CHAPTER 4

AGREEMENTS FOR THE INTERNATIONAL TRADING OF GOODS

INTRODUCTION 4.0 THE BASIC TRANSACTION—TOYS TO GREECE

Chapters 4 and 5, and Problems 4.1–5.3, arise out of a basic form of international sales of goods transaction called a documentary sale. The purpose of these problems is to go through a step-by-step consideration of some of the legal difficulties that arise in such transactions. However, before beginning to consider the legal problems involved, an understanding of the transaction itself is necessary. The purpose of this material is to introduce the documentary transaction, to illustrate not only what is being done, but also why it is being done in a particular manner. In order to accomplish this, the materials proceed, step-by-step, through a documentary sale which the parties perform correctly according to traditional practices, and in which no legal problems arise. In other words, the transaction in this illustration is “done right.”


PART A. FACTORS TO CONSIDER—HOW IS AN INTERNATIONAL COMMERCIAL TRANSACTION DIFFERENT FROM A DOMESTIC ONE?

Many of the aspects of international transactions are different only in degree from some domestic transactions (e.g., a sale of goods from New York to California), but others are novel and have no counterpart in any domestic transaction. These factors are illuminated by examining the risks arising out of such a transaction, and whether these risks are heightened by the fact that the transaction is international. Once a transaction is identified as international, it will usually involve distance between the parties, and therefore require transportation of the goods. It will also
involves more than one legal system, and could involve different currencies. In addition, it is more likely that buyer and seller do not know each other, and do not wish to trust each other or to rely upon litigation (especially in a foreign legal system) for protection.

The primary risk to seller is of not being paid after shipping the goods. Thus seller wants some assurance of payment, as long as the goods are shipped, and that payment will be made in seller’s home country. Buyer, on the other hand, will have several different worries. First, buyer will not want to pay unless assured that the goods have arrived, or at least have been shipped. Second, buyer will worry about whether the goods meet the quantity and quality requirements of the contract. For this reason, buyer prefers to pay only after inspecting the goods. However, where buyer and seller are at a distance from each other, and the goods must be transported, it is impossible both to have seller be paid upon shipment and to allow buyer to delay payment until after inspection after arrival of the goods. Intermediaries must be enlisted.

Payment also causes problems. Currencies fluctuate in value relative to each other. In addition, seller usually wants the funds to be available in its home country and in its currency, for its costs are more likely to be incurred in that currency; buyer, on the other hand, may not be able to pay in any currency but its own. Thus, the sales contract must specify the currency to be used for payment and assign the risk of currency fluctuations to one of the parties. In addition, when dealing with a buyer from a “soft currency” nation, seller must carefully ascertain whether buyer is authorized to pay in a “hard currency” or not. A simple declaration from buyer may not be sufficient, and much extra paper-work may be required even when such payment is authorized. Finally, if seller relies upon foreign sources for payment, unforeseen events can always interrupt the expected orderly flow of funds—as recent events in the Middle East have demonstrated. Thus, seller prefers someone “on the hook” to pay that is located within its jurisdiction and subject to its legal system.

In this day of “long-arm jurisdiction,” both buyer and seller must worry about the cultural and legal system of the other party. It may be difficult to determine what law governs the contract—the domestic law of seller’s state, the domestic law of buyer’s state, or perhaps even an international treaty. Regardless of what law is applicable, extra regulations may be imposed upon international contracts—e.g., license requirements on exports, customs duties or even quotas on imports. In addition, different rules may be provided for international contracts than for domestic ones. For example, in the United States, instead of consulting Article 7 of the UCC on Documents of Title (including bills of lading), the appropriate statute for regulation of bills of lading will be the Federal Bill of Lading Act, 49 U.S.C. §§ 80101–16, and for regulation of contracts with carriers will be the Carriage of Goods by Sea Act (COGSA, 46 U.S.C. § 30701 note). The Convention on International Sales of Goods (CISG) may govern the sales contract itself, rather than UCC Article 2, unless expressly excluded. If foreign law is applicable to the transaction, the
substance of such law may be very difficult to ascertain in a variety of senses, including that it may be in a foreign language, that it may be difficult to find in available law libraries, and also that the available materials may be insufficiently detailed to answer detailed questions. Further, your training is as a common law attorney, and not as a civil law attorney.

The international trading community has formulated two principal responses to these risks. First, it has sought to assign the foreseeable risks of the transaction as clearly as possible in the contracts involved. To do this it has developed a special language of commercial terms such as FAS, CIF, FOB vessel, non-negotiable bill of lading, negotiable draft (or bill of exchange), confirmed and irrevocable letter of credit. Many of these commercial terms of art are defined in several publications of the International Chamber of Commerce, in INCOTERMS (2010 edition) and Uniform Customs and Practice for Documentary Credits (2007 edition) and others.

Second, it has sought to avoid large and uncertain risks by creating devices that break them down into many small and measurable risks. That is what the documentary transaction is all about. For example, the letter of credit is a device to assure that seller will be paid upon shipment of the goods. However, there are interrelationships which must be understood. Thus, use of a documentary transaction to assure payment upon shipment may deprive the buyer of its ability to inspect the goods before payment—but a third-party Inspection Certificate may protect buyer’s position.

How is a documentary sale set up by the parties? To explain this process, the remainder of this introduction will trace such a sale of toys between the Santa Claus Company of East Aurora, New York, and Alpha Company of Athens, Greece. The documentary sale transaction illustrated below is made up of several different interrelated contracts. The three most important of these contracts will be used to organize our discussion: (1) the sale contract between buyer and seller, (2) the letter of credit contract between buyer’s bank and seller, and (3) the bill of lading contract between seller and the carrier.

**PART B. THE SALES CONTRACT**

Forms 1–3 will be used by the parties to form the sales contract, and to define its terms. The initial contact is Form 1, a letter sent by Alpha, the buyer, to Santa Claus, the seller, requesting a price quotation. Alpha could send a simple letter asking for quotations from Santa Claus’ price catalog; but, since this is a specialized sale, it will request a “proforma invoice” which should state the price of each of the components of the international sale. In addition, Alpha’s request can indicate sale terms which it prefers—e.g., payment and shipping terms, including the preferred method of handling insurance during transit.

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1. Many of the forms accompanying this text have been provided through the courtesy of Dorothy Dervay of the Fisher Price Company.
Santa Claus' response is a Proforma Invoice, Form 2. That form gives multiple price options to Alpha. If Alpha wishes to purchase the goods "FOB Santa Claus' Plant," it need pay Santa Claus only the list price of the toys, including the cost of crating them. Alpha would then be responsible for the costs and risks of transportation from Santa Claus' factory. Alternatively, Alpha could purchase the goods "FAS Port of New York City." The price would then include not only the price of the goods FOB Santa Claus' plant, but also the costs of transportation within the United States from Santa Claus' factory to the port facilities in New York City.

Two other prices are quoted by Santa Claus in its Proforma Invoice—"CIF" and "CFR." The "CIF" price is the price of the goods delivered in Athens, the destination point. This price includes all of the factors included in "FAS Port of New York City," and in addition the cost of ocean freight, handling fees of various types, and insurance covering the goods during the ocean voyage. "CFR" would be the price term used if Alpha did not want Santa Claus to purchase insurance coverage during that voyage. Under a contract using a CIF or CFR price term, Santa Claus must bear the cost of the freight charges (and, for CIF, insurance as well). In addition, Santa Claus must also bear the risk of fluctuations in freight costs (and, for CIF, insurance also) until the goods arrive at their destination port. Thus, there are advantages to Santa Claus to quote prices "FOB Santa Claus Plant." On the other hand, a sales contract bearing a CIF term requires buyer to pay when presented with documents—such as bills of lading—usually before the goods arrive, so there are also advantages to Santa Claus to sell on a CIF basis.

After receipt of the Proforma Invoice, and comparison shopping, Alpha decides to purchase Santa Claus' toys. It therefore sends a Purchase Order (Form 3) which duplicates the pricing in the Proforma Invoice. The Purchase Order Form may or may not have a large amount of small print clauses set forth on the reverse side. If it does, a "Battle of the Forms" can arise. Alpha considers its Purchase Order to be an offer, but could others consider the Purchase Order to be an acceptance of an offer contained in the Proforma Invoice? Santa Claus' normal practice, in any event, is to acknowledge all purchase orders with an Order Acknowledgement Form, which repeats the essential "business" terms of the Purchase Order. The Order Acknowledgement Form may or may not have large amounts of small print clauses on the reverse side. If it does, another round of the "Battle of the Forms" ensues. We will address in detail the special issues of contract formation that arise in international sales transactions in Problem 4.1 below.
(d) The bill of lading could be forged—and no goods were ever shipped.

(e) The bill of lading and attached draft could be stolen and presented to buyer by a thief—with any necessary indorsements having been forged.

(f) A transmitting bank could become insolvent while in possession of the bill of lading, before it reaches the buyer, and before the draft is paid.

Note that some of these problems are recognized and dealt with in the standard handling of the documentary transaction. For example, insuring the goods against loss or theft is standard practice (see Form 12), but problems can still arise (see Problems 4.2, 4.5, and 5.2 below).

9. Other problems, such as payment before inspection, make buyers feel unprotected, and they have searched for devices within the transaction which can afford them more protection. Such a device, in common use in modern transactions, is the Inspection Certificate. The purpose of such a document is to provide a certification by an independent third-party at the time of shipment (i.e., before the seller is able to obtain payment on the letter of credit) that the goods conform to the description in the sales contract. However, as one might expect, many legal issues can arise concerning the use and effect of Inspection Certificates. When does the absence of such a certificate allow the buyer to reject the documents and the goods? If the seller provides an Inspection Certificate, may the buyer reject the goods? If the seller provides an Inspection Certificate which conforms to the contract, but the goods do not in fact conform to either the certificate or the contract, is the buyer precluded by the certificate from bringing a successful action for the nonconformity?

PROBLEM 4.1 FORMATION OF AN INTERNATIONAL TRANSACTION: INSULATION TO GERMANY

SECTION I. THE SETTING

PART A.

(Basic Fact Pattern) Officers of Universal Pipe, Inc., a small Kansas manufacturer of pipe insulation, attend an international trade fair in New York, where they meet an agent of Eurobuilders, Ltd. (Euro), a builder of industrial facilities whose headquarters are in London, England. Euro is interested in Universal’s insulation for use in a refinery Euro is building in Darmstadt, Germany, which fact Euro explains to Universal. Universal’s representative gives Euro’s agent a price list which states that Universal’s “Standard Pipe Insulation Product A” is priced at $200 per 100 lb., F.O.B. Plant, Kansas City.

One month later, Euro faxes Universal a signed Purchase Order Form stating, “We order today 5,000 lb. Universal Standard Pipe Insulation Product A for $10,000 F.O.B. Kansas City for immediate delivery to Darmstadt, Federal Republic of Germany. This contract shall be governed by the laws of England (U.K.). Euro.”
That same day Universal responded by faxing a signed Order Acknowledgement Form to Euro’s headquarters. That form stated: “We accept your order to buy 5,000 lb. Universal Standard Pipe Insulation Product A for $10,000 F.O.B. Kansas City. Goods sold as is and with all faults (see UCC 2-316). This contract is governed by the laws of Kansas.”

(Expanded Fact Pattern) All of the events described above occur, and in addition within a week Universal ships the goods and bills Euro. Euro accepts the goods and pays for them.

Euro uses the insulation in constructing the refinery. The insulation corrodes the metal of the refinery piping, which piping is governmentally mandated and customarily used in all such facilities in Europe. Universal has sold its product throughout the United States and Canada, and has never encountered a similar problem before. However, the type of piping used in North America contains different critical alloys.

Euro incurs a $1 million loss due to corrosion of the refinery piping. There is some question as to whether the standard commercial insurance of either Euro or Universal covers the loss, because the insulation may not necessarily be “defective,” but might instead be considered only “unsuitable.” Thus, any damages might not arise out of product liability (tort) concepts, which are more likely to be covered by such insurance; but they might arise out of breach of contract concepts, which are less likely to be covered by such insurance.

PART B.

For Part B below, assume, instead, that Euro has its headquarters in Darmstadt, Germany (not in London, England) and that its Purchase Order states that the contract shall be governed by “the laws of the Federal Republic of Germany” (not the laws of England). All other facts in Basic and Expanded Fact Patterns above remain the same.

SECTION II. FOCUS OF CONSIDERATION

Most first year courses in Contract Law explore the issues relating to “the Battle of the Forms.” This problem is “the Battle of the Forms” revisited, but with a couple of new twists and variations. The most important of these is that the parties are transacting across national borders. This raises the fundamental issue of what law governs the contract formation process in the first place. In addition, the parties (as many merchants seem to do) were not overly concerned with the differences between their communications. They shipped and accepted the goods as though they had a contract. But, now a problem has arisen, involving significant damages, and each party claims that the terms of its communication control the terms of the contract as to the choice of governing law and whether warranties are available or are effectively disclaimed.

A growing body of international law now regulates commercial relations across borders, especially the United Nations Convention on Con-
tracts for the International Sale of Goods (CISG). However, the United Kingdom has not ratified this treaty. What then? That is, which national law then governs the contract formation process—that of the United Kingdom (or more specifically of England, a distinct legal system within the U.K.) or that of the State of Kansas? The answer to this question in turn can have direct consequences for the parties' contractual rights and obligations, if any, under both the Basic and Expanded Fact Patterns. We will explore this subject in Part A below. [If, contrary to all expectations, the United Kingdom were to ratify the CISG, assume that the parties validly agreed on an express exclusion of the CISG through corresponding clauses in their respective forms.]

In Part B, the same basic issues arise, but the change in Euro's headquarters from the United Kingdom to Germany creates a different legal context. Both Germany and the United States have ratified the CISG. As a result, this body of international legal rules is also the domestic law of both countries, and where applicable it displaces otherwise-applicable sale of goods laws such as the UCC. We will explore the substance and effect of the CISG in our revised Euro–Universal transaction in Part B below.

Most significantly, Part C of this Problem asks how you can advise your clients to act during the contract formation process so as to prevent this problem from arising.

Web sources for further study include:

(1) Pace Law School CISG database http://www.cisg.law.pace.edu/


SECTION III. READINGS, QUESTIONS AND COMMENTS

PART A. THE TRADITIONAL ANALYSIS—CONFLICTS OF LAW

We will first analyze the competing arguments for using English or United States law to govern the formation and interpretation of the contract. You may conclude, as the authors do, that there really is no certain resolution of these issues.

*Because the UCC may govern the Universal–Euro transaction, a reading of UCC §§ 1–105 (Rev. 1-301), 2–207, 2–314, 2–315 and 2–316 is essential to analysis of this Problem. Those sections can be found in the Documents Supplement to this book.*
NAFZIGER, THE LOUISIANA AND OREGON CODIFICATIONS OF CHOICE-OF-LAW RULES IN CONTEXT


By far the most significant set of statutory choice-of-law rules * * * is embedded in the Uniform Commercial Code (UCC). This legislation has been adopted with minor variations by every state as well as the District of Columbia and Puerto Rico. The importance of the UCC merits a closer look at it.

Historically, Section 1–105 of the UCC established the overall choice-of-law framework. This framework is significant to the extent of variations among the states in their respective versions of the UCC and to the extent that state choice-of-law rules may differ in their receptivity to the application of the law of a foreign country. It has allowed parties to a commercial transaction to exercise autonomy in selecting the law to govern their respective rights and duties related to or arising out of the transaction so long as that law bears a “reasonable relation” to the “state or nation” whose law is selected. Failing such agreement, the UCC “applies to transactions bearing an appropriate relation” to a state. The definition of “an appropriate relation” has been unclear, having been identified with both a “minimum contacts” theory borrowed from constitutional analysis of adjudicative jurisdiction and the “most significant relationship” test of the Second Restatement.

* * *

The frequent litigation concerning the terms and criteria for choice of law in the UCC indicates a substantial ambiguity and lack of uniformity in application[]. * * * Section 1–105 is potentially troublesome insofar as it better enables states to apply their own choice-of-law variations and thereby indirectly threaten the national uniformity of what, after all, is intended to be a uniform law throughout the country.


Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) was issued on June 17, 2008, and applies] to contracts concluded after December 17, 2009. This Regulation completes the package of basic private international law instruments through internal Community legislation, with the Brussels I and II Regulations providing rules for jurisdic-

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tion and for the recognition and enforcement of judgments, and the Rome I and II Regulations providing rules of applicable law for contractual obligations and non-contractual obligations, respectively.

The fundamental rule of Article 3 of the Rome I Regulation provides for party autonomy, stating that “[a] contract shall be governed by the law chosen by the parties.” This rule gives way, however, to mandatory rules of a country other than the country of the chosen law, when “all other elements relevant to the situation at the time of the choice are located” in that other country. It also is preempted by mandatory rules of Community law when the parties have chosen the law of a non-Member State and the forum is a court in a Member State. If no law is chosen by the parties, then Article 4 provides that, in the most common situations:

1) A contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence; and

2) A contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence.

[The Rome I Regulation contains special rules for consumer, employment, and insurance contracts, designed to protect the party commonly considered to have the lesser bargaining power in the relationship. This follows the more paternalistic approach of civil law systems, generally, and departs from the more economic-oriented approach for similar rules in the United States and some other common law countries.

**JUENGER, THE E.E.C CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS: AN AMERICAN ASSESSMENT**

P. North, Contract Conflicts, Ch. 13, p. 299 (1982).*

Let us now discuss the problem of the law applicable in the absence of a contractual choice. * * *

How well have American * * * conflicts experts coped with the difficult and frustrating problem of selecting a law for the parties? Not too well, I am afraid. The Second Restatement imposes a formidable task on the judiciary. The first paragraph of its section 188 requires a separate choice-of-law analysis for each contracts issue presented. The key term of this provision, the “most significant relationship”, has an appealing ring. But what sounds simple and straightforward becomes quite complex if one attempts to apply the qualifying proviso, which requires recourse to the choice-influencing considerations the Restatement enumerates in section 6. That section contains a shopping list of desiderata, all of which are very plausible, except that they conflict with one another. How, for instance, is it possible to pursue, at the same time, the goals of certainty, predictability and uniformity of result mentioned in letter (f) of Section 6, second

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paragraph, and the protection of forum policies specified in letter (b)? Nor does it simplify matters if paragraph 2 of section 188 lists numerous contacts, and then ordains that they should be evaluated in the light of their relative importance to the particular issue presented. The permutations of any number of issues, six choice-of-law factors and five contacts, combined with the need to evaluate the contacts in the light of each particular issue, would stymie a computer.

