws’ applicable to contracts for the international sale of goods posed a ‘serious obstacle to the free exchange of goods.’”) (citations omitted).

35. See E. Allan Farnsworth, *Formation of International Sales Contracts: Three Attempts at Unification*, 110 U. PA. L. REV. 305, 305 (1962) (“In an age of diversity among legal systems, we can look back with nostalgia to the hegemony of the law merchant, when commercial men could order their affairs according to an international body of custom which was applied with some consistency.”); see also MICHAEL JOACHIM BONELL, *AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW—THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS* 3 (1994) (discussing the justifications for the development of harmonized international commercial law); Ernst Von Caemmerer, *The Influence of the Law of International Trade on the Development and Character of the Commercial Law in the Civil Law Countries*, in *THE SOURCES OF THE LAW OF INTERNATIONAL TRADE* 90 (Clive M. Schmitthoff ed., 1962) (“[W]henver the private law is splintered into many jurisdictional fragments, the need for uniformity shows up most strongly in the field of commercial law.”).

36. Ferrari, *supra* note 24, at 184–85.

In 1926, Ernst Rabel made a specific, if somewhat limited, proposal to codify a uniform law of sale.³⁷ An early draft of this project was adopted in 1939 by the council of the International Institute for the Unification of Private Law (“UNIDROIT”).³⁸ The Second World War, however, hindered further developments until 1951, when this draft was tabled at the Hague Conference on the Unification of Sales Law.³⁹ In 1956, a special commission appointed by the Conference prepared and presented another version of this draft, which was then reworked several times until finally, on April 25, 1964, the conference members adopted two conventions, the Convention for the Uniform Law of International Sales (“ULIS”) and the Convention for the Uniform Law on the Formation of Contracts for the International Sale of Goods (“ULF”).⁴⁰ While neither of these early predecessors to the CISG was widely adopted outside of Europe,⁴¹ they paved the way for drafting the CISG by a working group of the United Nations Commission on International Trade Law (“UNCITRAL”), which saw the participation of delegates from sixty-two countries and observers from eight international organizations.⁴² This group’s work started in earnest by the early 1970s and finished in 1980.⁴³

Ultimately then, it is not an overstatement to say that the CISG resulted from the dedicated work of many different drafters making contributions over the course of the twentieth century. In the eyes of some, the CISG has “surpassed all expectations,” coming to “represent[] the most successful attempt to unify an important part of the many and various rules of the law of international commerce.”⁴⁴ Others point out that it is, in the

37. Sieg Eiselen, *Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa*, 116 S. AFR. L. J. 323, 334 (1996); see also, e.g., Peter Huber, *Comparative Sales Law*, in OXFORD HANDBOOK OF COMPARATIVE LAW 940 (Mathias Reimann & Reinhard Zimmermann eds., 2006); Michael Joachim Bonell, *Introduction to the Convention*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA CONVENTION 3 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987) (acknowledging Rabel’s involvement in the development of UNIDROIT and early efforts at the unification of sales law).

38. See Eiselen, *supra* note 37, at 334.

39. *Id.*

40. *Id.*

41. See JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER 1980 UNITED NATIONS CONVENTION 5 (4th ed. 2009).

42. See Eiselen, *supra* note 37, at 336.

43. See *id.*

44. Peter Schlechtriem, *Preface*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) at v (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005); see also Peter Huber, *Some Introductory Remarks on the CISG*, 6 INTERNATIONALES HANDELSGERICHT 227, 227 (2006) (“It is therefore fair to say that the CISG has in fact been one of the success stories in the field of the international unification of private law.”); E. Allan Farnsworth, *Developments in Contract Law During the 1980’s: The Top Ten*, 41 CASE W. RES. L. REV. 203, 204

end, a document filled with compromises designed to make it amenable to the legal systems whose representatives adopted it.⁴⁵ Despite these compromises, or perhaps because of them, the Convention has been adopted by seventy-three states from all five continents,⁴⁶ including many of the world's major trading nations.⁴⁷ As a result, most global sales transactions concerning goods are subject to the same set of rules. And, as the next section observes, a standardized set of legal rules, like the CISG, for international sales transactions confers significant benefits on contracting parties, saving them time and money by eliminating the need to learn about and negotiate over potentially competing legal regimes. Perhaps more importantly, a standardized set of rules focused on freedom of contract, as the next section notes that the CISG is, allows the parties flexibility to tailor their arrangements in ways that many domestic legal regimes may not.

B. Solutions through Agreements: Freedom of Contract and the CISG's Design

As the previous section suggests, widespread agreement on the need for a uniform law in international sales transactions has been recognized.⁴⁸ This broad consensus rests on the intuition that a uniform sales law confers

(1990) (stating that the harmonization of international commercial law was one of the “Top Ten” developments in contract law during the 1980s).

45. See, e.g., Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L L. J. 443, 481 (1989) (stating that the provisions of the CISG are more “the result of a compromise rather than a consensus”); Monica Kilian, *The CISG and the Problem with Common Law Jurisdictions*, 218 J. TRANSNAT'L L. & POL'Y 217, 217–18 (2001) (“CISG is the culmination of years of work spanning most of the 20th Century, representing compromises and solutions amenable to all legal systems whose representatives adopted the Convention.”); Karen Halverson Cross, *Parole Evidence Under the CISG: The “Homeward Trend” Reconsidered*, 68 OHIO ST. L. J. 133, 139 (2007) (“A number of scholars have observed that the many open-ended terms and ambiguities in the Convention were the result of numerous political compromises reached during the drafting process.”); Koneru, *supra* note 9, at 105 (“[M]any of [the Convention's] provisions reflect the difficult negotiations and compromises the drafters had to make.”).

46. The CISG entered into force a seventy-third country, Armenia, on January 1, 2010. The Convention also entered into force in Lebanon on December 1, 2009, and in Japan on August 1, 2009. See UNCITRAL, *Status: 1980–United Nations Convention on Contracts for the International Sale of Goods*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited March 22, 2011).

47. The United Kingdom and India have not adopted the CISG. See *id.*

48. See generally, e.g., Rene David, *The International Unification of Private Law*, in 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (1971); HONNOLD, *supra* note 41, at 3–4. But see, e.g., Ronald Harry Graveson, *The International Unification of Law*, 16 AM. J. COMP. L. 4, 5–6 (1968) (stating that “it may be necessary to correct the assumption that uniform law is good in itself and that the process of unification is one to be encouraged in principle” and advancing the argument that certain preconditions must be satisfied to warrant development of uniform laws).

significant benefits on contracting parties. The following section argues that this intuition, in turn, stems from an acknowledgement that most sales law rules are intended to become default terms to the extent that parties either choose to have, or wind up having because of unforeseen exigencies, gaps in their agreement.⁴⁹ After briefly recounting this default rule paradigm, this Part concludes by pointing out that virtually all of the rules in the CISG are non-mandatory defaults and thus that the CISG embraces a robust norm of freedom of contract.

1. The Default Rule Paradigm and an International Sales Law

Peter Pfund, the acting Assistant Legal Adviser for Private International Law for the United States Department of State, presented a 1984 speech to the Senate in support of the adoption of the CISG.⁵⁰ In his speech, Pfund argued that the CISG would allow U.S. corporations to engage in trade with foreign nations and enter into sales that they otherwise would not have.⁵¹ Pfund suggested that without a uniform sales law like the CISG, U.S. corporations would be dissuaded by the costs associated with determining what legal regime would govern their international sales contracts and the unavoidable uncertainties that overlapping legal regimes created.⁵²

Pfund's arguments recognized that parties to contracts generally, and international sales contracts especially, face a significant knowledge problem. Contracts, as drafted, are always incomplete.⁵³ The inevitability of incompleteness reflects, to borrow a distinction from H.L.A. Hart, both our "relative ignorance of fact" and "our relative indeterminacy of aim."⁵⁴

49. See, e.g., Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 276, 278 (1985).

50. *International Sale of Goods, 1984: Hearing on Treaty Doc. No. 98-9 Before the S. Comm. on Foreign Relations*, 98th Cong. 303-05 (1984) (statement of Peter Pfund acting Assistant Legal Adviser for Private International Law, Department of State).

51. See *id.* at 6.

52. See Heidi Stanton, *How to Be or Not to Be: The United Nations Convention on Contracts for the International Sale of Goods, Article 6*, 4 CARDOZO J. INT'L & COMP. L. 423, 428 (1996) ("In light of these uncertainties, difficulties and expenses, what were once attractive foreign markets suddenly appear unattractive.").

53. See, e.g., Robert E. Scott, *Rethinking the Default Rule Project*, 6 VIR. J. 84, 85 (2003) ("As an organizing principle, the notion that contract rules are defaults inevitably leads to the conclusion that all contracts are inevitably incomplete."); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L. J. 541, 595 (2003) ("There is an infinite number of possible future states and a very large set of possible partner types. When the sum of possible states and partner types is infinite and contracting is costly, contracts must contain gaps. Parties cannot write contracts about everything.").

54. HART, *supra* note 2, at 135; see also Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 822 (1992) ("Parties drafting a contract confront a

Although many contracts, and most international sales contracts, are negotiated and entered into by sophisticated parties, often acting with the assistance of counsel, and although contracts often contain detailed and extensive provisions seemingly addressing all of the possible future contingencies that might arise, no contract accounts for every future contingency.⁵⁵

First, the costs of attempting to conceive of and negotiate contract provisions regarding every contingent state of the world might well exceed the resulting gains from the transaction.⁵⁶ Such costs include not only the expense of gathering information about future possibilities, but also expenses associated with drafting and negotiating provisions to address each future contingency and error costs, which arise when parties attempt to draft a clear provision dealing with some future state of the world but actually draft a provision that is vague or unclear and that results in costly litigation.⁵⁷

Second, the costs of enforcing provisions, even if the contingent state of the world can be anticipated and a provision regarding the contingency can be drafted efficiently, may outweigh the benefits of the transaction,

serious knowledge problem. Because they cannot foresee every future event or know precisely how their own purposes may change, they cannot negotiate terms specifically to cover all contingencies.”)

55. Importantly, a contract may be “obligationally” complete by providing for an obligation that applies in a wide range of circumstances. *See, e.g.*, Robert E. Scott & George G. Triantis, *Incomplete Contracts and the Theory of Contract Design*, 56 CASE W. RES. L. REV. 187, 190 (2005) [hereinafter Scott & Triantis, *Incomplete Contracts*]. For instance, a contract might provide that, no matter what, a seller must deliver 2,000 widgets on January 1, 2010, for a price of \$10,000. While such a contract is free from gaps in the sense that it specifies the parties’ rights and obligations in all states of the world, the contract remains “informationally” incomplete in the sense that the parties cannot know whether delivery of the widgets on that date and for that price will truly be efficient. *See id.*; *see also, e.g.*, Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L. J. 814, n.2 (2006) [hereinafter Scott & Triantis, *Anticipating Litigation*].

A contract may be obligationally complete even though it is informationally incomplete. An obligationally complete contract might lump together various states and provide for the same obligations across the states of each lumped set. Yet, such a contract is informationally incomplete because it fails to discriminate within each set between states of the world that, optimally, call for different obligations. States of the world reflect both exogenous and endogenous variables. For example, different oil prices produce different states, but so does the decision of a seller to tender or not. Each event changes the state of the world and may be paired in the contract with a different obligation on the buyer.

56. As Clayton Gillette explains, “[t]he passage of time renders complete contracting both difficult and undesirable, for the costs of allocating risks deemed unlikely to materialize at all, or only in the distant future, tend to exceed the current value of expected losses from the remote event.” Clayton P. Gillette, *Commercial Relationships and the Selection of Default Rules for Remote Risks*, 19 J. LEGAL STUD. 535, 535 (1990).

57. *See, e.g.*, Juliet P. Kostrisky, *Plain Meaning vs. Broad Interpretation: How the Risk of Opportunism Defeats a Unitary Default Rule for Interpretation*, 96 KY. L. J. 43, 58 (2007) (“Error costs arise when courts make erroneous interpretations of words having a variable meaning.”).

making a complete contract ultimately inefficient.⁵⁸ For instance, in some circumstances, verifying to a court or tribunal that the provision has been breached may require access to information that is prohibitively costly to obtain. This may be true even if the costs for the parties of observing that the provision has been breached are low.⁵⁹ In short, because contracts, as drafted, are always incomplete, contractual default rules exist to help fill the gaps.⁶⁰

These defaults, in turn, promote trade and corresponding gains by reducing transaction costs, fostering legal neutrality, predictability, and stability, and improving the accessibility of the law.⁶¹ In these respects, a uniform international sales law does not differ appreciably from a uniform domestic sales law.⁶² Presumably, however, as Peter Pfund observed, a uniform international set of default rules, like the CISG, is more efficient for international transactors than a patchwork of domestic laws because it reduces or eliminates costs associated with reaching agreement on a choice of law, *ex ante* (or, of addressing conflict of laws rules in the absence of

58. See, e.g., Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466, 468 (1980) (“[B]ecause of the costs involved in enumerating and bargaining over contractual obligations under the full range of relevant contingencies, it is normally impractical to make contracts which approach completeness.”).

59. Information may be said to be unobservable if the other contracting party cannot perceive it. Information may be observable but not verifiable if the other party can perceive it but cannot, at a reasonable case, prove that information to a court or other third party. See, e.g., Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1642 n.2 (2003); see also Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1791–95 (1996) (discussing the distinction between observable information, which is information that it is both possible and worthwhile for transactors to obtain, and verifiable information, which is information that it is worthwhile for transactors to prove to a designated third-party neutral in the event of a dispute).

