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Determining Party Intent**

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# Understanding Exclusion of the CISG: A New Paradigm of Determining Party Intent

WILLIAM P. JOHNSON†

## INTRODUCTION

The village market of old has become a global market today. The products we use or consume on a daily basis are produced all over the world. Asparagus grown in Peru, coffee beans harvested in Guatemala, shoes made in Italy, and Japanese automobiles are all readily available to consumers throughout the United States. Moreover, U.S. companies—even small U.S. companies—have their products manufactured in foreign jurisdictions where labor is cheap and the necessary raw materials are plentiful. And those U.S. companies who do manufacture their products in the United States nevertheless often obtain their parts, components, raw materials, and supplies from sources located outside the United States. In 2009 alone, the total value of imports into the United States of all merchandise—from computers, mobile phones, and Malbec wine to capital equipment, heavy machinery, and oil and gas—was a staggering \$1,559,624,813,477.00, more than one and a half *trillion* dollars.<sup>1</sup>

While the enormous volume of imports into the United States suggests that U.S. buyers must have a nearly insatiable appetite for foreign-produced merchandise, U.S. sellers certainly desire to get their piece of the foreign pie as

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1. See 2009 Imports from World of NAICS Total All Merchandise, INTERNATIONAL TRADE ADMINISTRATION, <http://tse.export.gov/TSE/TSEHome.aspx> (Click on “National Trade Data”; then click “Global Patterns of U.S. Merchandise Trade”; under “Product” click “Imports”; then click Go; in the blue bar click “View Data—Text Only”) (last visited Oct. 29, 2010). That staggering amount was actually down from the preceding four years. See *id.*

well by selling U.S.-produced merchandise in foreign markets. In fact, the total value of exports out of the United States of all merchandise in 2009 was \$1,056,042,963,028.00, more than one trillion dollars.<sup>2</sup> As barriers to trade continue to fall or shrink, trillions of dollars' worth of goods will continue to flow across international borders to and from all corners of the planet.

Side by side with this sleek, sophisticated global marketplace are complex bodies of law governing the transactions that allow the goods to flow, and those bodies of law are fraught with peril for the unsuspecting and the uninitiated: peril for U.S. lawyers who are not familiar with these laws that seem to emerge from the international ether as disputes erupt from their clients' cross-border arrangements; peril for their unsuspecting clients who price their goods based on assumptions that are grounded in U.S. law and U.S. experience but that ring hollow in international transactions; and peril for U.S. courts charged with the arduous task of rendering decisions in cross-border disputes draped with a tangled web of U.S. law, U.S. regulations, foreign law, foreign regulations, and international law.

One increasingly important body of law that governs certain international sale of goods transactions is the United Nations Convention on Contracts for the International Sale of Goods ("CISG").<sup>3</sup> The CISG is an international treaty that has been ratified by the United States and is part of U.S. law. It automatically applies to certain sale of goods transactions. But when it applies or more specifically how it can be excluded has befuddled U.S. courts for the CISG's entire history.

One source of confusion has been how to understand the effect of a choice-of-law clause when such a clause is included in the underlying international contract. By way of example, in *American Biophysics*, a recent decision by a

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2. See 2009 Exports from World of NAICS Total All Merchandise, INTERNATIONAL TRADE ADMINISTRATION, <http://tse.export.gov/TSE/TSEHome.aspx> (Click on "National Trade Data"; then click "Global Patterns of U.S. Merchandise Trade"; under "Product" click "Exports"; then click Go; in the blue bar click "View Data—Text Only") (last visited Oct. 29, 2010).

3. United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1983), 1489 U.N.T.S. 3 (entered into force Jan. 1, 1988) [hereinafter CISG].

federal court, the underlying written contract that led to the dispute included a choice-of-law clause providing that the parties' agreement was to be "construed and enforced in accordance with the laws of the state of Rhode Island."<sup>4</sup> The contract was silent on the CISG. The court concluded that the choice-of-law clause was sufficient to exclude application of the CISG.<sup>5</sup> That conclusion was incorrect. It simply is not the case that a choice-of-law clause by itself has the effect of excluding application of the CISG.

Nevertheless, there is a widespread and growing body of U.S. jurisprudence propagating imprecise and incorrect analysis of the CISG and its effective exclusion. Recently, a federal court in California carelessly stated that "[t]he CISG governs contracts for the sale of goods between parties whose places of business are in different nations, if the nations are Contracting States, *unless the subject contract contains a choice-of-law provision.*"<sup>6</sup> A clear understanding of the proper role of a choice-of-law clause in the analysis of exclusion of the CISG has therefore been elusive. Moreover, even those courts who have carefully analyzed the role of a choice-of-law clause have nevertheless often leapt to the erroneous conclusion that exclusion of the CISG must always be express.

Perhaps an even more difficult issue—virtually no U.S. court has been able to temporarily suspend its traditional notions of contract enforcement and interpretation to engage in the specific kind of analysis that is required by the CISG when determining whether parties to a contract that would be governed by the CISG intended to exclude its application. Specifically, even when there is a written contract with contents that suggest that the parties did not intend to exclude application of the CISG, the CISG requires courts to consider evidence outside the four corners of the written contract that could show that the parties nevertheless did intend to exclude application of the CISG.<sup>7</sup>

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4. *Am. Biophysics Corp. v. Dubois Marine Specialties*, 411 F. Supp. 2d 61, 62-64 (D.R.I. 2006).

5. *Id.* at 63.

6. *Golden Valley Grape Juice & Wine, LLC v. Centrisys Corp.*, No. CV F 09-1424 LJO GSA, 2010 WL 347897, at \*2 (E.D. Cal. Jan. 22, 2010) (emphasis added).

7. *See CISG, supra* note 3, art. 8.

This is an exercise that is squarely outside the American legal imagination and is likely to be culturally difficult for courts to embrace.

In the U.S. legal tradition, the statute of frauds requires certain agreements to be evidenced by a writing in order to be enforceable. But under the CISG, there is no requirement for agreements to be concluded in or evidenced by writing. On the contrary, under the CISG, contracts and their terms may be proved by any means, including by witnesses.<sup>8</sup>

Similarly, the parol evidence rule in the U.S. legal tradition gives written agreements and their contents a kind of primacy with respect to determining the intent of the parties. If there is a written agreement, then the parol evidence rule makes it difficult or impossible to introduce evidence of the parties' intent from outside the four corners of that agreement. Under the CISG, by contrast, courts are called upon to consider "all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties" to determine the parties' intent.<sup>9</sup> This exercise is anathema in the U.S. legal tradition.

These U.S. concepts, and the underlying emphasis on putting a final agreement into writing and deferring to that written agreement, are simply assumed by many U.S. practitioners and courts. The CISG requires a different approach, reflecting a different legal philosophy that tells us, whether correctly or incorrectly, that written agreements should be viewed with some skepticism. And if the parties' actual intent—which may be contrary to the objective manifestation of intent evidenced by the writing—can be determined, then the actual intent prevails over a contrary objective intent under the CISG.<sup>10</sup>

But U.S. courts have not recognized their obligation to engage in this kind of analysis when determining whether or not the parties to a written agreement that would be governed by the CISG intended to exclude the CISG. That failure can lead to misapplication of the supreme law of the

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8. *Id.* art. 11.

9. *Id.* art. 8(3).

10. *Id.* art. 8.

land, thereby eroding the rule of law established by the U.S. Constitution. A haphazard approach to the analysis of application and exclusion of the CISG also seriously undermines the ability of businesspersons to engage in international business transactions by making impossible their already difficult task of identifying performance obligations implied by law, remedies made available at law, and allocations of risk and responsibility established as defaults under the law. Misunderstanding and inconsistent application of potentially applicable law make it impossible to determine *ex ante* which body of law the court will choose to provide the answers to the relevant questions.

This Article seeks to bring understanding where there is misunderstanding regarding effective exclusion of the CISG, including with respect to (i) the role that a choice-of-law clause ought to play in the analysis and (ii) the obligation under the CISG to consider extrinsic evidence to determine the parties' actual intent. To achieve that goal, this Article primarily analyzes four related but distinct items: (1) the text of the CISG itself, (2) the *travaux préparatoires*, or drafting history, of the CISG, (3) the *American Biophysics* decision and the five cases cited as authority by the *American Biophysics* court to support its incorrect conclusion, and (4) illustrative reasoning of U.S. courts that have engaged in analysis, some sound and some faulty, of a variety of other issues under the CISG.

## I. BACKGROUND ON THE CISG

### A. *Adoption and Ratification*

The CISG is an international treaty aimed at providing uniform rules to govern contracts for the international sale of goods in order to, among other things, remove legal barriers in and promote development of international trade, an important element in the promotion of friendly relations among countries.<sup>11</sup> A draft of the CISG was prepared by the United Nations Commission on International Trade Law ("UNCITRAL"), and a diplomatic conference of plenipotentiaries consisting of representatives of sixty-two independent states, including the United States, was

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11. *Id.* pmb1.

convened in 1980 to consider the draft.<sup>12</sup> The CISG was adopted at the conference on April 10, 1980, and it was opened for signature on April 11, 1980.<sup>13</sup> The CISG was signed on behalf of the United States in 1981, and the U.S. Senate ratified the CISG in 1986.<sup>14</sup> The CISG entered into force on January 1, 1988, in accordance with Article 99, Section 1 of the CISG after ten countries, including the United States, had deposited with the United Nations their respective instruments of ratification of the CISG.<sup>15</sup>

### B. *Contracts Governed by the CISG*

Subject to certain exclusions, the CISG automatically applies to contracts for the sale of goods between parties whose “places of business” are in different countries<sup>16</sup> when

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12. United Nations Conference on Contracts for the International Sale of Goods, Vienna, Austria, Mar. 10—Apr. 11, 1980, *Final Act*, ¶¶ 1-3, U.N. Doc. A/CONF.97/18 (Apr. 11, 1980) [hereinafter *Final Act*], reprinted in United Nations Conference on Contracts for the International Sale of Goods, *Official Records*, U.N. Doc. A/CONF.97/19, at 176-77 (1991) [hereinafter *Official Records*]; see also 1 UN Convention on Contracts for the International Sale of Goods—Explanatory Note by UNCITRAL Secretary xxxix-xl (1980).

13. *Final Act*, *supra* note 12, ¶ 13, reprinted in *Official Records*, *supra* note 12, at 176-77.

14. See Dep’t of State Pub. Notice 1004, 52 Fed. Reg. 6262 (Mar. 2, 1987); see also United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary General, Chapter X: International Trade and Development, United Nations Convention on Contracts for the International Sale of Goods (Apr. 11, 1980), Status (last updated Jan. 11, 2010), available at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20X/X-10.en.pdf> [hereinafter *CISG Status*].

15. “This Convention enters into force . . . on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession . . .” CISG, *supra* note 3, art. 99(1).

16. Because companies engaging in international business often have more than one place of business, sometimes in different countries, one threshold question is how to identify which of each party’s places of business is relevant. The CISG provides some rules for determining the answer to that question. To identify the relevant places of business, neither the nationality of the parties nor the civil or commercial character of the parties or contract are to be taken into consideration. *Id.* art. 1(3). If a party has more than one place of business, then the place of business that is relevant for determining whether the CISG is applicable is the place of business that has the “closest relationship to the

the countries are “Contracting States,” or parties to the CISG.<sup>17</sup> In the typical cross-border sale of goods transaction, when the parties know the goods are crossing an international border, the CISG will usually govern the transaction, if the parties’ places of business that are most directly involved with the transaction are in countries that have ratified the CISG. Because there are currently seventy-six parties to the CISG,<sup>18</sup> including most of the major trading partners of the United States, the CISG is potentially relevant for a very large volume of international trade.

### C. Sales Contracts Not Governed by the CISG

Certain sales of goods are expressly excluded from application of the CISG, however. The CISG does not apply to sales of goods when the goods are purchased for personal, family, or household use (unless the seller did not know and ought not have known at any time prior to or at the conclusion of the contract that the goods were purchased for such use), and does not apply to sales of ships, vessels, hovercraft, or aircraft. All such sales are expressly excluded from the scope of the CISG.<sup>19</sup> Additionally, the CISG does

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contract and its performance.” *Id.* art. 10(a). But whether the parties “have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.” *Id.* art. 1(2).

17. *Id.* art. 1(1)(a). The CISG also applies to contracts of sale of goods between parties whose places of business are in different countries even when the countries are not Contracting States, if the “rules of private international law [would] lead to the application of the law of a Contracting State.” *Id.* art. 1(1)(b). However, the United States declared when it ratified the CISG that the United States would not be bound by paragraph 1(b) of Article 1, a declaration that Article 95 of the CISG specifically contemplates. Article 1(1)(b) is therefore inapplicable in the United States. *See* CISG Status, *supra* note 14, at 4. Finally, the term “Contracting States” refers to signatory countries that have ratified, accepted, or approved the CISG and non-signatory countries that have acceded to the CISG. *See* CISG, *supra* note 3, art. 91.

18. *See* CISG Status, *supra* note 14, at 1.

19. CISG, *supra* note 3, art. 2(a), (e). In that respect, the scope of the CISG is narrower than that of Article 2 of the Uniform Commercial Code [hereinafter UCC], which generally applies to all transactions in goods. *See* U.C.C. § 2-102 (2002). The UCC defines “goods” quite broadly and without significant carve-outs:



not apply to sales of goods when the sales are conducted in certain ways. This includes sales by auction and sales on execution or otherwise by authority of law, as well as sales of stocks, shares, investment securities, negotiable instruments or money, and electricity.<sup>20</sup> Finally, the CISG does not apply to certain mixed contracts for the sale of goods and services, including contracts for the supply of goods when the “party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production” of the goods, and contracts in which the “preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.”<sup>21</sup>

## II. EXCLUDING APPLICATION OF THE CISG

While there are numerous exclusions under the CISG, it nevertheless will apply to many international sales of goods when the parties have their places of business in different countries and those countries are parties to the CISG. However, even when the CISG would apply to a particular contract, the CISG permits the parties to the contract to choose to exclude application of the CISG.<sup>22</sup> The challenge is knowing how to understand and apply the provisions of the CISG that allow its exclusion—that is, what, if anything, are the parties required to do in order to exclude application of the CISG? And what are the parties permitted (but not

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“Goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. “Goods” also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

*Id.* § 2-105(1). Article 2 of the UCC has been adopted throughout the United States, other than by the State of Louisiana, and Article 2 of the UCC is therefore the primary domestic sales law in the United States. *See* Uniform Commercial Code Locator, CORNELL UNIVERSITY LAW SCHOOL—LEGAL INFORMATION INSTITUTE, <http://www.law.cornell.edu/uniform/ucc.html#a2> (last visited Dec. 17, 2010).

20. CISG, *supra* note 3, art. 2(b)-(d), (f).

21. *Id.* art. 3.

22. *Id.* art. 6.

necessarily required) to do in order to exclude application of the CISG?

A. *Confusing the Means of Exclusion*

The challenge of understanding and applying the CISG has led to apparent confusion regarding its effective exclusion. The confusion has arisen in part due to a misunderstanding by some U.S. courts of the relationship under the U.S. Constitution between the CISG and applicable state law. The confusion has arisen in part due to a lack of careful analysis by some U.S. courts of the text of the CISG and virtually no analysis by any U.S. court of the *travaux préparatoires* of the CISG.<sup>23</sup> This has been exacerbated by a bevy of imprecise statements of law in dicta by a relatively large number of U.S. courts. And all of the foregoing has led to incorrect conclusions by U.S. courts that the CISG did not apply when the CISG should have been the applicable body of law.

B. *The Text of the CISG and the Travaux Préparatoires*

Article 6, the article that specifically provides for exclusion of the CISG, offers little guidance regarding how parties to contracts that would be governed by the CISG are specifically to exclude its application. Article 6 simply provides that “[t]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.”<sup>24</sup> For that reason, it

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23. A treaty’s drafting history is relevant to confirm the text, context, object, and purpose of the treaty, and to resolve ambiguity, as well as to prevent a manifestly absurd or unjust result. See Vienna Convention on the Law of Treaties, arts. 31(1), 32, May 23, 1969, 1155 U.N.T.S. 331, 340. U.S. courts in particular are willing to use a treaty’s *travaux préparatoires* to interpret the treaty. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 reporters’ n.1 (1987) (“United States courts, accustomed to analyzing legislative materials, have not been hesitant to resort to *travaux préparatoires*.”).

24. CISG, *supra* note 3, art. 6. Article 12 of the CISG provides:

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a

is not surprising that courts encounter difficulties when analyzing exclusion of the CISG.

The potential for difficulty in understanding how to apply Article 6 was recognized by some of the plenipotentiaries who participated in the conference that was convened to consider the draft text of the CISG prepared by UNCITRAL. For example, Miss O'Flynn of the United Kingdom "considered that . . . the existing text of [Article 6] was open to more than one interpretation."<sup>25</sup> And Mr. Plunkett of Ireland "said that the existing text of [Article 6] could be interpreted in different ways."<sup>26</sup> As well, there was a view held by some that it would be helpful to clarify how parties to a contract for the sale of goods that would be governed by the CISG could exclude application of the CISG. In the opinion of Mr. Reishofer of Austria, for example, "it should be specified how parties might exclude application of the Convention or derogate from any of its provisions."<sup>27</sup> And several amendments to Article 6, discussed in Part II.C.ii, *infra*, were proposed in an apparent effort to add clarity and certainty.<sup>28</sup> But each was rejected or withdrawn.<sup>29</sup>

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declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

*Id.* art. 12.

25. *Summary Records of the First Committee, 4th Meeting*, ¶ 24, U.N. Doc. A/CONF.97/C.1/SR.4, (Mar. 13, 1980), [hereinafter *Summary Records—4th Meeting*], reprinted in *Official Records*, *supra* note 12, at 250. In the draft of the CISG considered by the conference, Article 6 of the CISG was submitted as Article 5. The final version of the text of that article as adopted by the conference remained unchanged from the version presented in the UNCITRAL draft, other than the numbering of the article, which was changed to Article 6. All references in the conference documents to the relevant article are therefore to Article 5. To avoid confusion, all references in this article to the relevant article are to Article 6, as it is numbered in the CISG as adopted.

26. *Id.* ¶ 21.

27. *Id.* ¶ 14.

28. "Amendments were submitted to [Article 6] by the United Kingdom (A/CONF.97/C.1/L.8), Canada (A/CONF.97/C.1/L.10), India (A/CONF.97/C.1/L.30), German Democratic Republic (A/CONF.97/C.1/L.32), Belgium (A/CONF.97/C.1/L.41), Pakistan (A/CONF.97/C.1/L.45) and Italy (A/CONF.97/C.1/L.58)." United Nations Conference on Contracts for the International Sale of Goods, Vienna, Austria, Mar. 8—Apr. 11, 1980, *Report of the First Committee*,

C. *Misunderstanding the Effect of a Choice-of-Law Clause*

When parties to a sale of goods contract take the time to memorialize their agreement in writing, those parties will sometimes include in their written agreement an express provision purporting specifically to exclude application of the CISG.<sup>30</sup> Under normal circumstances, it should be uncontroversial for a court to give effect to such a provision as an express, objective manifestation of the parties' actual intent.<sup>31</sup> However, written agreements are often silent with respect to the application of the CISG. This may be so even when the parties have included an express choice-of-law clause purporting to choose the laws of a particular jurisdiction to govern the agreement. When the parties include a choice-of-law clause, if the jurisdiction whose law is selected by the choice-of-law clause is a state within the United States or is a country that is a party to the CISG, then such a choice-of-law clause generally should not by itself have the effect of excluding the CISG when the CISG is otherwise applicable. This is so because the CISG *is* the law of the selected jurisdiction. And for jurisdictions within the United States, this is so as a matter of U.S. constitutional law.