Everyone might agree that the search for the proper law should not be a mechanical process of counting contacts. But even a juggler, not to mention a trial judge, can only cope with a finite number of balls in the air. The Second Restatement, of course, recognizes this difficulty. To alleviate it the last paragraph of section 188 diffidently offers a near-rule, which provides that if the place of negotiation coincides with the place of performance, the law of that jurisdiction should "usually" be applied, whatever that may mean. Sections 189–197 try to offer some further guidance by stating tentative rules for a number of specific contracts. However, these rules in turn are subject to an escape clause that permits application of whatever law has a more significant relationship to the specific issue. Nor are the black-letter statements of sections 198–207 (which deal with various specific contract issues, such as form requirements and capacity) of much help, for most of them simply refer back to the general provisions of sections 187–188.

**RESTAMENT, CONFLICTS OF LAW (SECOND) (1971)**

§ 6. **Choice-of-Law Principles**

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

§ 188. **Law Governing in Absence of Effective Choice by the Parties**

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect

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to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract, and
(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189–199 and 203.

J. WHITE AND R. SUMMERS, UNIFORM COMMERCIAL CODE


§ 2–3 Battle of the Forms and the Like Under Existing Section 2–207

Many sales contracts are not fully bargained, not carefully drafted, and not understandably signed or otherwise acknowledged by both parties. Often, here is what happens: underlings of seller and buyer each sit in their offices with a telephone and a stack of form contracts. Today the "stack of forms" is more likely on the party’s hard drive and it may be transmitted from there digitally to the other party. Seller’s lawyer has drafted seller’s forms to give seller advantage. Buyer’s lawyer has drafted buyer’s forms to give buyer advantage. The two sets of forms naturally diverge. They may diverge not only in substantive terms but also in permissible methods of contract formation.

The process of "contracting" begins with an underling telephoning another underling or with the dispatch of a form. When the process ends, there will usually be two forms involved, seller’s and buyer’s. The documents will usually have the same bargained terms such as price, quality, quantity and delivery terms. But on other terms the forms will diverge in important respects. Frequently this will pose no problem, for the deal will go forward without breakdown. But sometimes the parties will fall into dispute even before the occasion for performance. More often, one or both will perform or start to perform and a dispute will break out. In all these cases the parties will haul out their forms and read them—perhaps for the

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first time—and they will find that their forms diverge. Is there a contract? If so, what are its terms?

Unfortunately the section [UCC 2-207] is like an amphibious tank that was originally designed to fight in the swamps, but was sent to fight in the desert. The original drafter of 2-207 designed it mostly to keep the welsher in the contract. * * *

But it is a mistake to think of 2-207 as a law dealing principally with contract formation. Parties to sales much more often call on courts to use 2-207 to decide the terms of their contract after they exchange documents, perform, or start to perform and then fall into dispute. Here the courts are not deciding whether there is a contract. They are answering a different question: what are its terms? This is not only a different but also a more difficult problem for the law than that of keeping the welsher in.

* * *

In our discussion of these cases, a central problem will be this: how may 2-207 be interpreted so as not to give an unearned and unfair advantage to the contracting party who by pure happenstance sends the first or in other cases the second form? When the parties send their forms blindly and blindly file the forms they receive, it makes little sense to give one an advantage over the other with respect to unbargained terms simply because one mailed the first form. Yet avoiding favoritism because of timing is a difficult task under 2-207.

1. Express Term in Second Form Different from Terms in First

Assume that buyer sends a purchase order which provides that any dispute will be governed by arbitration. Seller responds with an acknowledgement which provides that any dispute will not be resolved by arbitration. At least if the bargained terms on the purchase order and acknowledgement agree, we would find that the seller’s document is a definite and seasonable expression of acceptance under 2-207 and that a contract has been formed by the exchange of the documents. We would thus bind any party who seeks to get out of the contract before either performs.

Assume that the seller ships the goods, the buyer receives and pays for them, and the parties fall into dispute about their quality. Does the contract call for arbitration or does it not? Buyer will argue that buyer’s document was the offer (and it appears to us that buyer’s document was the offer since it was sent first) and that seller’s document operated as an acceptance of all of the terms on buyer’s form. Furthermore, buyer will correctly point out that seller’s term (no arbitration) was not an additional term which could come into their contract under 2-207(2) but was a “different” term and therefore could not become part of the contract under 2-207(2). Section 2-207(1) applies to an acceptance that “states terms additional to or different from those offered.” But the text of 2-207(2) only refers to “additional” terms, and the drafters could easily have inserted “or different” if they had so intended. Yet it would be more
than a little difficult to view a different term in an acceptance as a proposal for addition to the contract where the offer already includes a contrary term. It is not possible to have different terms on the same subject as "a part" of the same contract.

First, the seller offeree might respond that his "no arbitration" document differed from the buyer’s ("arbitration") so substantially that it did not constitute an "acceptance" under 2–207(1). But in our view, it is clear that a document may be an acceptance under 2–207(1) and yet differ substantially from the offer. The wording of 2–207(2)(b) supports this, too, for it presupposes that a contract can be formed under 2–207(1) even though the acceptance includes an additional term that "materially alters" the offer.

But how much can an acceptance differ? Certainly there is some limit. We think that in the usual purchase order-acknowledgement context the forms do not approach this limit at least if the forms do not diverge as to price, quality, quantity, or delivery terms, but only as to the usual unbargained terms on the reverse side concerning remedies, arbitration, and the like.

* * *

[T]he seller may [also] argue that seller’s acceptance is only an acceptance of the terms on which the two documents agree, and they did not agree on arbitration, nor do Code gap fillers provide for arbitration. This argument finds no explicit support in 2–207, but one of us (White) thinks part of Comment 6 supports it.

* * *

Most of the decisions agree with White. * * *

Consider this further problem. Assume for example that the offer contains an otherwise valid disclaimer of warranties and that the acceptance contains a conflicting express warranty. According to White, neither become part of the contract under 2–207(1) despite the fact that a contract is formed. Likewise neither enters the contract through 2–207(2) because the term in the acceptance is a different, not an additional term. Moreover by its terms 2–207(3) does not apply to this case but applies only to the case where "the writings of the parties do not otherwise establish a contract." Is it possible, nonetheless, that an implied warranty enters the contract directly as a gap filler without reference to 2–207(3)? White believes that it does and that indeed most of the gap fillers do not depend upon 2–207 to enter the contract. He says there are many contracts adequately formed by an offer and an acceptance which a gap filler dealing with price or warranty or terms of delivery would enter without any reference to 2–207. On White’s view, that seems the proper result. * * *

Summers believes White misreads 2–207, both in text and in spirit. Summers would, in the foregoing further hypothetical case, uphold the
offeror’s otherwise valid disclaimer as to both express and implied warranties. The offeree’s term is a different term and falls out.

* * *

3. Term in Second but not in First Form

This is the problem of the Roto-Lith case. In that case the buyer sent an offer—a purchase order—to seller. Though the offer was silent as to warranties, Code gap-fillers (e.g., 2-314) might supply them. Subsequently seller returned an acknowledgment that contained a disclaimer. The court ultimately found that the seller’s document was “expressly conditional” and therefore not an acceptance but a counteroffer, accepted by the buyer’s performance in receiving and using the goods. Under that case the seller got all of his terms, disclaimer included.

On the facts, we would find the second document to be an acceptance and would reject the Roto-Lith assumption that it was expressly conditional and therefore a counteroffer. Of course, the offeror could specify in the offer that acceptance must be in the exact terms of the offer, with the result that any additional or different terms would constitute a counteroffer. Similarly under 2-207(1), an acceptor could explicitly make acceptance “expressly conditional” on the offeror’s assent to additional or different terms, and thus also a counteroffer. Because neither is true in our hypothetical, we would find that a contract was formed upon the exchange of documents without reference to the subsequent performance. * * *

[T]he additional (not “different”) term in the acceptance that did not appear in the offer must pass through subsection (2) of 2-207 to become part of the contract. * * * Doubtless the parties in our case are merchants, but in the absence of a contrary course of dealing or usage of trade, a disclaimer “materially alters” the contract, and the disclaimer would not become part of the contract.

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5. At Least One Form Insists on All Its Terms and Expressly Prohibits a Contract on Any Other Terms

Assume that no contract exists under 2-207(1) yet the parties perform. A court can find a contract in one of two ways. First, a court can take the common law, Roto-Lith, approach and find that the second document is a counteroffer and hold that subsequent performance by the party who sent the first document constitutes acceptance. This gives one party (who fortuitously sent the second document) all of its terms. In our view, Code drafters rejected this approach, and the drafters sent us to section 2-207(3). * * *

After this problem flowered in Roto-Lith, the Code’s Permanent Editorial Board added a new Comment 7 to 2-207, which reads in full as follows:

In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has
been made. In such cases, where the writings of the parties do not establish a contract, it is not necessary to determine which act or document constituted the offer and which the acceptance. See Section 2–204. The only question is what terms are included in the contract, and subsection (3) furnishes the governing rule.

* * *

CONCLUSION

Under the present state of the law we believe that there is no language that a lawyer can put on a form that will always assure the client of forming a contract on the client’s own terms. * * * If one must have a term, that party should bargain with the other party for that term; a client should not get it by a lawyer’s sleight of hand. If a seller must have the term to reduce its liability but cannot strike a bargain for it, the only answer may be to raise the price, buy insurance, or—as a last resort—have an extra martini every evening and do not capitalize the corporation too heavily.

[Authors’ Note: In 2003, the American Law Institute (ALI) and the National Council of Commissioners on Uniform State Laws (NCCUSL)—the folks who brought us the original UCC—proposed a Revised UCC Article 2. For battle of the forms situations, this Revised Article included a complete rewrite of UCC § 2–207 in favor of a general “knock-out” rule. However, no state has enacted this revised Article 2 (nor is any likely to) and in 2011 even the ALI withdrew its support. As a consequence, as Professors White and Summers have concluded, “Amended Article 2 is dead.”]

RÜHL, THE BATTLE OF THE FORMS: COMPARATIVE AND ECONOMIC OBSERVATIONS


Although by now most common law countries have abandoned or at least dramatically limited the scope of the last-shot rule, it is still the prevailing solution to the battle of the forms problem under English law. * * *

The application of the last-shot rule under English law is due to the fact that English courts tackle battle of the forms cases through the general rules of offer and acceptance. Therefore, a contract comes into existence only if the terms of the acceptance correspond exactly to the terms of the offer. An acceptance that is not in conformity with the terms of the offer is considered a rejection of the offer and usually treated as a counteroffer. Of course, there are a few exceptions to this rule[.] * * * However, as the terms that are generally in question in battle of the forms

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cases usually do not fall into one of these categories, formation of the contract requires one party to accept the terms of the other party, including the general conditions.

Acceptance of an offer under English law may be expressed either explicitly by words of acceptance or implicitly by conduct. In battle of the forms cases, this rule will usually result in formation of the contract through conduct: The buyer makes an offer that is rejected by the seller because he refers to his own general conditions. Subsequently, he delivers the goods. Acceptance of the goods by the buyer amounts to acceptance of the seller's counteroffer by conduct. Because the buyer accepted the seller's offer, the seller's terms, as the party who "fired the last shot," govern the contract. The general principles of offer and acceptance under English law, thus, naturally lead to application of the last-shot rule.

**Questions and Comments**

1. If only the facts stated in the Basic Fact Pattern have occurred, is there a binding contract between the parties? The answer to that question will depend upon your analysis of two issues: First, would the issues be governed by the law of England or the law of Kansas? Second, what are the substantive contract formation rules in "the Battle of the Forms" situation under that governing law? Note that the analysis of these two issues is likely to be interdependent.

2. As to applicable law, this is not a course in conflicts of law. However, some relevant readings on the subject from both European Union and American sources have been included in the Readings—enough to give you a flavor of the difficulties involved in any analysis.

   Note that the choice of law rules applicable throughout the European Union are different from the American choice of law rules. Thus, two questions are posed: 1) Which "choice of law" rules will be used? and 2) What substantive law is chosen by the applicable rules?

   As to the first question, an English court will use English choice of law rules, and an American court will use American choice of law rules. Thus, at the beginning there is a basic division as to the applicable principles which depends upon where the lawsuit is filed—and that cannot be predicted at the time of contract formation.

3. If a lawsuit is filed in England, the court will apply the E.U. Rome I Regulation on the Law Applicable to Contractual Obligations (2008) (see the Documents Supplement). That Regulation transformed a free-standing treaty, the so-called "Rome Convention," into binding law throughout the European Union. If, in contrast, the lawsuit is filed in Kansas, a court there will turn first to the UCC because this sale of goods transaction falls within its broad scope. See UCC §§ 2-102, 2-105(1). As noted in the Nafziger excerpt, the UCC has its own general choice of law rule, UCC § 1-105 (Revised § 1-301, see below).

4. The fundamental principle of both the Rome I Regulation and the UCC § 1-105(1) is "party autonomy," that is, the power of the parties to
choose the governing law for their contracts (subject to certain limits). See the Brand and Nafziger excerpts. Issues relating to “Choice of Law” clauses will be discussed in detail in Problem 11.2; but note in our Problem here that Euro sought to include such a clause in the contract through a choice of English law in its Purchase Order form and that Universal tried to do the same through the choice of Kansas law in its Order Acknowledgement form. The question, therefore, is whether the parties have agreed on either choice of law. This would require you to find, first, that the parties formed a contract and, second, that one of those clauses is part of that contract. But note that both of these questions are substantive law issues and thus will depend what law governs contract formation issues in the first place.

Is there any way for a party to put a choice of law clause in its standard business terms and be assured in advance that the clause will be effective? In absence of a formally negotiated contract document, how would the parties choose the law that would govern the formation of their (proposed) contract in any event?

5. Now it is time for you to determine what law applies to contract formation issues in the Euro–Universal transaction in Part A. Note, again, that the answer may well turn on where the lawsuit is filed. In E.U. countries, the Rome I Regulation opts for a bright-line approach in sale of goods transactions. See the Brand excerpt. Under this bright-line rule, which jurisdiction’s laws would an English court apply to our contract formation problem?

6. UCC § 1–105 takes an entirely different approach, allowing a court in any UCC state to use its own law if the transaction “bears an appropriate relation” to the state. This so-called “Imperial Clause” was expressly used as a method of encouraging forum shopping as a means of pressuring non-UCC states into adopting the UCC. For that purpose it was successful, but it has never been regarded as a serious attempt at reconciling the competing interests involved in typical choice of law rules, especially by courts abroad.

There is now a Revised UCC Article 1, and original UCC § 1–105 has been replaced by Revised § 1–301. See the Documents Supplement. To date, 40 states have enacted Revised UCC Article 1, but all of them have refused to enact Revised § 1–301. Instead, they have enacted the language of original UCC § 1–105 and simply renumbered that provision as § 1–301. Thus the approach of original § 1–105 seems destined to continue.

7. But what does “appropriate relation” mean? A court’s natural tendency will be to apply its home state UCC for a lawsuit filed there (although Official Comment 2 to § 1–105 makes clear that this fact alone is not enough). Failing more explicit guidance, courts have generally retreated to general common law notions, especially the “most significant relationship” test of the Restatement (Second) of Conflicts of Law. See e.g. Butler v. Ford Motor Co., 724 F.Supp.2d 575, 584 (D.S.C. 2010); In re General Motors Corp. Dex–Cool Products Liability Litigation, 241 F.R.D. 305, 317 (S.D. Ill. 2007).

The reference to the Second Restatement’s “most significant relationship” test makes matters more complicated. See the critical analysis in the Juenger excerpt. Where is the “place of negotiation” when the parties do not negotiate in person, but exchange communications from points distant?
Where is the “place of performance”? Of its nature, an international transaction also is likely to involve differing places of incorporation and places of business. If you were a Kansas judge, would you find that the transaction bears an “appropriate relation” to Kansas when the only contact is that Universal happens to be located there? Would you instead find that “most significant relationship” is with England? (Or perhaps even Germany?)

Finally, with the relative clarity of the Rome I Regulation for sale of goods transactions as compared to the fact-specific analysis of the UCC/Restatement are there incentives for forum-shopping?

8. If it is difficult to decide whether Kansas law or English law will apply to resolve this contract formation problem, does it matter which one is used? What is the result under each set of substantive rules?

(a) First, as to American law, the applicable statute would be the Kansas version of the Uniform Commercial Code (UCC). Before the UCC, application of common law principles to this fact pattern would have meant that, under the “mirror image” rule, any variation between Euro’s order and Universal’s response would result in the response being a counteroffer and not an acceptance. Universal’s disclaimer of warranty and reference to the “laws of Kansas” are such variations. UCC § 2-207 sought to ameliorate this Common Law rule, but did it extinguish the principle completely? Read the excerpts from White & Summers.

If only the facts in the Basic Fact Pattern have occurred (i.e., the parties have not yet performed), have the parties formed a contract under UCC § 2-207? What does § 2-207(1) require for a response to “operate[] as an acceptance”? Note that Universal’s form agreed with Euro’s order on the essential terms of price, goods, and delivery time, but did not agree in other respects. What is the effect of such a response under UCC § 2-207(1)?

(b) As to English law, read the excerpt from Rühl. Again, if only the facts in the Basic Fact Pattern have occurred, have the parties formed a contract under English contract formation rules? Could a contract be formed by Universal’s reply and Euro’s subsequent silence?

9. Now consider the legal situation under the Expanded Fact Pattern. If all the facts stated in the Expanded Fact Pattern have occurred, the nature of the legal analysis changes. It is relatively clear under both English and American law that a contract was formed when goods were delivered, accepted and paid for. Now the issue becomes one of determining the terms of that contract—but those terms, in turn, will depend upon how the contract was formed.

(a) Consider, first, the analysis under Kansas law. Universal could have delayed contract formation by making its purported acceptance “expressly conditional” on Euro’s subsequent assent to all of the terms in the Order Acknowledgement as provided in the final clause of UCC § 2-207(1). See White and Summers, Case No. 5. But courts have set very high standards for such clause—and the mere fact of a new or different term in the reply, even a material one, clearly is not enough (the contrary approach of the Roto-Lith case having been expressly overruled and also uniformly rejected by other courts). So this argument is not a viable one here.
What, then, is the effect of the actual conflict between Euro’s choice of English law and Universal’s choice of Kansas law? On this point, note the disagreement between White and Summers. Under White’s view, what would be the result in the case of a conflict between such non-essential terms in an offer and an acceptance under UCC § 2–207? What would be the result under Summers’ view?

The warranty disclaimer clause in Universal’s Order Acknowledgement requires separate analysis. Note that this clause does not conflict with any express term in Euro’s offer. See White and Summers, Case No. 3. For such an “additional term” in a reply document, as White and Summers note, the proper analysis is found solely in UCC § 2–207(2). Universal’s warranty disclaimer is very likely a proposal for a material alteration under § 2–207(2)(b) and no indication of assent was received from Euro. As a result, the clause would not become part of the contract.