60. See Scott, *supra* note 53, at 85.

61. See, e.g., Jernej Sekolec, *Digest of Case Law on the UN Sales Convention: The Combined Wisdom of Judges and Arbitrators Promoting Uniform Interpretations of the Convention*, in THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS, AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 1–2 (Franco Ferrari et al. eds., 2004) (maintaining that these benefits of reduced transaction costs are contingent upon uniform interpretation of the CISG); Frank Diedrich, *Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG*, 8 PACE INT'L L. REV. 303, 305 (1996) (describing the CISG as an “ideal compromise” in contrast to local or domestic law and predicting the potential benefits from applying the CISG rather than domestic law to international software contracts); Filip De Ly, *Opting Out: Some Observations on the Occasion of the CISG's 25th Anniversary*, in QUO VADIS CISG? - CELEBRATING THE 25TH ANNIVERSARY OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 26, 40 (Franco Ferrari ed., 2005) (arguing that the CISG “entails a reduction of transaction costs, facilitates contract management and has psychological and cross-cultural advantages over domestic sales law”).

62. See, e.g., Goetz et al., *supra* note 49, at 276, 278 (explaining that domestic default rule sets governing sales transactions are public goods that maximize the joint welfare of contracting parties by reducing transaction costs).

agreement, *ex post*),⁶³ and the costs of learning about foreign legal regimes.⁶⁴ Additionally, an international set of default rules could contain provisions that offer parties greater flexibility and freedom of contract than otherwise applicable domestic default rules would offer.

Recognizing that a set of international sales default rules can theoretically produce value, however, does not necessarily resolve what the content of the rules should be.⁶⁵ The process by which lawmakers can and should determine the substance of sales default rules has, in fact, been a subject of heated discussion in contract-theory literature, especially over the last two decades.⁶⁶ For the purposes of this Article, I assume that most, though not all, default rules are best understood as attempts by law makers to anticipate terms that most similarly situated parties would have wanted to include had they thought about them.⁶⁷ Such majoritarian defaults maximize the probability that the terms to which transacting parties are being held correspond with the ones they intended but failed to express or imply, and they save the majority of parties the costs of specifying those

63. See, e.g., Peter Winship, *Commentary on Professor Kastely's Rhetorical Analysis*, 8 NW. J. INT'L L. & BUS. 623, 629–30 (1988).

64. See Diedrich, *supra* note 61, at 304–05 (viewing the CISG as a preferable alternative to interpreting contracts via one party's domestic laws or even a neutral domestic law).

65. See, e.g., Omri Ben-Shahar, *A Bargaining Power Theory of Default Rules*, 109 COLUM. L. REV. 396, 396 (2009) (“How to fill gaps in incomplete agreements is perhaps the most important question in contract law.”).

66. For a particularly good introduction to the subject, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (applying game theory to the question of how lawmakers should create contract default rules to facilitate efficient contracts); see also, e.g., Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990) (employing game theory, but challenging Ayres and Gertner's conclusions); *Symposium on Default Rules and Contractual Consent*, 3 S. CAL. INTERDISC. L.J. 1 (1993) (featuring 17 pieces on theoretical perspectives on contract default rules); Barnett, *supra* note 54 (discussing the default rule approach to gap-filling); Jules L. Coleman et al., *A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law*, 12 HARV. J.L. & PUB. POL'Y 639 (1989) (applying an economic analysis to default rules); Ian Ayres, *Making a Difference: The Contractual Contributions of Easterbrook and Fischel*, 59 U. CHI. L. REV. 1391 (1992) (reviewing FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991)).

67. See, e.g., Schwartz & Scott, *supra* note 53, at 596 (“The justification for a default rule is that it does for parties what they would have done for themselves had their contracting costs been lower.”). Not all defaults fit this model, of course. Some defaults may be purposefully set, in fact, to something that the parties would not want in order to induce them to exchange information that they otherwise might not. See, e.g., Ayres & Gertner, *supra* note 65, at 91 (explaining penalty defaults are “purposefully set at what the parties would not want—in order to encourage the parties to reveal information to each other or third parties”). Additionally, some defaults may exist to protect vulnerable parties or non-parties who are impacted or potentially impacted by a contractual exchange.

terms.⁶⁸ In designing a set of defaults, then, there are at least two critical dimensions that must be considered.⁶⁹

First, and perhaps most significantly, lawmakers must determine the extent to which the law should contain immutable or mandatory background rules⁷⁰ in contrast to non-mandatory defaults that supply a term unless the parties opt out.⁷¹ This choice will ultimately reflect the lawmakers' view about the degree of contractual freedom that the parties

68. See, e.g., Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597, 607 (1990) (contending that majoritarian defaults promote efficiency “by providing widely suitable preformulations, thus eliminating the cost (and the error) of negotiating every detail of the proposed agreement”). The majoritarian default rule approach favors an “objective conception of rationality,” and seeks to mimic “a risk allocation the majority of similarly situated rational actors would have devised were they to bargain costlessly over the question in advance.” *Id.*; Robert E. Scott & George G. Triantis, *Embedded Options and the Case Against Compensation in Contract Law*, 104 COLUM. L. REV. 1428, 1477 (2004) [hereinafter Scott & Triantis, *Embedded Options*]. (“The case for majoritarian default rules in contracts rests on the premise that state institutions, such as courts and legislatures, sometimes can design contract provisions at lower cost than the parties could themselves.”); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 396 (4th ed. 1992) (stating that default rules should “supply[] standard contract terms that the parties would otherwise have to adopt by express agreement”); Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 971 (1983) (stating that lawmakers should create default terms by asking, “[W]hat arrangements would *most* bargainers prefer?” (emphasis in original)); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 361 (1988) (positing that default rules should provide “the contract that most well-informed persons would have adopted if they were to bargain about the matter”); Coleman et al., *supra* note 65, at 641 (describing this as a hypothetical bargain approach to contractual gaps where the goal is to find the rule that “the parties would have made had transaction costs not made their doing so irrational”).

69. It is possible to conceive of more dimensions. For instance, Professor George Geis has pointed out that default rules may be more or less “granular,” applying to a precise range of parties or applying to most or all contracting parties. See George S. Geis, *An Experiment in the Optimal Precision of Default Rules*, 80 TUL. L. REV. 1109, 1111–12 (2006) (giving the example of the UCC’s differential treatment of merchants and non-merchants in some situations); see also, e.g., Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389, 390–91 (1993) (identifying six categories of contract defaults).

70. Immutable rules are not variable by the parties. There are several reasons for the law to impose immutable rules that cannot be contracted out of, as Ayres and Gertner explain. “There is surprising consensus among academics . . . on two normative bases for immutability. Put most simply, immutable rules are justifiable if society wants to protect (1) parties within the contract, or (2) parties outside the contract.” Ayres & Gertner, *supra* note 66, at 88.

71. See *id.* at 87. Courts (and other legal decision-makers) become involved in supplying default rules when the parties fail to resolve a matter by express contract *ex ante*. Questions of the legitimacy of legal intervention in such cases and the appropriate framework to use in supplying terms are examined in Coleman et al., *supra* note 66; see also, e.g., Randy E. Barnett, *Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty to Disclose, and Fraud*, 15 HARV. J.L. & PUB. POL’Y 783, 790–91 (1992) (critiquing Jules Coleman’s rational bargaining theory as a basis for choosing default rules and elevating importance of consent theory); Goetz & Scott, *supra* note 62, at 266–70 (examining the way in which the system of state-supplied terms interferes with contractual innovation).

should enjoy. Contracting parties, of course, are more limited in their freedom if the default set contains more mandatory background rules. On the other hand, parties can choose to ignore non-mandatory default rules by adopting, in their contract, workable alternatives. Non-mandatory defaults, in essence, assume that contracting parties are the best judges of how to maximize joint welfare and allow them to tailor their contracts to suit their transaction-specific preferences. “By enacting a [non-mandatory] default rule to govern a contingency . . . lawmakers implicitly render a determination that the desires of the parties to a transaction will be permitted to take precedence over other policy concerns.”⁷²

Second, lawmakers must decide whether to frame default norms as rules or standards.⁷³ I discuss this dimension of default rules at length in Part III, but for now it is sufficient to note that parties regularly choose to employ a mix of rules and standards when they craft express terms to their deal.⁷⁴ It is, thus, reasonable to conclude that both rules and standards can be advantageous to parties. On first glance, at least, it is not then apparent whether the default rule set should be comprised of rules or standards or some combination of the two.⁷⁵

With respect to the first dimension, as the next section argues, the drafters of the CISG chose to adopt an almost exclusively non-mandatory default set. Indeed, the CISG embraces an expansive view of contractual freedom, allowing parties whose contracts are governed by its provisions to have virtually unfettered discretion to adjust the default rules governing their transactions. With respect to the second dimension, as Part III discusses, the CISG drafters chose to cast, in significant measure, the default set as standards rather than rules.

2. The CISG’s Structure and Contents: An Expansive View of Contractual Freedom

72. Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 611 (1998).

73. See, e.g., Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S. CAL. INTERDISC. L. J. 1, 3 (1993) (arguing that default rules may be categorized as being simple rules, complex rules, simple standards or complex standards).

74. See, e.g., Gillette & Scott, *supra* note 6, at 457 (“To be sure, commercial parties often include broad standards of reasonableness or effort in their contracts. Commercial contracts regularly invoke factors such as ‘best efforts,’ ‘reasonable expenses,’ and ‘reasonable withholding of consent.’”).

75. Notably, as I discuss in more detail in Part III, Professors Gillette and Scott argue to the contrary. They maintain that the default rule set should be comprised primarily of rules and that “the parties can always include [standards] in their contract at relatively low cost” when such standards are efficient. See *id.*

Though the CISG establishes a fairly straightforward normative framework for international sales contracts,⁷⁶ its design is innovative. The innovation rests, as the previous section suggested, on the Convention's fundamental commitment to a robust freedom of contract.⁷⁷ This commitment can be seen most obviously in Article 6, which states concisely but powerfully that "[t]he parties may exclude the application of the Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."⁷⁸

The debates at the 1980 conference confirm that Article 6 is to be taken literally and that parties may indeed derogate from or vary the effect of all the provisions of the Convention other than Article 12.⁷⁹ Accordingly, "Article 6 guarantees party autonomy over both the conflict rules and the substantive law."⁸⁰

The right of the parties to contract out of the Convention entirely implements a generally recognized principle of private international law according to which the parties to an international contract of sale of goods

76. Although CISG has a wide scope of application, applying "to contracts of sale of goods between parties whose places of business are in different [contracting] States," it also has significant limitations. CISG, *supra* note 3, art. 1(1). First, it does not apply to consumer transactions or mixed contracts for the sale of goods and services where the services are the "preponderant part of the obligations of the party who furnishes the goods." *See id.* at art. 2(a) & 3(2). Similarly, it does not apply to the sale of certain kinds of property, such as stocks, shares, investment securities, money, electricity or ships, vessels or aircraft. *Id.* at art. 2(b)-(f). The Convention "does not apply to the liability of the seller for death or personal injury caused by the goods to any person," *id.* at art. 5, and Article 4 explains that matters of contract validity and the effect of a contract on property rights in the goods sold are beyond the scope of the convention. *Id.* at art. 4. Instead, the Convention "governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract." *Id.* at art. 4. Accordingly, the CISG does not address unconscionability, capacity defenses, fraudulent inducement or the rights of a bona fide purchaser to goods that turn out to have been stolen.

77. *See* Tom McNamara, *U.N. Sale of Goods Convention: Finally Coming of Age?*, 32 COLO. LAW. 11, 16 (2003) ("Many Convention commentators have argued that the most fundamental provision of the Convention is the 'freedom of contract' principle."); *see also, e.g.*, Richard D. Kearney, *Developments in Private International Law*, 81 AM. J. INT'L L. 724, 728 (1987) (noting that freedom of contract is a fundamental tenant of international sales law); Franco Ferrari, *Remarks on the Autonomy and the Uniform Application of the CISG on the Occasion of its Tenth Anniversary*, INT'L CONTR. ADV. 33 (1998); JAN RAMBERG, *Autonomy of Contract and Non-mandatory Law*, in SCANDINAVIAN STUDIES IN LAW 143 (1993); Ulrich Schroeter, *Freedom of Contract: Comparison Between Provisions of the CISG (Article 6) and Counterpart Provisions of the Principles of European Contract Law*, 11 VINDOBONA J. INT'L COMM. L. & ARB. 259, 260 (2002) (discussing at length the notion of freedom of contract embraced by the CISG).

78. CISG, *supra* note 3, art. 6.

79. Peter Winship, *The Scope of the Vienna Convention on the International Sale Contracts*, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1, 32 (Nina M. Galston & Hans Smit, eds., 1984).

80. PETER SCHLECHTRIEM, *UNIFORM SALES LAW: THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 35 (1st ed. 1986).

are permitted to choose the applicable law.⁸¹ In the absence of a uniform law, however, the parties' choice, of course, was restricted to existing domestic laws. Article 6 makes it clear that, despite the existence of the Convention, contracting parties remain free to decide what should be the proper law governing their transaction. Accordingly, Article 6's opt-out provision, while significant, is not particularly novel.