1. *The Role of U.S. Constitutional Law.* The CISG is a treaty that was signed by the executive on behalf of the United States and was ratified by the U.S. Senate, all in accordance with Article II of the U.S. Constitution.<sup>32</sup> The

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art. 5, ¶ 2, U.N. Doc. A/CONF.97/11, (Apr. 7, 1980) [hereinafter *Report of the First Committee*], reprinted in *Official Records*, supra note 12, at 85.

29. *Id.* ¶¶ 5-8.

30. After identifying the body of law that the parties intend to govern their agreement, the parties might include a clause that looks something like the following, for example: "NEITHER THIS AGREEMENT NOR ANY SALE OF GOODS MADE BY SELLER TO BUYER DURING THE TERM OF THIS AGREEMENT WILL BE GOVERNED BY THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, THE APPLICATION OF WHICH IS HEREBY EXCLUDED BY THE PARTIES."

31. This will not necessarily always be the case, however, as discussed in Part VII.

32. Article II establishes the so-called treaty power: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . ." U.S. CONST. art. II, § 2, cl. 2.

CISG is therefore a treaty that was made under the authority of the United States. Under the U.S. Constitution, all treaties made under the authority of the United States are the supreme law of the land.<sup>33</sup> The CISG is therefore part of the supreme law of the United States. Moreover, the CISG is a self-executing treaty.<sup>34</sup> Because it is self-executing, the CISG requires no implementing legislation in order to become law within the United States; it automatically became law within the United States (and part of the supreme law of the land) upon its entry into force.<sup>35</sup>

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33. See *id.* art. VI. Article VI provides in relevant part:

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

*Id.*; see also RESTATEMENT, *supra* note 23, § 111(1) (“International law and international agreements of the United States are law of the United States and supreme over the law of the several States.”).

34. See Letter of Submittal from George P. Schultz, U.S. Sec’y of State, to Ronald Reagan, President of the United States of Am. (Aug. 30, 1983), in S. Treaty Doc. No. 98-9, at vi (1983) [hereinafter Letter of Submittal] (“The Convention is subject to ratification by signatory states (Article 91(2)), but is self-executing and thus requires no federal implementing legislation to come into force throughout the United States.”); see also *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F.3d 894, 897 (7th Cir. 2005) (“[The CISG is] a self-executing agreement between the United States and other signatories”); *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1027 (2d Cir. 1995) (“[The CISG is] a self-executing agreement between the United States and other signatories”). Several U.S. District Courts have recognized that the CISG is a self-executing treaty. See, e.g., *Electrocraft Ark., Inc. v. Super Elec. Motors, Ltd.*, No. 4:09cv00318 SWW, 2009 WL 5181854, at \*3-5 (E.D. Ark. Dec. 23, 2009); *Forestal Guarani, S.A. v. Daros Int’l, Inc.*, Civ. Action No. 03-4821 (JAG), 2008 WL 4560701, at \*2 n.4 (D.N.J. Oct. 8, 2008), *rev’d on other grounds*, 613 F.3d 395, 396 (3d Cir. 2010); *Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Group, L.L.C.*, Civ. No. 08-762 (DSD/SRN), 2008 WL 2690287, at \*1 n.1 (D. Minn. July 1, 2008), *vacated*, 613 F.3d 345 (3d Cir. 2010); *Sky Cast, Inc. v. Global Direct Distribution, LLC*, Civ. Action No. 07-161-JBT, 2008 WL 754734, at \*4 (E.D. Ky. Mar. 18, 2008); *Am. Mint LLC v. GOSoftware, Inc.*, No. Civ.A. 1:05-CV-650, 2006 WL 42090, at \*3 (M.D. Pa. Jan. 6, 2006); *Filanto, S.p.A. v. Chilewich Int’l Corp.*, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992).

35. See Letter of Submittal, *supra* note 34, at vi; see also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); RESTATEMENT, *supra* note 23, § 111(3).

This uncontroversial proposition has been recognized by U.S. courts. In reversing a district court's grant of summary judgment, the Ninth Circuit stated that, "because the President submitted the [CISG] to the Senate, which ratified it . . . there is no doubt that the [CISG] is valid and binding federal law."<sup>36</sup>

As part of the supreme law of the land, treaties made under the authority of the United States are binding on individual states.<sup>37</sup> And such treaties preempt state law.<sup>38</sup> Indeed, and perhaps even more important for this analysis, treaties made under the authority of the United States *are* state law.<sup>39</sup>

As a consequence, a choice-of-law clause expressly choosing the laws of the State of New York—or of any other jurisdiction within the United States—also chooses the CISG, if the CISG is applicable to the contract. This is so because the CISG is part of the law of the State of New

36. *Chateau des Charmes Wines Ltd. v. Sabaté USA Inc.*, 328 F.3d 528, 530 (9th Cir. 2003) (citing Dep't of State Pub. Notice 1004, 52 Fed. Reg. 6262 (Mar. 2, 1987); Letter of Transmittal from President Reagan to the Senate of the U.S. (Sept. 21, 1983), in S. Treaty Doc. No. 98-9, at iii (1983)); *see also Valero Mktg. & Supply Co. v. Greeni Oy*, 373 F. Supp. 2d 475, 479 n.7 (D.N.J. 2005), *rev'd on other grounds*, 242 F. App'x 840, 845 (3d Cir. 2007).

37. *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236 (1795) (holding that a treaty cannot be the supreme law of the land if any act of a state legislature stands in its way). In another decision, the U.S. Supreme Court held:

International law is a part of our law and as such is the law of all States of the Union, but it is a part of our law for the application of its own principles, and these are concerned with international rights and duties and not with domestic rights and duties.

*Skiriotes v. Florida*, 313 U.S. 69, 72-73 (1941) (citing *The Paquete Habana*, 175 U.S. 677 (1900)), *reh'g denied*, 313 U.S. 599 (1941).

38. *See* RESTATEMENT, *supra* note 23, § 111(1) & cmt. D (1987). Some U.S. courts have recognized the preemptive force specifically of the CISG. *See, e.g., Forestal Guarani*, 2008 WL 4560701, at \*2 n.4 (“[T]he CISG, a treaty of the United States, preempts state contract law and common law, to the extent that those causes of action fall within the scope of the CISG.”); *see also Valero Mktg. & Supply Co.*, 373 F. Supp. 2d at 479 n.7; *Usinor Industeel v. Leeco Steel Prods., Inc.*, 209 F. Supp. 2d 880, 884 (N.D. Ill. 2002); *Asante Techs., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1151-52 (N.D. Cal. 2001).

39. *See Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880) (“It must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. This is a fundamental principle in our system of complex national polity.”).

York and of every other state and territory within the United States. The Supremacy Clause of the U.S. Constitution therefore compels application of the CISG by U.S. courts when the CISG is applicable by its terms, including when the parties to a transaction have included an express choice-of-law clause choosing the laws of a particular state within the United States but have not excluded the CISG under Article 6 of the CISG.

A U.S. court, therefore, improperly usurps the role of the executive branch, acting with the advice and consent of the U.S. Senate, in the exercise of the Article II treaty power when a U.S. court ignores or misapplies an Article II treaty duly ratified by the United States. When the court, whether intentionally or not, usurps the role of the executive branch in its exercise of the treaty power, it undermines the separation of powers established by the U.S. Constitution.<sup>40</sup>

2. *Choice-of-Law Clauses and the Travaux Préparatoires.* Of course, the counterargument is that a U.S. court could conclude that a choice-of-law clause choosing the laws of a particular jurisdiction within the United States should be understood under Article 6 of the CISG to show intent to exclude application of the CISG. That is, even though the objective understanding of the choice-of-law clause is that it chooses the CISG when it chooses the law of a party to the CISG, perhaps the drafters of the CISG intended an express choice-of-law clause to have the effect of showing an implicit intent to exclude the CISG nevertheless. A careful review of the *travaux préparatoires* shows that that is not the case.

In fact, there was a small minority of representatives who took the view that inclusion in a contract of an express choice-of-law clause should have the automatic effect of excluding application of the CISG. Two amendments were

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40. An example of unnecessary and undesirable undermining of the constitutional separation of powers can be seen in a stray comment in *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992). In that case, which is one of the early decisions of a U.S. court engaging in analysis of the CISG, the court displayed a flash of parochialism in conducting a battle-of-the-forms analysis. *See id.* at 1238. The court, in considering a UCC argument, indicated that, "as previously noted," the UCC did not apply in that case because "the State Department undertook to fix something that was not broken by helping to create the [CISG]." *Id.*

proposed that would have changed Article 6 to provide that a choice-of-law clause would have that effect.<sup>41</sup> But the proposed amendments were overwhelmingly rejected.<sup>42</sup>

One of the two amendments was proposed by the Canada delegation.<sup>43</sup> The Canada delegation proposed revising Article 6 to add a second paragraph as follows: “A provision in the contract that the contract shall be governed by the law of the particular State shall be deemed sufficient to exclude the application of this Convention even where the law of the State incorporates the provisions of the Convention.”<sup>44</sup> In other words, if the amendment proposed by the Canada delegation had been adopted, inclusion of any choice-of-law clause not specifically selecting the CISG would have had the effect of excluding the CISG. But an overwhelming majority of the representatives who participated in the consideration of Article 6 unequivocally rejected the proposed amendment and the concept underlying it.<sup>45</sup>

Not surprisingly, the rejection of the proposed amendment was based in part on the principle that the CISG, upon ratification by a country, becomes part of the national laws of that country. According to Mr. Plantard of France, “when a State had the Convention ratified by its Parliament, it decided by the same action to incorporate the rules into its legal system.”<sup>46</sup> Similarly, Mr. Shafik of Egypt said that “the provisions of the Convention were incorporated in the national law of a contracting State.”<sup>47</sup> Ultimately, of more than forty delegates participating in the meetings of the First Committee, the conference committee charged with considering Article 6, only three delegates

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41. *Report of the First Committee*, *supra* note 28, ¶¶ 3(ii), (v), reprinted in *Official Records*, *supra* note 12, at 85-86.

42. *See id.* ¶ 6.

43. *See id.* ¶ 3(ii) (citing U.N. Doc. A/CONF.97/C.1/L.10).

44. *Id.*

45. *See id.* ¶ 6.

46. *Summary Records—4th Meeting*, *supra* note 25, ¶ 40, reprinted in *Official Records*, *supra* note 12, at 251.

47. *Id.* ¶ 35.



voted in favor of the amendment proposed by the Canada delegation.<sup>48</sup>

The Belgian delegation had also proposed a new paragraph in Article 6 providing that an express choice-of-law clause should have the effect of excluding the CISG: "The application of this Convention shall be excluded if the parties have stated that their contract is subject to a specific national law."<sup>49</sup> The Belgian proposal was considered at the same time as the Canada proposal and also was not adopted.<sup>50</sup> In fact, some of the vocal opposition to the proposed amendment was quite strong. Mr. Plantard of France indicated that, to the extent that the wording of Article 6 was unclear, he was prepared to support amending Article 6 by means of "any proposal *diametrically opposed* to the tenor of the amendment proposed by the Belgian delegation."<sup>51</sup> After the Canada amendment was roundly rejected, the Belgian delegation withdrew its proposed amendment.<sup>52</sup>

Thus, the drafters specifically considered proposals to amend Article 6 in a way that would have made inclusion in a contract of an express choice-of-law clause tantamount to an automatic exclusion of the CISG under Article 6, and they overwhelmingly rejected the notion. The *travaux préparatoires* therefore show that a choice-of-law clause should not have the effect of automatically excluding the CISG. Moreover, the understanding that is appropriate under the Supremacy Clause of the U.S. Constitution, that is, that a choice-of-law clause choosing the laws of a jurisdiction within the United States in fact chooses the CISG when the CISG is otherwise applicable by its terms, is the best understanding of the effect of a choice-of-law clause under the CISG as well.

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48. *Report of the First Committee, supra* note 28, ¶ 6, reprinted in *Official Records, supra* note 12, at 85-86.

49. *Id.* ¶ 3(v).

50. *Id.* ¶ 6.

51. *Summary Records—4th Meeting, supra* note 25, ¶ 41, reprinted in *Official Records, supra* note 12, at 251 (emphasis added).

52. *Report of the First Committee, supra* note 28, ¶ 6, reprinted in *Official Records, supra* note 12, at 86.

## III. THE APPROACH TAKEN BY U.S. COURTS

Few U.S. courts have carefully analyzed or squarely addressed the question of exclusion of the CISG.<sup>53</sup> More than one U.S. court has noted that there has been a relative paucity of U.S. case law interpreting and applying the CISG, though this is beginning to change.<sup>54</sup> In the rare instances when U.S. courts have addressed this issue, they have largely not engaged in careful analysis of the issue and instead have made casual statements in dicta regarding application or exclusion of the CISG. Those casual statements are often imprecise in a way that leads to misunderstanding of the application of the CISG and its effective exclusion.

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53. The lack of case law analyzing the CISG has been argued by at least one commentator to be a myth. See Lisa Spagnolo, *A Glimpse through the Kaleidoscope: Choices of Law and the CISG*, 13 VINDOBONA J. INT'L COM. L. & ARB. 135, 153 & n.81 (2009) (stating that scarcity of CISG case law is a misconception and pointing out that there are more than 2000 CISG cases on the Pace University CISG website). However, at least some U.S. courts—and therefore U.S. practitioners and their clients—are simply unlikely to rely on decisions of courts outside the United States. While that is arguably problematic, given the purposes of the CISG, it is nevertheless the case that the relevant reference point for such U.S. courts is the volume of U.S. case law analyzing the CISG.

54. Whether empirically accurate or not, the lack of U.S. case law interpreting and applying the CISG has routinely been noted by U.S. courts. See, e.g., *Miami Valley Paper, LLC v. Lebbing Eng'g & Consulting GmbH*, No. 1:05-CV-00702, 2009 WL 818618, at \*9 (S.D. Ohio Mar. 26, 2009) (acknowledging that the case law interpreting and applying the CISG is sparse); *Forestal Guarani, S.A. v. Daros Int'l, Inc.*, Civil Action No. 03-4821 (JAG), 2008 WL 4560701, at \*4 (D.N.J. Oct. 8, 2008), *rev'd on other grounds*, 613 F.3d 395, 396 (3d Cir. 2010) (“Although the CISG has been in force for nearly two decades, there still are few U.S. decisions interpreting the Convention.”). As noted, this is beginning to change. In 2009 alone there were thirteen opinions reported by U.S. courts that recognized the application or potential application of the CISG and/or that analyzed the CISG in some way, though most contained little analysis. See William P. Johnson, *U.N. Convention on Contracts for the International Sale of Goods, in International Commercial Transactions, Franchising, and Distribution*, 44 INT'L LAW. 238, 239-40 (2010). In 2010 alone, there were sixteen opinions reported by U.S. courts that contain some analysis or interpretation of the CISG.

## A. American Biophysics Corp. v. Dubois Marine Specialties

The clearest example of incorrect analysis of the effect of a choice-of-law clause on application of the CISG is a 2006 decision of a federal district court in *American Biophysics Corp. v. Dubois Marine Specialties*.<sup>55</sup> American Biophysics Corp. was a U.S. company with its principal place of business in Rhode Island, and Dubois Marine Specialties was a Canadian company with its principal place of business in Manitoba, Canada.<sup>56</sup> The parties entered into a written Non-Exclusive Distributorship Agreement under which Dubois agreed to purchase and resell products manufactured by American Biophysics.<sup>57</sup> Among other terms, the written agreement included a choice-of-law clause providing for the agreement to be “construed and enforced in accordance with the laws of Rhode Island.”<sup>58</sup> And it provided that the courts of Rhode Island were to have exclusive jurisdiction over all matters arising from the agreement.<sup>59</sup>

American Biophysics subsequently brought an action against Dubois for breach of their agreement or, in the alternative, for recovery on book account or for goods sold and delivered.<sup>60</sup> Dubois made a motion to dismiss based on *forum non conveniens* and lack of personal jurisdiction.<sup>61</sup> In support of its argument that the court lacked jurisdiction, Dubois argued that the forum selection clause should not be enforced.<sup>62</sup>

Dubois asserted that its agreement with American Biophysics was governed by the CISG in apparent support of its argument that the forum selection clause should not

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55. 411 F. Supp. 2d 61 (D.R.I. 2006).

56. *Id.* at 62.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 61-62.

61. *Id.* at 62.

62. *See id.* at 62-63.

be enforced.<sup>63</sup> However, the court concluded that the CISG was not applicable to the dispute.<sup>64</sup> The court reached that conclusion not because the agreement was something other than a “contract of sale of goods,” which might have been a supportable conclusion due to the distributorship nature of the agreement. Instead, the court reached its conclusion because the contract contained a choice-of-law clause.<sup>65</sup> And the court reached that conclusion despite specifically considering arguments made by Dubois that the CISG had not been excluded by the mere inclusion of a choice-of-law clause, reasoning as follows:

[I]t appears that the CISG is inapplicable. The CISG governs “contracts for the sale of goods where the parties have places of business in different nations, the nations are CISG signatories, and the contract *does not contain a choice of law provision.*” *Amco Ukrservice v. Am. Meter Co.*, 312 F. Supp. 2d 681, 686 (E.D. Pa. 2004) (emphasis added); see 15 U.S.C. App. at Art. 1(1)(a). More specifically, Chapter I, Article 6 of the CISG provides that: “The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.”

Here, as already noted, subsection 11(h) of the Agreement provides that the Agreement “shall be construed and enforced in accordance with the laws of the state of Rhode Island.” That provision is sufficient to exclude application of the CISG.<sup>66</sup>

The court was simply incorrect when it concluded that the choice-of-law clause choosing the laws of Rhode Island was sufficient to exclude application of the CISG; and the authority cited by the court does not support the court’s conclusion that the CISG did not apply to the contract. In reaching its conclusion, the court cited five federal court

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63. *Id.* at 63. It is unclear how application of the CISG would have precluded American Biophysics’ action from being heard in the Rhode Island court, a point Dubois apparently failed to address. *Id.*

64. *Id.*

65. *See id.*

66. *Id.* at 63 (citing *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 n.1 (2d Cir. 1995); *Viva Vino Imp. Corp. v. Farnese Vini S.r.l.*, No. CIV.A. 99-6384, 2000 WL 1224903, at \*1 (E.D. Pa. Aug. 29, 2000); *Fercus, S.R.L. v. Palazzo*, No 98 CIV. 7728 (NRB), 2000 WL 1118925, at \*3 (S.D.N.Y. Aug. 8, 2000); *Claudia v. Olivieri Footwear Ltd.*, No. 96 Civ. 8052(HB)(THK), 1998 WL 164824, at \*4 (S.D.N.Y. April 7, 1998)).

opinions, none of which held that mere inclusion of a choice-of-law clause would automatically operate to exclude application of the CISG. Rather, each of the cases cited by the court in *American Biophysics* offers an example of imprecision in language that has led to misapplication of the law.