(b) Now consider the analysis under English law. If all of the facts in the Expanded Fact Pattern have occurred, what is the effect of the parties’ subsequent performance of the transaction without further discussion? Read the Rühl excerpt. Which party, then, would most likely want to have English contract formation rules apply to this transaction?

10. Finally, if all of the facts in the Expanded Fact Pattern have occurred, what is the result with respect to Universal’s warranty obligations?

(a) If Kansas substantive law applies and Universal’s warranty disclaimer did not become part of the contract, the UCC provides implied warranties in §§ 2–314 and 2–315, but does not provide implied disclaimers under § 2–316. Thus, Universal probably would have to proceed to trial on the merits. Was this insulation not fit for “ordinary use” under UCC § 2–314, or was it only unfit for the special use with the particular metal in European refinery piping? Note the special conditions for creating liability under UCC § 2–315. Between buyer and seller, who has—or should have—the burden of seeking information about whether there are specialized circumstances involved in the proposed use?

If, in contrast, Universal’s warranty disclaimer were to become part of the contract under applicable contract formation rules, its use of the express language of UCC § 2–316(3)(a) would seem to function as an effective disclaimer of liability for the implied warranties of §§ 2–314 and 2–315.

(b) If English substantive law were to apply, the same basic issues arise. Under a formal statute, the Sale of Goods Act (SGA) of 1979, a seller is deemed to extend implied warranties of “satisfactory quality” and of “fitness for all the purposes for which goods of the kind in question are commonly supplied.” See SGA, Article 14. But what is “satisfactory” quality for the insulation supplied by Universal? And what is the proper frame to measure the purposes for which such goods are “commonly” supplied (Europe or the United States)? Finally, although one commentator has observed with reference to this Act that “the parties are permitted to opt-out of the statutory implied terms by mere agreement,” he also notes that “English case law concerning international sales transactions rarely refers to the [Act], and at times makes marked departures from [its] express provisions.” See Markel, American, English and Japanese Warranty Law Compared: Should the U.S.
Reconsider Her Article 95 Declaration to the CISG?, 21 Pace Int’l L. Rev. 163, 175, 182 (2009).

PART B. ENTER INTERNATIONAL LAW (HEREIN OF CISG)

The change of Euro’s place of business from the United Kingdom to Germany in the revised facts for Part B has a significant effect on the legal analysis. Both Germany and the United States have ratified the Convention on International Sale of Goods (CISG). We thus must analyze issues concerning contract formation and interpretation as they would arise under that Convention. The issues may appear clearer under the Convention, but they are certainly still elusive.

Part A raised, inter alia, two major new and different problems: First, what law is applicable—English or Kansas? Second, if English law is applicable, what is the content of that law on the issues presented? The first of these problems is not easily resolved for the simple reason that we cannot even determine in advance what choice of law rules will apply, because we do not know where the lawsuit will be filed. Moreover, many of the involved issues leave substantial room for play in the analysis.

The second of these problems is even more difficult, for it involves research into foreign legal materials that often are not available in the ordinary law library. Even if available online, the risk is great that a U.S. lawyer may not understand the conceptual structure of and appropriate analytical methods for the foreign legal system. These challenges are compounded if the foreign country follows a civil law system and speaks an unfamiliar language.

However, these problems are obviated when one does not have to rely on the domestic law of a foreign country or the United States. One method of accomplishing that goal is to create a treaty—an agreement between the United States and the foreign country to use a specific law of sales of goods to govern all transnational sales transactions between the two nations. Such a treaty would create international law on the subject and, under the Supremacy Clause of Article VI of the Constitution, supercede the Kansas UCC.

Because international commerce is not simple, a single transaction often involves entities with contacts relating to more than two nations. Thus, for reasonable efficiency, a practical treaty would not be merely bilateral, but would be multilateral, and would involve as many nations as possible. Such a treaty has been drafted by UNCITRAL—the United Nations Commission on International Trade Law—and adopted by a diplomatic conference in Vienna in 1980. It is the Convention on International Sale of Goods (CISG), set forth in the Documentary Supplement. As of March, 2012, seventy-seven countries, including the United States and Germany, have become contracting States. Thus, CISG is federal law governing all covered contracts, unless the parties have effectively excluded its application (see below).
However, both the United States and Germany made statements about the applicability of the Convention when their instruments of ratification were deposited with the United Nations. The United States made a “declaration,” as permitted under CISG Article 95, that it “will not be bound by subparagraph (1)(b) of Article 1.”

The German government, on the other hand, made the following statement:

The Government of the Federal Republic of Germany holds the view that Parties to the Convention that have made a declaration under article 95 of the Convention are not considered Contracting States within the meaning of subparagraph (1)(b) of article 1 of the Convention. Accordingly, there is no obligation to apply—and the Federal Republic of Germany assumes no obligation to apply—this provision when the rules of private international law lead to the application of the law of a Party that has made a declaration to the effect that it will not be bound by subparagraph (1)(b) of article 1 of the Convention. Subject to this observation the Government of the Federal Republic of Germany makes no declaration under article 95 of the Convention.

Because the CISG may govern the Universal–Euro transaction under Part B, a reading of CISG Articles 1, 6, 7, 8, 10, 14, 18, 19, 35 and 36 is essential to analysis of this problem.

HANWhA CORPORATION v. CEDAR PETROCHEMICALS, INC.
760 F. Supp. 2d 426.

[After preliminary negotiations over a sale of goods, Cedar (a New York-based seller) and Hanwha (a South Korea-based buyer) exchanged standard business forms. Cedar’s form designated New York law as the governing law, but Hanwha’s form chose Singapore law. When a dispute arose over whether the parties had formed a contract, the court first had to confront the fact that both the United States and the Republic of Korea have ratified the CISG. Some citations have been omitted—the Authors.]

* * *

Before deciding whether the parties formed a contract, I must establish which law governs the analysis. Here, both parties are [located in] CISG signatory nations, but they have attempted to opt out of the CISG’s substantive terms by designating other choices of substantive law. The question therefore arises whether the CISG, some other law, or both, governs the question of contract formation.

* * *
The CISG is a self-executing treaty, binding on all signatory nations, that creates a private right of action in federal court under federal law. As a treaty, the CISG is a source of federal law. * * *

* * *


In this case, the parties each attempted to opt out of the CISG, but could not agree on the law to displace it, Cedar preferring New York law and the UCC, and Hanwha preferring Singapore law. * * * Here, the parties never agreed to a substantive law to displace the CISG, and their competing choices must fall away, leaving the CISG to fill the void by its own self-executing force.

Accordingly, * * * I apply the terms of the CISG without regard to the law either party attempted to select when bargaining over the terms of the [proposed] contract.

DIMATTEO, DHOOGE, GREENE, MAURER AND PAGNATTARO, THE INTERPRETIVE TURN IN INTERNATIONAL SALES LAW: AN ANALYSIS OF FIFTEEN YEARS OF CISG JURISPRUDENCE


C. Battle of the Forms

Article 19 raises the difficult issue of an acceptance with modification or the exchange of forms containing additional or conflicting terms. Negotiated terms, essential to the contract, may appear on the front of a form while additional terms and general conditions appear on the reverse side. Buyers’ and sellers’ forms undoubtedly contain provisions that favor their respective positions. The boilerplate terms are routinely ignored until a dispute arises. Forms are exchanged in what one author termed “une conversation des sourds” (a conversation of the deaf). Two questions arise when there is dispute. First, was a valid contract formed despite the existence of conflicting, non-dickered terms? Second, if a valid contract was concluded, what are the terms of the contract? Article 19(1) provides that an offer that “contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.” If the additional terms do not materially alter the offer, however, a valid contract is formed and the additional terms enter the contract[,,] unless the receiving party promptly objects * * *.

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Article 19(3) sets a broad materiality standard by listing "price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes" as terms that would materially alter the offer. The breadth of these categories of material terms is susceptible to even further extension by the open-endedness of the introductory phase "among other things." Article 19 is essentially an adoption of the now-discarded common law mirror image rule with the exception that minor differences do not defeat an otherwise valid acceptance. The breadth of Article 19(3) severely limits the scope of the minor term.

A battle of the forms arises when parties exchange forms that have inconsistent terms. * * * Courts seem willing to find a valid contract where there is an exchange of forms and a general intent to enter into a binding agreement. The more difficult issue to predict is the courts' determinations of what terms enter into the contract. * * * [T]he existence of conflicting terms creates a gap that the court can fill by recourse to Article 7(1)'s principle of good faith ("knock out rule"). [Another] solution that has been offered is that the terms provided in the acceptance controls (the "second shot rule"). * * *

Two cases decided by the German courts applied the knock out rule. In a case involving the sale of knitwear by an Italian seller to a German buyer, the parties had agreed on the essential terms of the contract and had performed. When a dispute arose about whether the goods conformed to the contract, the parties disagreed on whether certain general terms were part of the contract. The German buyer had included in its general terms a forum selection clause that was additional to the terms in the seller's form. Under Article 19, it could be argued that no contract was formed because the forum selection clause was a material alteration to the offer. Article 19(3) identifies differing terms regarding "the settlement of disputes" as material. Because the parties had performed based on the essential terms of the agreement, the court found that there was a valid contract and that the parties had either "waived their claim to the application of their respective standard business terms or derogated from Article 19 in exercise of their party autonomy under Article 6." The court held that neither party's general conditions became part of the contract.

The Federal Supreme Court of Germany confirmed the knock out rule approach to cases where the parties have agreed on the essential terms of the contract for the sale and have performed. Professor Schlechtriem has asserted that the German Supreme Court's message was that "[c]onflicting standard forms [terms] are entirely invalid and are replaced by CISG provisions, while the contract as such remains valid." In that case, a dispute arose when customers of a buyer complained that the powdered milk delivered by the seller had a sour taste. The standard terms exchanged by the parties contained conflicting terms regarding the extent of the seller's liability. The court found that the contradiction in terms "did not prevent the existence of the sales contracts because the parties did not view this contradiction as an obstacle to the execution of the contracts."
The seller argued that the CISG was derogated by a clause in its standard forms and that under the applicable German Civil Code, no damages could be claimed. In concluding that neither the buyer’s nor the seller’s standard forms were included in the contractual arrangement, the court refused to single out some clauses which might be beneficial to one side or the other.

The Cour de Cassation in France also applied the knock out rule regarding conflicting jurisdiction clauses. Recognizing that jurisdiction provisions are material terms according to Article 19(3), the court, instead of invalidating the contract, applied traditional conflict of law rules to determine jurisdiction. * * *

Some national courts have used the last shot doctrine to resolve cases involving the battle of the forms. According to this approach, courts interpret an action or performance by one of the parties as an indication of assent to additional terms. The last shot doctrine can be seen as evolving from rules of offer and acceptance, with each new offer being a counter-offer until the last one is accepted when one party indicates assent by performance or other conduct. Therefore, if a party fails to object to an additional or modified term, performs, or partially performs, then he has accepted the additional or modified term. Whereas the knock out rule would ignore conflicting terms, the last shot approach incorporates the terms of last communication. Some commentators maintain that the last shot rule is out of touch with commercial reality and encourages parties to act in bad faith by producing numerous forms with standard terms in hopes of controlling the contract through the last shot. Others consider the last shot rule to be the best approach to a difficult situation because it provides “certainty and legal security.”

A German court held that an 8-day notice of defects provision in a confirmation letter was enforceable at the time the buyer took delivery of the goods. The notification terms contained in the seller’s confirmation letter were additional material terms that amounted to a counter-offer under Article 19(1), but the court found that the buyer accepted those terms by accepting delivery. Another German court found that a buyer of cashmere sweaters accepted the seller’s additional terms which incorporated the “Standard Conditions of the German Textile Industry” by performing under the contract. The court merely cited Articles 18 and 19 without comment. Similarly, another German court held that acceptance of delivery indicated assent to a material modification. When the buyer claimed to have ordered a certain quantity of shoes and the seller delivered a different quantity, the court interpreted the delivery of a different quantity as a material alteration under Article 19(3). The court held, however, that the delivery was a counter-offer which the buyer accepted by taking the goods. * * *

If a party continues to perform, or fails to object in a timely manner, to additional terms, she runs the risk that her conduct, silence, or act of performance will be interpreted by a court as an acceptance of the
disputed term. This was the issue in *Filanto v. Chilewich*, where the court found that a manufacturer accepted an arbitration provision as part of the agreement, because he failed to object in a timely manner and commenced performance by opening a letter of credit. This was despite the fact that it repeatedly objected during negotiations to the incorporation of an arbitration clause and that such a clause is a material term under Article 19(3). In *Magellan Int'l Corp. v. Salzgitter Handel GmbH*, the court found that a contract was formed when a distributor indicated assent by opening a letter of credit. The court held that the terms of the contract were those agreed on at the time the letter of credit was opened.

* * *

It is important to understand the reach of Article 19. It is limited to issues of contract formation and not to modifications of contract. Thus, it is universally accepted that where a contract has been validly concluded, one party may not change a material term in the contract without the acceptance of the other party. The court in *Chateau des Charmes Wines Ltd. v. Sabate USA Inc.* found that where an oral agreement did not contain a forum selection clause, one party’s attempt to include such a provision in subsequent invoices did not alter the contract. Because the contract had already been concluded, any new terms were merely offers which required express assent and did not create an obligation to reject the term. The court noted that the mere performance of obligations under the oral contract did not indicate assent to what would be additional material terms under Article 19(3).

**BRAND, PROFESSIONAL RESPONSIBILITY IN A TRANSNATIONAL TRANSACTIONS PRACTICE**

17 J. of Law & Commerce 301, 335-6 (1998).*

A. Must a lawyer involved in negotiation or litigation of a contract matter be aware of the Sales Convention?

This question is not a difficult one. The duty of competence set forth in Model Rule 1.1 clearly requires of a lawyer “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Any lawyer involved in the negotiation or litigation of a contract for which the parties have their places of business in different countries has a duty to determine (1) whether two or more countries involved are contracting states to the Sales Convention, and (2) if one country is a party to the Sales Convention, whether that country has filed an Article 95 reservation to Article I(1)(b). If, as a result of either of these inquiries, the lawyer determines that the Sales Convention applies to the transaction, he or she then has a duty to understand fully the rules of the Convention and the application of those rules to the transaction in question. If the representation is in the context of negotiations, the lawyer is also respon-

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sible for determining and advising the client whether exercising the Article 6 possibility of "opting out" of the Convention rules would be to the benefit of the client. If the representation is in the context of litigation, the lawyer clearly has an obligation to know (1) whether the Convention applies to the transaction in question, and (2) if it does, the impact on his or her client of application of the Convention rules. The failure to understand and properly apply the Convention in regard to any of these obligations clearly constitutes a violation of Rule 1.1.

PERILLO, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS: THE BLACK LETTER TEXT AND A REVIEW

63 Fordham L. Rev. 281 (1994). *

To an extent, Principles is modelled on CISG. But in three significant ways it departs from CISG. First, it is far broader in scope. CISG is limited to contracts for the sale of goods and furthermore eschews many issues relevant to sales contracts. For example, CISG avoids the question of contractual validity. On the other hand, Principles deals not only with the broad range of commercial contracts, but also with some questions of validity. A second departure from CISG is that, to the extent that the two documents cover the same ground, Principles is a better, more mature product. For example, it deals with the "Battle of the Forms" in an innovative way, which presents a considerable improvement over the wretched draftsmanship of Uniform Commercial Code section 2-207 and the timorous Article 19 of CISG. The third departure is that Principles is not intended for adoption as a treaty or as a uniform law; rather, the document is in the nature of a restatement of the commercial contract law of the world.

I. THE FUNCTION OF PRINCIPLES

One could ask what might be the function of such a restatement. The Preamble lists a number of practical uses the statement of principles might have for the judge, arbitrator or practicing lawyer. If the parties negotiating a contract have difficulty in agreeing on a choice of law clause, the choice of Principles could avoid deadlock. If the principles had been in existence at the relevant time, it would have been an ideal choice of legal principles for contracts dealing with the construction of the "Chunnel" connecting England and France. Feelings of national dignity precluded each side from acceding to the choice of the other's law. Similarly, if the contract declares that it is governed by "general principles of law" or the like, Principles can be a primary source for the adjudication of any dispute that may arise from the contract. In addition, Principles could be employed as a supplement for decisions under other international agreements, such as CISG. Moreover, if the rules of conflict of laws point to a

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State whose law is obscure, undeveloped or merely difficult to ascertain, the judges or arbitrators have a neutral resource to apply. This last function of Principles should not be underestimated, as this is one of the primary functions of a restatement in the United States.

There is, I believe, another dimension to Principles that the Preamble does not state. Comparative law is a humanistic discipline. A comparison of legal systems expands the mind. Provisions within Principles regarding issues on which the common law and civil law systems have different conceptual frameworks (e.g., specific performance and penalty clauses) show that the drafters were able to break out of their respective conceptual straitjackets to reach common ground. This only could have happened by a process of mutual education and the expansion of understanding.

* * *

IV. BATTLE OF THE FORMS

The “battle of the forms” receives innovative and generally sound treatment in Principles. What the U.C.C. deals with in one section, the newer document addresses in three sections. The first deals with additional or different terms in a “custom-made” acceptance, and the second governs the use of a pre-printed standard form as an acceptance of the other party’s standard form. The third deals with written confirmations. The custom-made acceptance receives basically the same treatment as in CISG. The battle of the forms, however, is solved by a “knock-out” principle. A term on a printed form will be part of the contract only to the extent that both party’s forms agree to the substance of the term. Either party can, in advance, or, without undue delay, after the exchange of forms, declare to the other party that it does not intend to be bound by a contract formed under the knock-out rule. The commentary indicates that the inclusion of such a declaration in a standard-form offer or acceptance would not ordinarily be a sufficient declaration of intent not to be bound. If a written confirmation of a contract previously made is sent by one party to the other, an additional or different term becomes part of the contract unless it materially alters the contract or the recipient of the confirmation objects to the term.

* * *

UNIDROIT took precisely the bold step that was necessary by separating its provision on the battle of the forms from its rules governing offer and acceptance and inserted its solution as the last of four Articles dealing with standard forms. The first of these is a provision defining what is meant by the words “standard terms” and providing that, in general, “standard terms,” whether on a printed form or incorporated by reference, may be binding on the parties. The second of these provides that a “surprising” standard term is ineffective unless it is expressly accepted by the party adhering to the term. This in essence replicates one aspect of the U.C.C.’s approach to unconscionability that is designed for “the prevention of oppression and unfair surprise.” The other provision
with respect to standard terms is the obvious rule that if there is a conflict between a standard term and an individually agreed term the latter prevails.