The right of derogation and variation, however, is innovative. Even where the Convention applies as the proper law of the contract, the parties, pursuant to Article 6, may adapt the Convention to their particular needs with virtually no limitations.⁸² They may do so by excluding some of the Convention's provisions, agreeing on contractual terms to supplement the Convention, or modifying the provisions of the Convention. Although many domestic sales laws grant the parties at least some freedom to achieve similar outcomes,⁸³ such laws tend to contain more mandatory terms.⁸⁴

81. See, e.g., Diedrich, *supra* note 61, at 306–07 (noting that parties to an international sales contract can choose the law applicable to their transaction pursuant to “the universally recognized principle of party autonomy under non-unified private international law”); Francis A. Gabor, *Stepchild of the New Lex Mercatoria: Private International Law from the United States Perspective*, 8 NW. J. INT’L L. & BUS. 538, 542 (1988) (noting that a survey of conflict of law rules “leads to the conclusion that the principle of choice of law freedom of the parties is almost universally recognized at the present time”).

82. See, e.g., Lachmi Singh & Benjamin Leisinger, *A Law for International Sale of Goods: A Reply to Michael Bridge*, 20 PACE INT’L L. REV. 161, 164 (2008) (“It logically follows from this that the parties are free to tailor specific provisions of the CISG to their needs.”); Peter Winship, *Aircraft and International Sales Conventions*, 50 J. AIR L. & COM. 1053, 1060 (1984) (“[The CISG’s] rules are supplementary in nature and the parties have virtually unlimited freedom to contract out of some or all of the convention’s rules if they so choose.”); Arthur Fakes, *The Application of the United Nations Convention on Contracts for the International Sale of Goods to Computer, Software, and Database Transactions*, 3 SOFTWARE L.J. 559, 574 (1990) (“The parties may agree in their contract that the Convention does not apply to the transaction and thereby nullify its operation. In fact, the parties can eliminate or alter the application of specific treaty provisions by including in the contract the altered or totally different terms. Such capabilities illustrate the extreme flexibility of the treaty and its gap-filler nature.”). A few commentators, however, argue that, in addition to Article 6’s express declaration that the parties may not derogate from or vary the application of Article 12, the CISG contains several mandatory defaults that parties should not be able to change by agreement. See, e.g., Bojidara Borisova, *Freedom of Contract: Remarks on the Manner in Which the UNIDROIT Principles May be Used to Interpret or Supplement Article 6 of the CISG*, in AN INTERNATIONAL APPROACH TO THE INTERPRETATION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALES OF GOODS (1980) AS UNIFORM SALES LAW 39, 44 (John Felemegas ed., 2007).

83. For instance, the UCC provides that, with some exceptions, “[t]he effect of provisions of this Act may be varied by agreement.” U.C.C. § 1-302; see also *id.* §§ 4-103(a); 4A-501(a); 5-103(c).

84. For instance, the UCC has a number of mandatory defaults including, among many others, the statute of frauds. See U.C.C. § 2-201 (the obligation of good faith and fair dealing); *id.* § 1-302 (the parol evidence rule); *id.* § 2-202 (statute of limitations); *id.* §§ 2-725, 2A-506, 3-118, 4-111, 5-115, 6-110, and certain rules regarding warranties and disclaimers; see also *id.* §§ 2-316 (prohibiting the

Perhaps more importantly, even if a domestic default rule is non-mandatory, it may well be “sticky.”⁸⁵ In other words, parties might find themselves locked into the default even though they might prefer some alternative provision. Such stickiness might result from a variety of causes, including an inordinate focus on the status quo or a concern about negative signaling. As I argue in more detail in Part III.B, however, there are good reasons to believe that Article 6 helps render default norms under the CISG far less sticky, allowing parties virtually unfettered freedom to opt-out of them when doing so will maximize the parties’ joint contract surplus. Article 6 is an alerting rule—a rule that tells “private parties the necessary and sufficient conditions for contracting around a default,”⁸⁶ and those conditions are extremely minimal.

In short, then, Article 6 serves the dual purposes of allowing parties the freedom to opt in or out of the CISG entirely and allowing the parties who do opt into the CISG to tailor specific provisions to meet their individual transactional goals. When paired with the Convention’s underlying goal of reducing the costs of international sales and thus enhancing the welfare of contracting parties, this commitment to freedom of contract demonstrates that the drafters of the CISG intended to promote, first and foremost, the intentions of the contracting parties, allowing them to design their deals in whatever ways would maximize their perceived gains from trade. As the next two Parts argue, the conventional understanding of hard CISG interpretation cases potentially undermines this fundamental premise by attempting transform the default rule set from standards into rules.

II. THE CURRENT UNDERSTANDING OF THE CISG’S INTERPRETATIVE SCHEME

The CISG has been widely adopted.⁸⁷ The United States did so in 1986, making the CISG a self-executing treaty.⁸⁸ Since coming into force

negation or limitation of express warranties and imposing strict rules on governing other warranty disclaimers).

85. See generally, e.g., Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651 (2006) (discussing the stickiness of contract default rules).

86. Ian Ayres, *Menus Matter*, 73 U. CHI. L. REV. 3, 6 (2006).

87. See UNCITRAL, *supra* note 46.

88. HOWARD O. HUNTER, MODERN LAW OF CONTRACTS §23:6 (Supp. 2007). By making the CISG self-executing, Congress intended for it to have automatic domestic effect as federal law upon ratification. See, e.g., *Medellin v. Texas*, 552 U.S. 491, 505 n. 2 (2008) (“What we mean by ‘self-executing’ is that the treaty has automatic domestic effect as federal law upon ratification.”).

in 1988,⁸⁹ more than 5000 court and arbitral decisions applying the CISG from forty countries have been rendered.⁹⁰ Although a large and expanding membership to the CISG promises to formally increase the harmonization of international sales law, diversity of membership means that hundreds of different tribunals from different countries are tasked with the obligation of interpreting that law. The problem, of course, is that “even when outward uniformity [of rules] is achieved, . . . uniform application of the agreed rules is by no means guaranteed, as in practice different countries almost inevitably come to put different interpretations upon the same enacted words.”⁹¹ Or, to put it more succinctly, “[e]ven if you get uniform law, you won’t get uniform results.”⁹²

Critics of the CISG have, in fact, highlighted the threat of uneven application, arguing that the benefits of uniform international sales law are minimal.⁹³ But even supporters of the CISG have recognized that national courts will inevitably be the conscious or subconscious victims of “homeward trend.”⁹⁴ The CISG, in other words,

will often be applied by tribunals . . . who will be intimately familiar only with their own domestic law. These tribunals, regardless of their merit, will be subject to a natural tendency to read the international rules in light of the legal ideas that have been imbedded at the core of their intellectual formation. The mind sees what the mind has means of seeing.⁹⁵

Such a homeward trend, most commentators agree, tends to erode the uniformity of the CISG with “[d]ivergent or contradictory interpretations, like the application of rules of different countries lead[ing] to different judgments.”⁹⁶ Indeed, commentators have gone so far as to claim that “the single most important source of non-uniformity in the CISG is the different

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

90. See PACE DATABASE, *supra* note 29.

91. R.J.C. Munday, *The Uniform Interpretation of International Conventions*, 27 INT'L & COMP. L.Q. 450, 450 (1978).

92. John Honnold, *The Sales Convention in Action -- Uniform International Words: Uniform Application?*, 8 J.L. & COM. 207, 207 (1988).

93. See, e.g., Stephan, *supra* note 11, at 746–50.

94. John Honnold coined the term “homeward trend,” suggesting that it is a regrettable but inevitable consequence of the unification process. HONNOLD, *supra* note 4, at 1.

95. *Id.* at 1.

96. László Réczei, *Process and Value of the Unification of Commercial Law: Lessons for the Future Drawn from the Past 25 years*, 25th UNCITRAL Congress 6 (1992).

background assumptions and conceptions that those charged with interpreting and applying the Convention bring to the task.”⁹⁷

To combat this homeward trend, commentators, or at least commentators in favor of the continued existence of the CISG, have read Article 7 of the CISG and its interpretive scheme narrowly, finding that there are only two basic categories of hard cases: internal gap and external gap cases. They then insist that, with respect to the larger category of hard cases—cases falling within the scope of the Convention but not expressly settled by it—tribunals must interpret the CISG “autonomously,” looking only to the decisions of other tribunals interpreting the CISG, using the CISG’s general principles to deduce the correct interpretation, and avoiding the tendency to look to or rely on domestic contract law for guidance. By eschewing reliance on domestic law, at least for the largest category of interpretive challenges, it is hoped that tribunals will ultimately build an independent, internationally consistent set of interpretive outcomes under the Convention.

The next two sections discuss, in some detail, this conventional understanding of the CISG’s interpretive framework, focusing on Article 7(1) and 7(2). The third section in this part concludes by providing a brief summary of the conventional approach and highlighting its shortcomings.

A. Article 7(1)

“Article 7 of the Convention itself undertakes the formidable task of guiding judges.”⁹⁸ Described by some as “the single most important provision in ensuring the future success of the Convention,”⁹⁹ Article 7(1) states: “(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.”¹⁰⁰ Ascertaining precisely what Article 7(1)’s exhortation regarding the “need

97. Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187, 200 (1998); see also Harry M. Flechtner, *Funky Mussels, A Stolen Car, and Decrepit Used Shoes: Non-Conforming Goods and Notice Thereof Under the United Nations Sales Convention (“CISG”)*, 26 B.U. INT’L L.J. 1, 2 (2008) (“The most significant challenge arising from the CISG’s success is how to maintain the Convention as a source of uniform international sales rules (its primary function) when it is being applied by courts, arbitral tribunals and lawyers in such a large group of countries with diverse domestic legal cultures.”) [hereinafter Flechtner, *Funky Mussels*]; Spaic, *supra* note 9, at 239–40 (“The main issue with respect to the CISG’s divergent interpretation lies with the interpreters themselves, the different courts and tribunals who are likely to be influenced by national legal concepts and legal systems.”).

98. Koneru, *supra* note 9, at 106.

99. *Id.*

100. Convention on Contracts for the International Sale of Goods, *supra* note 3, art. 7.

to promote uniformity” means, however, has proven difficult.¹⁰¹ Certainly Article 7(1) encourages member states to keep in mind the nature and aspirations of the Convention, but it is unclear whether a distinction should be drawn between Article 7(1)’s emphasis on the need for uniformity and its call for recognition of the international character of the CISG.¹⁰² Some commentators maintain that “the need to promote uniformity” is no more than “a logical consequence” of interpreting the Convention according to its “international character.”¹⁰³ Indeed, Professor Aneta Spiac has argued that “[i]n the CISG, the elements of ‘internationality’ and ‘uniformity’ are interrelated thematically and structurally because of their position in the same Part and Article of the CISG.”¹⁰⁴ Regardless of whether or not the two criteria are completely coextensive, however, Paragraph 1 of the Secretariat Commentary to the 1978 draft seems to confirm that the two criteria in Article 7(1) are, at the least, complementary:

National rules on the law of sales of goods are subject to sharp divergencies [sic] in approach and concept. Thus, it is especially important to avoiding differing constructions of the provisions of this Convention by national courts, each dependent upon the concepts used in the legal system of the country of the forum. To this end Article 7 emphasizes the importance, in the interpretation and application of the provisions of the Convention, of having due regard for the

101. Much of the commentary on Article 7(1) focuses on the meaning of what might be considered the provision’s central term, “good faith.” See, e.g., Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 686, 778–82 (1998) (discussing the disagreements over the meaning of good faith arguing that it should have an expansive role in the CISG and should be regarded as a “general principle” under Article 7(2)); Harry Flechtner, *Comparing the General Good Faith Provisions of the PECL and the UCC: Appearance and Reality*, 13 PACE INT’L L. REV. 295, 289–301 (2001). Notably, however, “good faith” is not defined in the Convention—it is not “even accompanied by a definition as indefinite as the ‘observance of reasonable commercial standards of fair dealing,’ the definition of good faith within the Uniform Commercial Code.” Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales Law*, 25 INT’L REV. L. & ECON. 446, 452 (2005).

102. For example, Professor John Honnold initially distinguishes the two principles but then discusses only the legislative history of the criterion regarding the Convention’s “international character.” See HONNOLD, *supra* note 41, at 117–20.

103. See Bonell, *supra* note 37, at 72. Professor Flechtner similarly seems to agree that the two criteria are effectively coextensive. According to Professor Flechtner, the drafters of the CISG sought “to avoid, where possible, terminology commonly used in (and thus more likely to convey unintended meanings derived from) domestic sales law, particularly where the terminology is associated with a particular legal tradition.” Flechtner, *supra* note 96, at 5. This drafting technique, he goes on to say, reflects “the effort to create sales rules that will be interpreted and applied ‘autonomously’—i.e., in a fashion (as expressed in Article 7(1)) that reflects the Convention’s ‘international character’ and the need for ‘uniformity in its application.’” *Id.* at 5–6.