B. *Authority Cited in American Biophysics: A Pattern of Imprecision*

1. *Delchi Carrier SpA v. Rotorex Corp.* A Second Circuit decision, *Delchi Carrier SpA v. Rotorex Corp.*,<sup>67</sup> is the earliest decision cited by the court in *American Biophysics*, and is one of the earliest decisions by a U.S. court analyzing the CISG. It is a case that has been misunderstood and improperly interpreted to stand for the proposition that an express choice-of-law clause has the effect of excluding the application of the CISG.<sup>68</sup> But a careful review of the case shows that it does not stand for that proposition.

The *Delchi Carrier* case arose out of a dispute between an Italian buyer and a New York seller of compressors.<sup>69</sup> In the court below, there was a bench trial that resulted in judgment in favor of the Italian buyer, Delchi Carrier SpA, in the amount of nearly two million dollars.<sup>70</sup> The seller, Rotorex Corporation, appealed, and Delchi cross-appealed the denial of certain damages.<sup>71</sup>

The district court held, and the parties agreed, that the matter was governed by the CISG.<sup>72</sup> Therefore, application of the CISG—and the effect on the analysis of the absence or inclusion of a choice-of-law clause—was not before the court. Nevertheless, the Second Circuit provided in dicta (and, notably, in general terms only) a description of when the CISG applies.<sup>73</sup>

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67. 71 F.3d 1024 (2d Cir. 1995).

68. See, e.g., *Schmitz-Werke GmbH & Co. v. Rockland Indus., Inc.*, 37 F. App'x 687, 691 (4th Cir. 2002).

69. 71 F.3d at 1026.

70. See *id.* at 1026.

71. *Id.* at 1027.

72. *Id.*

73. See *id.* at n.1.

The court began with the following: “Generally, the CISG governs sales contracts between parties from different signatory countries.”<sup>74</sup> Of course, even this general statement by the Second Circuit provides an example of the risks of relying on dicta for accurate and precise statements of law. Indeed, contrary to the court’s broad assertion, the CISG applies only to sale of goods contracts and not to all “sales contracts.”<sup>75</sup> Moreover, even some sale of goods contracts are specifically excluded from the sphere of application of the CISG.<sup>76</sup> But taken at face value and out of context, the first sentence of the court’s dicta could be interpreted to suggest that the CISG applies to all sales contracts—though such an interpretation would be an incorrect understanding of the sphere of application of the CISG, of course. And the court qualified its characterization of the sphere of application of the CISG with the introductory clause “[g]enerally,” which makes it clear that the court is not purporting to definitively identify the sphere of application of the CISG.

The court went on to state (correctly) that the CISG makes it clear that “the parties may by contract choose to be bound by a source of law other than the CISG, such as the Uniform Commercial Code.”<sup>77</sup> The court further noted that the agreement in this matter was silent as to choice of law and that when that is the case, the CISG applies if both parties are located in signatory nations: “If, as here, the agreement is silent as to choice of law, the Convention applies if both parties are located in signatory nations.”<sup>78</sup>

Unfortunately, while this characterization of the sphere of application of the CISG may be true as a general matter, the language is not precise, and the statement will not be accurate in every instance. The language is not precise to the extent that it suggests—though without explicitly asserting—that if an agreement is not silent as to choice of law, then the CISG would automatically be excluded and would therefore not apply. While that is not what the court

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74. *Id.*

75. “This Convention applies to contracts of sale of goods . . . .” CISG, *supra* note 3, art. 1(1) (emphasis added).

76. *See id.* arts. 2-3.

77. 71 F.3d at 1027 n.1 (citing CISG, *supra* note 3, art. 6).

78. *Id.* (citing CISG, *supra* note 3, art. 1).

stated in its dicta, it is precisely that converse inference that has caused the language to be used to improperly describe the effect of an express choice-of-law clause.

Furthermore, the language used by the Second Circuit in its dicta is not necessarily even going to be accurate in every instance. As is demonstrated in Part VI, *infra*, even when the agreement is silent as to choice of law—and is silent as to the application or exclusion of the CISG—the court might need to determine whether the parties intended nevertheless to exclude application of the CISG. While the parties' failure to do so explicitly could be evidence of their intent not to exclude application of the CISG, such failure should not be dispositive of the issue. That is, the CISG does not provide for exclusion to occur by any specific means, and it could be the case that the parties to the contract have excluded application of the CISG without having done so by express, written means.

In any event, inclusion of a choice-of-law clause, without more, does not show the parties' intent to exclude application of the CISG. In *Delchi Carrier*, the parties agreed that the CISG governed, and application of the CISG therefore did not require complicated analysis. But when application of the CISG is disputed, the analysis that is necessary or appropriate to resolve the dispute could be much more complex than the court's statements in dicta have been interpreted to suggest.

Perhaps recognizing that it was on shaky ground in its reliance on the *Delchi Carrier* decision, the court in *American Biophysics* cited additional authority to reach its conclusion regarding the effect of a choice-of-law clause on its analysis of the exclusion of the CISG.<sup>79</sup> But as the court had done with respect to *Delchi Carrier*, the court relied on imprecise statements included in dicta in the four other decisions as well.

2. *Claudia v. Olivieri Footwear Ltd.* The earliest district court decision on which the court in *American Biophysics* relied is *Claudia v. Olivieri Footwear Ltd.*<sup>80</sup> In that case, Calzaturificio Claudia s.n.c., an Italian seller of shoes, brought a claim against Olivieri Footwear Ltd., a U.S.

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79. See 411 F. Supp. 2d 61, 63 (D.R.I. 2006).

80. No. 96 Civ. 8052(HB)(THK), 1998 WL 164824 (S.D.N.Y. Apr. 7, 1998).

buyer, for nonpayment in breach of contract.<sup>81</sup> The parties had no formal written contract in place, but Claudia claimed that the parties had entered into thirteen transactions, and Claudia had prepared and submitted invoices in connection with the claimed transactions.<sup>82</sup>

Olivieri counterclaimed for breach of contract, claiming that Claudia failed to deliver certain goods, and that the goods that were delivered were either late or nonconforming.<sup>83</sup> Claudia moved for summary judgment on its breach of contract claim, and Olivieri opposed the motion.<sup>84</sup>

The court noted that to prevail on its motion, Claudia had to be able to show that there was no genuine issue of material fact regarding the terms of the parties' agreement, or concerning the parties' agreement to be bound by the terms of the invoices and Claudia's fulfillment of its obligations under the parties' agreement.<sup>85</sup> To analyze whether Claudia had demonstrated the foregoing, the court applied the CISG.<sup>86</sup>

The court concluded that the CISG governed the transactions between Claudia and Olivieri because the CISG governs contracts for the sale of goods when the parties have their respective places of business in different countries that are signatories to the CISG "absent a choice-of-law provision to the contrary."<sup>87</sup> The court further stated in dicta, "[a]s the contractual relationship between . . .

81. *Id.* at \*1.

82. *Id.*

83. *Id.*

84. *Id.* at \*1-2. Olivieri opposed the motion on the basis that there existed disputed issues of material fact, by arguing that there was no agreement between the parties; that even if there was an agreement between the parties, there was no agreement on the disputed delivery term; that, in any event, Olivieri did not receive the goods in question; and that Claudia had delayed performance and delivered nonconforming goods. *Id.* at \*2.

85. *Id.* at \*4.

86. *See id.* at \*4-7.

87. *Id.* at \*4 (citing CISG, *supra* note 3, art. 1(1)(a) ("When two foreign nations are signatories to this Convention, as are the United States and Italy, the Convention governs contracts for the sale of goods between parties whose places of business are in these different nations, absent a choice-of-law provision to the contrary.")).



[Claudia and Olivieri] did not provide for a choice of law, the CISG controls.”<sup>88</sup>

Like the dicta in *Delchi Carrier*, the language the *Claudia* court used to describe the effect of a choice-of-law clause is imprecise and has the potential to cause misunderstanding, which is precisely what appears to have happened with the court in *American Biophysics*. That is, there is a risk that where the court states that because the contract “did not provide for a choice of law, the CISG controls,” the court was also reasoning that if the parties had provided for choice of law by including a choice-of-law clause in their contract, then the CISG would not control, even though the court did not explicitly so hold, and even though that issue was not before the court.

For purposes of determining whether there was any issue of material fact with respect to the existence and terms of the contract between Claudia and Olivieri, however, the court in *Claudia* considered the effect of the lack of a writing requirement under the CISG.<sup>89</sup> And the method of analysis that the court used under the CISG could be used to determine whether the parties to a sale of goods contract intended to exclude application of the CISG. For example, the court noted that contracts governed by the CISG are “freed from the limits of the parol evidence rule” otherwise applicable under Article 2 of the UCC, allowing for a wider spectrum of admissible evidence to be considered in construing the terms of the parties’ agreement.<sup>90</sup> In fact, the court reasoned, the CISG’s lack of a writing

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88. *Id.*

89. *See id.* at \*5-6.

90. *Id.* at \*5 (citations omitted). The UCC’s parol evidence rule provides as follows:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented (a) by course of performance, course of dealing, or usage of trade (Section 1-303), and (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

U.C.C. § 2-202 (2002).

requirement would allow evidence even when the evidence contradicts the writing.<sup>91</sup>

Thus, the court in *Claudia* seemed to recognize that in order to apply the CISG faithfully and to resolve a disputed issue as to the terms of a contract governed by the CISG, which should include any dispute regarding whether the parties have excluded application of the CISG, the analysis is more complex than simply pointing to the existence of a choice-of-law clause. Unfortunately, the court in *American Biophysics* did not take note of that aspect of the *Claudia* decision.

3. *Fercus, S.R.L. v. Palazzo*. The court in *American Biophysics* also cited *Fercus, S.R.L. v. Palazzo*, an unpublished opinion of a federal district court.<sup>92</sup> *Fercus* arose out of a transaction involving the supply of shoes manufactured by an Italian shoe manufacturer, Fercus, S.R.L., and sent by Fercus to USA National Shoe Corp.<sup>93</sup> USA National Shoe was an affiliate of MP Shoes Corp., Fercus's exclusive sales representative for the United States and Canada.<sup>94</sup> The shoes were ultimately delivered to and accepted by Shonac Corp., a third-party buyer.<sup>95</sup> Fercus brought claims against each of the foregoing, as well as against Mario Palazzo, the owner of USA National Shoes and MP Shoes, and against DSW Shoe Warehouse, Inc., an affiliate of Shonac.<sup>96</sup>

Shonac and DSW moved for summary judgment on the claims brought against them.<sup>97</sup> Shonac argued that there

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91. *Claudia*, 1998 WL 164824, at \*5. Under the UCC's parol evidence rule, by contrast, whenever there is a written agreement that is intended to be final, the written agreement will exclude evidence of any previously agreed-upon terms (even those that are in writing) and of any terms agreed upon orally at the time of entry into the contract, if those extrinsic terms contradict the writing. This is the case even if the written agreement is found to be incomplete. See U.C.C. § 2-202.

92. No. 98 CIV. 7728(NRB), 2000 WL 1118925 (S.D.N.Y. Aug. 8, 2000).

93. *Id.* at \*1.

94. *See id.*

95. *Id.*

96. *See id.*

97. *Id.*

was never a contract between it and Fercus upon which Fercus could bring a breach of contract claim.<sup>98</sup>

In its consideration of Shonac's argument, the court launched into a strained statute-of-frauds analysis under Article 2 of the UCC.<sup>99</sup> Fercus argued that the CISG would govern its contract with Shonac, and the CISG contains no statute of frauds, so the statute of frauds should not have been relevant for formation of any contract between it and Shonac.<sup>100</sup> In response, the court concluded that it ultimately did not matter whether there was a contract between Fercus and Shonac; if there was no contract, then there could be no claim for breach, and if there was a contract, then the facts as alleged showed that Shonac was not in breach.<sup>101</sup> Therefore, whether the CISG applied was immaterial to the disposition of the motion before the court. Nevertheless, the court stated that "[t]he C.I.S.G. applies to any sale of goods when: (1) the contracting parties have places of business in different nations; (2) the nations are signatories to the [CISG]; and (3) the contract between the parties does not have a choice of law provision."<sup>102</sup>

Ultimately, the court granted Shonac and DSW's motion for summary judgment.<sup>103</sup> Strangely, the court in *Fercus* never addressed the question of contract formation under the CISG, even though it should have. Because Fercus's place of business was in Italy and Shonac's place of business

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98. *Id.* at \*2.

99. *See id.* at \*2-3.

100. *See id.* at \*3. Article 96 of the CISG permits a country that is a party to the CISG to declare essentially that a domestic statute of frauds prevails over Article 11. CISG, *supra* note 3, art. 96. Italy has not made such a declaration. *See* CISG Status, *supra* note 14.

101. *See Fercus*, 2000 WL 1118925 at \*3-4.

102. *Id.* at \*3 (citing *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 n.1 (2d Cir. 1995); CISG, *supra* note 3, art. 1(1)(a)).

103. The court granted Shonac and DSW's motion for summary judgment because Shonac paid for the shoes in accordance with payment instructions provided by Palazzo. *See id.* at \*1-6. Fercus submitted an invoice to Shonac which was never paid. *See id.* at \*1. Instead, Shonac paid for the shoes in accordance with payment instructions Shonac subsequently received from Palazzo. *Id.* If there was a contract between Shonac and Fercus at all, then it was due to actions of Fercus' agent, and Fercus' agent provided payment instructions that were followed by Shonac. *See id.* at \*3. Therefore, there was no claim for breach. *Id.*

was in the United States, both of which are—and were at the time—parties to the CISG, and because the contract, if there was one, was a contract of sale of goods (in this case, sales of shoes), and because none of the exceptions contained in Articles 2 and 3 of the CISG appear to have been applicable, Fercus was correct when Fercus argued that if there were a contract between it and Shonac, it would have been governed by the CISG. Because the contract would have been governed by the CISG, the court should have at least considered the possibility of formation of a contract under Articles 14 through 19 of the CISG.<sup>104</sup> Upon any finding that a contract had formed under the CISG, Fercus's claim for breach should have then been analyzed under the CISG.

The court's failure to analyze contract formation under the CISG is an example of a U.S. court potentially misapplying municipal law at the expense of the proper application of the CISG. In any event, the *Fercus* decision offers no independent authority for the conclusion reached by the *American Biophysics* court regarding exclusion of the CISG.

4. *Viva Vino Import Corp. v. Farnese Vini S.r.l.* The court in *American Biophysics* relied on dicta from *Viva Vino Import Corp. v. Farnese Vini S.r.l.*, another unpublished opinion of a federal district court.<sup>105</sup> The dispute in *Viva Vino* arose out of three alleged agreements between Farnese Vini S.r.l., an Italian wine producer and supplier, and Viva Vino Import Corporation, a U.S. company and distributor.<sup>106</sup> Viva Vino claimed breach of contract, promissory estoppel, unjust enrichment, and tortious interference with business relations.<sup>107</sup> Farnese counterclaimed for breach of contract.<sup>108</sup>

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104. For example, it is plausible that the order submitted by Shonac for Fercus shoes to Fercus' exclusive sales representative could have constituted an offer under Article 14, Section 1 of the CISG, which could have been accepted by Fercus pursuant to Article 18 of the CISG by means of its performance. See CISG, *supra* note 3, arts. 14(1), 18(3). In that event, the terms of the invoice should have been analyzed under the CISG, and Shonac's payment in accordance with the instructions from Palazzo should have been considered under the CISG as well.

105. No. CIV.A. 99-6384, 2000 WL 1224903 (E.D. Pa. Aug. 29, 2000).

106. *Id.* at \*1.

107. *Id.*

108. *Id.*

In this case, governing law was in dispute, and the focus of the opinion was to determine the appropriate body (or bodies) of law to apply to the claims.<sup>109</sup> Viva Vino argued that the CISG, Pennsylvania law, or both governed the claims.<sup>110</sup> Farnese argued that Italian law should apply.<sup>111</sup> The court analyzed whether the CISG applied to the claims sounding in contract and concluded that it did not apply.<sup>112</sup> The court reasoned that the contracts at issue, as distributorship agreements, did not cover sales of specific goods or contain definite terms regarding quantity and price and therefore were not contracts of sale of goods for purposes of the CISG.<sup>113</sup> Because the court concluded that the contracts at issue were not contracts of sale of goods for purposes of the CISG, there was no need to engage in any analysis regarding the effect of a choice-of-law clause on the applicability of the CISG. However, in reaching its conclusion, the court nevertheless casually noted in dicta that the CISG governs contracts for the sale of goods between parties whose places of business are in different nations that are signatories to the CISG “unless the contract contains a choice of law provision to the contrary.”<sup>114</sup>

This is another example of a court making an imprecise statement in dicta regarding the role of a choice-of-law clause when that issue was not before the court. In fact, the potential harm created by this imprecise statement is arguably greater than the potential harm created by the imprecise statements in *Delchi Carrier, Claudia*, and *Fercus*. That is, the clear implication of stating that the CISG governs a contract “*unless* the contract contains a choice of law provision to the contrary” is that if the contract contains a choice-of-law clause to the contrary, then the CISG necessarily does *not* govern that contract, which suggests a consequence of inclusion of a choice-of-law

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109. *See id.* at \*1-3.

110. *Id.* at \*1.

111. *Id.*

112. *See id.* at \*1-2.

113. *Id.* at \*2.

114. *Id.* at \*1 (citing *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 2d 1229, 1237 (S.D.N.Y. 1992)).

clause that is not supported by the text of the CISG and was never intended by its drafters.

Of course, the language of the court in *Viva Vino* begs the question: What would constitute a choice-of-law clause “to the contrary”? But the court offered no guidance regarding what, in the court’s view, would be enough for the choice-of-law clause to exclude application of the CISG or how the phrase “to the contrary” should be interpreted. A court could interpret the phrase choice-of-law clause “to the contrary” to mean only a choice-of-law clause that effectively excludes application of the CISG. Unfortunately, that is not what the court in *Viva Vino* actually stated, and that is not how the court in *American Biophysics* interpreted the phrase.

Ultimately, the court in *Viva Vino* applied Pennsylvania state law—and not the CISG—to all claims, on the grounds that none of the underlying agreements at issue in the dispute was a contract of sale of goods. For that reason, the CISG would not apply, whether it was excluded or not.<sup>115</sup> Therefore, exclusion of the CISG is never at issue in the *Viva Vino* decision, which presumably helps to explain why the analysis of application of the CISG is not carefully articulated.

5. *Amco Ukrservice v. American Meter Company*. Finally, the court in *American Biophysics* cited *Amco Ukrservice v. American Meter Co.*<sup>116</sup> The dispute in *Amco Ukrservice* arose out of two joint venture agreements.<sup>117</sup> The two joint venture entities began submitting orders for products which were to be supplied by American Meter pursuant to the joint venture agreements.<sup>118</sup> But American Meter subsequently stopped a shipment of goods that was

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115. *Id.* at \*1, \*3.

116. 312 F. Supp. 2d 681 (E.D. Pa. 2004).

117. *Id.* at 683. The first joint venture agreement created a joint venture entity called Prompriladamco and was entered into by and among four parties, including American Meter Company and a Ukrainian manufacturing company, Promprilad, for developing the market for American Meter’s gas meter products. *Id.* at 684. The second joint venture was entered into by American Meter and American-Ukrainian Business Consultants, L.P., one of the other shareholders of the first joint venture, for developing the Ukrainian market for the gas piping products of a wholly-owned subsidiary of American Meter. *Id.* at 685.