* * *

On a pragmatic note, Principles will have a limited impact unless its implementation is made available to merchants and their attorneys. The implementation of CISG by court decisions and scholarly discussion of its provisions is reported in an ingenious piece of software known as UNILEX. Unless a comparable aid to research is provided with respect to Principles, uniformity of application is unlikely to occur, diffusion of knowledge of its implementation will be erratic, and its effect limited.

APPENDIX

UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

* * *

Article 2.19 (Contracting under standard terms)

(1) Where one party or both parties use standard terms in concluding a contract, the general rules on formation apply, subject to Articles 2.20–2.22.

(2) Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party.

Article 2.20 (Surprising terms)

(1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.

(2) In determining whether a term is of such a character regard is to be had to its content, language and presentation.

Article 2.21 (Conflict between standard terms and non-standard terms)

In case of conflict between a standard term and a term which is not a standard term the latter prevails.

Article 2.22 (Battle of forms)

Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.

[Authors' Note: In 2010, UNIDROIT issued a revision of the Principles of International Commercial Contracts. However, the wording of the
Articles quoted above did not change, although the inclusion of an unrelated new provision changed the numbering format to 2.I.19, etc."

BONELL, THE CISG, EUROPEAN CONTRACT LAW AND THE DEVELOPMENT OF A WORLD CONTRACT LAW

56 Am. J. Comp. L. 1, 22–25 (2008).*

It still remains to be seen whether and to what extent the relevant rules of private international law permit the parties to choose a soft law instrument such as the UNIDROIT Principles as the law governing their contract in lieu of a particular domestic law. In the context of international commercial arbitration, the answer is currently definitely in the affirmative. As far as court proceedings are concerned, however, the traditional and still prevailing view is that the parties’ freedom of choice is limited to a particular domestic law, with the result that a reference to the UNIDROIT Principles will be considered as a mere agreement to incorporate them into the contract. As such, the UNIDROIT Principles can bind the parties only to the extent that they do not affect the mandatory provisions of the lex contractus. Things may change, however, in the near future, and it is fair to say that the appearance of the UNIDROIT Principles has considerably contributed to such new prospects.

***

Let us look at some figures. As of October 2007, 150 decisions referencing to the UNIDROIT Principles were reported in the UNILEX database ***. Moreover, while 106 of those decisions were arbitral awards, 44 were court decisions, which contradicts the widespread belief that in view of their non-binding nature, the UNIDROIT Principles can only be relevant in the context of arbitration. Finally, the truly universal application of the UNIDROIT Principles is confirmed by the fact that in more than two-thirds of the cases, at least one of the parties was non-European. In fact, in almost one-third of the cases, all parties involved were from outside Europe, representing some thirty-five countries worldwide.

As to content, the decisions may be divided into three categories, depending on the way in which the UNIDROIT Principles are used. First, there are decisions—clearly the most important ones and all of them arbitral awards—in which the UNIDROIT Principles were applied as the law governing the substance of the dispute. Sometimes this was expressly requested by the parties, either in the contract itself or at the beginning of the arbitration proceedings. More often however, the contracts merely referred to “general principles of law,” “principles of international law,” “lex mercatoria” or the like, and the arbitrators applied the UNIDROIT Principles on the assumption that they represented a particu-

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larly authoritative expression of supra-national or transnational principles and rules of law. Recently there have been an increasing number of cases in which arbitral tribunals have gone even further and applied the UNIDROIT Principles—either alone or in conjunction with the otherwise applicable law—even in the absence of any choice of law clause in the contract. In doing so, the arbitrators relied on the relevant statutory provisions or arbitration rules according to which they may—to quote the language used in Article 17 of the ICC Rules of Arbitration—“apply the rules of law which [they] determine to be appropriate” and “in all cases [...] shall take account of [...] the relevant trade usages.”

In a second group of decisions—which include court opinions—the UNIDROIT Principles have been used to interpret or supplement international uniform law instruments. For obvious reasons, most of these decisions concerned Article 7 CISG, which states that the Convention should be interpreted by taking into account its international character and the need to promote uniformity and that gaps should be filled whenever possible by the general principles underlying it. Yet, occasionally the UNIDROIT Principles have also been used to interpret other international instruments.

In a third category of decisions—which represents almost half of the reported cases and again includes a number of court decisions—the UNIDROIT Principles have been referred to in applying a particular domestic law. * * *

R. FOLSOM, M. GORDON AND J. A. SPANOGLE,
INTERNATIONAL BUSINESS TRANSACTIONS
IN A NUTSHELL
53-54 (8th ed. 2009).*

Can seller exclude these obligations concerning the quality of the goods by terms in the contract—and, if so, how? CISG Article 6 states that the parties may, by agreement, derogate from any provision of the Convention, and Article 35(2) supports that ability to limit obligations concerning the quality of the goods. However, it is also clear that the standard formulation in domestic contracts—disclaiming implied warranties—will be inapposite, since the CISG obligations are neither “warranties” nor “implied.” New verbal formulations must be found, which deal directly with the description of the goods and their expected use.

The major unresolved issue is the extent to which local law regulating disclaimers will impact on the international contracts governed by CISG. Such local law covers a spectrum from prohibitions on disclaimers in printed standard terms to the “how to do it manual” set out in UCC 2–316. There seems to be agreement that the former raises a question of “validity,” and therefore governs contracts arising under CISG; and that the UCC provisions do not raise questions of “validity,” and therefore do

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not govern CISG contracts. The distinction drawn seems to depend upon whether the local public policy prohibits the conduct completely, or allows it but only within certain conditions.

**QUESTIONS AND COMMENTS**

1. Does CISG govern this German–American transaction under the revised facts of Part B? Both countries are "Contracting States", i.e., those that have ratified or acceded to the Convention, even if with reservations. (Note that "State" refers to independent sovereigns, not to individual states within the United States.) Further, the determinative "place" under CISG Article 1 is the "place of business" of each party, not the parties' formal nationality, where the goods are, or whether the goods themselves move in international commerce. See CISG, Articles 1(1) and 1(3).

   Under Article 1(1)(b), if only one Contracting State is involved, then the analysis of the issues becomes similar to that of Part A. One must determine whether applicable domestic choice of law concepts—so-called "rules of private international law"—lead to the application of the law of a Contracting State. If so, then CISG is applicable; if not, the domestic commercial law of the chosen noncontracting state is applicable. But, remember that United States courts are not bound by Article 1(1)(b).

2. It may still be possible to get different answers from different court systems. An American court would approach the issue only under subparagraph (1)(a) of CISG Article 1, since it is not bound by subparagraph (1)(b) of Article 1. It would find a transaction between parties in two different Contracting States, and hold the Convention to be governing law, unless the parties' contract expressly excludes its application.

   Analysis by German courts might be more complicated. The "observation" presented by the German government indicates that German courts will not consider the United States to be a Contracting State for purposes of Article 1(1)(b), due to the U.S. declaration under CISG Article 95. Does that mean that we must again go through the traditional choice of law analysis raised in Part A of this Problem? If German choice of law principles are more likely to select American law, then there are at least two possible sources of such law: CISG and the UCC. Does the German observation make clear which of these will be selected?

   An alternative analysis for the German courts is to make CISG govern the transaction under Article 1(1)(a). Under that analysis, the restrictions in the "observation" are limited to analysis under Article 1(1)(b), and do not affect analysis under Article 1(1)(a). Such an analytical approach does leave open one question however: If the German observation does not apply to this transaction, under what circumstances could it ever apply?

3. Even when the parties have their respective places of business in different Contracting States, CISG Article 6 permits the parties to exclude its application (to "opt-out" of the CISG). But similar to the general rule on choice of law clauses discussed in Part A above, Article 6 requires an agreement of the parties. The *Hanwha Corporation* case makes clear how
difficult this is to achieve through standard business terms, at least as to the contract formation rules in the CISG.

In the revised fact pattern for Part B, Euro’s form chose German law and Universal’s form chose Kansas law. Even if the parties actually agreed on one of the choices, would such a simple statement suffice to exclude application of the CISG? See Travelers Property Casualty Co. v. Saint-Gobain Tech. Fabrics Canada Ltd., 474 F.Supp.2d 1075, 1082 (D. Minn. 2007) (“[A]bsent an express statement that the CISG does not apply, merely referring to a particular state’s law does not opt out of CISG. As the Fifth Circuit stated, ‘[a]n affirmative opt-out requirement promotes uniformity and the observance of good faith in international trade, two principles that guide interpretation of the CISG.’ ”)(quoting BP Oil Int’l, Ltd. v. Empresa Estatal Petroleos, 332 F.3d 333, 337 (5th Cir. 2003)).

4. What is the effect of the CISG’s contract formation rules as applied to the Euro–Universal transaction in Part B? Note, first, that the CISG follows the basic offer-acceptance scheme. See Articles 14 and 18. But what are the “battle of the forms” rules under Article 19? For non-material alterations in the reply, Article 19(2) seems to water down the strict mirror image rule of Article 19(1); but—unlike UCC § 2–207(2)—if an offeror timely objects to such non-material terms, no contract is formed at all under the CISG. Does Universal’s Order Acknowledgement Form contain terms that “materally alter” the terms of the offer? Comment 4 to UCC 2–207 indicates that a warranty disclaimer likely would be a material alteration. Is a United States court likely to follow the same reasoning in interpreting CISG? Is it even permitted to do so for an international treaty?

Now focus on the broad list in CISG Article 19(3). If the parties have only exchanged forms (i.e., have not yet performed at all), what then is the result under CISG Article 19 for our German–American transaction in Part B?

5. Now assume the parties in Part B have performed as in the Expanded Fact Pattern. If they did not establish a contract through their forms under Article 19, they probably did so through their conduct after delivery and acceptance of the goods. Is this a type of situation for which Article 18(1) is designed? If so, does the seller’s shipment of the goods constitute conduct accepting the buyer’s offer—and its terms, without modification; or is the buyer’s acceptance of the goods in Germany conduct accepting the seller’s counteroffer in the Order Acknowledgement Form—and its terms, without modification? Reread Article 18(3). Is it biased in favor of sellers, since they most often send the second form? Or is it biased against sellers, since their shipment (“dispatch of the goods”) usually occurs before payment?

6. On the other hand, Universal’s Order Acknowledgement Form seems to be a rejection of Euro’s offer. Under CISG Article 17, when such a rejection reaches Euro, Euro’s offer is “terminated.” Perhaps then Euro’s offer may not be available to be accepted by Universal when it ships the goods. Such an analysis would argue that Euro accepted Universal’s terms when it accepted and paid for the goods.

7. This standard analysis in Comments 4–6 above has been challenged by case decisions and articles. The courts should be expected to balk at following the traditional approach, when most modern legal systems have
constructed a way around the "mirror image rule." For the CISG, the German Supreme Federal Court observed, in the so-called "powdered milk case" noted by DiMatteo, et al., that the "knock-out" rule is "probably the prevailing view" for battle of forms situations. But as DiMatteo, et al. also note, German courts have used both the "knock out" rule and the "last shot" rule in different cases, without attempting to harmonize the results. The U.S. courts are in similar disarray, including holding silence to be acceptance when the parties had been exchanging counter-offers for a long time. All this should alert the practitioner to a basic desire of many courts to avoid the "mirror image" and "last shot" rules suggested by Articles 19(1) and 18(3), and to arrive at a doctrine that adopts the "knock out" rule. What would be the terms of the Euro-Universal contract under a knock out rule?

8. Professor Brand suggests that an attorney violates the Model Rules of Professional Responsibility if he or she negotiates an international contract without understanding the CISG. Simply "opting out" automatically, because you know it exists, but do not know how it works, could be malpractice. The CISG may of course favor your clients, especially if they are sellers or exporters. Could this be a problem for the practicing bar?

Professor Peter Fitzgerald recently surveyed the legal communities on this subject across the spectrum of states (Florida, New York, California, Hawaii, and Montana) and reported the results in The International Contracting Practices Survey Project, 27 J.L. & Com. 1 (2008). This survey revealed that only 30% of practitioners were "thoroughly" or "moderately" familiar with the CISG, results that tracked almost exactly those of a similar survey of the Florida Bar by Professor Michael Gordon ten years earlier. The results for judges were even starker, with 82% reporting that they were "not at all familiar" with the CISG.

What are the implications of only 30% of international practitioners believing they have a reasonable knowledge of CISG? What are the implications of over 80% of judges being unfamiliar with an international treaty, which constitutes "the supreme Law of the Land" and thereby trumps the UCC?

9. A new entry into the effort to harmonize international contract law is the Principles of International Commercial Contracts, drafted and published by UNIDROIT (The Rome Institute) in 1994 and revised in 2004 and again in 2010. Their rules on standard terms and the "battle of the forms" are reprinted as an Appendix to Professor Perillo's article. The UNIDROIT Principles function as an international Restatement of the Law, but are more equivalent to a Restatement of the Best Practices in International Practice. Because they are not a treaty, domestic courts are not likely to use the Principles, unless the parties to a contract incorporate them by reference. They may, however, be much more widely used by arbitrators as a de facto international law merchant, just as Restatements are used domestically.

The Principles take a different analytical approach than either UCC § 2–207 or the traditional "last shot" doctrine. Can the Principles be used to aid those courts that want to interpret the CISG so as to avoid the "mirror image" and "last shot" rules? See CISG Article 7 and the Bonell excerpt.
10. Professor Fitzgerald’s survey, cited in Comment 8., found even less knowledge of the UNIDROIT Principles than of CISG. Roughly half as many international practitioners know about the Principles as know of CISG, and barely 10% of judges knew about them. The one bright spot—on both the CISG and the UNIDROIT Principles—was law faculty, who reported significantly increased knowledge as well as coverage in law school courses as compared to ten years earlier.

11. Finally, what about disclaimers of warranty? See CISG Articles 35 and 36. Article 35(2) allows the parties to “agree otherwise,” which is the standard statutory euphemism for permitting disclaimers. What must the contract say in order to “agree otherwise” effectively? Must some formalism be met which states a concept contrary to each of the ideas expressed in Article 35(2)(a)–(d) (e.g., “The parties agree that the goods may not be fit for the purposes for which goods of the same description would ordinarily be used.”)—or, is “as is” sufficient to exclude all expected properties of the goods—or, is there some usable middle ground?

In addition, there are the issues relating to the degree of “unfitness” required to show a breach of any of the CISG warranties.

12. Would it matter if Euro and Universal had sent their respective forms electronically or otherwise had conducted all of their communications orally? We will analyze “electronic commerce” in much more detail in Problem 4.4 below. But for now, is there a general “statute of frauds” for CISG transactions? See CISG Article 11. But see also CISG Articles 12 and 96.

13. Is it always clear when CISG would be applied to sales transactions entered into by multinational corporations? For example, suppose in the German–American transaction in Part B that Universal (our Kansas-based seller) owns a subsidiary warehousing corporation in England, and the goods are shipped out of stock in the English warehouse directly to Germany. Recall, moreover, that as of now the United Kingdom has not ratified the CISG. CISG Article 1(1)(a) makes the Convention applicable to contracts “between parties whose places of business are in different States,” when both states are “Contracting States,” unless its application is expressly excluded in the contract. If Universal’s “place of business” is in Kansas, the conditions of Article 1(1)(a) can be met. However, if Universal’s “place of business” is in England, they cannot be met. CISG Article 10(a) provides that

if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

Which Universal office would have “the closest relationship to the contract and its performance”? (emphasis added) Would it now become important to know whether Euro knew of the English warehouse? Would it be relevant that Universal’s representative had said during negotiations, “We ship all of our products from England, on European orders”? See also CISG Article 1(2).

14. In addition to the CISG, a series of further international treaties have been negotiated and opened for ratification. The most significant of
these is the 1974 Convention on the Limitation Period in the International Sale of Goods (as amended by Protocol in 1980). See 19 I.L.M. 696 (1980). This Convention, which has been ratified by the United States and two dozen other countries, provides special rules for what American lawyers would call the “statute of limitations” for international sale of goods transactions.


PART C. HOW CAN CLIENTS AVOID THIS PROBLEM?

We finally turn to how you should counsel your client to act—if you are able to give advice before the first communication arrives. In view of the uncertainties, is it wise to seek to win a “tactical victory” in the battle of the forms? If not, what conduct should your client undertake to protect its interests?

Suppose that after its representative had visited the trade fair, but before it received Euro’s Purchase Order, Universal consults you. It wants you to advise its sales department on how to handle incoming foreign orders—whatever the form of the “offer to buy,” whether it comes by telephone, telegraph, letter, email, or printed form. What is your advice?

Would you find this counseling to be easier or more difficult if Universal’s likely customers are located in countries that also have ratified the CIGS?

One fact that should be clear from all of the uncertainties involved in analyzing this Problem is that the lawyer who thinks primarily in terms of litigation would not find any of these uncertainties very appealing for either party in any jurisdiction. The uncertainties of both sides are very high and so will be the costs of litigation. Most such cases will be settled by negotiation, with each attorney carefully appraising the client’s and the opponent’s position.

A more important service to the client is counselling—how to prevent this problem from arising.

QUESTIONS AND COMMENTS

1. By now, you should be aware that courts have a wide latitude in deciding issues that arise out of such fact situations. We saw in Part A that choice of law issues may leave substantial uncertainty about what contract formation rules will apply to an international sales transaction. Moreover,
even if we knew that, for example, Kansas substantive law would apply, we have seen that two of the most learned commentators (White and Summers) disagree on at least one core issue of contract formation under the UCC. Read again the excerpt from their “Conclusion.”

The choice of law rule seems more predictable if the law of a European Union member state applies. Nonetheless, and notwithstanding substantial efforts to bring harmony, each of these states still has its own substantive contract formation rules. And even if we had some confidence that the law of one particular state would apply, it may not be possible, with the available research tools and resources, to determine what ambiguities may exist in that law, much less how to resolve them. And what if Universal receives an order from India or Indonesia? Or Mali? How much do you know (or, can you even find out) about any of these legal systems?

If the CISG governs, some ambiguities will still exist. But, in comparison to the law of any particular foreign system, many more aids to interpretation in English are available for the CISG. One of the most valuable of these is the UNCCITRAL Digest of Case Law on the CISG, which contains analyses and abstractions on CISG court decisions organized by specific Articles. Beyond this, a rich variety of legal commentaries and treatises should make the CISG more easily accessible (both practically and conceptually) for an American lawyer. Nonetheless, as we have seen in the analysis of Part B above, substantial disagreement exists about the proper resolution of the “battle of the forms” under the CISG as well.