104. Spiac, *supra* note 9, at 241.

international character of the Convention and the need to promote uniformity.¹⁰⁵

Accordingly, most commentators agree that subdivision (1) generally encourages local and national courts and tribunals to develop an “internationalist culture.”¹⁰⁶ Because of its freedom from domestic norms, the interpretive methodology derived from such an internationalist culture has somewhat confusingly been referred to as the “autonomous” approach to interpretation.¹⁰⁷

Significantly, however, this autonomous approach, despite its name, does not suggest that a tribunal is barred from considering the decisions of other tribunals faced with similar CISG interpretive challenges. In fact, the autonomous interpretive approach encourages, if not compels, tribunals to consider what other tribunals interpreting the CISG have done.¹⁰⁸ Most CISG commentators—and an increasing number of national courts—agree that the command ‘to have regard’ requires that particular consideration be given to CISG ‘foreign case law’, i.e., relevant decisions emanating from

105. Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat, Official Records, art. 6, cmt. 1., Prepared for the United Nations Commission on International Trade Law, U.N. Doc.A/CONF.97/5 (1979).

106. ALAN P. SWAN & JOHN F. MURPHY, *CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS* 3 (2d ed. 1999); see also Alexander S. Komarov, *Internationality, Uniformity and Observance of Good Faith as a Criteria in Interpretation of CISG: Some Remarks on Article 7(1)*, 25 J.L. & COM. 75, 76 (2005) (“[I]t was also stressed that a considerable merit of the paragraph would lay in the fact that it proclaimed an up-to-date legal policy in harmony with the exigencies of world trade which postulated that ‘no recourse to national law should be admitted in interpretation.’”).

The drafters of the CISG, in fact, attempted to avoid “as far as possible the use of what may be called legal shorthand, that is, the use of terms of art peculiar to the system of law prevailing in one group of countries signing a convention.” OTTO CHARLES GILES, *UNIFORM COMMERCIAL LAW: AN ESSAY ON INTERNATIONAL CONVENTIONS IN NATIONAL COURTS* 39 (1970). They wanted, instead, to develop a “neutral language” that could replace the idioms used by national legal systems with an international system designed to reflect the realities of commercial life. See, e.g., CESARE M. BIANCA & MICHEAL J. BONELL, *COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION* 74 (1987) (“Even in the exceptional cases where terms or concepts were employed which are peculiar to a given national law, it was never intended to use them in their traditional meaning.”).

107. Komarov, *supra* note 105, at 78.

108. See, e.g., Schlechtriem & Schwenger, *supra* note 44, at 64–65. HONNOLD, *supra* note 41, at 125 (“The Convention’s requirement of regard for ‘uniformity in its application’ calls for tribunals to consider [foreign] interpretations of the Convention.”); Flechtner, *Funky Mussels*, *supra* note 96, at 2 (“There is consensus among CISG commentators that one important tool in fulfilling [the requirement of uniformity] is consultation of past CISG decisions, particularly those rendered by tribunals in jurisdictions other than that of the interpreter.”); Spaic, *supra* note 9, at 240 (“Thus, uniformity can only be achieved if different tribunals take into consideration the decisions of other national courts on the same set of circumstances.”); Franco Ferrari, *CISG Case Law: A New Challenge for Interpreters?*, 17 J.L. & COM. 245, 254 (1998) (“The interpreter must consider decisions rendered by judicial bodies of foreign jurisdictions, because it is possible that the same or similar questions have already been examined by other States’ courts.”).

courts in (other) CISG Contracting States.¹⁰⁹ Thus, instead of having a store of domestic case law, commentators advocate for the creation of an international body of precedent (though admittedly nonbinding)¹¹⁰ to which tribunals can look to determine the outcome of a given case.¹¹¹ This approach emphasizes “awareness of and respect for, but not necessarily blind obedience to, interpretations of the CISG from outside one’s own legal culture.”¹¹²

In circumstances where there are diverging interpretations by different tribunals, the principles of autonomous interpretation suggest that the interpreting tribunal should harmonize such decisions. “[C]ourts [should serve] two primary functions [in their roles as informal appellate courts]. First, they would look to decisions of foreign courts for guidance. Second, they would actively unify international sales law by distinguishing seemingly inconsistent prior decisions and by harmonizing differences in foreign interpretations.”¹¹³

Perhaps not surprisingly, however, harmonization has proven challenging.¹¹⁴ Because “the CISG judicial ‘pyramid’ is essentially flat, no court sits atop with the authority to iron out differences in opinion among the numerous . . . judicial hierarchies spread across the globe.”¹¹⁵ Nevertheless, many commentators maintain that all tribunals are tasked

109. See, e.g., Franco Ferrari, *International Sales Law and the Inevitability of Forum Shopping: A Comment on Tribunale Di Rimini, 26 November 2002*, 23 J.L. & COMM. 169, 172 n.12 (2003-2004).

110. See, e.g., Singh & Leisinger, *supra* note 81, at 180–81 (noting that “there is no such a thing as ‘stare decisis’ with regard to interpretations of provisions of the CISG by courts or tribunals in other countries”); Ferrari, *supra* note 107, at 259–60 (criticizing the notion that foreign CISG case law should have the value of precedent).

111. See Franco Ferrari, *Applying the CISG in a Truly Uniform Manner: Tribunale di Vigevano (Italy), 12 July 2000*, 6 UNIFORM L. REV. / REVUE DE DROIT UNIFORME, 203, 206 (2001).

112. Flechtner, *supra* note 96, at 188; see also, e.g., Koneru, *supra* note 9, at 108 (“[I]t is important to recognize that giving an international interpretation does not mean merely choosing a domestic interpretation from another country.”).

113. Larry A. DiMatteo, et. al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW J. INT’L L. & BUS. 299, 304 (2004).

114. Joseph Lookofsky, *In Dubio Pro Conventione? Some Thoughts about Opt-Outs, Computer Programs and Preemption Under the 1980 Vienna Sales Convention (CISG)*, 13 DUKE J. COMP. & INT’L L. 263, 269 (2003) (“So while we find many examples of harmonious Convention interpretation, the CISG musicians do not all play the same tune; indeed, domestic idiosyncrasies sometimes make it difficult for outsiders to a given national system to even ‘hear’ the message sounded by foreign precedent.”).

115. Joseph Lookofsky, *Digesting CISG Case Law: How Much Regard Should We Have?*, 8 VINDOBONA J. OF INT’L COM. L. & ARB. 181, 185 (2004).

with the job of doing their utmost to separate the mellifluous from the discordant in CISG interpretive matters.¹¹⁶

In short, most commentators read Article 7(1) as an attempt to limit jurisdictional variance by admonishing tribunals to heed the CISG's "international character." In this role, these commentators view Article 7(1) as a succinct restatement of the underlying *legis ratio*, or purpose, of the entire convention.¹¹⁷ As the next section argues, most commentators maintain that, when paired with Article 7(2), the international character of the entire convention demands that the autonomous method, including recourse to an international store of precedent, be used to resolve all internal gap cases.

B. Article 7(2)

Article 7(2) establishes the basic categories of interpretive challenges that tribunals face when dealing with the CISG. This subdivision states that it is addressing "matters governed by this Convention [but] not expressly settled in it."¹¹⁸ It goes on to declare that such matters "are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."¹¹⁹

This statement of scope, I contend, implicitly delineates three basic categories of "matters":

First, there are matters governed by the Convention but settled in it (Category I Cases).

Second, there are the matters expressly being dealt with by the subdivision—matters that are governed by the Convention but not settled in it (Category II Cases).

116. See *id.*; Flechtner, *Funky Mussels*, *supra* note 96, at 9–10 ("The deference due a CISG opinion is based on how well it satisfies Article 7(1)'s mandates to interpret the Convention with regard to its international character and the need to promote uniformity in its application.")

117. "Ratio legis" refers to the purpose or "soul" of the law. [I]t is not the words of the law, but the internal sense of it that makes the law, and our law (like all others) consists of two parts, viz. of body and soul, the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law, *quia ratio legis est anima legis*. And the law may be resembled to a nut, which has a shell and a kernel within, the letter of the law represents the shell, and the sense of it the kernel, and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law, if you rely only upon the letter, and as the fruit and profit of the nut lies in the kernel, and not in the shell, so the fruit and profit of the law consists in the sense more than in the letter.

Eyston v. Studd, Plowden, 75 Eng. Rep. 459, 465 (1573).

118. CISG, *supra* note 3, art. 7(2).

119. *Id.*

Third, there are matters not governed by the Convention, either because they are expressly or implicitly excluded (Category III Cases).

Importantly, questions about Category I Cases are generally not hard, implicating, as they do, Judge Easterbrook's universal rule of interpretation—if the statute is clear, apply it. Accordingly, this article does not address Category I Cases. Questions about Category II and III Cases, however, may be hard. In fact, Category II Cases are quintessential hard CISG cases and the primary focus of this Article.

1. Matters Governed by But Not Settled in the CISG (Category II Cases)

To date, most commentators and tribunals have treated all questions about Category II Cases as homogenous. Interpretive challenges arising from Category II matters involve so-called *intra legem* or internal gaps.¹²⁰ Such gaps are formed, according to one view,

when the legislator is not aware of a problem. The reason for this is often that the problem did not exist at the time the law was made. The problems arise out of a change in the conditions of life caused by technical progress. It is also possible that the legislator simply overlooked the problem.¹²¹

Internal gaps, then, may be seen as sorts of mistakes, albeit understandable and even inevitable ones.¹²² As is often true with mistakes in general, the goal of conventional approaches to CISG interpretation is to permanently fix such mistakes.

Another view sees internal gaps as simply byproducts of the necessary concessions that were made in order to get the Convention ratified.¹²³ The drafters, in other words, did not overlook problems so much as they looked

120. See Ferrari, *supra* note 36, at 215–21.

121. Gert Brandner, *Admissibility of Analogy in Gap-filling and its Relationship to the General Principles under the CISG*, CISG DATABASE, PACE INSTITUTE OF INTERNATIONAL COMMERCIAL LAW (1999), http://www.cisg.law.pace.edu/cisg/biblio/brandner.html#N_25_.

122. See *id.*

123. Karen Halverson Cross, *Parole Evidence Under the CISG: The "Homeward Trend" Reconsidered*, 68 OHIO ST. L. J. 133, 139–40 (2007); Koneru, *supra* note 9, at 5 (“[M]any of [the Convention’s] provisions reflect the difficult negotiations and compromises the drafters had to make.”); Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT’L L. 443, 450–52 (1989) (discussing in some detail the need for compromise during the drafting of the CISG).

away from them in order to get broad-ranging agreement on the content of the Convention.¹²⁴

Even if this later explanation of internal gaps more accurately reflects the drafting history of the Convention than the “mistake” view, however, the bottom line is the same: commentators believe that tribunals interpreting the Convention should, over time, permanently fill the gaps left as a result of the drafting process. For instance, Professor Kastely, in an early article discussing the Convention, argued that “[c]ourts and commentators should strive to develop an international jurisprudence of Convention interpretation . . . [which will] articulate the detailed meanings of the *general principles* of the Convention.”¹²⁵ Thus, over time, the general, open-ended provisions of the Convention would slowly be transformed into a set of clear and detailed rules.¹²⁶ Similarly, Professor Spaic argues that “[t]he creation and adoption of the CISG are only the preliminary steps towards uniformity in international sales law. It is the interpretation—and uniform application—of the uniform law that will *complete the process*.”¹²⁷

To fill the gaps, the conventional view of the CISG’s interpretive scheme reads Article 7(2) as establishing a two-tier hierarchy. First, tribunals are directed to settle a question about a matter falling into Category II hard CISG Cases in conformity with the Convention’s general principles.¹²⁸ Second, only if no such principles can be found (“in the absence of such principles”), can a tribunal look to some domestic contract law—a domestic law “applicable by virtue of the rules of private

124. See, e.g., Garro, *supra* note 123, at 471–73 (discussing the “uneasy” compromise reached regarding notice of nonconformity and arguing that this compromise, which hinges on several open-ended terms like “reasonable,” was necessary to accommodate the competing visions of the drafters).

125. Amy H. Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 63 WASH. L. REV. 607, 651 (1988) (emphasis added).

126. In this respect, Professor Kastely’s argument may reflect the widely accepted notion that the relationship between rules and standards is dialectical, at least in common law systems where precedent accretes over time. As standards are applied by courts, they acquire increasing specificity, slowly becoming more rule-like. See, e.g., Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy and Realism*, 48 VILL. L. REV. 305, 376–79 (2003) (also observing that rules, over time, tend to become more standard-like as courts question the application of specific norms to particular facts).

127. Spaic, *supra* note 9, at 258 (emphasis added).

128. Obviously, the question of how courts should ascertain what counts as a “general principle” has generated a great deal of scholarly thought. See, e.g., Koneru, *supra* note 9, at 115–23 (discussing appropriate methods for ascertaining the general principles of the Convention); JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES* 102 (2d ed. 1991) (suggesting that general principles should only be found to exist when they are “moored to premises that underlie specific provisions of the Convention”).

international law”¹²⁹—to resolve the question. In other words, it is “[o]nly as a last resort” that a tribunal may settle the matter in accord with the “domestic law indicated by the conflict of law rules of the forum” and thus interpret a case in a non-uniform manner.¹³⁰

The method by which tribunals are to ascertain the content of the “general principles” of the CISG, in turn, while not self-evident, has been widely accepted to be the autonomous method detailed in the previous section.¹³¹ Tribunals, in other words, should adopt an interpretive perspective, whenever possible, that views the CISG as self-contained.¹³²

129. CISG, *supra* note 3, art. 7(2).

130. Alejandro M. Garro, *The Gap-Filling Role of the UNIDROIT Principles in International Sales Law*, 69 TUL. L. REV. 1149, 1156 (1995). Ironically, this approach potentially results in there being an *intra legem* gap. Theoretically (and very likely in many actual cases), a court might be able to deduce one or more underlying principles of the CISG relevant to an interpretive question. These principles, however, may conflict or ultimately prove to be insufficient to answer the question. Read narrowly, subdivision (2) might prohibit a court from resorting to the forum’s domestic law in such a case, since a principle is available.