118. *Id.*

on its way to Ukraine and refused to extend credit to either joint venture entity, effectively terminating the joint ventures.<sup>119</sup> The joint venture entities filed parallel complaints, which were consolidated by the court, claiming that American Meter had breached the joint venture agreements by refusing to deliver the goods that the joint venture entities could sell in the applicable market.<sup>120</sup>

American Meter moved for summary judgment on the basis that the joint venture agreements were invalid under both the CISG and Ukrainian law.<sup>121</sup> After a careful and detailed analysis, the court concluded that the joint venture agreements were not governed by the CISG, reasoning that, although the CISG might have governed discrete contracts for the sale of goods entered into under either of the joint venture agreements, the CISG did not apply to the joint venture agreements themselves because they were not contracts of sale of goods.<sup>122</sup> Notwithstanding that ultimate conclusion, the court included in dicta the statement that the CISG “applies to contracts for the sale of goods where the parties have places of business in different nations, the nations are CISG signatories, *and the contract does not contain a choice of law provision.*”<sup>123</sup>

Thus, a careful review of each of the five decisions relied upon by *American Biophysics* shows that, in each case, the language cited by the court in *American Biophysics* is not part of the holding of the cited decision, and should not have been relied upon to support the court’s conclusion. Rather, the authority relied upon by the court in *American Biophysics* offers several examples of imprecise descriptions, in dicta, of the application of the CISG when the question of exclusion of the CISG by the parties was either not in dispute or had otherwise been rendered moot and, in any event, was not carefully analyzed by any court.

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119. *Id.*

120. *Id.*

121. *Id.* at 685-86.

122. *Id.* at 686-87.

123. *Id.* at 686 (citing *Fercus, S.R.L. v. Palazzo*, 2000 WL 1118925, at \*3) (S.D.N.Y. Aug. 8, 2000) (emphasis added).

C. *The Wake of American Biophysics: The Imprecision Continues*

In fact, the five decisions cited by the court in *American Biophysics* are not the only U.S. court decisions engaging in imprecision in a way that leads to misapplication in this area. On the contrary, imprecision with respect to the effect of a choice-of-law clause continues. Recently, in *Golden Valley Grape Juice & Wine, LLC v. Centrisys Corp.*, the court used imprecise language to refer to the effect of a choice-of-law clause and arguably misapplied California domestic law.<sup>124</sup>

The case arose out of a sale of a centrifuge by Centrisys Corporation, a Wisconsin corporation, to Golden Valley Grape Juice and Wine, LLC, a California limited liability company.<sup>125</sup> The centrifuge was manufactured by Separator Technology Solutions PTY Ltd. (“STS”), an Australian company.<sup>126</sup> Centrisys was operating as STS’s distributor.<sup>127</sup> The centrifuge sold by Centrisys to Golden Valley did not perform in accordance with its specifications.<sup>128</sup> Golden Valley notified Centrisys, and Golden Valley claimed that it had been assured by both Centrisys and STS that the defect would be cured.<sup>129</sup>

Later, Golden Valley sued Centrisys under their contract for sale of the centrifuge, and Centrisys filed a third party complaint against STS.<sup>130</sup> STS moved to dismiss the claim against it for change of venue pursuant to a forum selection clause that STS argued was part of its agreement with Centrisys.<sup>131</sup> The clause required disputes to be

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124. No. CV F 09-1424 LJO GSA, 2010 WL 347897, at \*1 (E.D. Cal. Jan. 22, 2010).

125. *Id.* at \*1.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *See id.*

131. *Id.*



resolved by litigation in Victoria, Australia or through arbitration, at STS's option.<sup>132</sup>

Centrisys argued that the forum selection clause was not part of the agreement because Centrisys never agreed to be bound by the STS document entitled "General Conditions" which contained the clause.<sup>133</sup> In order to analyze whether the "General Conditions" were part of the agreement between the parties, the court analyzed questions of contract formation under the CISG.<sup>134</sup>

To begin its analysis, the court made several statements about the CISG and its application. Among others, the court haphazardly stated that "[t]he CISG governs contracts for the sale of goods between parties whose places of business are in different nations, if the nations are Contracting States, unless the subject contract contains a choice-of-law provision."<sup>135</sup> Like the dicta in *Viva Vino*, this imprecise and inaccurate statement is even more misleading than the imprecise statements in most of the cases cited by *American Biophysics*. By stating that the CISG governs a contract "unless the subject contract contains a choice-of-law provision,"<sup>136</sup> the court seems to be stating that if the subject contract does contain a choice-of-law clause, then the CISG necessarily does not govern the contract. And unlike the language used in *Viva Vino*, this court appears to suggest that any choice-of-law clause would have that effect, not only a "choice of law provision to the contrary."<sup>137</sup>

After making its incorrect and misleading statement, the court then strangely stated that STS and Centrisys "acknowledge that the United States and Australia are signatories to the CISG" and that they "agree that their contract is governed by the CISG."<sup>138</sup> Remarkably, the court

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132. *Id.* The contract included the following clause: "Any dispute between the parties shall be finally settled in accordance with laws of Victoria (the jurisdiction shall be the State of Victoria) or through arbitration at STS P/L's option." *Id.*

133. *Id.*

134. *See id.* at \*4-5.

135. *Id.* at \*2 (citing CISG, *supra* note 3, arts. 1, 6).

136. *Id.* at \*2.

137. *Viva Vino Import Corp. v. Farnese Vini S.R.L.*, No. CIV.A. 99-6384, 2000 WL 1224903, at \*1 (E.D. Pa. Aug. 29, 2000).

138. *Golden Valley Grape Juice & Wine, LLC*, 2010 WL 347897 at \*3.

then reasoned that, “the CISG governs the substantive question of contract formation, including whether the forum selection clause was part of the parties’ agreement.”<sup>139</sup> And the court analyzed the contract between Centrisys and STS under the CISG, even though the contract contained a choice-of-law provision.<sup>140</sup> The court therefore applied the correct body of law, notwithstanding its incorrect statement that the CISG applies unless the contract contains a choice-of-law clause. And despite its imprecision, the court’s analysis under the CISG of contract formation is largely sound.<sup>141</sup>

Similarly, a federal district court in *Forestal Guarani, S.A. v. Daros International, Inc.*, despite exercising apparent care and ordering the parties to submit

139. *Id.*

140. *See id.* at \*2-5.

141. However, later in the opinion the court provides another example of imprecision that can lead to misapplication when analyzing Centrisys’ argument that, if the General Conditions were part of the agreement, a paragraph of the General Conditions dealing with allocation of risk of product liability claims ought to control the choice of forum. *Id.* at \*6-7. In rejecting Centrisys’ argument, the court applied California law, noting that the court was applying California law for purposes of the product liability issue, even though the court stated that “the General Conditions contain a choice-of-law provision in which Australian law is chosen” but that “Australian law has not been provided” to the court. *Id.* at \*7 n.3. Because the CISG was found by the court to apply to this dispute and to the contract, the court should have first looked to the CISG. The court might have ultimately concluded that the CISG was not the appropriate body of law to analyze Centrisys’ argument, due to Article 5 of the CISG, which provides: “This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.” CISG, *supra* note 3, art. 5. But the court should have done so explicitly. Then, it should have conducted an appropriate choice-of-law analysis to determine whether to apply to the claim California law, the laws of Victoria, or some other body of law.

Arguably, however, Centrisys’ argument was, at its heart, a question of contract interpretation and concerned the rights and obligations of the parties under their agreement (and, more specifically, under Paragraph 10 of the General Conditions). And in that respect, proper interpretation of the applicable contract terms would very much be governed by the CISG. *See* CISG, *supra* note 3, art. 4. In any event, the court’s terse statement that, “[f]or purposes of the ‘product liability’ issue only, the Court applies California law” because Australian law has not been provided to the court, appears to be an unprincipled and erroneous automatic application of the local law of the jurisdiction of the forum. *Golden Valley*, 2010 WL 347897 at \*7 n.3.

supplemental briefs addressing five questions of law regarding the CISG,<sup>142</sup> nevertheless described the application of the CISG and its exclusion imprecisely. The court stated that the CISG governs contracts for the sale of goods between parties whose places of business are in different nations that have ratified the CISG, but that such parties “may, nevertheless include an alternative choice of law provision.”<sup>143</sup> And the court continued that if the agreement is silent as to choice of law, then the CISG applies.<sup>144</sup>

It will usually be the case that silence will lead to application of the CISG (when the CISG is otherwise applicable by its terms), though not necessarily. But it is not the case that the inclusion of an alternative choice-of-law clause will automatically exclude the CISG, as could arguably be suggested by the court’s statement in dicta.

Finally, one federal court has gone so far as to cite favorably to the *American Biophysics* decision.<sup>145</sup> In considering a dispute between plaintiff Easom Automation Systems, Inc., a U.S. company, and defendant Thyssenkrupp Fabco, Corp., a Canadian company, which arose out of Easom’s agreement to design, fabricate and install a special machine for Thyssenkrupp, the court had to determine whether Easom could avail itself of a Michigan lien statute.<sup>146</sup> Thyssenkrupp argued that the Michigan lien statute was inapplicable because the contract was governed by Ontario law pursuant to a choice-of-law/choice-of-forum clause included in its purchase order, which, according to Thyssenkrupp, Easom had accepted.<sup>147</sup> Easom responded that the CISG, and not the domestic law of Ontario, was the applicable law, and that under the CISG, Easom’s terms (and not Thyssenkrupp’s) governed because Thyssenkrupp had orally accepted Easom’s terms.<sup>148</sup>

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142. Civ Action No. 03-4821 (JAG), 2008 WL 4560701, at \*1-2 (D.N.J. Oct. 8, 2008).

143. *Id.* at \*3 (citing CISG, *supra* note 3, art. 6).

144. *Id.*

145. *See* Easom Automation Sys., Inc. v. Thyssenkrupp Fabco, Corp., (Easom I), No. 06-14553, 2007 WL 2875256, at \*3 (E.D. Mich. Sept. 28, 2007).

146. *Id.* at \*1-2.

147. *Id.* at \*2.

148. *Id.*

The court analyzed the parties' respective arguments and began its analysis with consideration of the CISG and its applicability: "The CISG governs contracts for the sale of goods between parties whose places of business are in different nations, if the nations are Contracting States, unless the subject contract contains a choice-of-law provision."<sup>149</sup> Like the court in *Golden Valley*, the statement by this court is not only imprecise, it is inaccurate in that it clearly suggests that if the contract does contain a choice-of-law provision, the CISG automatically does not govern the contract. Nevertheless, the court strangely goes on to state that in order to opt out of the CISG, parties must do so expressly.<sup>150</sup> And the court concludes that because neither of the parties' respective order documents expressly indicated that the CISG did not apply, the CISG governed the transaction.<sup>151</sup>

Thus, the imprecision continues.<sup>152</sup> And, in some respects, it worsens. The imprecision of language in some decisions is especially vexing, given that the courts ultimately reach conclusions that are inconsistent with their statements. One obvious risk of this imprecise characterization of the role of a choice-of-law clause is that a court could ultimately apply the incorrect body of law to the dispute. In the United States, that generally means that the court will apply Article 2 of the UCC instead of applying the CISG. And while the CISG resembles in many ways Article 2 of the UCC, the CISG varies from Article 2 of the UCC in some very important ways. Differences between the CISG and UCC Article 2 lead to different results, sometimes of critical importance, which has been recognized by some courts and commentators.<sup>153</sup>

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149. *Id.* at \*3 (citing *Am. Biophysics Corp. v. Dubois Marine Specialties*, 411 F. Supp. 2d 61, 63-64 (D.R.I. 2006); CISG, *supra* note 3, arts. 1, 6).

150. *Id.* (citing CISG, *supra* note 3, art. 6). Express exclusion is not required for effective exclusion. *See infra* Part V.

151. *Easom I*, 2007 WL 2875256, at \*3.

152. *See Norfolk S. Ry. Co. v. Power Source Supply, Inc.*, Civ Action No. 06-58 J, 2008 WL 2884102, at \*2 (W.D. Pa. July 25, 2008) ("The Parties' documents are silent as to choice of law. This action is therefore governed by the [CISG]").

153. *See, e.g., Chateau des Charmes Wines Ltd. v. Sabaté USA Inc.*, 328 F.3d 528, 531 n.3 (9th Cir. 2003) (noting that the outcome under the CISG is different from the outcome that would likely have been appropriate under Article 2 of the UCC); *Miami Valley Paper, LLC v. Lebbing Eng'g & Consulting*

## IV. U.S. COURTS ENGAGING IN CAREFUL ANALYSIS

A. *Understanding the Effect of a Choice-of-Law Clause*

While there are many examples of U.S. courts that have been imprecise in their analysis of the CISG and its application or effective exclusion, some courts have been careful in their analysis of the effect of a choice-of-law clause on the CISG and its application. And several of these decisions were reported prior to the *American Biophysics* decision.<sup>154</sup> Yet, in conducting its analysis, the court in

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GmbH, No. 1:05-CV-00702, 2009 WL 818618, at \*4-5 (S.D. Ohio Mar. 26, 2009) (“There are several critical differences between the law governing contract formation under the CISG and the more familiar principles of the Uniform Commercial Code.”); Louis F. Del Duca & Patrick Del Duca, *Selected Topics Under the Convention on International Sale of Goods (CISG)*, 106 DICK L. REV. 205, 207 (2001); see also Barbara Berry, *S.A. de C.V. v. Ken M. Spooner Farms, Inc.*, 254 F. App’x 646, 647 (9th Cir. 2007) (reversing district court’s grant of summary judgment when the district court erred in failing to first analyze under the CISG the formation of the underlying contract).

154. See, e.g., *BP Oil Int’l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333, 337 (5th Cir. 2003) (concluding that the CISG is the law of Ecuador and that a choice-of-law clause selecting the laws of Ecuador merely confirms that the CISG governs the transaction), *as amended on denial of reh’g*; *Am. Mint LLC v. GOSoftware, Inc.*, No. Civ.A. 1:05-CV-650, 2006 WL 42090, at \*3 (M.D. Pa. Jan. 6, 2006) (concluding that an express choice-of-law clause choosing the laws of the State of Georgia but silent as to the application of the CISG would not have the effect of excluding the CISG); *Valero Mktg. & Supply Co. v. Greeni Oy*, 373 F. Supp. 2d 475, 482 (D.N.J. 2005) (concluding that inclusion in an oral agreement of a provision that New York law applied to the agreement did not exclude application of the CISG and that, under New York law, courts would apply the CISG by virtue of the Supremacy Clause of the U.S. Constitution), *rev’d on other grounds*, 242 F. App’x 840, 845 (3d Cir. 2007); *Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd.*, No. 01 C 5938, 2003 WL 223187, at \*3 (N.D. Ill. Jan. 30, 2003) (concluding that a choice-of-law clause choosing the laws of Ontario, Canada does not exclude the CISG); *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmbH*, No. 00 CIV. 9344(SHS), 2002 WL 465312, at \*3 (S.D.N.Y. Mar. 26, 2002) (recognizing that the CISG is an integral part of German law, and that when parties designate a choice-of-law clause in their contract selecting the law of a country that is a party to the CISG without excluding the CISG, the CISG is the law of the designated country); *Asante Technologies, Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001) (concluding that a choice-of-law clause choosing the law of British Columbia, Canada, chooses the CISG when it is applicable because the CISG is the law of British Columbia, and further concluding that a choice-of-law clause choosing the laws of California also would not exclude the CISG).

*American Biophysics* seems to have ignored the more careful analysis of the effect of a choice-of-law clause on the exclusion of the CISG that had been conducted by other federal courts. One such decision was the decision of the Fifth Circuit in *BP Oil International, Ltd. v. Empresa Estatal Petroleos de Ecuador*.<sup>155</sup>

In *BP Oil*, the dispute arose out of an agreement by which BP Oil International, Ltd. agreed to supply Empresa Estatal Petroleos de Ecuador (“PetroEcuador”), with 140,000 barrels of unleaded gasoline.<sup>156</sup> The agreement stated that the gasoline was required to have a gum content of less than three milligrams per one hundred milliliters, which was to be established at the port of departure.<sup>157</sup> BP Oil shipped the gasoline, but on arrival at the port of destination, the gum content exceeded the permitted limit.<sup>158</sup> PetroEcuador refused to accept delivery of the gasoline, and BP Oil sold it at a loss to a third party.<sup>159</sup> BP Oil then filed a claim in Texas against PetroEcuador.<sup>160</sup>

Applying Texas choice-of-law rules, the district court concluded that domestic Ecuadorian law was the appropriate substantive law to apply to the transaction, based on an apparent choice-of-law clause in the parties’ contract, which provided as follows: “Jurisdiction: Laws of the Republic of Ecuador.”<sup>161</sup> The district court held that under domestic Ecuadorian law, BP Oil was obligated to deliver conforming goods to Ecuador, the agreed-upon destination.<sup>162</sup> The district court granted summary judgment for PetroEcuador.<sup>163</sup>

BP Oil appealed, and the Fifth Circuit reversed the district court, stating that the district court was correct in determining that a federal court is normally to apply the choice-of-law rules of the state where it sits, but that the

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155. 332 F.3d 333 (5th Cir. 2003), *as amended on denial of reh’g*.

156. *Id.* at 335.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 335-36.

162. *Id.* at 335.

163. *Id.*

district court ignored its concurrent federal question jurisdiction that made a conflict-of-laws analysis unnecessary in this case.<sup>164</sup> Specifically, the federal question jurisdiction statute grants subject matter jurisdiction over all civil actions that arise under a U.S. treaty, including the CISG.<sup>165</sup> The Fifth Circuit recognized that the CISG generally applies to contracts for the sale of goods between parties whose places of business are in different countries when the countries are parties to the CISG, and further recognized that the United States and Ecuador have both ratified the CISG.<sup>166</sup> Therefore, the court concluded, “[a]s incorporated federal law, the CISG governs the dispute so long as the parties have not elected to exclude its application.”<sup>167</sup>

PetroEcuador argued that the choice-of-law provision demonstrated the parties’ intent to apply the domestic law of Ecuador, but the Fifth Circuit disagreed: “A signatory’s assent to the CISG necessarily incorporates the treaty as part of that nation’s domestic law. . . . Given that the CISG is Ecuadorian law, a choice of law provision designating Ecuadorian law merely confirms that the treaty governs the transaction.”<sup>168</sup> The court stated that when the CISG applies, if the parties “seek to apply a signatory’s domestic law in lieu of the CISG, they must affirmatively opt-out of the CISG.”<sup>169</sup> Thus, because the CISG is the law of Ecuador, the court held that the CISG governed the dispute.<sup>170</sup> In so holding, the court reasoned that an affirmative opt-out requirement promotes uniformity and the observance of good faith in international trade, two principles that guide interpretation of the CISG.<sup>171</sup>

Similarly, in *Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd.*, the court analyzed the effect on the applicability of the CISG of a choice-of-law clause choosing

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164. *Id.* at 334-36.

165. *Id.* at 336.

166. *Id.* (citing CISG, *supra* note 3, art. 1(1)(a)).