2. With this degree of uncertainty, would you seek to rely upon terms inserted in an Order Acknowledgement Form to win a “tactical victory” in “the Battle of the Forms”? If not, what advice can you give to your client? What positive steps can the client take to prevent misunderstandings, and when should they be taken?

3. If your client communicates with the other party, what should be the content of the communication? If the warranty term of the contract is at issue, should the client communicate to the buyer that “we don’t stand behind our goods at all”—before the contract is binding? The Sales Department might object to that approach.

4. What is it about this possible fact situation that scares Universal? Universal has pride in its product and has had few complaints with its sales within the United States. The price of the goods is not a significant loss or risk in an effort to open up a new sales territory, if the goods fail to perform due to some new operating conditions. However, one million dollars in “consequential damages” is a significant loss or risk for Universal. The rules for damages under the CISG are found in Articles 74–77. (Fortunately or not for Universal, the CISG does not apply to personal injury claims. See CSIG Article 5.) Under the UCC, damages rules in §§ 2–714, 2–715 both invoke “foreseeability,” and visions of Hadley v. Baxendale, 156 Eng.Rep. 145 (1854). However, under both, the stated provisions may be varied by agreement of the parties. CISG Article 6, UCC §§ 2–718, 2–719. With these concepts in mind, what should the client do to obtain protection without overreaching?

5. Does your client, Universal, have any duty to investigate the context in which its product will be used in foreign markets before it ships to those
markets? This Problem is a remarkable demonstration of ignorance by all parties. Who has the burden of initiating investigation? Who should have that burden? One clear counselling point is that a party should discuss the matter with the other party if it has not investigated the commercial and legal environment in a foreign country.

**PROBLEM 4.2 COMMERCIAL TERMS, BILLS OF LADING AND INSURANCE—BOOKS TO BATH**

**SECTION I. THE SETTING**

Your client, Sam Silver, of Savannah, Georgia, wishes to consult with you about a sale of goods he has just negotiated with a couple of buyers in England. Sam is a publisher of "romance novels," and his latest publication is "Desire Under the Thornbush." Bill Bones is a book distributor in Bath who wants "two dozen gross" of this latest publication. Howard Hunt is a competing book distributor, also in Bath. Not to be outdone, Howard ordered "three dozen gross" of "Desire Under the Thornbush."

Sam has never sold goods outside the United States before, but he is very proud of his ability to write a "lawyer-like contract." Thus, when Sam comes to consult you, he has a piece of paper signed by both Bill and himself and labelled "Contract," containing all the necessary items for a contract, such as price, description, quantity, and quality of the goods. The contract does not state whether the sale is for cash or on credit, but it does have two terms which catch your eye: "Price: F.O.B. Savannah;" and "This Contract shall be governed by I.C.C. INCOTERMS (2010 Edition)." Sam also has a second piece of paper signed by both Howard and himself and labelled "Contract." It also contains all necessary terms, including: "Price: C.I.F., Bath, United Kingdom," and "This Contract shall be governed by I.C.C. INCOTERMS, 2010 Edition."

Sam explains that Howard was very insistent on the CIF term, and would not purchase under any different arrangement, and so Sam now has these two contracts with different terms. Sam is well aware of the different components in the price of the two different contracts, and tells you that the problem is "already taken care of." But Sam does want to know "just a couple of things" about how to set up the transportation of the goods. In particular, he needs your advice on:

1. Is Sam supposed to arrange for the transportation of the books to Bill or Howard, or is that their responsibility?

2. If Sam does arrange the transportation for Bill (as a favor or otherwise), and Bill is supposed to pay the freight charges, how can Sam assure himself that Bill will do so?

3. Is Sam supposed to arrange for insurance on the books to Bill during transit, or is that Bill’s responsibility?
4. Sam also wants to know whether to get negotiable or non-negotiable bills of lading. See the Basic Transaction in the Introduction to this Chapter. Should they be issued “to bearer” or “to order”? If the latter, to whose order?

5. After discussing the problem with Sam for a few minutes, it becomes clear that what Sam really wants to do—for his own ease and convenience—is load all the books for both Bill and Howard into one container, obtain one bill of lading to cover them, and ship them off to Bill and Howard jointly. Can Sam do this? If not, please explain to him why it would not be possible.

6. Will either Bill or Howard have a right to inspect the goods before accepting or paying for them?

7. Does anyone need to obtain insurance on any of the books sent to Bill? After all, if these books are damaged, it will be due to negligence of the carrier, so carrier would be liable for any loss or damage. Thus, Sam wants you to assure him that insurance is an unnecessary expense.

8. Several days later, at 4 p.m. on a Friday afternoon, Sam calls you from the Carrier’s office. He has delivered 30 boxes of books in cardboard cartons to the carrier. Sam filled out two Commercial Invoices, one each for Bill and Howard, stating that they covered 12 and 18 cartons respectively “each carton containing two gross books: ‘Desire Under the Thombush.’” The carrier’s clerk waited until the cartons were loaded, then stamped the bills of lading “On Board,” “Shipper’s Load, Weight & Count,” and “Contents Unknown.” Sam protested, but the carrier’s clerk said he stamps all bills of lading that way, on orders of his supervisor, “so we never have to get involved with disputes between the parties over the quality or quantity of the goods.” Sam is worried and frustrated. He wants to know whether he can safely accept the bills of lading so stamped, and allow the goods and these documents to go forward, or whether the documents will cause problems when they arrive in Bath. What is your advice? (Incidentally, he does not want you to research the matter and call him on Monday.)

SECTION II. FOCUS OF CONSIDERATION

It is possible to have a cash sale international transaction that does not involve a letter of credit. Such a transaction uses the negotiable bill of lading and a series of collecting banks to require the buyer to pay before it can obtain physical possession of the bill of lading, and therefore control of the goods. These principles are at the heart of the CIF transaction. “CIF”, as a term of a contract, is typically not just a price term (as is shown in Introduction 4.0), but is also a payment term (payment is due against tender of documents) and a delivery term (at shipment). The CIF transaction can be diagramed in exactly the same way as the transaction in Introduction 4.0, but deleting the letter of credit. (See diagram on page 52, supra.)
Most international sales contracts are not cash transactions, however. Instead they are sales on open credit between buyers and sellers who deal with each other on a long-term basis, or who are subsidiaries of the same parent company. For such sales, the complexities of a CIF contract are not necessary, and the use of FOB place of shipment is more typical. “FOB place of shipment,” as a contract term, is typically both a price term (as is shown in Introduction 4.0) and a delivery term (at shipment), but is not a payment term. Thus, it does not require the formalities of payment against documents, unless otherwise agreed.

The first Part of this problem compares and contrasts the FOB shipment and CIF contracts to explore the fundamental differences between them and the fundamental difference in their uses. To analyze these issues one must consider not only local laws, but also international customs, of which the predominant one in U.S.–European trade is Incoterms.

In the second Part of this problem, we begin our analysis of the regulation of international bills of lading. What does it mean when a piece of paper is a “document of title” (such as a bill of lading)? In specific, what are the obligations of a carrier when it issues such a document covering the international transportation of goods? Problem 4.5 below will examine in detail the grounds for the carrier’s potential liability arising out of bills of lading, and in particular where a bill misdescribes the goods in the first place or the carrier delivers them contrary to the bill’s terms.

In this Problem 4.2, we begin with the carrier’s basic responsibility for loss of, or damage to, the goods in transit (i.e., after they have been entrusted to the carrier’s care). But the special focus here will also be on attempts by carriers to limit the amount of their liability, and on the domestic and international regulatory responses to those efforts.

The regulation of the terms of the bill of lading, i.e., the relationship of the carrier and its customers, is the subject of three international conventions and three United States federal statutes. The three conventions—the Hague Rules, the Hague/Visby Rules, and the Hamburg Rules, respectively—all cover the same subject matter, but are progressively more customer-oriented. (As noted in the Comments below, a compromise fourth convention, the Rotterdam Rules, is also now available.) The United States has enacted the Hague Rules into its domestic law as the Carriage of Goods by Sea Act (COGSA), but also has in force non-conforming pre-COGSA legislation (the Harter Act) as well as a special Federal Bill of Lading Act (the so-called Pomerene Act). English law is based on the Hague/Visby Rules.

A final issue raised by this problem is the differences between the 1) mandatory laws of a state which are binding on the parties and may not be set aside by contractual clauses, 2) optional laws of a state which may be subject to contrary contractual agreement by the parties, and 3) trade customs and usages which arise out of contractual terms and not out of the law of a state. Examples of the first are COGSA and the Pomerene
Act. Examples of the second are most provisions of the UCC and the Common Law of contract. An example of the third is the I.C.C.'s Incoterms. The practical importance of the provisions of each of these sources of rules does not depend upon its place in the legal hierarchy, however.

Web sources for further study include the International Chamber of Commerce web page http://www.iccwbo.org/incoterm/id3045/index.html

If the UCC is applicable to this transaction, then a reading of UCC §§ 1-302(a), 2-319, 2-320 is essential to an analysis of the Problem. For Part B below, please also read the Carriage of Goods by Sea Act (COGSA) (see the Document Supplement).

SECTION III. READINGS, QUESTIONS AND COMMENTS

PART A. THE ROLE OF COMMERCIAL TERMS

SCHMITTBOFF'S EXPORT TRADE: THE LAW AND PRACTICE OF INTERNATIONAL TRADE

† 2-006, 07 (Murray, Holloway, Timson–Hunt, eds., 11th ed., 2007).*

AMERICAN PRACTICE

In the United Kingdom and the Commonwealth “f.o.b.” is understood as meaning “f.o.b. vessel.” In the American practice “f.o.b.” has become a general delivery term which, if used in the form “f.o.b. place of destination” even denotes free delivery at that place. The equivalent to the English meaning of “f.o.b.” is the American term “f.o.b. vessel.” The American regulation can be gathered from the following provisions of the Uniform Commercial Code [UCC 2–319]:

Unless otherwise agreed the term f.o.b. (which means “free on board”) at a named place, even though used only in connection with the stated price, is a delivery term under which

(a) when the term is f.o.b. the place of shipment, the seller must at that place ship the goods * * * and bear the expense and risk of putting them into the possession of the carrier; or

(b) when the term is f.o.b. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them * * *;

(c) where under either (a) or (b) the term is also f.o.b. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is f.o.b. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this Article on the form of bill of lading * * *.

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Types of F.O.B. Clauses

The term f.o.b. may be used by an exporter who buys from a manufacturer or merchant in the United Kingdom and who intends to resell the goods abroad; this transaction may be concluded f.o.b. UK Port. Further, an exporter may sell or resell goods to an overseas buyer f.o.b. UK Port; in this case the f.o.b. term is used in the export transaction. The exporter should be aware of the fact that the f.o.b. term when used in the supply transaction may carry different incidental obligations from such a term when used in the export transaction. This point was made clear by Singleton L.J. in *M.W. Hardy & Co., Inc. v. A.V. Pound & Co. Ltd.*, who explained that this difference might be material for the decision whether an export licence has to be obtained by the seller or the buyer.

A further distinction of considerable practical importance is that between three types of f.o.b. contract, and, here again, it depends on the intention of the parties which of these types is used.

The first type is the *strict or classic f.o.b. contract*. Under this arrangement the buyer has to nominate a suitable ship. When it arrives in the port of shipment, the seller places the goods on board under a contract of carriage by sea which he has made with the carrier, but this contract is made for the account of the buyer. The seller receives the bill of lading which normally shows him as consignor and is to his order, and he transfers it to the buyer. Marine insurance is normally arranged by the buyer directly, if he wishes to insure, but he may also ask the seller to arrange marine insurance for his—the buyer’s—account.

The second type is the *f.o.b. contract with additional services*. Under this arrangement the shipping and insurance arrangements are made by the seller, but this is done for the account of the buyer. In this type of f.o.b. contract the buyer is not under an obligation to nominate a suitable ship but the nomination is done by the seller. Again, as in contracts of the first type, the seller enters into a contract with the carrier by sea, places the goods on board ship and transfers the bill of lading to the buyer.

The third type may be described as the *f.o.b. contract (buyer contracting with carrier)*. Here the buyer himself enters into a contract of carriage by sea directly or through an agent, e.g. a forwarder. Naturally the buyer has nominated the ship, and when it calls on the port of shipment, the seller puts the goods on board. The bill of lading goes directly to the buyer, usually through an agent of the buyer in the port of shipment, such as a freight forwarder, and does not pass through the seller’s hands.

Considerable legal differences exist between these three types of f.o.b. contract. They indicate the flexible nature of this arrangement. Indeed, variations and combinations of these types of f.o.b. contract are met in practice. In f.o.b. contracts of the first and third type the duty to nominate the ship falls on the buyer, but in those of the second type it falls on the seller. In contracts of the first and second type the seller is in contractual relationship with the sea carrier, and for this reason the second type has been described as a variant of the first type. In a contract of the third
type, on the other hand, the contract of carriage by sea is made directly with the buyer and the seller is not a party to it.

The three different types of f.o.b. contract are described by Devlin J. in *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.* as follows:

The f.o.b. contract has become a flexible instrument. In ... the classic type ... for example, in *Wimble, Sons & Co. Ltd. v. Rosenberg & Sons*, the buyer’s duty is to nominate the ship, and the seller’s to put the goods on board for account of the buyer and procure a bill of lading in terms usual in the trade. In such a case the seller is directly a party to the contract of carriage at least until he takes out the bill of lading in the buyer’s name. Probably the classic type is based on the assumption that the ship nominated will be willing to load any goods brought down to the berth or at least those of which she is notified. Under present conditions, when space often has to be booked well in advance, the contract of carriage comes into existence at an earlier point of time. Sometimes the seller is asked to make the necessary arrangements; and the contract may then provide for his taking the bill of lading in his own name and obtaining payment against the transfer, as in a c.i.f. contract. Sometimes the buyer engages his own forwarding agent at the port of loading to book space and to procure the bill of lading; if freight has to be paid in advance this method may be most convenient. In such a case the seller discharges his duty by putting the goods on board, getting the mate’s receipt and handing it to the forwarding agent to enable him to obtain the bill of lading.

**R. FOLSOM, M. GORDON, J. A. SPANOGLE,**
**PRINCIPLES OF INTERNATIONAL BUSINESS TRANSACTIONS**
§§ 2.3, 2.8, 2.9 (2nd ed., 2010).*

**Incoterms as Trade Usage**

* * *

Although the UCC has definitions for some commercial terms (e.g., F.O.B., F.A.S., C.I.F.), these definitions are expressly subject to “agreement otherwise.” Thus, an express reference to Incoterms will supercede the UCC provisions, and United States courts have so held.

* * *

**The Free on Board (FOB) Term**

Under the Incoterms Free on Board (FOB) commercial term, the seller is obligated to deliver the goods on board a ship arranged for and named by the buyer at a named port of shipment. Thus, this term is also appropriate only for water-borne transportation, and seller must bear the costs and risks of inland transportation to the named port of shipment,

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and also of loading the goods on the ship. * * * Seller has no obligation to arrange transportation or insurance, but does have a duty to notify buyer “that the goods have been delivered on board” the ship. The risks of loss will transfer to the buyer also at the time the goods [are “on board the vessel”]. The seller must provide a commercial invoice, or its equivalent electronic message, and necessary export license, and usually a transport document that will allow buyer to take delivery—or an equivalent electronic [record]. The seller must also provide an export license, and clear the goods for export from the place of delivery. The seller must therefore pay any costs of customs formalities and export taxes.

In addition, the seller must provide all customary packaging and working, and pay for checking operations. The latter include measuring, weighing, counting, and checking of the goods considered necessary to accomplish delivery. [Authors’ Note: The new 2010 edition of the Incoterms provides that seller also must bear the cost of any pre-shipment inspection required by authorities in the export country.]

**The Cost, Insurance and Freight (CIF) Term**

Under the Incoterms Cost, Insurance and Freight (CIF) commercial term, the seller is obligated to arrange for both transportation and insurance to a named destination port and then to deliver the goods on board the ship arranged for by the seller. Thus, the term is appropriate only for water-borne transportation. Seller must arrange the transportation, and pay the freight costs to the destination port, but has completed its delivery obligations when the goods are “on board the vessel at the port of shipment.” The seller must pay the freight and unloading costs of the carrier at the destination port under the CIF term, but the buyer must pay all other costs, including unloading costs not collected by the carrier. However, demurrage charges for the cost of docking the ship longer than agreed are to be borne by the party causing the delay.

* * *

The seller must arrange and pay for insurance during transportation to the port of destination, but the risk of loss transfers to the buyer at the time the goods [are “on board the vessel”] at the port of shipment. Thus, the risk of damage to the goods due to improper loading or stowing on board the vessel is on the buyer. The buyer bears the risk of damages that occur to the goods during transit, even though the seller has a duty to procure insurance against such risks. Seller must notify buyer “that the goods have been delivered on board” the ship to enable buyer to receive the goods. Seller must provide a commercial invoice, or its equivalent electronic message, any necessary export license, and “the usual transport documents” for the destination port.

The transportation document “must . . . enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer . . . or by notification to the carrier,” unless otherwise agreed. The traditional manner of enabling buyer to do this, in either the “payment against
documents” transaction or the letter of credit transaction, is for seller to obtain a negotiable bill of lading from the carrier and to tender that negotiable document to buyer through a series of banks. The banks allow buyer to obtain possession of the document (and control of the goods) only after buyer pays for goods. Thus, buyer “pays against documents,” while the goods are at sea, and pays for them before any post-shipment inspection of the goods is possible.

**Comments**

1. The leading case concerning buyer's (lack of a) right of inspection under a CIF contract (or any other contract that requires “payment against documents”) is *Biddell Bros. v. E. Clemens Horst Co.*, [1912] A.C. 18 (House of Lords), which construed both the commercial usage and the British Sales of Goods Act. Earl Loreburn, L.C. summed up the issues in the following language:

   This is a contract usually called a c.i.f. contract, under which the seller is to ship a cargo of hops and is to contract for freight and to effect insurance; and he is to receive 90s. per 112 lbs. of hops. The buyer is to pay cash. But when is he to pay cash? The contract does not say. The buyer says that he is to pay cash against physical delivery and acceptance of the goods when they have come to England.

   Now § 28 of the Sale of Goods Act says in effect that payment is to be against delivery. Accordingly we have supplied by the general law an answer to the question when this cash is to be paid. But when is there delivery of goods which are on board ship? That may be quite a different thing from delivery of goods on shore. The answer is that delivery of the bill of lading when the goods are at sea can be treated as delivery of the goods themselves, this law being so old that I think it is quite unnecessary to refer to authority for it.