It is worth noting that, according to the late E. Allan Farnsworth, who represented the United States on the CISG drafting committee, Article 7(2) was a compromise between civilian and common-law traditions:

The more numerous civilians had some success. What they got, in article 7(2), was this: “Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based” But we common lawyers also had some success. What we got, in the balance of article 7(2) was this: “In the absence of such principles, [matters not expressly settled by the Convention are to be settled] in conformity with the law applicable by virtue of the rules of private international law.” Here is a recognition of the Swiss cheese theory: Look at the Convention as a piece of Swiss cheese, and, if you see a hole in the Convention, look through it to the backdrop of the law that would otherwise apply under choice of law rules. This concession to the common lawyers was all the more remarkable because the predecessor of the Vienna Convention--the less widely adopted Uniform Law on the International Sale of Goods--had said exactly the opposite.

E. Allan Farnsworth, *A Common Lawyer’s View of His Civilian Colleagues*, 57 LA. L. REV. 227, 231 (1996).

131. CISG, *supra* note 3, art. 7(1). Many commentators, it should be noted, argue that the principle of autonomous interpretation permeates the entire Convention. *See, e.g.*, Komarov, *supra* note 105, at 76–77 (“The general observation of means of interpretation of the Convention may be supplemented by the reference to an interesting remark relating to evaluation of the rule stipulated in Article 7(1). It was suggested that because most of the articles, if not all, manifest a purpose and the policy, in a sense the entire Convention is a cross-reference to this article.”) (citing Robert A. Hillman, *Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity*, in REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 21 (Cornell Int’l Law Journal ed. 1995). It is not, therefore, merely a product of the conjunction of Articles 7(1) and 7(2).

132. *See, e.g.*, SCHLECHTRIEM & SCHWENZER, *supra* note 44, at 10 (finding it imperative for interpreters of the CISG to become familiar with uniform international concepts, and to “understand them as autonomous concepts and to counter the danger of their being interpreted in the light of the familiar solutions of domestic law”); BIANCA & BONELL, *supra* note 25, at 74 (having regard to the “international character” of the Convention under Article 7(1) “implies the necessity of interpreting its terms and concepts autonomously, i.e., in the context of the Convention itself and not by referring to the

Autonomous interpretation, according to these scholars, must divorce itself from domestic law as an influence on questions of CISG interpretation.¹³³

Most commentators agree that, as an initial matter, the CISG's general principles can and should be filled by analogical extensions of specific provisions.¹³⁴ These general principles can also be derived from scholarly works on the CISG, and more controversially, many argue that they can be found within the UNIDROIT Principles.¹³⁵ The general principles, however, are seen as fixed answers that may be used, once found, to permanently plug interpretive gaps left by the Convention's vague language.

In brief, the conventional approach to CISG interpretive challenges arising from an internal gap—arising because a matter falls within the scope of the Convention but it is not settled by it—strives to fill the gaps left by the Convention drafters both for purposes of the pending case and for all future cases. The primary mechanism for accomplishing this goal is the autonomous principle of interpretation, which should be, in the conventional commentators' view, applied to all hard cases arising from internal gaps. By following the autonomous interpretation principle in all

meaning which might traditionally be attached to them within a particular domestic law"); Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183, 200–01 (1994) (arguing that Article 7(1) requires the interpreter to read the Convention, “not . . . through the lenses of domestic law, but . . . against an international background”).

133. See Franco Ferrari, *Applying the CISG in a Truly Uniform Manner: Tribunale di Vigevano (Italy)*, 12 July 2000, 6 REVUE DE DROIT UNIFORME [UNIFORM L. REV.] 203, 204 (2001); John E. Murray, Jr., *The Neglect of CISG: A Workable Solution*, 17 J.L. & COM. 365, 367 (1998) (stating that autonomous interpretation requires that a tribunal “transcend its domestic perspective and become a different court that is no longer influenced by the law of its own nation state”).

134. See, e.g., Franco Ferrari, *Interpretation of the Convention and Gap Filling: Article 7*, in DRAFT UNCITRAL DIGEST 138, 160 (Franco Ferrari et al. eds., 1989); FRITZ ENDERLEIN & DIETRICH MASKOW, *INTERNATIONAL SALES LAW* 58–59 (1992).

135. See John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, in REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 115, 291–94 (Pace Int'l L. Rev. ed., 2001) (asserting that the UNIDROIT principles have been and should continue to be applied by tribunals to interpret the CISG); Michael Joachim Bonell, *The UNIDROIT Principles of International Contracts and the CISG: Alternative or Complementary Instrument?*, 1 UNIF. L. REV. 26, 33–36 (1996) (arguing that the UNIDROIT Principles may be used to interpret and supplement some aspects of the CISG); Ulrich Magnus, *General Principles of UN-Sales Law*, 59 RABELS ZEITSCHRIFT (Ger.) 492 (1995) (characterizing the UNIDROIT Principles as “additional general principles” in the context of the CISG because of correspondence between them and the provisions and general principles of the CISG). *But see* Ferrari, *supra* note 133, at 170–71 (arguing that supporting comments are often accompanied by a warning that the UNIDROIT Principles go further than the CISG); Troy Keily, *Good Faith and the Vienna Convention on Contracts for the International Sale of Goods*, 3 VINDOBONA J. INT'L COM. LAW & ARB. 15, 35 (1999) (describing the argument that the UNIDROIT Principles can provide general principles for use in CISG interpretation as “flimsy” and reiterating the warning that UNIDROIT Principles go “well beyond the CISG”).

such cases, it is believed that interpretive outcomes can be normalized across signatory states.

2. Matters Not Governed by the Convention (Category III Cases)

Just as tribunals and commentators have treated questions about Category II Cases as homogenous, so too have they treated all questions about matters falling into Category III as homogenous. Matters falling into the third category are outside of the scope of the CISG. They fall into what have been described (somewhat confusingly) as external gaps or gaps *praeter legem*.¹³⁶ Because the CISG does not address questions related to matters falling into these external gaps, the standard view is that they may be directly settled by domestic law.

Though these external gaps are classified, initially, the same, some commentators recognize that there are differences in the natures of these gaps. Accordingly, the ascertainment of which domestic law will be applied will depend on the type of external gap the tribunal faces. If the external gap is one of procedural law, recourse will be had to the law of the forum.¹³⁷ For other types of external gaps, some commentators have suggested that the appropriate domestic law should be that made applicable by the rules of private international law.¹³⁸

For purposes of this Article, the important point is that commentators believe that the only truly acceptable non-uniformity of interpretive outcomes exists with respect to external gaps.

C. Brief Summary of the Conventional Approach to CISG Interpretive Challenges

The conventional approach to CISG interpretation, in short, relies on Article 7(1) to derive the overarching goal of uniformity of interpretive outcomes as well as the methodology for achieving this goal—autonomous interpretation.¹³⁹ Article 7(1) requires consideration of the CISG’s “international character” and the “need to promote uniformity” in its

136. See Franco Ferrari, *Uniform Application and Interest Rates Under the 1980 Vienna Sales Convention*, 24 GA. J. INT’L & COMP. L. 467, 471 (1995).

137. See, e.g., *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D’Agostino, S.P.A.*, 144 F.3d 1384, 1389 (11th Cir. 1998).

138. See, e.g., Shrivbir S. Grewal, *Risk of Loss in Goods Sold During Transit: A Comparative Study of the United Nations Convention on Contracts for the International Sale of Goods, the Uniform Commercial Code, and the British Sale of Goods Act*, 14 LOY. L.A. INT’L & COMP. L. REV. 93, 102 (1991) (stating that, generally, the question of who carries the burden of proof is to be determined by the choice of law rules of the forum, not the Convention).

139. See *id.* at 95–106.

application.¹⁴⁰ This implies that the CISG's legislative history, international case law, and scholarship should inform courts and tribunals applying its provisions.¹⁴¹ Unlike the common law, in which legislation traditionally is strictly read,¹⁴² the CISG's "international character" and "need to promote uniformity" invites a more flexible, purposive approach.¹⁴³

Most tribunals and commentators then rely on subdivision (2) of Article 7, however, to distinguish between only two categories of hard cases: cases involving questions about matters governed by the CISG but not expressly settled by it (Category II matters) and cases falling outside of the coverage of the CISG (Category III matters).¹⁴⁴ All Category II interpretive matters should be resolved uniformly and permanently; only Category III matters may be decided in a non-uniform and case-by-case matter. Thus, the goal of CISG autonomous interpretation, with respect to all Category II matters, should be the crystallization, over time, of uniform and definitive rules. This crystallization should occur, to be sure, at the international level and without regard to domestic legal norms, but ultimately, the goal should be a set of definitive interpretive outcomes that all tribunals, the world around, can apply uniformly. As the next part of this Article argues, however, while the two identified categories of hard cases are important, they are not the only types of hard cases that tribunals interpreting the CISG face. By starting with a narrow view about the goals of interpretation and the possible types of interpretive challenges tribunals face, tribunals and commentators have created unnecessary confusion as they try to stuff all hard cases into one of two boxes.

III. A NEW TAXONOMY OF INTERPRETIVE CHALLENGES

Professor Philip Hackney wrote an article ten years ago entitled *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?*¹⁴⁵ In the article, Professor Hackney provided an answer:

140. *See id.*

141. *See id.*

142. *See, e.g.,* Michael Joachim Bonell, *Article 7*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 65, 77–78 (Cessare Massimo Bianca & Michael Joachim Bonell eds., 1987) (stating that in common law systems, statutes are interpreted "in a very strict sense" and that general principles derived from case law are used for statutory gap-filling as opposed to the civil law approach of deriving general principles from the legislation itself).

143. *See* Grewal, *supra* note 138, at 95–106; *see also* Kilian, *supra* note 45, at 228–29 (stating that "[n]arrow interpretation . . . does not sit well with the international character of the Convention").

144. *See* Grewal, *supra* note 138.

145. Philip Hackney, *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?*, 61 LA. L. REV. 473 (2001).

maybe.¹⁴⁶ Following Professor Hackney's invitation, this article provides another answer: it depends. I contend that if by "uniformity" one means uniformity of interpretive outcomes, then the answer is an unequivocally "no." If, however, by "uniformity" one means uniformity of procedural or methodological interpretation, then the answer may well be "yes." After all, most commentators and tribunals seem to agree that the proper method of addressing CISG interpretive disputes is the autonomous method.¹⁴⁷ I too agree that the autonomous method should be used. I argue, however, in this Part that the CISG was never intended to achieve the goal of uniformity of interpretive outcomes in all hard CIG cases.

Significantly, my argument differs from similar sounding arguments made by skeptics of the CISG or those proponents of the CISG that aim to justify the Convention's uneven application by maintaining, in essence, that the CISG is better than nothing.¹⁴⁸ Rather than maintaining either that the CISG is failing because it has not, and likely cannot, promote uniformity of interpretive outcomes or that the CISG remains a valiant, if ultimately pyrrhic, effort to give the world a framework for promoting relatively uniform interpretive outcomes, I contend that many of the CISG's key provisions invite, and may well require, that tribunals reach case-specific and contingent interpretations that may differ across jurisdictions and among contracts.

Accordingly, this Part begins by explaining why rational international contracting parties might want open-standard terms to govern portions of their relationships. Relying on the path-breaking work of Professors Robert Scott and George Triantis in *Anticipating Litigation in Contract Design*, this Part argues that all contracting parties design their deals by making tradeoffs between investing in ex ante specification of contract rules or postponing detailed specification of performance requirements by adopting standards. By including an optimal mix of rules and standards, contracting parties maximize their perceived joint welfare. Given that standards have value precisely because they require ex post and individuated specification, an important goal of the CISG—promoting freedom of contract and corresponding gains from trade—could be eroded if, as many commentators want, CISG standards were slowly hardened into more precise rules.

146. See *id.* at 479–81.

147. See *supra* notes 108–117.

148. See, e.g., Johan Steyn, *A Kind of Esperanto?*, in *THE FRONTIERS OF LIABILITY* 14–15 (Peter Birks, ed. 1994) ("No convention can eliminate uncertainties in its application. But a convention such as the Vienna Sales Convention will tend to reduce differences and to eliminate uncertainty.").

This Part then offers a taxonomy of hard CISG cases that recognizes the value of open-textured standards to contracting parties. More specifically, this Part argues that three, rather than merely two, general types of hard CISG cases exist. First, there are cases where a tribunal determines that a matter is governed by the Convention but “not expressly settled in it.” Second, there are cases where a tribunal determines that a matter was governed by the Convention but has been altered by the parties pursuant to Article 6. Finally, there are cases where a tribunal will determine that a matter falls outside of the ambit of the Convention. The real innovation of the proposed taxonomy, however, is in the recognition that each of these types of hard cases includes one or more subtypes, two of which need not be, and in fact should not be, interpreted with the goal of achieving uniform outcomes.