167. *Id.* at 337 (citing CISG, *supra* note 3, art. 6).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* (citing CISG, *supra* note 3, art. 1(1)(a)).

the law of Ontario.<sup>172</sup> The case arose out of the sale by Can-Eng, a Canadian corporation, to Ajax, a U.S. corporation, of a fluidized bed furnace.<sup>173</sup> In response to a request for proposal, Can-Eng prepared four proposals to sell to Ajax a fluidized bed furnace.<sup>174</sup> Ajax rejected the first three proposals and accepted the fourth, and the terms of the fourth proposal formed the parties' contract.<sup>175</sup> Among other terms, the contract provided that it was to be governed by "the laws of the Province of Ontario, Canada."<sup>176</sup>

Can-Eng shipped the furnace to Ajax, and Ajax experienced problems with the furnace over the next four years, which eventually led to Ajax's claims.<sup>177</sup> Ajax filed a complaint alleging breach of warranty and breach of contract.<sup>178</sup> Can-Eng moved for summary judgment.<sup>179</sup>

The court recognized a threshold question that required an answer before analysis of the merits of the claim—what body of law governed the contract and the dispute?<sup>180</sup> The court noted that the United States and Canada have each adopted the CISG, that the CISG's purpose is "to provide for the orderly conduct of international commerce," and that the CISG applies to contracts of sale of goods between parties whose places of business are in different countries when the countries are parties to the CISG.<sup>181</sup> The court further noted that the parties may exclude application of the CISG by "expressly providing in the contract that the law of a non-CISG jurisdiction applies or that the CISG does not control."<sup>182</sup> And the court concluded that the CISG would

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172. No. 01 C 5938, 2003 WL 223187, at \*2-3 (N.D. Ill. Jan. 30, 2003).

173. *Id.* at \*1.

174. *Id.*

175. *Id.*

176. *Id.*

177. *See id.* at \*1-2.

178. *Id.* at \*1.

179. *Id.*

180. *Id.* at \*2.

181. *Id.* (quoting CISG, *supra* note 3, art. 1(1)(a)).

182. *Id.* at \*2 (citing CISG, *supra* note 3, art. 6).



apply to the contract between Can-Eng and Ajax unless the parties had opted out of it.<sup>183</sup>

With respect to the choice-of-law clause, the court concluded that it “[o]bviously” did not exclude the CISG “because the CISG is the law of Ontario.”<sup>184</sup> The court then applied the CISG to analyze Can-Eng’s motion for summary judgment.<sup>185</sup>

Ultimately, the court concluded that there were genuine issues of material fact regarding whether Can-Eng breached its warranty and whether its limited warranty terms had been waived, irrespective of the body of law that was applicable, making summary judgment inappropriate.<sup>186</sup> Because there were no facts in dispute regarding limitations on Can-Eng’s liability for certain damages, the court granted Can-Eng’s motion for summary judgment in part.<sup>187</sup>

The court’s analysis therefore appears to be correct with respect to the effect of a choice-of-law clause in a written agreement that is silent on the applicability of the CISG. That is, the court correctly concluded that a choice-of-law clause that simply chooses the laws of a jurisdiction that is a party to the CISG does not by itself exclude the CISG.<sup>188</sup>

#### B. *When Choice of Law Can Exclude the CISG: Selection of Domestic Law*

One of the earliest decisions by a U.S. court that squarely addresses the issue of the effect of a choice-of-law clause on the court’s analysis of the applicability of the CISG is *Asante Technologies, Inc. v. PMC-Sierra, Inc.*<sup>189</sup> Unlike *BP Oil* and *Ajax*, however, in *Asante Technologies*, there was no agreed-upon choice-of-law clause in a signed agreement, because there was no signed agreement.<sup>190</sup>

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183. *Id.* at \*3.

184. *Id.*

185. *See id.* at \*3-6.

186. *Id.* at \*4-5.

187. *Id.* at \*6-7.

188. *See id.* at \*3.

189. 164 F. Supp. 2d 1142 (N.D. Cal. 2001).

190. *See id.* at 1145.

Instead, there was a battle of the forms.<sup>191</sup> Both parties sent forms that included choice-of-law clauses, and the court considered the effect of that exchange of forms—and the forms’ respective choice-of-law clauses—on the exclusion of the CISG.<sup>192</sup>

The case arose out of a dispute involving the sale of electronic components by a Delaware corporation with its headquarters and places of business in British Columbia, Canada, to a Delaware corporation with its place of business in California.<sup>193</sup> The buyer, Asante Technologies, Inc., argued that its standard terms and conditions of purchase governed, which included a choice-of-law clause providing that the validity and performance of the purchase order was to be governed by the laws of the state shown as part of the buyer’s address on the order—California.<sup>194</sup> The seller’s standard terms and conditions of sale provided for the laws of the Province of British Columbia to govern.<sup>195</sup>

The seller, PMC-Sierra, Inc., took the position that the agreement between the parties was governed by the CISG.<sup>196</sup> Asante argued that because both parties included a choice-of-law clause in their respective standard forms, the parties showed their mutual intent to opt out of the CISG.<sup>197</sup> The court concluded that the choice-of-law clauses included in the respective standard forms were inadequate to opt out of the CISG.<sup>198</sup>

The court reasoned that “selection of a particular choice of law, such as the ‘California Commercial Code’ or the ‘Uniform Commercial Code,’ could amount to implied exclusion of the CISG.”<sup>199</sup> But here the choice-of-law clauses

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191. *See id.* at 1145-46.

192. *See id.* at 1149-50.

193. *Id.* at 1144-45.

194. *Id.* at 1145.

195. *Id.*

196. *Id.* at 1147.

197. *Id.* at 1149.

198. *Id.* at 1150.

199. *Id.*

at issue did not “evince a clear intent to opt out of the CISG.”<sup>200</sup>

In other words, even a choice-of-law clause expressly choosing the UCC (but presumably silent as to the role of the CISG) would not automatically have the effect of excluding the CISG. Such a choice-of-law clause might provide evidence of the parties’ mutual intent to exclude application of the CISG under Article 6, and it appears that the court in *Asante Technologies* would consider such evidence in its analysis. But inclusion of such a choice of law would not be dispositive, the court’s reasoning suggests.

### C. *Selection of Domestic Law and the Travaux Préparatoires*

This understanding of Article 6 of the CISG is the best understanding of Article 6, and it is supported by the *travaux préparatoires*. When rejecting the amendments proposed by the Belgian and Canadian delegations,<sup>201</sup> some of the representatives indicated that the only way a choice-of-law clause could be understood to have the effect of excluding the CISG would be to choose specifically some named, domestic body of law. “Mr. Boggiano (Argentina) said that, when the parties subjected their contract to a national law, the application of the Convention should be excluded only if they referred explicitly to the law on domestic sales.”<sup>202</sup> Similarly, Mr. Rognlien of Norway said that the Belgian proposal could be interpreted to be consistent with the CISG if the Belgian proposal were interpreted to mean that a choice-of-law clause would have the effect of excluding the CISG if the parties chose the municipal law of a contracting state “by referring to the title of such a law.”<sup>203</sup> Such a choice-of-law clause would offer

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200. *Id.*

201. See *Report of the First Committee*, *supra* note 28, ¶¶ 3(ii), (v), reprinted in *Official Records*, *supra* note 12, at 86.

202. *Summary Records—4th Meeting*, *supra* note 25, ¶ 42, reprinted in *Official Records*, *supra* note 12, at 248-51.

203. *Id.* ¶ 38; see *Doolim Corp. v. R Doll, LLC*, No. 08 Civ. 1587(BSJ)(HBP), 2009 WL 1514913 (S.D.N.Y. May 29, 2009). The court in *Doolim* concluded that the CISG applied to a contract, which the court found to be a contract of sale of goods within the meaning of the CISG, between a seller with its place of business in South Korea and a buyer with its place of business in the United

evidence of the parties' intent for the selected, specifically named, municipal law to prevail over the CISG. And the court in *Asante Technologies* astutely recognized that possibility.

Ultimately, the court in *Asante Technologies* concluded that the CISG was applicable, notwithstanding the choice-of-law clauses.<sup>204</sup> The court then continued with a detailed and scrupulous analysis of preemption, concluding that the CISG preempts state contract law "to the extent that the state causes of action fall within the scope of the CISG."<sup>205</sup>

#### D. Good Analysis by U.S. Courts in the Wake of American Biophysics

Not all decisions by U.S. courts following *American Biophysics* have imprecisely or incorrectly analyzed the effect of a choice-of-law clause on exclusion of the CISG. The federal district court in Michigan that issued the *Easom* decision, discussed in Part IV.C, *supra*, issued a subsequent decision upon rehearing the motion at issue in the first *Easom* decision.<sup>206</sup> Ironically, while the first *Easom* decision offers an example of a court using imprecise language (and citing favorably to *American Biophysics*), the second *Easom* decision reflects a marginally more refined approach to the analysis of application of the CISG.

The matter was before the court on Easom Automation Systems, Inc.'s motion for rehearing or reconsideration of the court's original order denying Easom's original motion for immediate repossession of the system it sold to Thyssenkrupp Fabco Corp.<sup>207</sup> Whereas in the first *Easom*

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States when none of the CISG exceptions to applicability applied. *Id.* at \*5. In its analysis, the court cited *Delchi Carrier*, noting by parenthetical that the CISG applies if the agreement is silent as to choice of law and both parties are located in signatory nations "unless parties have 'by contract choose[n] [sic] to be bound by a source of law other than the CISG, such as the Uniform Commercial Code.'" *Id.* (quoting *Delchi Carrier S.p.A. v. Rotorex Corp.*, 71 F.3d 1024, 1027 n.1 (2d Cir. 1995)).

204. *Asante*, 164 F. Supp. 2d at 1150.

205. *Id.* at 1152.

206. See *Easom Automation Sys., Inc. v. Thyssenkrupp Fabco, Corp.*, (Easom II), No. 06-14553, 2008 WL 1901236, at \*1, 2 (E.D. Mich. Apr. 25, 2008).

207. *Id.* at \*1.

decision the court imprecisely described the role that a choice-of-law clause plays in the analysis of exclusion of the CISG,<sup>208</sup> in the second *Easom* decision there is no reference to the role a choice-of-law clause plays (and the court does not cite to *American Biophysics*), even though the court engages in essentially the same analysis as it had in the first *Easom* decision.<sup>209</sup>

Additionally, in *Travelers Property Casualty Co. of America v. Saint-Gobain Technical Fabrics Canada Ltd.*, a federal district court specifically rejected the holding in *American Biophysics*.<sup>210</sup> The dispute in *Travelers Property* arose out of a series of arrangements that were entered into in connection with the construction of the exterior wall of a large, multi-purpose arena.<sup>211</sup> The specific supply arrangement at issue was entered into by TEC Specialty Products, Inc., a U.S. company and a components supplier for the project, and Saint-Gobain Technical Fabrics Canada Ltd., a Canadian company and a supplier to TEC.<sup>212</sup> Specifically, Saint-Gobain supplied TEC with mesh for the exterior wall, which TEC ordered with a purchase order containing TEC's general terms and conditions of purchase.<sup>213</sup> Saint-Gobain shipped the mesh and on the same day, sent an invoice containing Saint-Gobain's general terms and conditions of sale.<sup>214</sup> Thus, the parties engaged in a classic battle of the forms.

After construction was completed, portions of the arena's wall lamina debonded, which necessitated repairs and led to litigation.<sup>215</sup> There were multiple claims filed, but at issue in this case was a claim filed against Saint-Gobain

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208. See *Easom I*, 2007 WL 2875256 at \*3.

209. See *Easom II*, 2008 WL 1901236 at \*2. Nevertheless, the court also suggested that the CISG can only be excluded expressly, which is also not accurate, as discussed in Part VI.

210. 474 F. Supp. 2d 1075, 1081-82 (D. Minn. 2007).

211. *Id.* at 1077.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 1078.

that alleged that the mesh from Saint-Gobain was defective and caused the debonding.<sup>216</sup>

The case involved a complex procedural history.<sup>217</sup> Among other motions, the plaintiffs moved for partial summary judgment, asking the court to find as a matter of law that certain terms of the TEC general terms and conditions of purchase were part of the contract between TEC and Saint-Gobain.<sup>218</sup> Saint-Gobain argued that, under Article 2 of the UCC, the relevant terms in TEC's purchase order were "knocked out" of the contract between the parties by means of the corresponding terms in Saint-Gobain's terms and conditions of sale.<sup>219</sup> But the plaintiffs argued that the CISG, and not the UCC, was the applicable body of law governing contract formation issues in the case, and the plaintiffs argued that the CISG would lead to the conclusion that the TEC terms and conditions were part of the contract between the parties.<sup>220</sup>

Saint-Gobain argued that a choice-of-law provision in TEC's purchase order that specified that Minnesota law governed the contract precluded application of the CISG.<sup>221</sup>

The court concluded that the CISG was applicable.<sup>222</sup> TEC's place of business was in the United States, while Saint-Gobain's was in Canada.<sup>223</sup> The court reasoned that, because both the United States and Canada were parties to the CISG, the CISG would apply to this contract for the sale of mesh "unless the parties have excluded its application."<sup>224</sup> Saint-Gobain specifically argued that the parties excluded its application by specifying that Minnesota law governed

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216. *Id.*

217. *See id.* at 1076.

218. *Id.* at 1079-80.

219. *Id.* at 1080.

220. *Id.* at 1081.

221. *See id.* The choice-of-law clause at issue stated that the "validity, interpret[ation], and performance of these terms and conditions and all rights and obligations of the parties shall be governed by the laws of the State of Minnesota." *Id.* at 1080.

222. *Id.* at 1081.

223. *Id.*

224. *Id.*

the contract.<sup>225</sup> But the court rejected that argument, concluding that a mere reference to a specific state's law does not constitute an exclusion of the CISG.<sup>226</sup> When there is a choice-of-law clause choosing the laws of a particular state to govern a contract that would be governed by the CISG, the state under the Supremacy Clause must honor treaties of the United States and, accordingly, the CISG was the applicable body of law.<sup>227</sup>

The court concluded that referring to a state's law does not have the effect of excluding the CISG, unless an express statement is included which provides the CISG does not apply.<sup>228</sup> In reaching that conclusion, which the court characterized as the majority position, the court cited *American Biophysics* as an exception to the majority position.<sup>229</sup>

The court's analysis of the effect of a choice-of-law clause is careful, and its conclusion that a choice-of-law clause should not have the effect of automatically excluding the CISG is correct. But, like other U.S. courts, the court failed to acknowledge the next step under the CISG, as discussed in Part VII, *infra*, which is to consider whether the parties nevertheless intended to exclude the CISG.

In considering the battle of the forms that took place between the parties and TEC's argument that its purchase order formed the contract under the CISG's contract formation rules, the court did, however, acknowledge that the analysis required looking at more than just the writings that were exchanged.<sup>230</sup> The court stated:

The parties seem to assume that only their writings could have formed a contract; the CISG, however, explicitly states that "[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses."<sup>231</sup>

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225. *Id.*

226. *Id.* at 1081-82.

227. *See id.* at 1082.

228. *Id.*

229. *See id.* at 1081-82

230. *See id.* at 1083.

231. *Id.* (quoting CISG, *supra* note 3, art. 11).

The court ultimately held that there were issues of material fact that precluded it from granting partial summary judgment to the plaintiffs.<sup>232</sup>

#### V. EXPRESS EXCLUSION OF THE CISG IS NOT NECESSARY FOR EFFECTIVE EXCLUSION

It might be tempting to assume that the only way to exclude application of the CISG is by doing so expressly and, at least when there is a written contract, in writing. Indeed, many U.S. courts have suggested that that is the case.<sup>233</sup>

##### A. *No Writing Requirement*

In fact, including an express choice-of-law clause accompanied by an explicit exclusion of the CISG that is clear, conspicuous, and in a writing signed by the parties is arguably the most desirable means of exclusion of the CISG. It leaves little room for doubt, and helps to establish at the

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232. *Id.*

233. *See, e.g.*, *Forestal Guarani, S.A. v. Daros Int'l, Inc.*, Civ. Action No. 03-4821 (JAG), 2008 WL 4560701, at \*3 (D.N.J. Oct. 8, 2008) (“The inclusion of an alternate choice of law provision must . . . be announced explicitly in the contract.”); *Easom II*, No. 06-14553, 2008 WL 1901236, at \*2 (E.D. Mich. Apr. 25, 2008) (“Courts have held that parties can only opt out of the CISG if their contract explicitly states this fact. Since neither the Plaintiff’s quote nor the Defendant’s Purchase Order contained an express provision opting out of the CISG, it is appropriate to apply it here.”) (internal citations omitted); *Sky Cast, Inc. v. Global Direct Distribution, LLC*, Civil Action No. 07-161-JBT, 2008 WL 754734, at \*4 (E.D. Ky. Mar. 18, 2008) (“Although the parties to a contract normally controlled by the CISG may exclude the applicability of the CISG to their contract, any such exclusion must be explicit.”); *Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Technical Fabrics Can. Ltd.*, 474 F. Supp. 2d 1075, 1082 (D. Minn. 2007) (concluding that a choice-of-law clause does not exclude the CISG “absent an express statement that the CISG does not apply”); *Am. Mint LLC v. GOSoftware, Inc.*, No. Civ.A. 1:05-CV-650, 2006 WL 42090, at \*3 (M.D. Pa. Jan. 6, 2006) (concluding that the CISG was not excluded because the contract failed “to expressly exclude the CISG by language which affirmatively states that it does not apply”); *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmbH*, No. 00 CIV. 9344(SHS), 2002 WL 465312, at \*3 (S.D.N.Y. Mar. 26, 2002) (reasoning that German law, and therefore the CISG, was the applicable body of law: “(1) both the U.S. and Germany are Contracting States to [the CISG], and (2) neither party chose, by express provision in the contract, to opt out of the application of the CISG”) (emphasis added).



beginning of the relationship the body of law that will govern the contract and its interpretation in the event that a dispute arises after the parties are no longer interested in cooperating with each other.<sup>234</sup> By making that choice before performance of the contract has commenced—and before disputes have arisen—the parties make clear to each other and to third parties (including courts and other decision makers) their mutual intent to exclude application of the CISG. This helps to increase predictability and to avoid the transaction costs that could be incurred in connection with arguing at a later time about the application or exclusion of the CISG.

Indeed, it is a good idea to include an express clause that makes the parties' mutual intent clear, whether their intent is to exclude the CISG or for the CISG to apply.<sup>235</sup> But it is important to note that the CISG does not require

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234. Depending on the circumstances and the parties involved, a typical choice-of-law clause in a contract governed by the laws of some jurisdiction within the United States when the parties have agreed to exclude application of the CISG might look something like the following:

**Choice of Law.** THIS AGREEMENT SHALL BE GOVERNED BY AND INTERPRETED IN ACCORDANCE WITH THE LAWS OF [THE STATE OF \_\_\_\_\_], USA, WITHOUT REFERENCE TO ANY PRINCIPLES PERTAINING TO CONFLICTS OF LAWS. HOWEVER, THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS ("CISG") SHALL NOT GOVERN OR APPLY TO THIS AGREEMENT OR ITS ENFORCEMENT OR TO ANY SALE MADE UNDER THIS AGREEMENT. THE PARTIES HEREBY EXCLUDE APPLICATION OF THE CISG.