   Now in this contract there is no time fixed at which the seller is entitled to tender the bill of lading. He therefore may do so at any reasonable time; and it is wrong to say that he must defer the tender of the bill of lading until the ship has arrived; and it is still more wrong to say that he must defer the tender of the bill of lading until after the goods have been landed, inspected and accepted.

2. To the extent that one regards commercial practices (and law) as dynamic—involving a continuous jostling by different parties for a more advantageous position—there are two more items of interest. All of the foregoing doctrines can seem to favor seller, leaving an aggrieved buyer with little protection, even if buyer proceeds to sue the seller in the seller's home jurisdiction. The attack by buyers on this problem has been the specification in the sales contract that the seller provide an Inspection Certificate by a trusted and financially responsible third party. The Certificate, if properly arranged, allows the buyer to rely upon the credit and stability of the third party, as was discussed in Problem 4.0.

3. However, as one might expect, sellers have developed a method of parrying the effect of Inspection Certificates—by specifying in the sales
contract that the representations in any Certificate shall be final and binding on the buyer. Thus, where a contract specifies that a certificate of quality is final, and a seller then ships wheat which does not conform to the contract, but the certificate describes the wheat as conforming, the buyer is bound by the description in the certificate; and any later inspection is irrelevant. Toepfer v. Continental Grain Co., [1974] 1 Lloyd's Rep. 11 (C.A.); Gill & Duffus S.A. v. Berger & Co., [1984] 1 All E.R. 438 (House of Lords).

ZWILLING-PINNA, UPDATE OF IMPORTANT COMMERCIAL TERMS: REVISION OF THE INCOTERMS AS OF 2011

Der Betriebs-Berater, v. 65, pp. 2980–2981 (2010).*

[Translation from German by the Authors]

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The Legal Nature of Incoterms 2010

The Incoterms were not designed to supplant domestic law, but rather to bridge the conflicts that arise for the parties from the contract law rules of the different domestic legal systems. The Incoterms do not apply as formal law of their own force *, **, but rather have the character of recommended contract terms. A specific Incoterm rule may become part of a contract through an agreement of the parties. But the Incoterms also may apply as a usage of trade if they are referred to as a whole either in the contract of the parties or in standard business terms accepted by them. Within the scope of the CISG, which recognizes binding trade usages, this result obtains through a party agreement on a trade usage under CISG Art. 9(1) or through the recognition of the Incoterms as a widely known trade usage under CISG Art. 9(2).

Each term in the Incoterms, with ten specific rights and duties of seller and buyer for their sales contract, theoretically represents a complete and integrated system within the background of the domestic law otherwise applicable to the contract. The parties that incorporate the Incoterms nonetheless may agree on different rules for specific issues. To avoid conflicts, however, such agreements should be expressly and clearly defined.

Authors’ Note on Incoterms 2010

In September, 2010, the International Chamber of Commerce, following an extensive period of consultation, adopted a new edition of the Incoterms. These “Incoterms 2010”, which formally entered into effect on January 1, 2011, are designed to respond to general developments in trade and transport practices and otherwise to simplify and clarify uncertain aspects of Incoterms 2000.

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Two Broad Categories. The result was, first, a distillation and organization of the defined commercial terms into two general categories: those limited to sea and inland waterway transport, and those allowed for any mode of transport. The former category includes the most frequently used terms in large international transactions, CIF and FOB, as well as their less common cousins CFR (Cost and Freight) and FAS (Free Along-side Ship). The latter category covers a number of detailed terms also used in water transport, but which are more prevalent for air, land, and rail transportation: CIP (Carriage and Insurance Paid), CPT (Carriage Paid To), DAP (Delivered At Place), DAT (Delivered At Terminal), DDP (Delivered Duty Paid), EXW (Ex Works), and FCA (Free Carrier). One might also align these eleven different terms along a spectrum according to the relative responsibilities of seller and buyer. At one end of the spectrum would be EXW (Ex Works), under which seller must merely make the goods available at its own place of business (or other named place); at the other end would be DDP (Delivered Duty Paid), which obligates seller to place the goods at buyer’s disposal at the destination location and to assume the responsibility and cost of both export and import customs clearance.

Electronic Commerce. In more practical terms, the principal purpose for the 2010 revisions of Incoterms was to address specific legal and factual developments relating to the transportation of goods. Perhaps most significant, the new rules expressly endorse the substitution of paper communications with an “equivalent electronic record or procedure.” The previous edition allowed the agreed use of electronic data interchange (EDI) messages, the most prominent early form of which was the rules for electronic bills of lading developed by the Comité Maritime International (CMI). At the core of this system was a unique “private key” issued by the carrier to the shipper upon receipt of the goods. The shipper (the “holder” of the private key) could then transfer rights over the goods by notification to the carrier. If the transferee agreed with this electronic system, the carrier would cancel the original private key and issue a new one to the transferee as the new “holder” of the electronic bill of lading.

Incoterms 2010, however, now broadly embrace both electronic communications and electronic records where either the parties so agree or such is “customary” in the trade. This reference to trade custom is significant because it will increasingly authorize buyers and sellers to fulfill communication and documentation requirements with electronic equivalents. Moreover, the new Incoterms intentionally adopted an open-ended definition of “electronic records” to permit the rules to adapt to new technologies as they arise in the future. (We will examine the subject of electronic bills of lading in more detail in Problem 4.5 below.)

Use in International and Domestic Trade. Incoterms 2010 also expressly recognize that they may be used in “both domestic and international trade.” The goal of this language was to facilitate the use of Incoterms in customs-free trade zones such as the European Union (where
international borders are less significant) as well as in large domestic legal systems (such as in the place of the UCC in the United States).

INCOTERMS® 2010
International Chamber of Commerce pub. no. 715.*

FREE ON BOARD

FOB (insert named port of shipment) Incoterms® 2010
This rule is to be used only for sea or inland waterway transport.

* * *

A THE SELLER’S OBLIGATIONS

A1 General obligations of the seller

The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract.

Any document referred to in A1–A10 may be an equivalent electronic record or procedure if agreed between the parties or customary.

A2 Licenses, authorizations, security clearances and other formalities

Where applicable, the seller must obtain, at its own risk and expense, any export license or other official authorization and carry out all customs formalities necessary for the export of the goods.

A3 Contracts of carriage and insurance

a) Contract of carriage

The seller has no obligation to the buyer to make a contract of carriage. However, if requested by the buyer or if it is commercial practice and the buyer does not give an instruction to the contrary in due time, the seller may contract for carriage on usual terms at the buyer’s risk and expense. In either case, the seller may decline to make the contract of carriage and, if it does, shall promptly notify the buyer.

b) Contract of insurance

The seller has no obligation to the buyer to make a contract of insurance. However, the seller must provide the buyer, at the buyer’s request, risk, and expense (if any), with information that the buyer needs for obtaining insurance.

A4 Delivery

The seller must deliver the goods either by placing them on board the vessel nominated by the buyer at the loading point, if any, indicated by the buyer at the named port of shipment or by procuring the goods so delivered. In either case, the seller must deliver the goods on the agreed date or within the agreed period and in the manner customary at the port.

If no specific loading point has been indicated by the buyer, the seller may select the point within the named port of shipment that best suits its purpose.

A5 Transfer of risks
The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A4 with the exception of loss or damage in the circumstances described in B5.

A6 Allocation of Costs
The seller must pay
a) all costs relating to the goods until they have been delivered in accordance with A4, other than those payable by the buyer as envisaged in B6; and
b) where applicable, the costs of customs formalities necessary for export, as well as all duties, taxes and other charges payable upon export.

A7 Notices to the buyer
The seller must, at the buyer’s risk and expense, give the buyer sufficient notice either that the goods have been delivered in accordance with A4 or that the vessel has failed to take the goods within the time agreed.

A8 Delivery document
The seller must provide the buyer, at the seller’s expense, with the usual proof that the goods have been delivered in accordance with A4.

Unless such proof is a transport document, the seller must provide assistance to the buyer, at the buyer’s request, risk and expense, in obtaining a transport document.

A9 Checking-packaging-marking
The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A4, as well as the costs of any pre-shipment inspection mandated by the authority of the country of export.

The seller must, at its own expense, package the goods, unless it is usual for the particular trade to transport the type of goods sold unpackaged. The seller may package the goods in the manner appropriate for their transport, unless the buyer has notified the seller of specific packaging requirements before the contract of sale is concluded. Packaging is to be marked appropriately.

A10 Assistance with information and related costs
The seller must, where applicable, in a timely manner, provide to or render assistance in obtaining for the buyer, at the buyer’s request, risk and expense, any documents and information, including security-related information, that the buyer needs for the import of the goods and/or for their transport to the final destination.
The seller must reimburse the buyer for all costs and charges incurred by the buyer in providing or rendering assistance in obtaining documents and information as envisaged in B10.

**B THE BUYER'S OBLIGATIONS**

**B1 General obligations of the buyer**

The buyer must pay the price of the goods as provided in the contract of sale.

Any document referred to in B1–B10 may be an equivalent electronic record or procedure if agreed between the parties or customary.

**B2 Licenses, authorizations, security clearances and other formalities**

Where applicable, it is up to the buyer to obtain, at its own risk and expense, any import license or other official authorization and carry out all customs formalities for the import of the goods and for their transport through any country.

**B3 Contracts of carriage and insurance**

a) Contract of carriage

The buyer must contract, at its own expense for the carriage of the goods from the named port of shipment, except where the contract of carriage is made by the seller as provided in A3 a).

b) Contract of insurance

The buyer has no obligation to the seller to make a contract of insurance.

**B4 Taking delivery**

The buyer must take delivery of the goods when they have been delivered as envisaged in A4.

**B5 Transfer of Risks**

The buyer bears all risks of loss of or damage to the goods from the time they have been delivered as envisaged in A4.

If

a) the buyer fails to notify the nomination of a vessel in accordance with B7; or

b) the vessel nominated by the buyer fails to arrive on time to enable the seller to comply with A4, is unable to take the goods, or closes for cargo earlier than the time notified in accordance with B7;

then, the buyer bears all risks of loss or damage to the goods:

(i) from the agreed date, or in the absence of an agreed date,

(ii) from the date notified by the seller under A7 within the agreed period, or, if no such date has been notified,

(iii) from the expiry date of any agreed period for delivery,

provided that the goods have been clearly identified as the contract goods.

**B6 Allocation of costs**
The buyer must pay

a) all costs relating to the goods from the time they have been delivered as envisaged in A4, except, where applicable, the costs of customs formalities necessary for export, as well as all duties, taxes and other charges payable upon export as referred to in A6 b);

b) any additional costs incurred, either because:

(i) the buyer has failed to give appropriate notice in accordance with B7, or

(ii) the vessel nominated by the buyer fails to arrive on time, is unable to take the goods, or closes for cargo earlier than the time notified in accordance with B7,

provided that the goods have been clearly identified as the contract goods; and

c) where applicable, all duties, taxes and other charges, as well as the costs of carrying out customs formalities payable upon import of the goods and the costs for their transport through any country.

**B7 Notices to the seller**

The buyer must give the seller sufficient notice of the vessel name, loading point and, where necessary, the selected delivery time within the agreed period.

**B8 Proof of delivery**

The buyer must accept the proof of delivery provided as envisaged in A8.

**B9 Inspection of goods**

The buyer must pay the costs of any mandatory pre-shipment inspection, except when such inspection is mandated by the authorities of the country of export.

**B10 Assistance with information and related costs**

The buyer must, in a timely manner, advise the seller of any security information requirements so that the seller may comply with A10.

The buyer must reimburse the seller for all costs and charges incurred by the seller in providing or rendering assistance in obtaining documents and information as envisaged in A10.

The buyer must, where applicable, in a timely manner, provide to or render assistance in obtaining for the seller, at the seller’s request, risk and expense, any documents and information, including security-related information, that the seller needs for the transport and export of the goods and for their transport through any country.

**COST, INSURANCE AND FREIGHT**

**CIF** (insert named port of destination) Incoterms® 2010

This rule is to be used only for sea or inland waterway transport.

* * *
A THE SELLER'S OBLIGATIONS

A1 General obligations of the seller

The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract.

Any document referred to in A1–A10 may be an equivalent electronic record or procedure if agreed between the parties or customary.

A2 Licenses, authorizations, security clearances and other formalities

[Same as FOB A2]

A3 Contracts of carriage and insurance

a) Contract of carriage

The seller must contract or procure a contract for the carriage of the goods from the agreed point of delivery, if any, at the place of delivery to the named port of destination or, if agreed, any point at that port. The contract of carriage must be made on usual terms at the seller's expense and provide for carriage by the usual route in a vessel of the type normally used for the transport of the type of goods sold.

b) Contract of insurance

The seller must obtain, at its own expense, cargo insurance complying at least with the minimum cover provided by Clauses (C) of the Institute Cargo Clauses (LMA/IUA) or any similar clauses. The insurance shall be contracted with underwriters or an insurance company of good repute and entitle the buyer, or any other person having an insurable interest in the goods, to claim directly from the insurer.

When required by the buyer, the seller shall, subject to the buyer providing any necessary information requested by the seller, provide at the buyer's expense any additional cover, if procurable, such as cover provided by Clauses (A) or (B) of the Institute Cargo Clauses (LMA/IUA) or any similar clauses and/or cover complying with the Institute War Clauses and/or Institute Strikes Clauses (LMA/IUA) or any similar clauses.

The insurance shall cover, at a minimum, the price provided in the contract plus 10% (i.e., 110%) and shall be in the currency of the contract.

The insurance shall cover the goods from the point of delivery set out in A4 and A5 to at least the named port of destination.

The seller must provide the buyer with the insurance policy or other evidence of insurance cover.

Moreover, the seller must provide the buyer, at the buyer's request, risk, and expense (if any), with information that the buyer needs to procure any additional insurance.

A4 Delivery

The seller must deliver the goods either by placing them on board the vessel or by procuring the goods so delivered. In either case, the seller
must deliver the goods on the agreed date or within the agreed period and in the manner customary at the port.

A5 Transfer of risks
The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A4, with the exception of loss or damage in the circumstances described in B5.

A6 Allocation of Costs
The seller must pay
a) all costs relating to the goods until they have been delivered in accordance with A4, other than those payable by the buyer as envisaged in B6;
b) the freight and other costs resulting from A3 a), including the costs of loading the goods on board and any charges for unloading at the agreed port of discharge that were for the seller’s account under the contract of carriage;
c) the costs of insurance resulting from A3 b); and
d) where applicable, the costs of customs formalities necessary for export, as well as all duties, taxes and other charges payable upon export, and the costs for their transport through any country that were for the seller’s account under the contract of carriage.

A7 Notices to the buyer
The seller must give the buyer any notice needed in order to allow the buyer to take the measures that are normally necessary to enable the buyer to take the goods.

A8 Delivery document
The seller must, at its own expense, provide the buyer without delay with the usual transport document for the agreed port of destination.
This transport document must cover the contract goods, be dated within the period agreed for shipment, enable the buyer to claim the goods from the carrier at the port of destination and, unless otherwise agreed, enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer or by notification to the carrier.
When such a transport document is issued in negotiable form and in several originals, a full set of originals must be presented to the buyer.

A9 Checking-packaging-marking
[Same as FOB A9.]

A10 Assistance with information and related costs
[Same as FOB A10.]

B THE BUYER’S OBLIGATIONS
B1 General obligations of the buyer
The buyer must pay the price of the goods as provided in the contract of sale.
Any document referred to in B1–B10 may be an equivalent electronic record or procedure if agreed between the parties or customary.
B2 Licenses, authorizations, security clearances and other formalities

[Same as FOB B2]

B3 Contracts of carriage and insurance

a) Contract of carriage

The buyer has no obligation to the seller to make a contract of carriage.

b) Contract of insurance

The buyer has no obligation to the seller to make a contract of insurance. However, the buyer must provide the seller, upon request, with any information necessary for the seller to procure any additional insurance requested by the buyer as envisaged in A3 b).

B4 Taking delivery

The buyer must take delivery of the goods when they have been delivered as envisaged in A4 and receive them from the carrier at the named port of destination.

B5 Transfer of Risks

The buyer bears all risks of loss of or damage to the goods from the time they have been delivered as envisaged in A4.

If the buyer fails to give notice in accordance with B7, then it bears all risks of loss of or damage to the goods from the agreed date or the expiry date of the agreed period for shipment, provided that the goods have been clearly identified as the contract goods.

B6 Allocation of costs

The buyer must, subject to the provisions of A3 a), pay

a) all costs relating to the goods from the time they have been delivered as envisaged in A4, except, where applicable, the costs of customs formalities necessary for export, as well as all duties, taxes and other charges payable upon export as referred to in A6 d);

b) all costs and charges relating to the goods while in transit until their arrival at the port of destination, unless such costs and charges were for the seller’s account under the contract of carriage;

c) unloading costs including lighterage and wharfage charges, unless such costs and charges were for the seller’s account under the contract of carriage;

d) any additional costs incurred if it fails to give notice in accordance with B7, from the agreed date or the expiry date of the agreed period for shipment, provided that the goods have been clearly identified as the contract goods;

e) where applicable, all duties, taxes and other charges, as well as the costs of carrying out customs formalities payable upon import of the goods and the costs of their transport through any country, unless included within the cost of the contract of carriage; and

f) the costs of any additional insurance procured at buyer’s request under A3 b) and B3 b).
B7 Notices to the seller

The buyer must, whenever it is entitled to determine the time for shipping the goods and/or the point of receiving the goods within the named port of destination, give the seller sufficient notice thereof.

B8 Proof of delivery

The buyer must accept the transport document as envisaged in A8 if it is in conformity with the contract.

B9 Inspection of goods

[Same as FOB B9.]

B10 Assistance with information and related costs

[Same as FOB B10.]

INTERNATIONAL CHAMBER OF COMMERCE,
INCOTERMS IN PRACTICE
14, 21, 32 (C. Debattista, ed., 1995).*

For the seller to perform his duty to tender a “usual” contract of carriage, the contract tendered must provide the buyer with continuous documentary cover against the carrier. This means two things: first, the seller must provide the buyer with a document which gives the buyer a contract enforceable by him against the carrier. The document tendered must give the buyer legal locus standi against the carrier. Secondly, the cover afforded to the buyer by the contract of carriage must contain no gaps. Thus, for example, where a seller tendered a bill of lading covering only the second leg of a voyage during which goods were transhipped, the seller was held to be in breach of his obligations under a c.i.f. contract.

The duty to provide the buyer with continuous documentary cover may cause difficulties where the goods are carried in containers, difficulties which illustrate the importance of choosing the right incoterm for the mode of transport envisaged.

* * *

[CIF clause] A8 goes directly to the nature of the document tendered as a key to the warehouse and raises the issue as to what type of transport document can be tendered by the seller to the buyer.