A. The Value of Open-Textured Standards

Contrary to the standard view of CISG interpretation and of *intra legem* gaps, in particular, not all vague CISG provisions are equal. Some vague provisions may be considered open-textured standards intentionally designed by the drafters to condition on criteria that must be established by a tribunal *ex post*. For instance, vague provisions conditioning on terms like “reasonableness” or “best efforts” may be viewed not as drafting errors or unfortunate byproducts of concessions made during the CISG drafting process, but instead as valuable contracting terms that allow parties to allocate investments between the “front and back end of the contracting process.”¹⁴⁹

This section begins by describing the value that contracting parties can gain from using a mix of standards and rules in their contracts and arguing that CISG default standards may aid the parties in creating an optimal mix. It then rebuts two interrelated arguments, at least in the context of the CISG, that defaults in contract law should be comprised of rules rather than standards. First, it rebuts the contention that CISG defaults are sticky and that parties will, therefore, either be stuck with a standard when they would prefer a rule or they will have to spend an inefficiently large amount of effort to opt out of the default standard. Second, it rebuts the contention that the default set should be comprised primarily of rules rather than standards because standards fail to provide sufficient guidance to parties about their performance obligations and expose parties to the risk of moral hazard. Finally, this section concludes that the value parties can gain from having the default set comprised of open-textured standards might be

149. See Scott & Triantis, *Anticipating Litigation*, *supra* note 55, at 818.

eroded if CISG defaults framed as standards were slowly transformed into rules through application of the autonomous method of interpretation.

1. Parties Can Gain Value by Including a Mix of Standards and Rules in their Contracts

In *Anticipating Litigation in Contract Design*, Professors Scott and Triantis address a core puzzle: why do sophisticated contracting parties regularly include and even negotiate over vague standards in their deals?¹⁵⁰ The significance of this puzzle cannot be overstated. The theory of incomplete contracting had led many commentators to conclude that parties were so concerned about uncertainty and litigation costs that they would avoid the use of vague standards like “best efforts” and “commercial reasonableness” altogether.¹⁵¹ These commentators’ conclusions, however, chafed against commercial practice, creating a noticeable gap between theory and reality. Contracting parties not only use vague terms like “best efforts” in their agreements, they use them frequently. Professors Scott and Triantis offered a solution to this puzzle, explaining that parties regularly include a mix of precise and vague terms in their contracts because such a mix allows them to calibrate the efficiency of their transaction.¹⁵²

Contract terms may be precise, vague or anywhere in between. When parties choose a relatively precise or specific rule, they are increasing their ex ante investment.¹⁵³ In other words, parties spend more money at the front end of the contracting process contemplating future contingencies and negotiating over terms specifying precise obligations in light of those contingencies. By investing more at the front end of the process, parties are hoping to leverage the information that they have about their shared contracting goals and incentives to maximize gains from trade in order to reduce ex post enforcement costs.¹⁵⁴ On the other hand, when parties choose a relatively open-textured standard, they are decreasing their ex ante investment and increasing their expected ex post enforcement costs.¹⁵⁵

150. *See id.* at 817 (observing that, despite the predictions of economic theory, parties regularly negotiate over and include vague contract terms in their deals).

151. *See id.* Indeed, many commentators went further and argued that contract default rules should be framed as rules rather than standards precisely because this is what most contracting parties would want. For more on this point, see *id.* at 848–51.

152. *Id.* at 817.

153. *See* Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023, 1071 (2009).

154. *Id.* (noting that parties “are exploiting their informational advantage (they know their contractual ends and have the right incentives to choose the best means to achieve them), but they are sacrificing the hindsight advantage that a court might have”).

155. *See id.*

Rather than spending time and money worrying about future contingencies and terms specifying precise obligations in light of those contingencies at the front end of the contracting process, parties are choosing to delegate to a future tribunal the task of specifying precise obligations. Such ex post or back-end specification is efficient, Professors Scott and Triantis argue, where the value to the parties of a decision maker's hindsight outweighs the value that the parties would gain by specifying ex ante a more precise rule to govern their contract.¹⁵⁶

In short, as Professors Scott and Triantis state, parties use rules and standards to “maximize the incentive bang for the contracting buck.”¹⁵⁷

By reaching the optimal combination of front-end and back-end costs, parties can minimize the aggregate contracting costs of achieving a particular gain in contractual incentives. Conversely, for any given expenditure of contracting costs, the parties can reach the highest possible incentive gains by optimizing the allocation of their investment between the front and back ends.¹⁵⁸

Thus, both rules and standards are important tools in efficient contract design. Both rules and standards, in other words, have value to contracting parties.

Given that both rules and standards have value to contracting parties, it is at least conceivable that an international sales law default set could be comprised of primarily rules, primarily standards or some combination of the two without necessarily having a negative impact on contract efficiency. Ultimately, of course, the question of what terms the majority of international contracting parties want in their sales contracts is an empirical one that could be tested by observing how frequently parties opt out of the Convention.¹⁵⁹ Empirical evidence on this issue, however, is lacking.¹⁶⁰ In

156. Scott & Triantis, *Anticipating Litigation*, *supra* note 55, at 819 (“The parties choose between front- and back-end proxy determination by comparing the informational advantage the parties may have at the time of contracting against the hindsight advantage of determining proxies in later litigation.”); *id.* at 842 (“The parties may view the court’s hindsight as an advantage or disadvantage depending on how much uncertainty has been resolved by the time contract performance is due.”).

157. *Id.* at 823.

158. *Id.* at 817.

159. See, e.g., Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349, 1361 (2009) (“Observation of contracting-around behavior can thus provide an empirical test of the efficiency of a contractual default provision.”).

160. Others have also recognized this but suggested that the scant empirical evidence available indicates that the CISG does not contain defaults that most contracting parties want. For instance, Professors Scott and Gillette note that “[a] successful ‘substantively uniform’ [international sales law] would result in only a minimal amount of opting out.” Gillette & Scott, *supra* note 6, at 477. They go on to observe that, although hard empirical evidence is lacking, “our anecdotal evidence from conversations with attorneys who deal in international sales is that a substantial amount of opting out

the absence of such evidence, commentators have offered essentially two overlapping arguments for the proposition that default standards are, in general, less likely to be desirable to contracting parties than default rules. First, commentators have argued that defaults, whatever their content, become sticky, so that contracting parties have a trouble opting out of them. Commentators then pair this stickiness problem with a second contention: standards often fail to supply contracting parties with sufficient ex ante guidance about their performance obligations and expose them to the risk of moral hazard. In the following sections, I rebut both of these arguments. I then conclude by suggesting that the potential value of the CISG's default standards would, in fact, be eroded if these standards were slowly crystallized into rules through an application of the autonomous method of interpretation.

a. The Problem of Sticky Defaults

Many contract defaults are sticky in the sense that parties who want to opt out of them may have a hard time doing so. At least after Ronald Coase's revolutionary work, it seems clear that, if transaction costs are sufficiently low, contractual defaults are really irrelevant because parties can and will negotiate around suboptimal ones.¹⁶¹ "Parties should arrive at the same contractual risk allocations, either explicitly (by contracting around the defaults) or implicitly, (by choosing not to contract around the defaults) regardless of the content of the default rules."¹⁶² Of course, transactions costs are not always low, as the default rule paradigm itself recognizes. More significantly, however, considerations other than drafting

occurs." *Id.* at 478; *see also, e.g.*, Ingeborg Schwenzer & Pascal Hachem, *The CISG – Successes and Pitfalls*, 57 AM. J. COMP. L. 457, 463 n.35 (2009) (discussing the few surveys that have been conducted suggesting that in the United States, Germany and Switzerland, a majority of contracting parties, particularly in commodities transactions, exercise their Article 6 rights to opt out of CISG coverage entirely). This evidence seems unpersuasive even for the general proposition that many contracting parties are opting out of the Convention. It seems even more unpersuasive for the proposition that the reason that parties are opting out is that the Convention fails to provide the terms that most contracting parties want. Indeed, even Professors Scott and Gillette concede that much of the sparse survey evidence that exists on opting out focuses on commodities associations, but such associations have complex self-regulatory regimes and thus stand to benefit little from any set of default rules. *See* Gillette & Scott, *supra* note 6, at 478. The fact that such associations tend to opt out of the Convention, then, says very little about the desirability of the Convention's terms to other general parties not protected by self-regulatory regimes. Moreover, other recent surveys show that after an initial rejection of the CISG, business people seem more and more willing to accept the CISG. Bonell, *supra* note 9, at 5.

161. *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). The Coase theorem predicts that contracting parties will bargain to the efficient allocation of rights and responsibilities, without regard to initial entitlements so long as transaction costs are low. *See, e.g.*, ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 80–82 (2d ed. 1997).

162. Korobkin, *supra* note 72, at 621.

costs might cause contracting parties to stick with an otherwise undesirable default. Parties, that is, “might choose not to opt out of a legal default *even when a better provision can easily be identified and articulated at a negligible drafting cost.*”¹⁶³

A number of scholars have explored at length this notion that default rules, and contract default rules in particular, may be sticky.¹⁶⁴ For purposes of this Article, it suffices to note that three principle explanations for the stickiness of defaults have been offered. First, stickiness may be explained on behavioral economic grounds. More specifically, stickiness may be due to the prevalence of the status quo bias.¹⁶⁵ Individuals tend to systematically favor maintaining a current state of affairs—the status quo—rather than switching to some alternative state.¹⁶⁶ Second, stickiness may exist because proposing an opt out might send an undesirable signal to a contracting partner.¹⁶⁷ This is particularly true in situations where repeat interactions are likely or necessary and thus where relational norms may become as important or more important than legal norms in enforcing the arrangement.¹⁶⁸ Finally, defaults might be sticky because of network and learning benefits that arise because multiple parties are using and reusing a widely proliferated term.¹⁶⁹ Essentially, when a term gets regularly used by multiple parties, it may become a shorthand signifier of many complex norms because it is now a familiar and commercially standard part of transactions.

163. Ben-Shahar & Pottow, *supra* note 85, at 651 (emphasis in original).

164. *See, e.g., id.* at 651–52 (noting that the “stickiness” of defaults has been discussed in a number of contexts); *see generally* Korobkin, *supra* note 72; Johnston, *supra* note 66; Lisa Bernstein, *Social Norms and Default Rules Analysis*, 3 S. CAL. INTERDISC. L.J. 59 (1993); Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or “The Economics of Boilerplate”)*, 83 VA. L. REV. 713 (1997). The descriptions that follow are based largely on the taxonomy developed by Omri Ben-Shahar and John A.E. Pottow.

165. *See generally* Korobkin, *supra* note 72.

166. *See id.* at 625; *see also, e.g.,* Russell Korobkin, *Behavioral Economics, Contract Formation, and Contract Law*, in BEHAVIORAL LAW AND ECONOMICS 116 (Cass R. Sunstein ed., 2000) (discussing the status quo bias in contract negotiations).

167. *See* Bernstein, *supra* note 164, at 71–72; *see also, e.g.,* Johnston, *supra* note 66, at 626–27 (arguing that some defaults are stickier than others because proposing an opt out would reveal particularly sensitive information that might allow the contracting partner to expropriate a greater share of the contractual surplus).

168. Bernstein, *supra* note 164, at 70; *see also, e.g.,* Scott, *supra* note 59, at 1646 (“[W]here parties contemplate repeated interactions, neither party will breach an agreement if the expected gains from breaching are less than the expected returns from future transactions that breach would sacrifice.”); Avner Greif, *Informal Contract Enforcement: Lessons from Medieval Trade*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 287, 287–95 (Peter Newman ed., 1998) (describing how cultural and social standing impact self-enforcement).

169. *See, e.g.,* Kahan & Klausner, *supra* note 164, at 718–23.

Although all three explanations of stickiness may be persuasive, there are sound reasons to believe that none of them applies (or they only apply with substantially reduced force) to CISG defaults. With respect to the status quo bias, there is little reason for parties using the CISG to feel a strong attachment to the current state of affairs—the defaults. The altering rule provided by Article 6 gives the parties virtually unfettered discretion to opt in or out of the default set entirely and equally unfettered discretion to vary or derogate from any particular default.¹⁷⁰ Certainly, a distinction can and should be drawn between the stickiness of an altering rule and the underlying stickiness of the substantive default provisions, but when an altering rule expressly authorizes opt outs with few (or in the case of the CISG, essentially no) restrictions, it becomes less likely that any inherent stickiness in the underlying defaults matters. This is so because no CISG contracting party would have grounds to feel any strong entitlement to a particular CISG default. The status quo, in other words, is weak and easily alterable. It is reasonable to infer, then, that neither party would have a strong basis for preferring the default over other possible contract terms.¹⁷¹

Similarly, although the concern about sending an undesirable signal might obtain with respect to CISG defaults, the strength of any such signal would be weak because the status quo is weak. The CISG regime self-consciously places party autonomy and freedom at the center of its priorities. The fact that one party might propose an alteration of the CISG framework says little other than that the party is doing precisely what the Convention anticipates that parties will do—tailor the Convention to their particular transactional needs.