235. Thus, depending once again on the circumstances and the parties involved, a typical choice-of-law clause in a contract governed by the laws of some jurisdiction within the United States when the parties have agreed that the CISG will apply and will prevail over inconsistent domestic law might look something like the following:

**Choice of Law.** THIS AGREEMENT SHALL BE GOVERNED BY AND INTERPRETED IN ACCORDANCE WITH THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS ("CISG") AND THE LAWS OF [THE STATE OF \_\_\_\_\_], USA, WITHOUT REFERENCE TO ANY PRINCIPLES PERTAINING TO CONFLICTS OF LAWS. FOR THE AVOIDANCE OF DOUBT, IT IS THE INTENT OF THE PARTIES THAT THE CISG SHALL GOVERN AND APPLY TO THIS AGREEMENT AND TO ANY AND ALL SALES MADE UNDER THIS AGREEMENT. IN THE EVENT OF ANY CONFLICT BETWEEN THE CISG AND THE DOMESTIC LAWS OF [THE STATE OF \_\_\_\_\_], THE CISG SHALL PREVAIL.

written exclusion of the CISG. In fact, Article 6 does not require any specific means of exclusion of the CISG. And Article 11 of the CISG specifically rejects any writing requirement and allows a contract to be proved “by any means, including witnesses.”<sup>236</sup>

#### B. *Express Exclusion and the Travaux Préparatoires*

The drafters considered four proposals to amend Article 6 of the CISG that sought, in varying degrees, to address the requirement of express exclusion of the CISG.<sup>237</sup> None was adopted. Two proposed amendments would have changed Article 6 to include a requirement for any attempted exclusion to be express in order to be effective. The first proposal, which was made by the Italian delegation, was to add a second paragraph to Article 6 that would have required any exclusion of the CISG to be express, although it would have permitted exclusion by means of a choice-of-law clause selecting the laws of any country that is not a party to the CISG.<sup>238</sup> Thus, the Italian proposal would have added as a new second paragraph: “The Convention may only be excluded in its entirety where the parties have expressly so agreed or where they have chosen the law of a non-contracting State to govern their contract.”<sup>239</sup>

And the second proposal, made by the Pakistani delegation, would have amended Article 6 simply to require exclusion to be express.<sup>240</sup> Mr. Inaamullah of Pakistan

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236. “A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.” CISG, *supra* note 3, art. 11. Article 29 of the CISG further demonstrates the CISG’s emphasis on considering extrinsic evidence, including conduct of the parties, when identifying the terms of the parties’ agreement. *See id.*, art. 29. Specifically, Article 29 provides that even when a written contract contains a provision requiring any modification or termination by agreement to be in writing, “a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.” *Id.*, art. 29(2).

237. *Report of the First Committee, supra* note 28, art. 5, ¶ 3, *reprinted in Official Records, supra* note 12, at 85-86.

238. *Id.* ¶ 3(vii).

239. *Id.*

240. *Id.* ¶ 3(vi). Thus, Article 6 as amended by the Pakistani proposal would have provided as follows: “The parties may **‘expressly’** exclude the application

explained that his delegation felt that the existing text of Article 6 allowed the parties too much freedom and would lead to uncertainty, which could only be avoided “by specifying that exclusion or variation should be the result of an express agreement between the parties.”<sup>241</sup> There were only four votes (out of more than forty) in favor of the Pakistani amendment.<sup>242</sup>

There was some modest support for amending Article 6 in a way that would require exclusion of the CISG to be express in order to be effective. Mr. Wagner of East Germany said that parties might exclude application of the CISG in different ways, but any exclusion must be express.<sup>243</sup> And Mr. Michida of Japan expressed concern that allowing implied exclusion of the CISG could “encourage courts to conclude, on insufficient grounds, that the [CISG] had been entirely excluded.”<sup>244</sup>

At the same time, however, there was a great deal of opposition to requiring exclusion of the CISG to be express, and the drafters ultimately rejected any requirement of express exclusion of the CISG, and objected to the notion that explicit exclusion of the CISG is necessary to exclude it effectively. Mr. Loewe of Austria, the Chairman of the First Committee, upon presenting the proposed amendments for consideration by the committee, stated that he “considered that exclusion of the application of the Convention, derogation from its provisions or variation of their effect could be either express or implied,” and that “that was also apparently the conclusion which had emerged from the preparatory work.”<sup>245</sup>

In fact, the two additional proposals to amend Article 6 of the CISG that sought to address the requirement of express exclusion of the CISG specifically contemplated exclusion by means other than express means.

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of this Convention or, subject to article [12], derogate from or vary the effect of any of its provisions.”

241. *Summary Records—4th Meeting*, *supra* note 25, ¶ 8, *reprinted in Official Records*, *supra* note 12, at 249.

242. *Report of the First Committee*, *supra* note 28, art. 5, ¶ 6, *reprinted in Official Records*, *supra* note 12, at 86.

243. *Id.* at ¶ 15.

244. *Id.* at ¶ 18.

245. *Id.* at ¶ 4.

One of the additional proposals to amend Article 6, this one made by the Belgian delegation, would have required either express exclusion of the CISG or exclusion derived with certainty from the circumstances: “Such exclusion, derogation or variation must be express or derive with certainty from the circumstances of the case.”<sup>246</sup> Thus, the Belgian proposal contemplated exclusion of the CISG by means other than express exclusion. However, the Belgian delegation sought to identify a standard for implied exclusion of the CISG. Mr. Dabin of Belgium explained that the Belgian proposal included a standard in order to constrain judges or other decision makers who might otherwise overstep their authority in determining that the CISG had been excluded: “The Belgian proposal . . . provided that exclusion, derogation or variation must definitely result from the circumstances of the case, unless such measures were specifically provided for in writing, in order that the judge or arbitrator might be precluded from attributing to the parties an intention they did not have.”<sup>247</sup>

Finally, the United Kingdom delegation proposed an amendment that would have amended Article 6 simply to make it clear that exclusion could be implied, by adding to Article 6 the following sentence: “Such exclusion, derogation or variation may be express or implied.”<sup>248</sup> And a large number of representatives stated their view that exclusion of the CISG need not be express.<sup>249</sup>

Despite apparent widespread agreement (though not consensus) among the drafters that exclusion of the CISG would be possible by means other than express means, the

246. *Report of the First Committee, supra* note 28, art. 5, ¶ 3(v), reprinted in *Official Records, supra* note 12, at 85.

247. *Summary Records—4th Meeting, supra* note 25, ¶ 5, reprinted in *Official Records, supra* note 12, at 249.

248. *Report of the First Committee, supra* note 28, art. 5, ¶ 3(i), reprinted in *Official Records, supra* note 9, at 85.

249. *Summary Records—4th Meeting, supra* note 25, ¶ 9, reprinted in *Official Records, supra* note 12, at 249 (endorsement by the Australian representative of the UK proposal); *id.* ¶ 10 (expression of support by the U.S. representative for the UK proposal); *id.* ¶ 16 (expression of opposition by the West German representative to the Pakistani proposal because the proposal “did not allow for the fact that business practice did not always take legal considerations into account at the time of concluding contracts.”); *id.* ¶ 17 (expression of support by the Swedish representative for the UK proposal).

drafters were unable to reach agreement on how specifically to amend Article 6 to reflect that general agreement. Ultimately the drafters did not go so far as to add a statement that exclusion could be implied. In fact, the UNCITRAL working group responsible for preparing the draft CISG specifically removed from the draft of Article 6 the words “such exclusion may be express or implied,” which had appeared in a predecessor convention.<sup>250</sup> And the United Kingdom proposal to reintroduce that sentence was rejected as well, with twelve votes in favor of the amendment, nineteen opposed to it, and a large number of abstentions.<sup>251</sup>

It is curious that the drafters would reject the amendment proposed by the delegation of the United Kingdom. Of course the small minority of representatives who favored a requirement of any exclusion to be express would oppose the amendment proposed by the United Kingdom. But that can account for only a fraction of the nineteen votes opposed to the amendment.

One might draw the conclusion that a majority of the drafters did not intend for parties to be able to exclude application of the CISG by implied means. But such a conclusion is neither consistent with the text of the CISG, nor supported by the *travaux préparatoires*. Instead, it seems that those drafters who agreed that Article 6 should be amended to reflect their understanding that exclusion need not be express were unable to agree as to how Article 6 should be amended to reflect that understanding. And the existing text of Article 6 was sufficient to support their understanding that exclusion of the CISG need not be express.

The *travaux préparatoires* offer another explanation for some of the opposition to the proposed amendment. Specifically, Mr. Rognlien of Norway said that he was in favor of retaining the existing text (that is, the current text) of Article 6, because in his view the existing text already meant that exclusion or derogation could be express or tacit, making the United Kingdom amendment unnecessary.<sup>252</sup>

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250. *Id.* ¶ 5 (in a statement by Mr. Dabin of Belgium).

251. *Report of the First Committee, supra* note 28, art. 5, ¶ 6, *reprinted in Official Records, supra* note 12, at 86.

252. *See Summary Records—4th Meeting, supra* note 25, ¶ 11, *reprinted in Official Records, supra* note 12, at 249.

And in his view, the proposed amendment was not only unnecessary, it was undesirable as well, because he was concerned that by including in Article 6 a statement that exclusion of the CISG could be express or implied, all of the remaining provisions of the CISG might be interpreted restrictively, such that any agreement on a particular point between the parties to a contract covered by the CISG would have to be express:

Mr. ROGNLIEN (Norway) said that he was in favour of retaining the existing text which, in his view, meant that derogation might be express or tacit. If one or other of the additions to [Article 6] proposed by the United Kingdom or Belgium were adopted, it might be deduced *a contrario* that other provisions of the Convention were to be interpreted in a restrictive sense.<sup>253</sup>

It appears from the *travaux préparatoires* that other representatives shared the concern expressed by Mr. Rognlien. For example, in direct reply to Mr. Rognlien's comments, Mr. Khoo Leang Huat of Singapore said he, too, was in favor of keeping the existing text.<sup>254</sup> And other representatives had previously expressed their view that the proposed amendment was simply unnecessary, though they agreed with the idea of allowing implied exclusion. For example, Mr. Farnsworth of the United States said that "he could see no reason why the existing text of [Article 6] should not be retained, although he would be able to support the United Kingdom proposal . . . ."<sup>255</sup>

Ultimately, none of the proposed amendments was accepted, and the existing text remained unchanged. As a result, Article 6 as finally adopted requires no specific means of exclusion and does not establish a standard for exclusion.

Because the CISG does not specify any particular means of exclusion of the CISG, courts and other decision makers are required by Article 8, Section 3 of the CISG to consider all relevant circumstances when attempting to determine the parties' intent, including as relates to their mutual intent to exclude application of the CISG.

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253. *Id.*

254. *Id.* ¶ 12.

255. *Id.* ¶ 10.

## VI. ARTICLE 8—THE MISSING LINK

A. *Determining Party Intent*

Even if a court (i) concludes that a contract would be governed by the CISG due to the nature of the sale of goods and the location of the contracting parties and (ii) finds that the agreement does not exclude application of the CISG under Article 6 of the CISG, either because there is no choice-of-law clause at all or there is a choice-of-law clause choosing the laws of a state within the United States to govern the agreement but silent on the application of the CISG, the analysis concerning determination of the applicable body of law is not yet complete. At that point in the court's analysis, the CISG applies to the contract. Because the CISG is the applicable body of law at that point, Article 8 is relevant for the court's continuing analysis. Article 8 calls on the court to look beyond the four corners of any written agreement to determine the parties' intent. Courts have largely failed to consider this aspect of the analysis in the analysis of exclusion of the CISG that has taken place, and it is this aspect of the analysis that requires a paradigmatic shift on the part of U.S. courts.

Article 8 of the CISG provides as follows:

- (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
- (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
- (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.<sup>256</sup>

Under Article 8, Section 1, a party's statements and conduct are to be interpreted in accordance with their

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256. CISG, *supra* note 3, art. 8.

actual intent whenever the other party knows that intent or could not have been unaware of it.<sup>257</sup> The reasonable understanding of a party's statements and conduct—or objective intent—only becomes relevant under Article 8, Section 2 if the actual intent—or subjective intent—cannot be determined under Article 8, Section 1.<sup>258</sup> In other words, a party's actual intent, if it is known by the other party, prevails over a different objective intent that would otherwise be attributed to the party's statements or conduct.

Under Article 8, Section 3, the court must give due consideration to all relevant circumstances of the case, including but not limited to the parties' negotiations, any practices between the parties, and the parties' conduct following formation of the contract in order to determine the intent of the parties—subjective intent or objective intent.<sup>259</sup> In other words, each party must be given the opportunity to show that the parties agreed, outside of the four corners of the written agreement, upon an actual understanding of their words that is inconsistent with the objective understanding that would otherwise be attributable to those words. This is a significant departure from the U.S. legal tradition, which emphasizes the objective understanding that would be given to the parties' words<sup>260</sup> and which would preclude introduction of parol evidence that would contradict the written agreement.<sup>261</sup>

It is therefore possible that the parties enter into a robust written contract, signed by both parties, that is silent on the application of the CISG, or that even expressly provides for the CISG to apply. And it is possible that a party to the contract might seek to introduce extrinsic

257. *Id.* art. 8(1).

258. *See id.* art. 8(2).

259. *See id.* art. 8(3).

260. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1981) (“A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.”); *see also id.* § 2 cmt. b. (“Many contract disputes arise because different people attach different meanings to the same words and conduct. The phrase ‘manifestation of intention’ adopts an external or objective standard for interpreting conduct; it means the external expression of intention as distinguished from undisclosed intention.”).

261. *See, e.g., id.* § 213; U.C.C. § 2-202 (2002).



evidence tending to show that the parties nevertheless agreed outside the four corners of their agreement that the CISG would not govern their transaction. While the parol evidence rule of the UCC would specifically preclude the possibility of such a showing when the writing is a complete and exclusive statement of the parties' agreement, and would limit it even when the writing is not complete and exclusive if it is nevertheless a final expression of the parties' agreement,<sup>262</sup> Article 8 of the CISG specifically calls for the possibility of showing such intent. The writing is not dispositive of the parties' intent.

Some commentators have argued that Article 8, Section 3 deals only with interpretation of the parties' agreement and that the impact of Article 8, Section 3 on parol evidence issues is therefore limited.<sup>263</sup> That view of the CISG appears to be grounded in a bias for the sanctity of the written contract that inheres in the U.S. legal tradition.<sup>264</sup> While the CISG reflects the influence of the U.S. legal tradition in many ways, the CISG is not the same in every respect. The text of Article 8 shows that courts must defer to a party's actual intent—when that actual intent can be determined and it can be shown that the other party knew or could not have been unaware of it. Moreover, courts must consider extrinsic evidence in their determination of that intent.

The *travaux préparatoires* offer support for this as well. This view was expressed by Mr. Rognlien of Norway, who said that “[t]he determining factor must always be the intention of the parties at the moment of concluding the

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262. See U.C.C. § 2-202 (2002).

263. Ronald A. Brand & Harry M. Flechtner, *Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention*, 12 J.L. & COM. 239, 251-52 (1993).

264. One challenge relating to implementation of the CISG in general is that courts in different countries and in different legal systems might interpret provisions of the CISG in a way that reflects the courts' own legal traditions more than the text of the CISG and the purposes underlying it. This tendency has been identified as a “homeward trend.” See Harry Flechtner, *Article 79 of the United Nations Convention on Contracts for 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, 30-31 (2007).

contract, whether or not such intention had been express or implied in [Article 8].”<sup>265</sup>

Nevertheless, U.S. courts largely have not acknowledged this aspect of the analysis when determining whether the CISG has been excluded, perhaps because there was no real dispute regarding application of the CISG; perhaps because neither party offered evidence of other “relevant circumstances” to show a contrary intent; or perhaps because courts and litigants alike, influenced by U.S. legal traditions, have not considered that the additional analysis is appropriate—indeed, necessary—under the CISG. But, as noted by the Eleventh Circuit, “[w]e may only achieve the directives of good faith and uniformity in contracts under the CISG by interpreting and applying the plain language of article 8(3) as written and obeying its directive to consider” extrinsic evidence.<sup>266</sup>

#### B. *U.S. Courts Applying an Article 8 Analysis*

Even though courts have not explicitly recognized that Article 8 of the CISG may require additional analysis beyond looking simply at the four corners of the written agreement to determine whether the CISG has been excluded by the parties, some U.S. courts have recognized the importance of Article 8 in determining the parties’ intent for other purposes.<sup>267</sup> In addition, at least one court has engaged in the sort of analysis that is contemplated by Article 8 in the court’s determination of whether or not the parties had excluded the CISG.<sup>268</sup>

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265. *Summary Records—4th Meeting, supra* note 25, ¶ 11, reprinted in *Official Records, supra* note 12, at 249.

266. *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D’Agostino, S.p.A.*, 144 F.3d 1384, 1391 (11th Cir. 1998).

267. *See generally* *Chateau des Charmes Wines Ltd. v. Sabaté USA Inc.*, 328 F.3d 528 (9th Cir. 2003); *MCC-Marble Ceramic Center, Inc.*, 144 F.3d at 1384; *ECEM European Chem. Mktg. B.V. v. Purolite Co.*, Civ. Action No. 05-3078, 2010 WL 419444 (E.D. Pa. Jan. 29, 2010); *TeeVee Toons, Inc. v. Gerhard Schubert GmbH*, No. 00 Civ. 5189(RCC), 2006 WL 2463537 (S.D.N.Y. Aug. 23, 2006); *Mitchell Aircraft Spares, Inc. v. European Aircraft Serv. AB*, 23 F. Supp. 2d 915 (N.D. Ill. 1998).

268. *See OrthoTec, LLC v. EuroSurgical, S.A.*, Nos. B179387, B189213, 2007 WL 1830810, at \*1 (Cal. Ct. App. June 27, 2007).

The Ninth Circuit recognized the important role of Article 8, Section 3 of the CISG.<sup>269</sup> In *Chateau des Charmes Wines Ltd. v. Sabaté USA Inc.*, Chateau des Charmes Ltd., a Canadian company and the plaintiff, entered into a contract to purchase wine corks from a French company, Sabaté, S.A., and its U.S. subsidiary, Sabaté USA, Inc.<sup>270</sup> Chateau des Charmes and Sabaté USA entered into an oral agreement by telephone for the supply of a specified quantity of wine corks at a specified price and with agreed-upon payment and shipping terms.<sup>271</sup> The parties subsequently entered into a second oral agreement for additional wine corks, substantially on the same terms.<sup>272</sup> Sabaté France shipped the corks in eleven shipments and sent corresponding written invoices for the shipments; the written invoices included, among other terms, a forum selection clause providing for resolution of disputes in France.<sup>273</sup>

Chateau des Charmes subsequently realized that wine bottled using the Sabaté wine corks was tainted, and it filed suit in California against Sabaté USA and Sabaté France.<sup>274</sup> Sabaté USA and Sabaté France moved to dismiss Chateau's complaint based on the forum selection clause contained in the invoices.<sup>275</sup> The federal district court granted the motion, finding that the forum selection clause was part of the agreement between the parties.<sup>276</sup> Chateau des Charmes appealed.<sup>277</sup>

The Ninth Circuit began its analysis by determining that the CISG governed the substantive question of contract formation as to the forum selection clause.<sup>278</sup> The court noted that international sales of goods like those at issue in this case "are ordinarily governed by a multilateral treaty,

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269. *Chateau des Charmes Wines Ltd.*, 328 F.3d at 528.

270. *Id.* at 529.

271. *Id.*

272. *Id.*

273. *See id.*

274. *Id.*

275. *Id.* at 530.