The article identifies two separate aspects of the “key” tendered by the seller to the buyer: it must allow the buyer access to the goods and it must, unless otherwise agreed, allow the buyer to transfer that right of access through the transfer of the document. Clearly a bill of lading would satisfy both requirements of article A8 if it is made out to the shipper’s or the consignee’s order, appropriately endorsed in full or in blank to the ultimate buyer if the goods have been sold while in transit.

However, difficulties arise where the document tendered by the seller provides the buyer with the right of access to the goods but not with the power of transfer. Thus, for example, what if the seller tenders a sea waybill, a bill of lading made out to the buyer without it being “to order”, or a ship’s delivery order acknowledging the buyer’s right to delivery on discharge. All these documents clearly give the party for the time named as consignee a right of access to the goods; none of them grant the buyer the power of transferring that right through transfer of the document. The upshot is that tender of such documents under the CIF Incoterm would put the seller in breach “unless otherwise agreed.” Where sellers expect to tender such a document, the documents clause in the contract of sale needs to be appropriately drafted, making it clear that the seller performs his documentary duties through tender of a bill of lading or a sea waybill or a ship’s delivery order. A failure to do so may catch the seller unawares where a buyer who is no longer interested in the goods, or in the goods at the contract price, puts the seller in breach and threatens to cancel the contract.

* * *

The Multimodal Transport bill of lading differs from the ocean bill of lading in the kind of carriage the carrier has agreed upon.

The Multimodal Transport bill of lading evidences the contract between shipper and carrier, here called the Multimodal Transport Operator (MTO), for the carriage of goods involving at least two different modes of transport. The MTO issuing a Multimodal Transport bill of lading is responsible for the goods from the time he receives them until the time he delivers them at destination.

There is considerable doubt as to whether the Multimodal Transport Document is a document of title. While there is no doubt that such a document is acceptable to the banks in the circumstances envisaged by article 26 of the Uniform Customs and Practice for Documentary Credits, the better view seems to be that it cannot transfer control of the goods while in transit through the simple endorsement of the document.

RAMBERG: ICC GUIDE TO INCOTERMS® 2010
71–74 (2010).*

[T]he seller’s duty to provide proof of delivery and the transport document

All terms except EXW require the seller to submit to the buyer formal proof that he has fulfilled his delivery obligation (A8).

Under [CFR and CIF], when the seller has to arrange and pay for the carriage, the transport document becomes very important, since it must show not only that the goods have been handed over to the carrier by the

date agreed, but also that the buyer has an independent right to claim the goods from the carrier at destination.

* * *

Surrender of original bill of lading essential

In some trades, there is a further problem connected with the use of bills of lading. This is caused by the need to present and surrender one original document to the carrier in order to obtain delivery of the goods. Ships frequently arrive at destination before an original bill of lading is available there. In such cases, the goods are often delivered to the buyer against a bill of lading guarantee issued by a bank. This is to protect the carrier if some person other than the person to whom the goods were delivered is the rightful holder of the original bill of lading.

This practice—or rather malpractice—defeats the whole bill of lading system, which depends for its validity on the firm principle that under no circumstances should the goods be delivered except in return for an original bill of lading. If that principle is not strictly followed, one can no longer say that the “bill of lading represents the goods”.

Non-negotiable transport documents

In recent years, transport documents other than bills of lading for carriage of goods by sea have been increasingly used. These documents in the “waybill system” are similar to those used for modes of transport other than carriage by sea and when no original document is required to obtain the goods from the carrier at destination. It is sufficient that the consignee be named and that he can properly identify himself, as in the widespread use of air waybills (AWBs) and waybills for international road and rail carriage.

Such documents cannot be used, however, for transferring rights to the goods by the transfer of the document; they are therefore called non-negotiable. They bear various names such as “liner waybills”, “ocean waybills”, “data freight receipts”, “cargo quay receipts” or “sea waybills”. Although in such transport documents a buyer or a bank has been named as consignee, the seller and the seller alone enters into a contractual relationship with the carrier when the seller has contracted for carriage. The carrier takes instructions from his contracting party—the seller—and from no one else.

Payment against sea waybills requires caution

If the buyer has paid for the goods in advance, or a bank wishes to use the goods as security for a loan extended to the buyer, it is not sufficient that the buyer or the bank be named as consignee in a non-negotiable document. This is the case because the seller, by new instructions to the carrier, could replace the named consignee with someone else. To protect the buyer or the bank it is therefore necessary that the original instruc-
tions from the seller to the carrier to deliver the goods to the named consignee be irrevocable.

It follows that * * * the buyer should not pay for the goods, and the bank should not rely on security in the goods, merely by accepting transport documents naming the buyer and the bank respectively as consignees, unless such instructions to the carrier are made irrevocable.

The problems of replacing bills of lading by EDI

Apart from the need to agree on a method for using EDI and adopting international message standards, there should be no particular problems when replacing transport documents by electronic messages. However, it is difficult to replace the bill of lading because it is not only proof of the delivery of the goods to the carrier but also a legal symbol often expressed by the principle that “the bill of lading represents the goods”.

* * *

The Incoterms rules CFR and CIF and EDI

The Incoterms 1990 rules, in the trade terms CFR and CIF, section A8, already took the development of EDI into consideration. They did this first by maintaining the traditional principle that, unless otherwise agreed, the transport document must enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer. But they also indicated that the transfer could be made by notification to the carrier. In the former case, the negotiable bill of lading is expressly referred to. In the latter, reference is made to a system of notification. In any event, a mere notification to the carrier is not sufficient to replace a bill of lading.

Authors’ Note on UCC Revisions

As noted in Problem 4.1 above, in 2003 the Uniform Commissioners and the ALI, the folks responsible for the UCC, proposed substantial amendments to UCC Article 2. These amendments would have deleted all the detailed statutory definitions of commercial terms (FOB, CIF, etc.). No state has adopted the proposed revision of UCC Article 2, however, and none is likely to do so in the future. For domestic transactions, therefore, we are left with the uncomfortable relationship between UCC Article 2’s definitions of commercial terms and those of the Incoterms. Nonetheless, as noted above, the new 2010 edition of the Incoterms now expressly permits the use of these uniform international commercial terms in “both domestic and international trade.”

Questions and Comments

1. The excerpt from Schmitthoff indicates that there are different interpretations in the United States and the United Kingdom of the term “FOB,” including differences as to arranging for freight and insurance, shifting of risk
of loss, and even duty to procure an export license. The United States rules on FOB are found in UCC § 2–319 in the Documents Supplement.

2. Under the classic form of FOB place of shipment, the seller may have risks, and need insurance protection, after the goods have left seller’s premises but before they have been loaded on the vessel at the port of shipment. However, more modern approaches under domestic law shift risks to the buyer under an FOB place of shipment contract after the goods are delivered to the first carrier, regardless of whether they are then placed on a ship or not.

3. With such large variations on fundamental aspects, how can an attorney determine the specific meaning of “FOB shipment” or “CIF destination”? The goal of Incoterms, a product of the International Chamber of Commerce, is to solve the problem of conflicting domestic law approaches by providing a uniform set of definitions for such common commercial terms.

What is the legal nature of Incoterms? See the excerpt from Zwilling–Pinna.

The Incoterms definitions of “FOB shipment” and “CIF destination” are set out in the Readings, as are excerpts from several books which explain their use and critique them. These definitions should allow you to analyze many of Sam’s questions.

4. Both American and English law allow contracting parties to specify most of the terms of a contract, and Sam, Bill and Howard have chosen to do so through the reference to Incoterms. As noted in the excerpt from Zwilling–Pinna, such detailed terms can be expressed in the contract, incorporated by reference, or implied by commercial usage and custom. However, although they are useful for the types of disputes that arise in Problem 4.2, note that they would not be useful in resolving the type of dispute that arose in Problem 4.1. If Sam and Bill later have a dispute about whether a contract between them was formed or not, that dispute would be determined by the substantive contract law of Georgia or England. Incoterms, in contrast, address only the allocation of rights, obligations, risks, and costs as between buyer and seller on the specific subject of the delivery and transportation of the goods.

5. The excerpts from Folsom et al. describe the legal consequences of the incorporation of an FOB term as compared to a CIF term. Sam’s contract with Bill uses the FOB term, whereas the one with Howard uses CIF. Now analyze the initial questions Sam posed to you at the beginning of this Problem with reference to the specific clauses in Incoterms.

(a) What are Sam’s obligations to Bill regarding the transportation of the goods and who bears the associated risks and costs? If Sam does not have this obligation, but does so anyway, does it have a right to recover the costs from Bill?

(b) What are Sam’s obligations to Howard on the same subjects?

(c) The CIF term in Howard’s contract specifically obligates Sam to procure insurance. But is Sam similarly obligated to arrange insurance covering the books to Bill while in transit?
6. Now turn to Sam’s question about bills of lading. What type of “transport document” may or must Sam obtain for the CIF shipment to Howard? See the Debattista and Ramberg excerpts. Why would Howard care whether Sam obtained a negotiable or a non-negotiable bill of lading? Also, if a negotiable bill of lading is required, would you recommend that Sam arrange for an “order” or a “bearer” bill (if Sam wants to be on the safe side in this regard)?

Debattista and Ramberg also discuss “sea waybills” and similar non-negotiable transport documents. Note that, unless otherwise agreed, these documents would not comply with an Incoterms CIF term, because the buyer cannot sell the goods in transit by transferring the document alone.

A second issue discussed by Debattista is the problem created by the use of multiple carriers in most individual transactions. A trucker may take the goods to a railroad yard, a railroad may then take them to a shipment port, where a ship will take them to a destination port for further transfer by rail and truck. Multimodal transport is involved, and a multimodal transport bill of lading may be more efficient. Note, however, that it may not be useable to control the goods in the letter of credit transaction in Problem 4.0. For that, you may still need a negotiable bill of lading.

7. One of the most pressing demands in modern transportation practice is for a uniform and secure legal framework for the use of electronic bills of lading. As noted in the Ramberg excerpt, electronic versions of this essential document as of yet have not been able to fulfill all of the characteristics of the traditional paper form, with the result that they have proved unsuitable for documentary sale transactions, and especially those with letters of credit. An early effort at creating the needed legal framework for electronic commerce in this field was the 1996 UNCITRAL Model Law for Electronic Commerce.

A recently concluded treaty, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, provides even more hope for the future of electronic bills of lading. These so-called “Rotterdam Rules,” which were opened for signature in 2009, create an explicit legal framework to support the recognition of “negotiable electronic transport records” as reliable systems develop in the future. Although only one country has ratified the Rotterdam Rules as of 2012, twenty-three have signed it, including the United States.

8. One functional method of comparing and contrasting the two types of contracts is to analyze whether Sam can put both orders in one container and ship it off. A starting point for such an analysis is the documents normal to each transaction. Note that the bill of lading is fundamental to a CIF transaction, and must pass an inspection of the buyer which is independent of any inspection of the goods. The bill of lading in an FOB shipment contract is somewhat more incidental, however, since the buyer is not normally expected to pay against the document. In the Incoterms definitions, compare clauses A.8 under each definition. In light of this requirement of a negotiable bill of lading for a CIF transaction, may Sam properly send Howard’s books in a container covered by a bill of lading made out to Howard and Bill jointly?

9. Another starting point for such analysis is the buyer’s right of inspection. The Incoterms rules say nothing about inspection, so that the
answer to that issue depends upon local law, either Georgia or England. As Folsom et al. state, inspection is usually allowed before payment, as in an FOB shipment contract. UCC § 2-513(1) and CISG Article 58(3) agree.

What about a CIF contract such as that with Howard? From the nature of a CIF contract, does Howard have a legal right to demand inspection of the goods before he is obligated to pay Sam? Compare UCC § 2-320(4) and the Biddle Bros. case noted in the first set of Comments above.

10. Note when the risk of loss passes from seller to buyer under Incoterms. Compare clauses A.5 and B.5 in each definition. As noted in Question 2. above, the classic approach on this issue has transferred the risk from seller to buyer at a highly specific point—when the goods “pass the ship’s rail” at the port of shipment. The new Incoterms 2010 have a revised rule. Under this new rule, when does the seller fulfill its delivery obligation and when does the risk of loss pass to the buyer? Compare clauses A.4/B.4 and A.5/B.5 in both FOB and CIF. Note also here that the risk of loss passes at this time for a CIF contract as well, even though the seller is obligated to procure insurance. See CIF clauses A.3(b), and A.5.

11. Finally, what is the effect of the “shipper’s load, weight and count” clause that the carrier’s clerk stamped on the bills of lading? We will see more about such clauses concerning the liability of the carrier in Problem 4.5 below. But for now, we need to clarify that such a clause does not cause problems for Sam. The 1980 edition of Incoterms (in a provision equivalent to CIF clause A.8) required seller to provide a “clean” bill of lading. A related note stated, however, that clauses “disclaim[ing] on the part of the carrier knowledge of the contents” of packages were not a problem. Note that Incoterms 2010, CIF clause A8, now has no limiting language about such descriptions on the transport document that seller must provide to buyer (other than the obvious requirement that it “cover the contract goods”).

PART B. THE BASICS OF CARRIER LIABILITY

TETLEY, MARINE CARGO CLAIMS


The Hague Rules* were adopted in 1924, the Hague/Visby Rules in 1968 * * * and the Hamburg Rules* in 1978. Each international convention in turn attempted to broaden its application in order to avoid lacunae, to encompass all contracts of carriage as well as bills of lading, and to

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1. International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels, August 25, 1924 and entered into force June 2, 1931, better known as the “Hague Rules.” * * *

2. The term “Hague/Visby Rules 1968” refers to the Hague Rules 1924, as amended by the “Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading”, adopted at Brussels, February 23, 1968, which Protocol entered into force June 23, 1977, and is often referred to as the “Visby Rules”. * * *

permit incorporation by reference. This chapter deals with the application of the three sets of rules.

While the Hamburg Rules are in force in about thirty-two countries, the Hague Rules or the Hague/Visby Rules are presently in force in most of the world’s shipping nations. Some nations such as France have two international regimes. They apply the Hague Rules to shipments from a Hague Rules nation and the Hague/Visby Rules to all outbound shipments. Belgium applies the Hague/Visby Rules inbound and outbound and the United States applies COGSA (the “Hague Rules”) in the same way. Some nations have a national local law for internal shipments which is similar but not identical, to the Hague Rules or the Hague/Visby Rules. Finally, some nations such as the United States have a local law for inland traffic which is unique to them.

* * *

Art. 10 of the Hague Rules states: “The provisions of this Convention shall apply to all bills of lading issued in any of the contracting States.”

Most national laws invoking the Hague Rules stipulate that the bill of lading shall contain a paramount clause. Sect. 13, para. sixth, of COGSA states:

[(E)very bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this [Act]].

Even if the bill of lading does not contain a paramount clause, the Rules still apply.

* * *

If the bill of lading does not contain a paramount clause and does not invoke the Hague Rules but invokes some other law, the Hague Rules still apply.

* * *

COGSA and the Harter Act apply outwards from U.S. ports, as well as inwards, unlike [the Hague Rules] which apply outwards only. The inwards application of COGSA to bill of lading contracts made outside the United States for carriage to the United States is unfortunate and chauvinistic. The consequences are even more incongruous now that most shipping nations have adopted the Visby Rules. Shipments to the U.S. from a Hague/Visby nation may be subject to two compulsory regimes: the Hague/Visby Rules and COGSA. One district court has characterized this situation as a “legal Gordian Knot,” and has seemingly approved of this chauvinistic legislation, stating: “* * * United States courts must apply COGSA, when its terms so require, regardless where bills of lading were issued or when carriage began.”

* * *

6. The American Carriage of Goods by Sea Act, 46 U.S. Code Appx. 1300–1315, is commonly referred to by the acronym “COGSA.”

The condition of the goods at shipment is usually proven by the bill of lading which describes the goods as received on board.

A bill of lading is important for the three different roles it plays. First, although not the contract of carriage itself, it is the best evidence of the contract. Secondly, it serves as a receipt for the goods. Finally, it is a document of title to property, which can be endorsed and negotiated.

* * *

Because the carrier is obliged to state the marks and the number or the quantity or the weight of the goods and in every case their apparent order and condition on the bill of lading, it is clear that the carrier must inspect the goods upon receiving them.

The inspection, nevertheless, of the carrier, master or agent is only a reasonable inspection. The master need not be an expert nor need he employ experts.

On the other hand, the carrier cannot contradict the clean bill of lading which he gave by relying on the laxity with which the cargo was examined on the ship’s behalf.

* * *

The Hague Rules at art. 3(4) stipulate that a clean bill of lading only creates a prima facie presumption that the goods are as described on the bill of lading. Nevertheless, the principle of estoppel has prevented a carrier from proving that the goods were other than as described against a third party holder of the bill of lading for value who is acting in good faith. The principle is codified in the last sentence of art. 3(4) of the Hague/Visby Rules and in art. 16(3) of the Hamburg Rules.

* * *

In order to avoid being bound by the description of the goods on the bill of lading, the carrier will often add qualifying clauses such as “shipper load and count” or “particulars furnished by the shipper”. The carrier’s dilemma, particularly if he cannot verify the description of the goods, is to avoid being bound by that description, and yet not to issue a bill of lading which is “unclean”; such a bill of lading is unacceptable to the carrier’s client, the shipper, and to the shipper’s client, the consignee, because its negotiability, and therefore its commercial value, is jeopardized.

* * *

Ocean carriers for over 100 years have attempted to avoid their heavy responsibility as common carriers by inserting non-responsibility clauses into bills of lading. Neither the U.S. Harter Act 1893 nor the other national legislation modelled upon it * * * contained a package or unit limitation but all contained stipulations voiding non-responsibility clauses. * * * The Hague Rules of 1924 were a compromise whereby nonresponsibility clauses were disallowed by art. 3(8) but, on the other hand, the
carrier was not to be responsible for more than £100 sterling per package or unit as stipulated in art. 4(5). [The COGSA package limit is $500.]

* * *

The shipper may avoid the package or kilo limitation by making a declaration as to "the nature and value" of the goods "before shipment and inserted in the bill of lading." A statement by the shipper that he wanted to insure his goods for a certain amount was held to be a sufficient declaration. * * * Art. 4(5) of the Hague Rules and art. 4(5)(a) of the Visby Rules indicate that the obligation to declare the higher value is on the shipper.

2) Opportunity to declare a higher value

As the package limitation has decreased with inflation (the $500.00 U.S. package limitation in 1936 when COGSA was adopted had the buying power of about $7,400 in U.S. in 2007 money), American courts have become increasingly reluctant to impose the package limitation. One method whereby the courts avoid the limitation has been to insist that the shipper be given a clear opportunity to declare the true value of the goods when it is higher than the package limitation.