Finally, at least if my proposal that tribunals resist the temptation to harden default standards into default rules is adopted, there would be few network or learning benefits to be gained by sticking with the CISG defaults. Instead, parties that choose to stick with the defaults would be doing so precisely because they believe that inclusion of an open-textured standard that does not have *ex ante* content and detail will be more efficient than inclusion of a more specific and definite rule. Accordingly, sticking with the defaults would mean only that the parties were asking courts to engage in an *ex post* and case-by-case consideration of disputes, which would provide little benefit to future parties using the same set of defaults. Parties would therefore feel little compulsion to stick to the defaults—they

170. See discussion, *supra*, at notes 82-84.

171. Significantly, there is also little research to suggest that firms suffer from cognitive biases. To the contrary, it is likely that firms tend to correct for cognitive biases, due to market pressures, even if individuals in the firm suffer from them. See Schwartz & Scott, note 53, at 551.

would do so only if the defaults were sensible in the context of their particular transaction.

b. The Ex Ante Guidance and Potential Moral Hazard Problems with Default Standards

Professors Gillette and Scott, in their seminal article on the political economy of the CISG drafting process, have argued that “[t]he promulgation of many vague default terms [in the CISG] is inconsistent with the need to balance standards with rules.”¹⁷² According to them, it is better policy for sales law to provide definite default rules and allow the parties to contract around those defaults with vague standards when they so choose. They, in other words, maintain that “[c]ourts and statutory drafters . . . are wise to interpret the absence of vague standards in particular cases as instructions to limit their construction to the specific terms of the contract.”¹⁷³

In their view, vague or open-textured default rules in international sales law can adversely impact contracting costs in at least two ways:

First, contracting parties typically need specific guidance regarding their performance obligations. For example, a seller generally will want to know what quality level to produce in order to satisfy a contractual obligation. Telling that seller that its product must “at least satisfy the buyer’s ordinary purposes” is not a very helpful guide to satisfactory performance. . . .

[Second] [s]tandards can also increase the risk of moral hazard and the evasion of contractual responsibilities. When it is unclear what any party must do, contracting parties have an incentive to interpret ambiguous circumstances in their favor.¹⁷⁴

These two arguments derive from nearly identical ones that Professor Scott has made about default standards in domestic contract law.¹⁷⁵ According to Professor Scott, “standards give rise to a variety of undesirable effects and thus should be avoided [as defaults] as a matter of contract policy.”¹⁷⁶ These undesirable effects, as he makes clear in a footnote, are the same impacts that he and Professor Gillette refer to in the

172. Gillette & Scott, *supra* note 6, at 484.

173. *Id.* at 457.

174. *Id.* at 456–57.

175. See, e.g., Schwartz & Scott, *supra* note 53, at 601–05 (articulating the same two concerns regarding standards as defaults in domestic contract law).

176. Scott & Triantis, *Embedded Options*, *supra* note 68, at 1478.

context of standards as defaults in the CISG.¹⁷⁷ Indeed, more recently, Professor Scott has reaffirmed his skepticism of standards as defaults in domestic law, arguing that “both theory and the available empirical evidence suggest that commercial parties would prefer a regime in which equitable override of formal contract doctrine is invoked only if specifically requested at the time the parties form their agreement.”¹⁷⁸ Although Professor Scott’s skepticism of standards as defaults in domestic law is well founded, I maintain that it should not extend to the CISG.

With respect to the concern that standards as defaults fail to provide sufficient guidance to contracting parties, Professor Scott has conceded that “[p]arties that need specific guidance write detailed rules in their contracts.”¹⁷⁹ Thus, parties in need of specific guidance “commonly ignore,” or opt out of, default standards articulated in domestic sales law and draft their own terms.¹⁸⁰ Unless the defaults are sticky, then, it is not necessarily apparent why a default that fails to provide any particular contracting parties with sufficient guidance should be problematic. And, as discussed in the previous section, there are good reasons to believe that CISG defaults are not sticky.

Professor Scott has also argued that if default standards provide little guidance to most parties and most parties therefore opt out of the defaults and draft their own more illuminating rules, lawmakers are simply wasting resources when they create the defaults.¹⁸¹ While this argument makes good sense in the context of United States domestic law (and potentially other domestic law) where the lawmakers are frequently courts creating, modifying or extending common law rules and thus constantly in the process of lawmaking, it does not hold up as well in the context of the CISG. As an initial matter, the bulk of the lawmaking process with respect to the CISG is complete and thus most of the creation costs have already been expended. These creation costs are, in essence, sunk costs that can be ignored for purposes of deciding whether the now-existing legal regime should be used.¹⁸²

177. *See id.* at n.184.

178. Kraus & Scott, *supra* note 153, at 1028.

179. Schwartz & Scott, *supra* note 53, at 602.

180. *Id.*

181. *See id.* (“The state wastes drafting resources when it creates a standard that parties routinely reject.”); Gillette & Scott, *supra* note 6, at 457–58.

182. *See, e.g.,* EARL L. GRINOLS, MICROECONOMICS 241 (1994) (explaining that sunk costs are “costs that cannot be altered or avoided by current or future decisions” and thus should not be considered when weighing future choices).

Moreover, as has already been discussed, little empirical evidence exists demonstrating that parties are, in fact, “routinely” opting out of the CISG defaults.¹⁸³ Finally, even if they were, that fact alone would not necessarily undermine the framework of the CISG as a whole. To the contrary, the CISG’s robust commitment to freedom of contract—authorizing parties to opt out of specific, undesirable default provisions—may confer significant benefits on contracting parties when compared with more restrictive domestic sales law regimes.

With respect to the concern that standards as defaults increase the risk of moral hazard, Professors Gillette and Scott concede that contracting parties themselves often choose to incorporate into their contracts vague, open-texture terms requiring *ex post* specification.¹⁸⁴ “To be sure,” Professors Gillette and Scott point out, “commercial parties often include broad standards of reasonableness or effort in their contracts.”¹⁸⁵ Thus, they recognize that open-textured standards can and often do have value to parties. Professors Scott and Gillette suggest, however, that “[w]hen it is unclear what any party must do, contracting parties have an incentive to interpret ambiguous circumstances in their favor.”¹⁸⁶ They offer, as an example, a situation where the market price of a good dips below the contract price.¹⁸⁷ Under such circumstances, a buyer may have the incentive to claim that it has a reasonable basis for refusing to pay the contract price.¹⁸⁸ If the price term, in this hypothetical situation, is governed by a standard rather than a rule, then the buyer’s incentive to act opportunistically will be increased. Standards, in short, exacerbate the risk that one or both parties might act opportunistically. Standards only make sense, then, under particular conditions that are best identified by the parties themselves. Because of this serious concern, Professors Scott and Gillette suggest that standards only be incorporated into a contract if the parties expressly include them:

In any event, when these terms [standards] are useful, the parties can always include them in their contract at relatively low cost. Courts and statutory drafters, therefore,

183. As discussed previously, in footnote 160, there is some tentative evidence that parties opt out of the CISG as a whole under Article 6. While such evidence could be more damning, if true, it is far too threadbare to hold much weight.

184. Gillette & Scott, *supra* note 6, at 457.

185. *Id.*

186. *Id.*; see also Schwartz & Scott, *supra* note 53, at 602–04 (arguing that default standards exacerbate the risk of moral hazard).

187. See Gillette & Scott, *supra* note 6, at 457.

188. See *id.*

are wise to interpret the absence of vague standards in particular cases as instructions to limit their construction to the specific terms of the contract.¹⁸⁹

In this way, parties can precisely communicate their particular mix of rules and standards to a tribunal, and thus ensure that a standard only governs when “the party on whom it confers discretion is otherwise motivated to take both parties’ interests equally into account.”

Again, this argument mirrors, almost precisely, the same argument made by Professor Scott about domestic contract law.¹⁹⁰ But, unlike domestic law, the CISG diminishes the concern that default standards might increase the risk of moral hazard. As discussed in the previous section addressing the stickiness of defaults, unlike domestic defaults where parties might not know what precise wording will operate to exclude enforcement of a default, Article 6 of the CISG provides definitive authorization for parties to derogate from or vary any particular provision of the Convention. Thus parties can refer specifically to the relevant Convention Article and provision from which they wish to derogate and thereby delineate, with the clarity that Professors Scott and Gillette insist parties need, their optimal mix of rules and standards to ensure that a standard governs only when both parties’ interests are equally taken into account.

2. The Value of Open Textured Standards to Parties Might be Eroded if They Were Hardened into Rules

Open-textured standards, as the previous sections argue, can and often do have value to contracting parties. Notably, even commentators concerned with non-uniformity of interpretive outcomes under open-textured CISG provisions often come close to acknowledging that such provisions have value. For instance, one commentator complaining, in one breath, about the lack of uniform outcomes under the CISG, has, in another breath, recognized that, because the CISG was intended to apply “across the globe and in a wide variety of sale situations[,] . . . [i]t is vital that such an ambitious and broad document is open-textured and gives enough room to decision-makers to make it workable.”¹⁹¹ Whether these open-textured standards are incorporated into the contract because the parties have acquiesced to them as defaults or whether they are incorporated because the parties have specifically drafted them into the contract, opting out of more

189. *Id.*

190. Schwartz & Scott, *supra* note 53, at 602–05.

191. Notably, Nicholas Whittington, *Comment on Professor Schwenzer’s Paper*, 36 VICT. U. WELLINGTON L. REV. 809, 809–10 (2005).

definite rule-like defaults,¹⁹² they are an important part of efficient contract design.

This conclusion compels another: tribunals interpreting open-textured CISG provisions should not diminish the value that such provisions provide to parties by attempting to render them, under the guise of interpretation, more definite for future cases. Tribunals, in other words, should not try to convert open-textured standards into definite rules.¹⁹³ This is true even if the parties have the ability to freely contract out of the newly-hardened rules. It is no answer to contend that so long as the parties have such freedom it should make little difference to them whether a tribunal slowly adds definiteness to a formerly vague default rule because the parties can, at whatever point they find it efficient to do so, revise the slowly evolving rule-like default so that it is, once again, a vague standard requiring ex post specification. This is no answer because it assumes that ascertaining the current state of the evolution of the default is costless. Particularly in the context of the CISG, obtaining, translating and then interpreting CISG tribunal decisions from around the globe in order to determine the current state of CISG defaults would be far from costless. And, as Professors Gillette and Scott note, one of the key benefits to a uniform sales law is the “reduc[tion of] the costs to particular parties of learning about the legal consequences of any particular set of sales law rules.”

Specification, then, of sufficiently detailed standards to make sense of such vague, open-textured provisions should take place on a case-by-case basis. Tribunals need not look outside of the context of the specific parties’ agreement when specifying these standards nor should they develop factors or rules that can be applied in future cases. Indeed, the point of a vague, open-textured standard is to avoid such rigidity and allow tribunals to address contingencies with the full benefit of hindsight.

Formally, tribunals faced with hard cases involving intentionally vague provisions of the CISG should utilize Article 7(2) only insofar as it directs tribunals to consider one of the fundamental principles underlying the Convention: broad freedom of contract. This general principle, derived from Article 6, which provides the parties with virtually unfettered discretion to opt out of the Convention entirely or derogate from or vary its

192. *See* CISG, *supra* note 3, art. 6 (allowing the parties to exclude, derogate from or vary the effect of any provisions subject only to the constraints in Article 12).

193. Gillette & Scott, *supra* note 6, at 458–59. This benefit only exists so long as the sales law itself remains relatively constant. The gradual judicial hardening of intentionally soft default terms runs counter to the requirement that sales law remain predictable.

provisions,¹⁹⁴ requires tribunals to adhere to the parties' selection of contract provisions, including the parties' choice to acquiesce to open-textured defaults.

B. A Taxonomy of Hard CISG Cases Recognizing the Value of Open-Textured Standards

Having established the potential value of default standards to contracting parties, I now turn to the introduction of a taxonomy of hard CISG cases. This taxonomy recognizes the importance of default standards while conceding that some CISG provisions may, in fact, be framed as unclear rules in need of additional clarification by tribunals.

1. Matters Governed by but "Not Expressly Settled" in the CISG

As the standard view of Article 7(2) correctly recognizes, the first type of hard case under the CISG involves matters that are governed by but not expressly settled in the Convention.¹⁹⁵ The standard view, however, treats all gaps in this category the same, running them through what is conventionally viewed as a two-tiered interpretive methodology in Article 7(2) in order to plug them permanently.¹⁹⁶ This standard view fails to recognize that there are two distinct subcategories of hard cases involving matters governed by but not expressly settled in the CISG, each of which needs to be analyzed differently.

a. Open-Textured Standards

Many of the CISG's provisions are open-textured and allow application of contextual inputs such as trade usage or custom or past dealings between the parties. For example, the CISG does not precisely define "fundamental breach," a significant concept that impacts the availability of remedies.¹⁹⁷ The only explanation of the term, which appears in Article 25, raises as many questions as it answers. It provides in

194. See, e.g., HONNOLD, *supra* note 40, at 4 ("[T]he Convention . . . responds to the power of agreement . . . [It] does not interfere with the freedom of sellers and buyers to shape the terms of their transactions.").

195. See CISG, *supra* note 3, art. 7(2) (stating that general principles on which the CISG is based should guide its interpretation and if these do not exist then private international law).

196. See *supra* Part II.

197. The CISG, *supra* note 3, distinguishes between a general and a fundamental breach. While a general breach entitles the aggrieved party to claim damages, the party is only entitled to the remedies of contract avoidance or the delivery of substitute goods if he can prove that the breach is fundamental. With respect to buyer's remedies, see Article 49(1)(a), Article 51(1) & (2) (avoidance), and Article 46(2) (substitute delivery). With respect to seller's remedy, see Article 64(1)(a) (avoidance). With respect to common remedies, see Article 72(1), Article 73(1) & (2) (avoidance in case of anticipatory breach and installment contracts).

pertinent part that “[a] breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract.”¹⁹⁸ No express provision, however, explains what a detriment that substantially deprives a party of what they were entitled to expect might be.