276. *Id.*

277. *Id.*

278. *Id.*

the [CISG], which applies to ‘contracts of sale of goods between parties whose places of business are in different States . . . when the States are Contracting States.’”<sup>279</sup>

After determining that the CISG applied to the transactions, the court concluded that the forum selection clauses were not part of any agreement between the parties.<sup>280</sup> The court reasoned that the CISG provides that contracts for the sale of goods that are governed by the CISG “need not be concluded in or evidenced by writing. . . .”<sup>281</sup> The court then analyzed contract formation under Articles 14, 18, and 23 of the CISG and concluded that the oral agreements between the parties “were sufficient to create complete and binding contracts,” and the oral agreements contained no forum selection clause.<sup>282</sup> Thus, the forum selection clause was not part of the oral agreement between the parties.<sup>283</sup>

Importantly, the Ninth Circuit acknowledged that even though it was clear that the oral agreements formed binding and complete contracts, its analysis was not yet complete.<sup>284</sup> The court quoted Article 8, Section 3 of the CISG, recognizing that it was appropriate for the court to consider “all relevant circumstances” to determine whether Chateau des Charmes nevertheless agreed to the terms of the Sabaté invoices.<sup>285</sup> But the court concluded that no circumstances existed that led to the conclusion that Chateau des

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279. *Id.* at 530 (quoting CISG, *supra* note 3, art. 1(1)(a)).

280. *Id.* at 531.

281. *Id.* (quoting CISG, *supra* note 3, art. 11).

282. *Id.*

283. In reaching its conclusion that the oral agreements were complete and binding, the court specifically noted that the outcome under the CISG is different from the outcome that would likely have been appropriate under Article 2 of the UCC. *Id.* at 531 n.3 (citing U.C.C. § 2-201 (2002)). Specifically, the statute of frauds under Article 2 of the UCC “would require a contract for the sale of corks for the value involved here to be evidenced by a writing.” *Id.* Notably, however, the UCC statute of frauds creates an exception when goods have been delivered and accepted and when payment has been made and accepted, such that the statute of frauds likely would not have provided a defense against enforcement of the oral agreements. U.C.C. § 2-201(3) (2002).

284. *See Chateau des Charmes Wines Ltd.*, 328 F.3d at 531.

285. *Id.* (quoting CISG, *supra* note 3, art. 8(3)).

Charmes' conduct evidenced any agreement to the forum selection clause, and the court reversed the district court.<sup>286</sup>

This method is the sort of analysis that a court should use under Article 8 of the CISG. In this case, it was not a stretch for the court to consider "all relevant circumstances" because there was no signed agreement. But Article 8, Section 3 applies even when there is a signed agreement. To be sure, the signed agreement itself is arguably the best evidence of the parties' intent, in particular when the signed agreement is negotiated and entered into by merchants or other sophisticated parties. But it is not necessarily the only evidence of the parties' intent. Some U.S. courts have recognized this and have applied Article 8 even when there is a written agreement.

C. *Use of Article 8 by U.S. Courts When There is a Writing*

The Eleventh Circuit conducted analysis under Article 8, Section 3 of the CISG in its decision in *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.*<sup>287</sup> The dispute arose out of an arrangement for the sale of ceramic tiles by an Italian ceramic tile producer, Ceramica Nuova D'Agostino, S.p.A., to a U.S. buyer, MCC-Marble Ceramic Center, Inc.<sup>288</sup> MCC's president met representatives of D'Agostino and saw sample product at a trade show in Bologna, Italy.<sup>289</sup> The parties reached an oral agreement at the trade show for the purchase and sale of some shipments of ceramic tiles, agreeing on price, quality, quantity, delivery, and payment.<sup>290</sup> Their oral understanding was then memorialized on a preprinted standard D'Agostino sales form, which also contained D'Agostino's standard terms and conditions of sale (in Italian), which MCC's president signed.<sup>291</sup>

In addition to the oral agreement struck at the trade show, MCC claimed that the parties subsequently entered

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286. *Id.* at 531-32.

287. 144 F.3d at 1384.

288. *Id.* at 1385.

289. *Id.*

290. *Id.*

291. *Id.*

into a requirements contract.<sup>292</sup> MCC brought a claim under the requirements contract, claiming breach when D'Agostino failed to fill certain orders placed by MCC.<sup>293</sup> D'Agostino claimed that it was not obligated to do so because MCC was in payment default, and the D'Agostino standard terms and conditions of sale gave D'Agostino the right to suspend its performance or cancel the agreement with MCC altogether in the event of payment default.<sup>294</sup> D'Agostino counterclaimed, seeking damages for nonpayment.<sup>295</sup>

MCC argued that the parties actually intended that the fine print of the D'Agostino form would not apply.<sup>296</sup> MCC submitted three affidavits to that effect, including the affidavits of two D'Agostino sales representatives.<sup>297</sup> But, deferring to the signed agreement, the district court applied the parol evidence rule and held that the affidavits, even if they were true, did not raise any issue of material fact regarding the applicability or terms of the written contract that had been signed by the MCC president.<sup>298</sup> MCC appealed.<sup>299</sup>

The parties agreed that the CISG governed the dispute.<sup>300</sup> MCC argued on appeal that, by applying the parol evidence rule, the district court improperly ignored evidence that it should have considered under the CISG.<sup>301</sup>

The Eleventh Circuit stated that the CISG “appears to permit a substantial inquiry into the parties’ subjective intent, even if the parties did not engage in any objectively ascertainable means of registering the intent.”<sup>302</sup> Looking carefully at the text of Article 8 of the CISG, the court

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292. *Id.*

293. *Id.*

294. *Id.* at 1385-86.

295. *Id.* at 1386.

296. *Id.*

297. *Id.*

298. *See id.*

299. *Id.*

300. *Id.*

301. *Id.* at 1387.

302. *Id.*

reasoned that the plain language of the CISG “requires an inquiry into a party’s subjective intent as long as the other party to the contract was aware of this intent.”<sup>303</sup> The court considered whether the parol evidence rule changes that result and concluded that it did not.<sup>304</sup> The court stated that the CISG contains no express statement on the role of parol evidence.<sup>305</sup> On the contrary, Article 8, Section 3 expressly directs courts to give due consideration to all relevant circumstances of the case, including the negotiations, in order to determine the parties’ intent.<sup>306</sup> In light of Article 8, Section 1’s focus on the subjective intent of the parties, the court concluded that Article 8, Section 3 is “a clear instruction to admit and consider parol evidence regarding the negotiations to the extent they reveal the parties’ subjective intent.”<sup>307</sup>

The court reasoned that its conclusion was supported by one of the key factors behind the CISG, which was “to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party’s legal system might otherwise apply.”<sup>308</sup> The court concluded that it can “only achieve the directives of good faith and uniformity in contracts under the CISG by interpreting and applying the plain language of article 8, Section 3 as written and obeying its directive to consider this type of parol evidence.”<sup>309</sup>

In short, the Eleventh Circuit conducted a careful analysis of the CISG, refraining from succumbing to the temptation to simply conclude that legal principles that are part of the U.S. legal tradition automatically guide the court’s analysis. The court’s analysis offers a good example

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303. *Id.*

304. *See id.* at 1388-91.

305. *Id.* at 1389.

306. *Id.* (quoting CISG, *supra* note 3, art. 8(3)).

307. *Id.*

308. *Id.* at 1391.

309. *Id.*

of a U.S. court suspending its assumptions and doing the difficult work necessary to properly apply the CISG.<sup>310</sup>

Other U.S. courts have similarly suspended traditional legal doctrines in deference to Article 8 of the CISG, even when a writing was present. Recently, a federal district court in Pennsylvania applied Article 8 effectively in its analysis.<sup>311</sup> In *ECEM European Chemical Marketing B.V., Purolite Company*, an international company with its principal place of business in the United States, was a manufacturer of ion exchange resins and polymers.<sup>312</sup> Styrene monomer was an essential ingredient in Purolite's products.<sup>313</sup> ECEM European Chemical Marketing B.V., a Dutch company, was a purchaser and reseller of styrene.<sup>314</sup> Beginning in 2002, Purolite and ECEM entered into a series of agreements for the supply by ECEM to Purolite of styrene for Purolite's use in the production of its products.<sup>315</sup> The case before the court resulted from Purolite's failure to pay for five shipments of styrene received in the final quarter of 2004, which were delivered by ECEM pursuant to a Purolite purchase order for the year 2004, which ECEM had accepted.<sup>316</sup> The 2004 purchase order was modified by the parties in connection with continuing use of a railcar

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310. Unfortunately, notwithstanding the court's scrupulous, careful analysis of the text of the CISG, the court then stated in dicta that, "to the extent parties wish to avoid parol evidence problems they can do so by including a merger clause in their agreement that extinguishes any and all prior agreements and understandings not expressed in the writing." *Id.* at 1391. While such a merger clause should be given weight in a court's analysis and might very well have the effect of excluding parol evidence in most cases, it is plausible that a written agreement, especially a standard form contract, could include such a clause but that the conduct of the parties or other extrinsic evidence could belie any intent for the clause to govern the agreement between the parties. *See, e.g., TeeVee Toons, Inc. v. Gerhard Schubert GmbH*, No. 00 Civ. 5189(RCC), 2006 WL 2463537, at \*8-9 (S.D.N.Y. Aug. 23, 2006), discussed in Part VII.

311. *See ECEM European Chemical Mktg. B.V. v. Purolite Co.*, Civ. Action No. 05-3078, 2010 WL 419444 (E.D. Pa. Jan. 29, 2010).

312. *Id.* at \*1.

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.* at \*2.



through March 2005, but the parties disputed precisely how the 2004 purchase order was modified.<sup>317</sup>

Before the court were five motions in limine, two filed by ECEM and three filed by Purolite.<sup>318</sup> Two of Purolite's motions in limine are relevant for this analysis: to bar the use of ECEM's standard Terms and Conditions of Sale, and to exclude evidence of prior negotiations leading up to the 2004 purchase order, as well as evidence that the purchase order was not accepted and binding.<sup>319</sup> Purolite sought to exclude the evidence by means of the parol evidence rule.<sup>320</sup>

Purolite's argument was that the 2004 purchase order that had been prepared by Purolite and accepted by ECEM was the entire agreement between the parties, and ECEM's terms and conditions of sale could not vary, alter, or modify the terms of the purchase order.<sup>321</sup> But ECEM argued that the terms and conditions were part of the agreement between the parties and maintained that each shipment of styrene contained an ECEM invoice that incorporated by reference the ECEM terms and conditions of sale.<sup>322</sup>

In denying Purolite's motion, the court applied Article 8 of the CISG.<sup>323</sup> Purolite argued that, because Purolite was "objectively unaware" of ECEM's intent to incorporate the terms and conditions of sale into the parties' agreement, the case should be governed by the interplay between Article 8, Sections 2 and 3 of the CISG, which, Purolite argued, should limit the court to objective, rather than subjective, evidence of the parties' conduct.<sup>324</sup> The court rejected that argument, concluding that it did not matter whether Section 1 or 2 of Article 8 was applicable, because, in either case, the CISG would allow evidence of the parties' intent to be admitted and considered to interpret the terms of the agreement and that "Article 8(3) requires due consideration

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317. *Id.* at \*2-3

318. *Id.* at \*1.

319. *Id.*

320. *See id.* at \*10-12, \*14.

321. *Id.* at \*10.

322. *See id.* at \*11.

323. *See id.* at \*11-13.

324. *Id.* at \*12.

to be given to all relevant circumstances regardless of whether Article 8(1) or 8(2) applies.”<sup>325</sup>

Applying the same reasoning, the court also denied Purolite’s motion in limine to preclude ECEM from introducing parol evidence consisting of negotiations prior to the execution of the purchase order.<sup>326</sup>

Similarly, in *Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB*,<sup>327</sup> an early CISG decision by a federal court, Mitchell Aircraft Spares, Inc., a U.S. company with its principal place of business in Illinois, filed suit against European Aircraft Service AB (“EAS”), a Swedish company with its principal place of business in Sweden, for breach of contract and breach of warranty under an agreement between the parties by which EAS was to sell aircraft parts to Mitchell.<sup>328</sup> Specifically, EAS agreed to sell three integrated drive generators, (“IDGs”).<sup>329</sup> Mitchell issued a purchase order describing the IDGs by name and by part number.<sup>330</sup> EAS issued an invoice in response, and the invoice referred to the same IDGs by name and by the same part number.<sup>331</sup> However, EAS shipped the IDGs, and Mitchell discovered that the IDGs that were delivered by EAS were, in fact, of a different part number.<sup>332</sup> Mitchell alleged damages of \$120,000 as a consequence of the alleged breach by EAS for failure to supply IDGs of the correct part number and filed a claim against EAS.<sup>333</sup>

Before the court was Mitchell’s motion for summary judgment, as well as EAS’s cross-motion for a determination of applicable law.<sup>334</sup> EAS argued that the CISG governed the contract (but not its formation), and Mitchell did not dispute

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325. *Id.* at \*13.

326. *Id.* at \*14.

327. 23 F. Supp. 2d 915 (N.D. Ill. 1998).

328. *Id.* at 916.

329. *Id.*

330. *Id.* at 917.

331. *Id.*

332. *Id.* at 918.

333. *See id.*

334. *Id.*

that position.<sup>335</sup> The court concluded that, because the parties had their respective places of business in the United States and Sweden, both of which have ratified the CISG, the CISG governed the contract.<sup>336</sup>

With respect to Mitchell's breach of contract claim, Mitchell argued that the parties contracted for EAS to sell Mitchell three IDGs bearing a specific part number and that EAS breached the contract when it sold Mitchell IDGs which were not the correct part number.<sup>337</sup> EAS, on the other hand, argued that the parties had simply contracted for EAS to sell Mitchell the three IDGS that EAS had available for sale and not IDGs bearing any particular part number, notwithstanding the express terms of the order documents.<sup>338</sup>

Looking at the plain language in the documents exchanged by the parties, it would be possible to conclude that the objective manifestation of the parties' intent was that there was agreement for EAS to sell three IDGs bearing the particular part number identified in the order documents.<sup>339</sup> But in applying the CISG, the court stated that it was necessary to determine whether it could consider parol evidence.<sup>340</sup> The court concluded that "article 8 of the CISG requires the court to consider parol evidence inasmuch as that evidence is probative of the subjective intent of the parties."<sup>341</sup> The court concluded that:

[I]t must consider any evidence concerning any negotiations, agreements, or statements made prior to the issuance of the purchase order in this case in determining whether the parties contracted for EAS to sell Mitchell three IDGs part

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335. *See id.*

336. *Id.*; *see* CISG, *supra* note 3, art. 92(1). The CISG did not govern issues of contract formation, however, because "Sweden declared in its instrument of ratification that it would not be bound by Part II" (Formation of the contract), a declaration that is expressly permitted by the CISG. *Mitchell Aircraft Spares, Inc.*, 23 F. Supp. 2d at 915, 918.

337. *Id.* at 919.

338. *Id.*

339. *See id.* at 917, 919

340. *Id.* at 919

341. *Id.* at 920.

number 729640 or, alternatively, to sell Mitchell the three IDGs that EAS had available for purchase.<sup>342</sup>

In considering parol evidence, the court concluded that there was a genuine issue of material fact which precluded summary judgment.<sup>343</sup>

Thus, the court recognized the important role Article 8 plays in determining the agreement between the parties. In this case, Article 8 played a role in determining the precise nature of the parts to be sold. But the same concept would also apply to determining whether the parties intended to exclude application of the CISG.

There are other decisions that show that U.S. courts are willing and able to conduct an appropriate Article 8 analysis, even when there is a writing present. In *Alpha Prime Development Corp. v. Holland Loader Co., LLC*, the court reasoned that “[t]he text of and commentary to the CISG show that a writing between the parties is not conclusive of the terms of their agreement.”<sup>344</sup> And the court stated that, under the CISG, testimony of the parties may even contradict the written terms of an agreement.<sup>345</sup> Similarly, in *TeeVee Toons, Inc. v. Gerhard Schubert GmbH*, the court concluded that evidence of the parties’ conduct could belie the terms of a written agreement signed by both parties.<sup>346</sup> And as noted in Part V.D, *supra*, the court in *Travelers Property Casualty Company* recognized that, despite the presence of writings exchanged by the parties which could have formed a contract, it was appropriate also to consider extrinsic evidence to determine whether an oral contract had formed.<sup>347</sup>

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342. *Id.*

343. *Id.* at 921-22.

344. *Alpha Prime Dev. Corp. v. Holland Loader Co., LLC*, Civ. Action No. 09-cv-01763-WYD-KMT, 2010 WL 2691774, at \*4 (D. Colo. July 6, 2010).

345. *Id.* at \*5; *see also* Larry A. DiMatteo, *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization Of Contract Law Equals Unexpected Contractual Liability*, *L = (ii)*<sup>2</sup>, 23 SYRACUSE J. INT’L L. & COM. 67, 109 (1997).

346. No. 00 Civ. 5189(RCC), 2006 WL 2463537, at \*8 (S.D.N.Y. Aug. 23, 2006).

347. *See Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Technical Fabrics Can. Ltd.*, 474 F. Supp. 2d 1075, 1083 (D. Minn. 2007).

D. *Objective Intent is Still Relevant*

As U.S. courts begin to develop jurisprudence using the method of analysis prescribed by Article 8 of the CISG, there is a risk of going too far, and emphasizing determination of subjective intent more than is called for by Article 8.

In *TeeVee Toons, Inc.*, a federal court concluded that it was appropriate to consider parol evidence not only when there was a signed, written agreement between the parties, but even when that signed, written agreement contained a merger clause.<sup>348</sup> In that case, TeeVee Toons, Inc. (“TVT”), a U.S. company, entered into a written agreement with Gerhard Schubert GmbH, a German company, under which Schubert would supply TVT with a system for the production of TVT’s packaging product.<sup>349</sup> Not long after that, the parties began to experience problems with Schubert’s performance<sup>350</sup>—“Schubert experienced delays that set the project back nearly two years,” and when the system was finally delivered, it “malfunctioned frequently and severely.”<sup>351</sup> TVT (and an affiliate of TVT) later brought an action against Schubert, asserting contract and tort claims.<sup>352</sup> The claims survived Schubert’s motion to dismiss, and before the court in this decision was Schubert’s motion for summary judgment.<sup>353</sup>

The court concluded that the CISG governed TVT’s breach of contract claims, which arose under Articles 35 and 36 of the CISG.<sup>354</sup> But Schubert argued that Article 35 warranties had been disclaimed by the plain language of its “Terms and Conditions” that were attached to the written contract signed by both parties.<sup>355</sup> TVT argued that there was an “express oral understanding” between the parties

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348. See *TeeVee Toons, Inc.*, 2006 WL 2463537, at \*8.

349. *Id.* at \*1.

350. See *id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.* at \*4-5.

355. *Id.* at \*6.

that boilerplate language of the Terms and Conditions had been excluded from the agreement.<sup>356</sup>

The court noted that Article 11 of the CISG does away with the statute of frauds and provides that an agreement may be proved by any means, including oral statements between the parties.<sup>357</sup> And the court continued by noting that Article 8 of the CISG explains the process of interpreting oral statements.<sup>358</sup> The court concluded that under the CISG, “any statements made between Schubert and TVT that contradicted the written ‘Terms and Conditions’ . . . must be considered in deciding what is part of the [agreement].”<sup>359</sup> Enough evidence was introduced to raise a genuine factual question regarding whether Schubert, through its agent, “could not have been unaware’ that TVT was interpreting his words and conduct as doing away with the boilerplate ‘Terms and Conditions’.”<sup>360</sup>

The court further noted that the matter was complicated by the inclusion in the Terms and Conditions of a merger clause purporting to extinguish all prior oral agreements.<sup>361</sup> The merger clause offered evidence that the parties intended to exclude consideration of extrinsic evidence, yet TVT was proposing to use extrinsic evidence to show that the Terms and Conditions, including the merger clause, were not intended to govern the agreement between the parties.<sup>362</sup> The court concluded that “only if both Schubert and TVT shared the intent to be bound by the Merger Clause contained in the ‘Terms and Conditions’ is the Merger Clause operative.”<sup>363</sup> And the court stated that if there was no “shared intent” of both TVT and Schubert to be bound by either the Terms and Conditions or the merger clause itself, “then the ‘Terms and Conditions’ section and Merger Clause would drop out, and TVT would be entitled

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356. *Id.*

357. *Id.* at \*7 (citing CISG, *supra* note 3, at 11).

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.* at \*8.

362. *See id.* at \*7-9.

363. *Id.* at \*8.

to the full panoply of implied warranties offered by the CISG . . . .”<sup>364</sup>

While the court’s attention to Article 8 is laudable, and while the ultimate conclusion reached by the court that summary judgment was not yet appropriate was arguably the correct conclusion, the court appears to have misstated the appropriate standard for determining whether or not the merger clause and the Terms and Conditions were part of the agreement between the parties. Because there was a written agreement signed by both parties that incorporated the Terms and Conditions, there was strong evidence of the intent of the parties to be bound by those Terms and Conditions. Under Article 8, TVT could attempt to show that the parties had a different actual intent—that is, that the parties actually intended not to be bound by the Terms and Conditions. But under Article 8, Section 1, TVT must show that Schubert either knew or “could not have been unaware” of that alternative actual intent.<sup>365</sup> True, TVT ought to be able to use under Article 8, Section 3 all relevant circumstances of the case, but TVT still must bear its burden of showing that it had such intent and that Schubert was aware of that intent or could not have been unaware of it. If TVT were unable to show that, then Article 8, Section 2 should govern; when Article 8, Section 1 “is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.”<sup>366</sup> And the signed, written agreement should therefore be enforced in accordance with the objective understanding of its terms (to the extent those terms are enforceable).

The court in *TeeVee Toons* seems to have misunderstood this aspect of Article 8, improperly imposing a requirement that Schubert show that the parties shared an intent to be bound by the Terms and Conditions before the court would conclude that the Terms and Conditions were part of the agreement.

The court in *TeeVee Toons* stated that the finder of fact would be required to determine the subjective intent of both

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364. *Id.*

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

366. *Id.* art. 8(2).

parties “at the time Schubert’s offer was accepted by TVT.”<sup>367</sup> But the fact finder is not required under the CISG to make such a determination. The CISG does not compel the fact finder to determine subjective intent; rather, the CISG requires the court to consider a broad range of evidence in determining the parties’ intent and calls for subjective intent to prevail over objective intent, when applicable.<sup>368</sup>

This is an important distinction that the *TeeVee Toons* decision failed to make. If subjective intent is determinable, it should prevail. But if subjective intent is not determinable, it is certainly not automatically the case that a signed agreement would not be enforceable. Rather, the signed written agreement offers what is arguably the best objective evidence of the intent of the parties. Unless subjective intent is established by one of the parties to overcome the signed written agreement, the objective intent should govern and the signed written agreement should be enforced.

#### E. *Exclusion of the CISG under Article 8—The OrthoTec decision*

At least one court has engaged in the sort of analysis contemplated by Article 8 of the CISG in analyzing exclusion of the CISG, though without clear reference to Article 8.<sup>369</sup> The dispute between the parties in *OrthoTec* arose out of a complex set of arrangements between EuroSurgical, S.A., a French corporation and the owner of surgical technology, and OrthoTec, Inc., a U.S. company.<sup>370</sup> OrthoTec was EuroSurgical’s agent in the United States, and the relationship between EuroSurgical and OrthoTec involved both licensing and agency arrangements.<sup>371</sup>

Subsequently, the original OrthoTec entity organized a limited liability company, and EuroSurgical was granted

367. *TeeVee Toons, Inc.*, 2006 WL 2463537, at \*9.

368. CISG, *supra* note 3, art. 8.

369. *See OrthoTec, LLC v. EuroSurgical, S.A.*, Nos. B179387, B189213, 2007 WL 1830810, at \*1 (Cal. Ct. App. June 27, 2007).

370. *Id.* at \*1.

371. *See id.* at \*1-2.



membership units in it.<sup>372</sup> The assignment agreement that was used to transfer rights to the limited liability company expanded those rights at the same time that it granted EuroSurgical an interest in the limited liability company.<sup>373</sup> The assignment agreement provided that it was governed by California law.<sup>374</sup>

In time, OrthoTec came to work with REO SpineLine as U.S. distributor of the licensed products, and the products became very profitable.<sup>375</sup> OrthoTec, EuroSurgical, and REO SpineLine contemplated a merger, but the merger never materialized, and the relationship between EuroSurgical and OrthoTec soured.<sup>376</sup> Eventually, EuroSurgical wished to sell directly to REO SpineLine without OrthoTec's involvement, and EuroSurgical proceeded to terminate its relationship with OrthoTec.<sup>377</sup> Termination of OrthoTec's rights and agency resulted in a variety of claims against EuroSurgical, and EuroSurgical responded with its own counterclaims.<sup>378</sup>

The claims were heard by a jury, and the jury returned a verdict for OrthoTec.<sup>379</sup> EuroSurgical had requested a series of jury instructions on the CISG, but the trial court concluded that the CISG did not apply, and it therefore did not instruct the jury on the CISG.<sup>380</sup> On appeal EuroSurgical argued, among other things, that the trial court's decision not to instruct the jury on the CISG was prejudicial error.<sup>381</sup> The court of appeal rejected that argument.<sup>382</sup>

The trial court's conclusion that the CISG did not apply to the sales of goods by EuroSurgical to OrthoTec under the assignment agreement was based in part on the inclusion of

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372. *Id.* at \*2.

373. *Id.*

374. *Id.* at \*2.

375. *Id.* at \*3.

376. *See id.* at \*4-6.

377. *See id.* at \*5-6.

378. *Id.* at \*6-7.

379. *See id.* at \*7-8.

380. *Id.* at \*12.

381. *Id.*

382. *Id.*

a choice-of-law clause choosing California law, but silent as to the application of the CISG, which was included in the assignment agreement. However, the trial court did not base its conclusion solely on inclusion of the choice-of-law clause; on the contrary, the trial court specifically pointed to four factors.<sup>383</sup> The trial court based its conclusion on evidence that “(1) the initial draft of the agreement provided for application of the CISG; (2) [OrthoTec’s principal] believed potential distributors would be uncomfortable with a treaty governing the parties’ relationship and discussed the matter with [one of EuroSurgical’s principals]; (3) [the EuroSurgical principal] agreed to eliminate application of the CISG; and (4) the final version of the agreement omitted any reference to the CISG and provided only for the application of California law.”<sup>384</sup> Based on all of the evidence, the trial court determined that the parties intended to exclude application of the CISG.<sup>385</sup> In making that finding, the trial court distinguished the case from *Asante Technologies*, where the parties expressed no clear desire to exclude application of the CISG.<sup>386</sup>

Whether it occurred by accident or by design, this is the sort of analysis that a court should conduct under Article 8, Section 3 of the CISG when the CISG would otherwise apply to a contract but one party argues that the parties intended to exclude the CISG and offers evidence showing that the parties intended to exclude the CISG.

The choice-of-law clause alone does not exclude application of the CISG, and, in fact, should give rise to a presumption that the CISG is applicable whenever the choice-of-law clause chooses the laws of a state or territory within the United States or of another party to the CISG. But even so, when a written agreement includes a choice-of-law clause that chooses the laws of a particular state to govern the agreement, it is not necessarily the case that the CISG *must* apply. The additional evidence to be considered by the court in accordance with Article 8, Section 3 of the CISG could lead the court to conclude that the parties intended nevertheless to exclude application of the CISG.

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383. *Id.* at \*12 n.14.

384. *Id.*

385. *See id.*

386. *Id.*

That kind of analysis, which is required under Article 8, appears to be the analysis conducted by the court in *OrthoTec*, even though the court does not appear to have acknowledged ostensibly that that is what it was doing. And this sort of analysis should occur every time there is a contract that would be governed by the CISG, as required by Article 8, Section 3, if the parties disagree regarding their intent to exclude its application.

Under the CISG, it is therefore reasonably possible that a party to a contract who wishes to exclude application of the CISG could present sufficient evidence for the court to find that the parties intended to exclude the CISG, notwithstanding the failure of the parties to exclude the CISG expressly in their written agreement. If a party can show that the parties agreed outside the four corners of the written agreement to exclude application of the CISG, then the CISG should be excluded with respect to all subsequent analysis by the court of the dispute.<sup>387</sup> Instead of proceeding with analysis of the contract dispute under the CISG, the court should then use the court's own choice-of-law rules to determine the applicable body of law, and it should do so using the principles set forth in Article 8 of the CISG to the extent that the court's analysis under its choice-of-law rules requires determining the parties' intent. Once the applicable body of law is determined by the court, from that point forward Article 8 will no longer be relevant.

Because the contract at issue will always be a contract of sale of goods, within the United States the applicable

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387. The court should not at that point reconsider under the UCC (or other applicable body of law) any issues already resolved under the CISG. If the court were to conduct a new choice-of-law analysis under the new body of law, then the choice-of-law analysis under the new body of law could lead to the conclusion that the CISG is the applicable body of law (if extrinsic evidence were not considered under the other body of law, for example); a return to choice of law under the CISG (and a return to permitting extrinsic evidence under Article 8) would send the court back to the alternative body of law; and there would ensue an irresolvable echo effect, causing the court to consider and reconsider the question of applicable law *ad infinitum*. See, e.g., *Chateau des Charmes Wines Ltd. v. Sabaté USA Inc.*, 328 F.3d 528, 530 (9th Cir. 2003) (concluding that the CISG must be applied to determine whether a contract had formed that included a forum selection clause); see also *Belcher-Robinson, L.L.C. v. Linamar Corp.*, 699 F. Supp. 2d 1329, 1335 (M.D. Ala. 2010) (reasoning that the CISG must be applied to determine if the parties formed a contract that included a forum selection clause excluding application of the CISG).

body of law for the contract would very likely be Article 2 of the UCC, as adopted by the state where the court hearing the claim is located, if that state bears a sufficiently close relationship to the performance of the agreement.<sup>388</sup>

## VII. HOPE FOR THE PRACTITIONER

The commercial lawyer who yearns for predictability and certainty in helping her client to manage her client's cross-border commercial arrangements may understandably recoil at the idea that her hard work and diligence in carefully crafting a written contract that memorializes her client's agreement with a counterparty located in another country could be unraveled by a crafty argument that the written contract does not represent the "true" intent of the parties. Indeed, that risk exists.<sup>389</sup> However, the risk can be reduced by taking certain steps.<sup>390</sup>

First, the drafting by both parties of a comprehensive, robust written agreement should minimize the necessity and appropriateness of turning to extrinsic evidence to determine party intent. Article 8, Section 3's reference to "all relevant circumstances of the case"<sup>391</sup> surely includes the terms of the written agreement itself. When that written agreement is the product of a negotiation and its drafting was undertaken by both parties, the written agreement arguably offers the very best evidence of the parties' subjective intent, at least with respect to those terms that are addressed in the written agreement. In the normal case, it should be given great deference by the court.

Second, the well-drafted written international commercial contract should include a well-drafted express choice-of-law clause, as well as a well-drafted express choice-of-forum clause, each of which has been carefully considered in light of the laws of the jurisdictions where the

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388. See U.C.C. § 1-301(c) (2008), 1 U.L.A. 23 (Supp. 2010); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) (amended 1988).

389. See *supra* Part VII.C.

390. See generally Peter Winship, *Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners*, 29 INT'L LAW. 525 (1995) (guidance for the practitioner on modifying practices in light of the CISG and its terms).

391. CISG, *supra* note 3, art. 8(3).

agreement is likely to be enforced (due to the location of the parties and their assets). Those clauses should be the result of actual agreement by the parties, should be conspicuous, and should specifically address application or exclusion of the CISG, as discussed in Part V.A, *supra*.

Third, the agreement should contain a clear merger clause that provides that the terms of the written agreement supersede all prior agreements and understandings. While a merger clause will not be dispositive, especially one that is merely contained in a standard form contract that has not been negotiated,<sup>392</sup> inclusion of a well-drafted merger clause in a negotiated agreement should bolster an argument that extrinsic evidence should not prevail over the written agreement.<sup>393</sup> In addition, it may be worthwhile specifically to exclude Article 8, Section 3 by means of an express clause in the written agreement. Such a clause also would not be dispositive, as a court would apply an Article 8, Section 3 analysis to determine whether the parties agreed to exclude Article 8, Section 3 and might reach the conclusion that they did not actually intend to exclude Article 8, Section 3. But if the court finds that the parties did intend to exclude Article 8, Section 3, then introduction of extrinsic evidence should thereafter be largely, if not entirely, curtailed, except to the extent permitted by some other principle of law.

Similarly, the parties should consider inclusion of a clause providing that the written agreement cannot be amended or supplemented except in a writing signed by both parties. While enforcement of such a clause is limited by Article 29 of the CISG,<sup>394</sup> it nevertheless should contribute to a greater level of confidence on the part of third parties that the contracting parties intended the written agreement to be given primacy over inconsistent extrinsic evidence.

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392. See *TeeVee Toons, Inc. v. Gerhard Schubert GmbH*, No. 00 Civ. 5189(RCC), 2006 WL 2463537, at \*7-8 (S.D.N.Y. Aug. 23, 2006).

393. Professor Winship has suggested that “[p]arties may wish to exclude reference to prior negotiations, especially when they fear representations made by agents without express authority. Parties may also wish to exclude reference to usages of trade because, for example, they may believe usages are uncertain.” Winship, *supra* note 390, at 542.

394. CISG, *supra* note 3, art. 29.

Fourth, the commercial lawyer should counsel her client to be careful to avoid engaging in conduct that belies the terms of the written agreement. In order to facilitate accomplishing that task, the commercial lawyer and her client should work together to confirm that (i) the terms of the written agreement actually reflect the allocation of risk, rights, and responsibility that has been agreed upon and (ii) those terms accurately reflect how the client expects the parties to behave. Once performance has commenced, the commercial lawyer and her client should be vigilant about making sure that any conduct of the parties that is inconsistent with that which is required under the written agreement is appropriately addressed. How the conduct is addressed will depend on the circumstances. For example, it could be the case that the conduct is preferable to that which is required by the terms of the written agreement, in which case a written amendment of the written agreement might be desirable.

The question that the commercial lawyer should always consider is, how certain will a disinterested third party (such as a court) be that the written agreement actually represents the intent of both parties? It seems likely that the nature of the written agreement, including how it was created and entered into, as well as the scope of its terms, will determine that level of certainty. Thus, a set of standard terms and conditions that were simply included with an order document in the wake of an oral negotiation would be viewed with some skepticism. Such a document is less likely to reflect bargained-for terms or the shared intent of the parties. On the other hand, a highly negotiated agreement that is the result of drafting by both parties and that is drafted in a way that accurately reflects the expressly agreed-upon allocation of risk and responsibility between the parties, especially one that is detailed, comprehensive and clear, is much more likely to be deemed to be a manifestation of the parties' actual intent. If such a written agreement is entered into, the burden of overcoming the terms of that written agreement by means of extrinsic evidence under Article 8 should be a very heavy burden indeed.

#### CONCLUSION

When two or more parties enter into an international sale of goods transaction, the cross-border nature of the transaction adds layers of complexity in terms of law,

language, culture, business practice, and logistics, which makes predictability in the arrangement elusive. Establishing at the beginning of the relationship the terms on which the parties intend to do business helps to reduce uncertainty relating to performance obligations, allocation of risk and responsibility, and remedies available when things go wrong, as they inevitably will from time to time. In that regard, it is essential that the body of law that governs performance and breach and remedies be determinable with reasonable certainty, or the parties are left with the untenable "dicey atmosphere of . . . a legal no-man's land," which surely will "damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."<sup>395</sup>

However, as businesspersons are keenly aware, businesses do not operate in a risk-free world, and international commerce and trade continues to occur in enormous volumes. That arguably makes it even more important for U.S. courts to avoid contributing unnecessarily to the uncertainty in the world of international business by improperly or inconsistently analyzing and applying the CISG.

What must the parties do under Article 6 of the CISG to exclude application of the CISG? Article 6 requires no particular method of exclusion. Contrary to the statements of some courts, Article 6 does not require exclusion of the CISG to be in writing (Article 11 makes it doubly clear that it need not be in writing) and Article 6 does not require exclusion to be express.

What may the parties do under Article 6 of the CISG to exclude application of the CISG? Because the CISG does not require written exclusion or express exclusion of the CISG, it is enough for the parties to intend to exclude application of the CISG. And that intent can be demonstrated in numerous ways.

However, because the CISG applies automatically to certain contracts unless it is excluded, when the CISG applies to a contract pursuant to Article 1 of the CISG, a party who desires to exclude its application should bear the burden of showing that the parties mutually intended to

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395. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 (1974).

exclude its application. If that party fails to carry its burden, then the CISG should apply.

Inclusion of an express choice-of-law clause that chooses the laws of a state within the United States (or of a country that is a party to the CISG) but that is silent on the CISG should not by itself allow the party to carry its burden of proof that the parties intended to exclude the CISG. On the contrary, because the law of the selected state includes the CISG pursuant to the Supremacy Clause of the U.S. Constitution, the choice-of-law clause provides objective evidence that the parties intended the CISG to apply.

However, whether or not there is a choice-of-law clause, in carrying its burden of proof, the party desiring to exclude application of the CISG must be allowed to introduce evidence of any and all relevant circumstances showing the parties' intent to exclude application of the CISG. Such evidence could include but is not necessarily limited to the negotiations, any practices the parties have established between themselves, usages, and the parties' conduct. When the party desiring to exclude application of the CISG introduces such evidence, the court is required by Article 8, Section 3 of the CISG to give due consideration to those relevant circumstances. In so doing, the court could reach the conclusion that the parties intended to exclude application of the CISG, even when there is a written contract that contradicts that conclusion, provided that the court is satisfied that the party desiring to contradict the writing has proven that the parties' actual intent was contrary to the writing, which will be a very steep burden indeed.

This approach is different than the approach taken by U.S. courts under the common law and under the UCC, where the statute of frauds and the parol evidence rule make it much more difficult, if not impossible, to introduce such evidence. And it may be difficult for some courts to overcome that cultural tradition of affording a position of primacy to the written word. But as U.S. courts encounter disputes arising from international sale of goods contracts, it is imperative that they do so, so that businesspersons can determine which body of law governs their transactions. It is imperative that they do so, so as to avoid undermining the rule of law established by the Supremacy Clause of the U.S. Constitution. And it is imperative that they do so, because proper application of the CISG is essential for ensuring reciprocal treatment by courts located in other



countries that have ratified the CISG when U.S. persons appear before those courts in a contract dispute that ought to be governed by the CISG rather than some unfamiliar, foreign body of law. The failure of U.S. courts to apply the CISG in lieu of national (or, more accurately, state) law invites courts of other countries to disregard the CISG when it suits them, in the event that U.S. persons or entities are parties to litigation in such courts, thus undermining the CISG's goals of uniformity and certainty.

Instead, U.S. courts must play their part in enforcing the body of law that has been adopted by the United States and most of its top trading partners with the stated purpose of removing legal barriers in and promoting the development of international trade.