Another example of an open-textured provision in the CISG is Article 39 and 43’s reference to “a reasonable time.”¹⁹⁹ Article 39 essentially deals with warranties of quality. Article 43 essentially deals with warranties of title. Both Articles provide, in pertinent part, that buyers cannot recover for breaches of these warranties if they “not give notice to the seller specifying the nature of the [lack of conformity or third party claim] within a reasonable time.”²⁰⁰ The CISG does not, however, define what constitutes a “reasonable time.”

Fundamental breach and reasonable time are not the only concepts that are left vague in the CISG. Professor Van Alstine has shown that in no fewer than thirty-one instances, the CISG “variously measures the parties’ conduct from the perspective of a ‘reasonable person,’ defines rights or obligations with reference to what is ‘reasonable’ or ‘unreasonable,’ [or] requires certain actions or notices within a ‘reasonable’ time.”²⁰¹

As the previous sections of this Article have argued, such open-textured standards may well provide value to contracting parties. Accordingly, these standards should not be hardened into rules through an accretion of CISG case law or decisional practice.

2. Unclear Rules

Although some vague provisions of the CISG are intended to serve as open-textured default standards, not all vague provisions fall into this category. Instead, some provisions of the CISG are vague or imprecise—unclear—rules. The CISG contains some unclear or vague rules for the reasons articulated by proponents of the more standard system of classifying CISG interpretation challenges. In many instances, unclear rules exist in the CISG because of compromises during the convention’s drafting.²⁰² As one commentator has noted, “[i]t is clear from the

198. CISG, *supra* note 3, art. 25.

199. CISG, *supra* note 3, arts. 39, 43.

200. CISG, *supra* note 3, arts. 39(1), 43(1).

201. *See, e.g.*, Van Alstine, *supra* note 101, at 751–52 (citing, among others CISG arts. 34, 35(2)(b), 37, 48(1), 60(a), 75, 77, 79(1), 79(4), 85, 86(1), 86(2), 87, 88(2), 88(3)).

202. *See, e.g.*, Cross, *supra* note 12, at 139.

Convention's drafting history that many of the vague and ambiguous terms that ended up in the CISG were the result of deliberate compromise."²⁰³

For instance, although Article 1(1) states that the CISG applies only to "contracts of sale of goods between parties whose places of business are in different states,"²⁰⁴ neither the term "sale" nor the term "goods" is defined by the CISG, except for exclusions of particular transactions.²⁰⁵ Unlike intentionally vague, open-textured default terms like "fundamental breach" discussed in the previous section, unclear rules—like ambiguity about what constitutes a good and thus triggers application of the CISG—must be formally specified for purposes of the pending case and for future cases.

Distinguishing, at the margins, between the terms in the CISG that are intentionally vague, and thus designed to be standards, and terms that are unclear rules may prove, of course, challenging. But recognizing the distinction is the first critical step. With respect to the former, as the previous section argues, tribunals should not engage the two-tier interpretive hierarchy of Article 7(2). Instead, they should heed the will of the parties and specify standards only contextually and provisionally. With respect to the latter, however, Article 7(2) sets out the interpretive approach that tribunals must take. In line with the conventional approach to CISG interpretation, tribunals, in this situation, should first look to the general principles of the CISG, interpreting the provision at issue autonomously to provide a fixed and durable rule. Only if the general principles, as viewed autonomously, do not provide an answer should a tribunal, under Article 7(2), turn to the domestic law applicable by virtue of the rules of private international law for assistance. In any event, however, tribunals, faced with imprecise or unclear rules, have an obligation to disambiguate those rules because contracting default rules are public goods (and in the context of the CISG, internationally shared public goods).²⁰⁶

C. Derogation or Variation of CISG Provisions by the Parties

The standard classification of hard CISG cases fails to account for a significant category of hard cases, those created by gaps formed when the parties exercise their freedom under Article 6 to derogate from or vary provisions of the CISG. As previously discussed, there are, in fact, few

203. *Id.* at 140.

204. *See* CISG, *supra* note 3, art. 1(1).

205. *See* CISG, *supra* note 3, art. 2 (excluding certain transactions from the scope of "sale"), art. 3 (excluding certain transactions in which the buyer supplies materials for goods or in which the "seller" primarily provides labor or services).

206. Goetz & Scott, *supra* note 49, at 276, 278; *see also, e.g.*, Gillette & Scott, *supra* note 6, at 447 (observing that "[s]ales law default rules thus are public goods" and citing Goetz & Scott).

limitations on this broad freedom of contract,²⁰⁷ so tribunals must account for the probability that parties may take advantage of this freedom in ways that can create two different types of hard cases.

1. Vague Standards

Sometimes, the parties may derogate from or vary the provisions in the CISG in ways that generate vague standards. For instance, parties might take an otherwise definite default rule, like Article 38(2)'s allowance that "examination [of goods] may be deferred until after the goods have arrived at their destination" if the contract provides for the carriage of the goods,²⁰⁸ and eliminate it altogether. In the instance of Article 38, this would leave subdivision (1) intact, which provides, in pertinent part, that "[t]he buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances."²⁰⁹ The result would be that the parties would have replaced a definite rule—the buyer could wait at least until the goods were transported to examine them. With an open-textured default, the buyer must examine the goods within a reasonable time, which under the particular circumstances could conceivably precede their carriage.

As discussed previously in section A(1), open-textured standards play a valuable role in contract law. Tribunals should not minimize or undermine the value gained by parties from incorporating vague standards into their contracts by attempting to transform those standards into fixed rules. This conclusion is warranted both when the parties simply opt into an open-textured default, as previously discussed, and certainly when the parties exercise their freedom under Article 6 to alter or derogate from an otherwise applicable CISG provision.

2. Creation of Unclear Rules

In some instances, parties may derogate from or vary provisions of the CISG under Article 6 in ways that unwittingly create unclear rules. For instance, the parties might decide to derogate from Article 33 altogether. Article 33 specifies three options for when a seller is obligated to deliver

207. The parties may not derogate from or vary the effect of Article 12, which essentially states that some member states may have made a declaration under Article 96 effectively requiring parties, in those member states or doing business in those member states, to evidence their contracts, modifications, or terminations with a writing. *See* CISG, *supra* note 3, art. 12. And, although the Convention does not expressly mention it, there are likely a few other provisions that the parties cannot derogate from—for example, public international law provisions contained in Articles 89-101. *See* Ferrari, *supra* note 76, at 19.

208. CISG, *supra* note 3, art. 38(2).

209. CISG, *supra* note 3, art. 38(1).

goods to the buyer.²¹⁰ First, the seller must deliver the goods on or by any date “fixed by or determinable from the contract.”²¹¹ If no such date can be ascertained, then the seller must deliver the goods within a reasonable time.²¹² Without Article 33, the seller’s obligation under Article 31, to deliver the goods at issue, is rendered unworkably vague. By eliminating Article 33, the parties, in this hypothetical, would have generated not an open-textured standard but an unclear or imprecise obligation.

When faced with situations where parties have exercised their freedom under Article 6 to create, presumably unwittingly, an unclear or imprecise obligation rather than an open-textured standard, tribunals should use the conventionally understood precepts of Article 7(2) to disambiguate the situation. In this respect, tribunals should address party-created unclear rules in the same manner as they address unclear rules existing independent of the parties’ actions.

D. Matters Falling Outside of the Scope of the CISG

Article 4 establishes the essential scope of the CISG, stating that “[t]his Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract.”²¹³ Article 4 goes on to point out that the Convention is not concerned with “the validity of the contract or of any of its provisions or of any usage” or “the effect which the contract may have on the property in the goods sold.”²¹⁴ Thus, as previously discussed, the CISG does not address unconscionability, capacity defenses, fraudulent inducement or the rights of a bona fide purchaser to goods that turn out to have been stolen.²¹⁵ It also carves out consumer transactions²¹⁶ or mixed contracts for the sale of goods and services where the services are the “preponderant part of the obligations of the party who furnishes the goods.”²¹⁷ Similarly, it does not apply to the sale of certain kinds of property, such as stocks, shares, investment securities, money, electricity or ships, vessels or aircraft.²¹⁸ The

210. CISG, *supra* note 3, art. 33.

211. CISG, *supra* note 3, arts. 33(a)-(b).

212. CISG, *supra* note 3, art. 33(c).

213. CISG, *supra* note 3, art. 4.

214. CISG, *supra* note 3, arts. 4(a)-(b).

215. *See supra* note 76.

216. CISG, *supra* note 3, art. 2(a).

217. CISG, *supra* note 3, art. 3(2).

218. *See CISG, supra* note 3, arts. 2(b)-(f).

Convention “does not apply to the liability of the seller for death or personal injury caused by the goods to any person.”²¹⁹

Ultimately then, it is clear that “the CISG does not govern all the legal questions which may arise in connection with an international sales transaction.”²²⁰ Nevertheless, the precise delineation of matters falling within the scope of the CISG (whether or not they are expressly settled in it)²²¹ or outside of the CISG’s coverage is difficult at best. As one commentator has pointed out:

The phrase “governs only” (formation, rights, and obligations) is too narrow and should be read as “governs without doubt,” for the Convention also governs interpretation of statements, conduct, and contracts (Article 8), the applicability of usage and customs (Article 9), (freedom of) form (Article 11 . . .), termination or modification of contracts by agreement (Article 29(1)), [as well as] interpretation of the Convention and gap filling²²²

Because the boundaries of the CISG are challenging to chart, hard cases may arise when tribunals are faced with matters that might or might not fall within the ambit of the Convention.²²³

CONCLUSION

CISG was formally uniform at the time of its adoption—it used the same words in all of the jurisdictions adopting it.²²⁴ But uniform words are not enough to guarantee uniform application. Indeed, to date, courts and commentators have reached divergent interpretive positions with respect to many of the CISG’s provisions. In the view of many commentators this situation poses a dire threat to the continued validity or efficacy of the Convention. Without greater uniformity of results, these commentators

219. CISG, *supra* note 3, art. 5.

220. Schlechthiem, *supra* note 44, at 64.

221. *See supra* Part II.A.

222. Schlechthiem, *supra* note 44, at 64.

223. Certainly, courts may also be faced with easy cases where one of the Convention’s express carve outs applies. In such cases, courts need only abide by Judge Easterbrook’s simple and universal rule—apply the carve out. *See* Easterbrook, *supra* note 2, at 61.

224. More precisely, the CISG was co-drafted, simultaneously, in six languages. *See* Steven Walt, *Novelty and the Risks of Uniform Sales Law*, 39 VA. J. INT’L L. 671, 676 (1999). This fact has caused some commentators to fear that inaccuracies and discrepancies might exist between the “official” texts of the CISG, not to mention between the “unofficial” texts produced in other languages, thus increasing the risks of inconsistent interpretive results. *See, e.g.,* Rose Kennedy, *Much Ado About Noting: Problems in the Legal Translation Industry*, 14 TEMP. INT’L & COMP. L.J. 423, 431 (2000) (“The lack of a controlling version among the CISG language versions is especially problematic, as some sections of some translations differ and thus would bring about inconsistent results.”).

argue, the CISG will, over time, fail to supply standard solutions to similar contracting problems and thus fail to supply the sort of predictability on which the Convention was premised.

I have argued, however, that these commentators start with an exaggerated expectation about the kind and degree of uniformity called for by the CISG. The conventional view about CISG interpretation, I contend, rests on a binary reading of Article 7(2) coupled with an insistence on autonomous interpretation in virtually all CISG hard cases. In so doing, it oversimplifies the classification of hard CISG cases and thus overlooks at least two significant categories of cases for which uniformity of outcomes is not an appropriate goal—situations in which a CISG default provision was cast by the drafters of the Convention as an open-textured standard and situations in which the parties have modified a CISG rule to make it an open-textured standard.

To rectify the shortcomings of the conventional view of CISG interpretation, I have proposed a more nuanced taxonomy of hard CISG cases. The real innovation of this proposed taxonomy is its recognition that the methodological uniformity called for in Article 7, combined with a proper regard for the structure of the Convention and its robust emphasis on freedom of contract, compels the conclusion that case-by-case differences in the interpretations of some provisions of the CISG are not only inevitable but may be necessary. Accordingly, this proposed taxonomy respects Article 7's mandate of uniformity of interpretive methodology while more accurately reflecting the substantive design of the Convention. It also helps, I suggest, to recalibrate expectations about uniformity, thereby establishing a framework for future work that can evaluate whether or not the remaining non-uniformity in CISG outcomes is significant enough to undermine the CISG as a whole.

In short, I believe that the CISG represents a remarkable achievement in the harmonization of international sales. While uniformity of outcomes in all hard CISG cases is, I believe, a quixotic goal, uniformity in the interpretive methodology of the CISG is not. The continued validity and efficacy of the Convention should not be impugned merely because tribunals respect the contractual wishes of the parties and render case-by-case decisions based on the particularized circumstances facing parties. These sorts of decisions are not only to be expected, but they are proper, given the open-textured nature of many of the Convention's default rules. So long as tribunals use a uniform method of *ex post* specification of these open-textured standards, I believe that there is hope that the Convention can continue to offer contracting parties a valuable framework for international sales.