The requirement of a fair opportunity to declare the true value was first raised in U.S. sea carriage in 1953 and in subsequent years the requirement became a standard practice as the COGSA $500 package limitation became more and more devalued and obsolete. * * *

3) What is a "fair opportunity"?

* * *

It has generally been accepted by American courts that a blank square on the face of the bill of lading in which to declare a higher value is a fair opportunity, although the courts have quite properly recognized that providing such a blank space on the bill's face is not required by COGSA. Even a reference to COGSA in the general clauses of the bill of lading was understood to be a fair opportunity or a "constructive notice" to declare a higher value. Similarly a published tariff which gave the shipper a choice of valuations was sufficient, as were the tariff terms incorporated in the bill of lading, although the Ninth Circuit disagreed.

More recently, the Ninth Circuit has clarified its position by holding that a clear reference to the COGSA limitation * * * suffices to afford the shipper a fair opportunity to declare a higher value. * * *

In other circuits, incorporation of COGSA by reference in the bill of lading, by way of a clause paramount, has been held sufficient to constitute fair opportunity * * *.

* * *
Contracts for international commercial transactions are normally governed by the national law of a given country (the *lex contractus*), according to national conflict of laws rules concerning contracts (sometimes also termed *lex contractus*) and often under express choice of law clauses. It is still a widely accepted rule that each contract with a private (non-sovereign) party is necessarily governed by a national law, and that there are no "homeless" contracts or obligations in international commerce. On the other hand, with respect to the aforementioned practice of purposely omitting an express choice of law, one could argue that the parties can, at least under certain circumstances, entirely disconnect their contract from any national law. This may be the case in contracts with an international institution such as the World Bank, or in multi-party contracts involving governmental agencies and private parties of various states. It seems that today the 'no homeless contract' rule is not without exceptions.

Both in the normal case of a private contract under an applicable national contract law and in the still rather exceptional and debated case of a 'homeless' contract, the private parties make use of their party autonomy as conferred and recognised by the national laws in question. They make use of this autonomy not only in the choice of applicable law, but also in the precise regulation of the substance of their contractual obligations; thus they substitute the (non-mandatory) rules of applicable law with their own freely agreed arrangements, their private *lex contractus*. If we look for uniformity in international commercial contracts, we have to inspect not only the applicable contract laws, but also the substance of the contractual arrangements, the freely agreed "*lex contractus*":

* * * *(T)he various systems of national law * * * essentially consist of two types of legal rules. Some of them are mandatory in character, others are optional. The mandatory rules have to be accepted by the persons affected by them, whether they like them or not. The optional rules may be accepted by the parties or not; they may be modified or adapted to suit their convenience. Ultimately it is the interest of the state which determines whether a particular rule shall be mandatory or optional. Speaking generally, branches of law such as criminal law, family law, property law or tax law are dominated by mandatory rules. On the other hand, a wide area of contract law is optional. It is governed by the principle of the autonomy of the parties’ will, in the common law countries called the principle of freedom of contract. * * * Of course, there exist:

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also mandatory rules in the law of contract and their impact should not be minimised. In the domestic sphere of civil and commercial contracts there exists, in fact, a growing tendency to impose mandatory restrictions on the freedom of the parties to contract as they like. They serve, e.g., the protection of the consumer or the prevention of the abuse of dominant economic power or the maintenance of fair competitive conditions in the free market economies.

BERISFORD METALS CORP. v. S/S SALVADOR
779 F.2d 841.

MANSFIELD, CIRCUIT JUDGE.

Berisford Metals Corporation (Berisford), plaintiff in this cargo-loss action, appeals from an order and judgment of the Southern District of New York, Gerard L. Goettel, Judge, granting its motion for summary judgment against the ship S/S Salvador and A/S Ivarans Rederi (Ivarans), its owner and operator, for loss of 70 bundles of tin ingots valued at $483,214.90 but applying the limitation of liability provision of § 4(5) of the Carriage of Goods by Sea Act,1 (COGSA), to limit the defendants’ liability to $500 per bundle, or a total of $35,000. Defendants cross-appeal from the district court’s denial of their motion for dismissal of the action. We reverse the judgment to the extent that it limits defendants’ liability to $500 per bundle and remand the case with directions to enter judgment in Berisford’s favor for the full value of the lost cargo. We affirm the district court’s denial of defendants’ motion to dismiss the complaint.

The material facts are not in dispute. On June 23, 1983, Berisford contracted to purchase from Paranapanema International Ltd. (Paranapanema), located in Sao Paulo, Brazil, 50 metric tons of grade A tin ingots in bundles at a price of $13,140 per metric ton (a price later changed by the parties [to] $13,300 per metric ton). The terms were F.O.B. vessel at Santos, Brazil, for shipment to New York in January 1984.2 Payment was to be made net cash 45 days after ocean bill of lading date against presentation of a “full set of shipping documents,” which, in conjunction with the F.O.B. vessel term, was understood by the parties as requiring a clean on board bill of lading.

1. Section 4(5) of COGSA, provides:

"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier."

2. F.O.B. or Free on Board “means that title to property passes from the seller to buyer at the designated FOB point.” 10 Williston on Contracts, § 1079A, at 94 n. 6 (3d ed. 1967). Since the vessel was designated as the FOB point in this case title to the goods was to pass when the goods were loaded on board the ship. See id., § 1080A, at 109–10 (Standard American Foreign Trade Definitions).
Pursuant to the contract Paranapanema delivered 100 bundles, each containing 30 tin ingots and steel-strapped onto wooden pallets, to Ivarans’ agent at Santos, Agencia de Vapores Grieg, S.A. (Grieg), which maintains a terminal located about 5 kilometers from the dock where cargo would be loaded onto Ivarans’ ship. Grieg acknowledged receipt of the bundles on December 29, 1983. Grieg stuffed the 100 bundles into four 20-foot containers at its terminal, ***. Clause 6 of the bill of lading later issued by Ivarans authorized the carrier to stow goods “as received or, at Carrier’s option, by means of containers or similar articles of transport used to consolidate goods”.

After stuffing of each container its doors were closed, locked and sealed. On January 3, 1984, the containers were transported by Grieg to a Brazilian government-controlled storage yard located near the loading dock. Upon delivery of the containers to that yard they appeared, from the sound and handling of the trucks used to transport them, to be loaded, not empty. The government storage yard issued receipts indicating weights approximately equaling those listed on the shipping documents. At that point the seals and locks appeared unchanged.

On January 4, 1984, the containers were removed from the yard and loaded by stevedores aboard the vessel. On the same date Grieg, acting on behalf of Ivarans and the Master of the S/S Salvador, issued a clean on board bill of lading stating that the ship had received “100 bundles steel strapped on wooden skids containing 3000 refined tin ingots, ‘Mamore’ brand, with a minimum purity of 99.9%”. The gross weight was stated on the bill to be “50,647” kilos and the net weight as “49,845” kilos. Par. 3 of the conditions on the back side of the bill of lading provided that the provisions of COGSA would apply throughout “the entire time the goods [would be] in the carrier’s custody, including the period of carrier’s custody before loading on and after discharge from the ship”. The bill further stated that unless a higher value had been declared in writing prior to delivery and inserted in the bill, the $500 limit per package specified by COGSA would govern the carrier’s liability.

Upon the loading of the four containers aboard the ship, neither Ivarans nor its agent Grieg verified the contents or made a tally of the 100 bundles represented by the bill of lading to be in the containers. After being loaded aboard the ship, the containers were not shifted from their place of stowage until the ship arrived in New York on January 19, 1984, at the Red Hook Terminal in Brooklyn. There the four containers were discharged on January 20, 1984, and placed on the ground outside Pier 11 to await stripping. On January 24, 1984, Universal Maritime Services, Ivarans’ stevedore, opened the four containers by using a bolt cutter or pliers to cut the seals and found that two of them supposed to contain 70 bundles were empty. Before being broken the seals of the containers appeared to be intact, with no evidence of tampering; in fact, the seals were pitted and rusted. Neither the floors of the two containers nor the snow-covered ground around them near Pier 11 revealed any evidence of
recent removal of any cargo from the containers. Each bundle would have weighed approximately 1100 lbs.

* * *

In the meantime the Mellon Bank in New York, representing Parana-panema, the seller and shipper of the tin ingots, presented to Berisford in accordance with the purchase contract a full set of shipping documents with respect to the 100 bundles of tin ingots purchased by Berisford, including three original on board bills of lading issued by the carrier (Ivarans), Paranaapanema’s invoice, weight and analysis certificates, and a draft in the amount of $662,938.50, payable 45 days after the bill of lading date. Since the papers were in order and complied with the parties’ purchase contract Berisford accepted the draft and on February 17, 1984, paid the full amount of the purchase price to the Mellon Bank as collection agent for Paranaapanema. In addition, Berisford paid Ivarans’ freight charges amounting to $10,101.67.

On August 31, 1984, Berisford commenced the present action, seeking $525,000 damages for the missing cargo. Defendants’ answer admitted receipt of the shipment of bundles of tin ingots but denied liability, asserting its rights under COGSA and its bill of lading with respect to the shipment, including COGSA’s $500 per package limitation on its liability, and alleging that it acted without any fault or neglect. * * *

In an oral bench opinion Judge Goettel concluded that an evidentiary hearing was unnecessary since the existing evidence demonstrated that the loss had occurred while the cargo was in the possession of the Brazilian government’s stevedores in Santos. He rejected Ivarans’ argument that it was not responsible for a loss occurring while the cargo was in the possession of the Brazilian Government. However, he also rejected Berisford’s contention that Ivarans’ issuance of a false on board bill of lading constituted a “quasi deviation” negating the availability of the COGSA per package limitation on liability. Instead, he held that a carrier is estopped from denying that the goods were loaded only upon a showing that it knew that they had not been loaded. He accordingly granted plaintiff’s motion to the extent of awarding it judgment in the sum of $35,000, from which both parties appeal.

**DISCUSSION**

The central question raised by this appeal is whether a carrier that issues a clean on board bill of lading erroneously stating that certain goods have been received on board when they have not been so loaded should be precluded from limiting its liability pursuant to an agreement binding the parties to the terms of § 4(5) of COGSA * * *

* * * [A] negotiable or order bill of lading is a fundamental and vital pillar of international trade and commerce, indispensable to the conduct and financing of business involving the sale and transportation of goods between parties located at a distance from one another. It constitutes an acknowledgement by a carrier that it has received the described goods for
shipment. It is also a contract of carriage. As a document of title it controls the possession of the goods themselves. It has been said that the bill and the goods become one and the same, with the goods being “locked up in the bill.” * * * The necessity for maintaining the integrity of and confidence in bills of lading has been recognized by us in a line of cases beginning before and continuing after the 1936 enactment of COGSA. In Higgins v. Anglo-Algerian Steamship Co., for instance, after reviewing decisions of English courts on the question we held that a carrier which issued a clean bill of lading falsely representing that it received goods in apparent good order and condition when it knew they were damaged may not take advantage of exceptions and limitations in the bill for its own benefit.

* * *

* * * [W]e have steadfastly adhered to * * * the proposition that the $500 per package limitation of liability may not be invoked by a carrier that has issued an on board bill of lading erroneously representing that goods were loaded aboard its ship, regardless whether or not the carrier acted fraudulently. * * *

* * * Whether one likens the carrier’s issuance of a false bill of lading with respect to its loading of cargo to a “deviation,” a “breach of warranty” or a representation which it must be “estopped” to deny, its adverse impact on trade and on reliance on bills as an essential method of facilitating trade is serious. Title to the goods usually passes from the seller to the buyer when the seller delivers the goods to the carrier and the carrier or its agent issues a bill. In the past, on board bills, signifying that the goods had been loaded on board the ship, were generally required. More recently, “received for shipment” bills, which indicate merely that the carrier has received the goods, are sometimes used. In this case, an on board bill was clearly required by the parties. When the proper bill issues, the seller then ceases to assume any risk of loss or damage. The carrier, by issuing the bill, enables the seller to collect full payment of the purchase price from the buyer since presentation of the bill to the buyer assures it that the seller has fulfilled its commitment to ship the goods and obligates the buyer to pay for them. Presentation of an on board bill also serves to satisfy the buyer that the goods have not been stolen or lost while in the custody of the carrier prior to loading, an interval during which the seller bears the risk of any loss in any transaction requiring such a bill. If, instead, the buyer were free to question the accuracy of the bill upon presentation, the entire structure would be weakened as a method of carrying out commercial transactions.

In support of their contention that a carrier may be held liable for a misstatement in its bill of lading only if it acted intentionally or fraudulently, defendants direct our attention to decisions holding that when a carrier issues a bill of lading to the effect that it has received goods in apparent good condition it may not be held liable beyond a per package limitation for damaged goods contained in the bill of lading or COGSA
unless it had actual knowledge of the damaged condition at the time of loading or the damage was readily apparent at that time. These "conditions" cases are readily distinguishable **. The "conditions" cases raise the issue of the extent to which a carrier must inspect the condition of goods made, sold and bought by others. Since the imposition of a duty to make a detailed inspection of the condition of the contents of every package received from others would be excessive, the carrier may be held liable only if it knew or could readily see that the packages were not in good condition. A carrier is not required to open every package received from a shipper and inspect the contents before issuing a bill to the effect that they appear to be in good condition.

When a carrier, on the other hand, makes a representation in a bill of lading with respect to its own conduct it is properly held to a higher standard since it is reasonably expected to be aware of its own actions, including whether or not it has loaded cargo, or has loaded the cargo below or above decks. **

Applying the foregoing principles to the present case, we conclude that the defendants must be held responsible for the full value of the lost cargo at the time of shipment in Santos and cannot invoke the $500 per package limitation of liability provision of § 4(5) of COGSA. The carrier here, having received 100 bundles of tin ingots from the shipper in Santos, issued a false F.O.B. bill of lading with respect to its own conduct, warranting that on January 4, 1984, it had loaded 100 bundles on its ship when in fact it had loaded only 30. The bill of lading, whether or not intentionally false, enabled the shipper to collect from Berisford, the buyer, the full purchase price for 100 bundles. If the carrier had disclosed that 70 bundles had not been loaded, Berisford would have been entitled to refuse payment and the loss would have fallen on the seller of the goods as required by the conditions of the sales contract. The carrier's misrepresentation therefore amounted to a fundamental breach going to the very essence of its contract and precluding it from invoking those provisions extending the limitation of liability terms of § 4(5) of COGSA to the period when the goods were on shore.

Defendants cannot escape responsibility on the ground that the four containers into which it claims that it had placed the bundles after receipt from the shipper were locked and sealed at the time when the containers were loaded aboard its ship, the S.S. Salvador. It is undisputed that the defendant received from the shipper the 100 separate bundles and that for its own convenience it placed them in the four containers. It was thereafter responsible for verifying the contents before loading the containers and issuing a clean on board bill of lading. The weight of the missing 70 bundles of tin ingots was approximately 78,885 lbs. Even if opening of the containers posed difficulties, at the very least the carrier owed a duty to verify the weight of the containers at shipside before they were placed aboard its ship and before it stated that they contained 100 bundles of tin ingots weighing the equivalent of 50,647 kilos or 111,656 lbs., which would
have been 78,885 lbs. in excess of the weight of the containers actually loaded.

* * *

Our holding leaves intact the principle that, once goods are aboard the ship as represented, a carrier may be responsible for misdescription of the apparent condition of the goods loaded by it only upon proof of knowledge or intent. We hold simply that when a carrier misrepresents its own conduct in loading goods aboard ship it is responsible for the misrepresentation and may not invoke contract provisions incorporating COGSA’s limitations on liability.

The order and judgment of the district court are reversed and the case is remanded to the district court with directions to enter judgment in favor of Berisford in the sum of its full damages, plus that portion of freight and handling charges attributable to the lost bundles, and costs and interest from January 20, 1984.

**Questions and Comments**

1. Should the goods be insured against loss or damage in transit—or will the liability of the carrier fully protect parties such as Sam, Bill, and Howard? As Tetley notes, the Hague Rules create a presumption that the carrier received the goods as described in the bill of lading, with the result that it generally should be liable for loss or damage in transit. See also COGSA, § 3(4) ("[A] bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described."). Nonetheless, there are many factors which affect the carrier’s liability under COGSA, and many limitations on its liability. The $500 per package limit is the best known, but others include limitations on the types of harm for which a carrier can be held liable. Thus, reliance on carrier liability may be misplaced, and insurance advisable.

2. We will see much more about the grounds for the carrier’s potential liability arising out of the bill of lading in Problem 4.5 below. One issue of special importance there will be the effect of so-called “Shipper’s Load and Count” (SLC) clauses. But as a general matter for now, recall that the carrier’s agent stamped such a clause on Sam’s bills of lading. If Sam misdescribed the goods, does such a clause relieve the carrier of all obligations regarding the nature of the goods received from Sam? Would your answer change if the carrier could have discovered the discrepancy only by opening sealed cartons? Or if the discrepancy instead was apparent from the markings on the outside of the cartons? The fundamental point is that the carrier must, as Tetley points out, make only a “reasonable” inspection of the goods. And note also that, if the shipper provides a description of the condition of the goods, COGSA § 3(3)(c) permits the carrier to exclude from the bill of lading any information that it “has had no reasonable means of checking.”

3. Our special focus here is also on rules that set monetary limits on the amount of carrier liability. The goal of the Hague Rules, on which COGSA is based, was to bring international uniformity on this and other issues relating to the obligations of carriers. The Hague Rules were at one time widely
adopted and uniform, but developments in commercial practice have led to amendments (the Hague–Visby Rules) and further amendments (the Hamburg Rules). Since not all nations have adopted either set of amendments, the earlier uniformity has disintegrated.

However, the newly concluded Rotterdam Rules, noted above, provide hope for greater international uniformity. The product of two decades of negotiation and drafting by interested parties from a broad range of perspectives, this proposed treaty—which the United States has not ratified as of 2012—may well be acceptable to a noteworthy majority of maritime states, whether principally supportive of buyers, sellers, or carriers. The Rotterdam Rules also contain detailed provisions on limitations of carrier liability. See Articles 59–61.

4. The Hague Rules, and therefore COGSA, were an attempt to introduce more balance into the shipper-carrier relationship. Before those rules, the carrier drafted the clauses in bills of lading and so the contract clauses were thought to favor the carrier too much. Thus, the Hague Rules were designed to overcome the carrier’s contract clauses, and were designed to govern the carrier-shipper relationship despite what the carrier-written contract might say. In other words, they were designed to be “mandatory law.”

Horn and Schmitthoff discuss the distinction between “optional” and “mandatory” rules, and use COGSA as an example of the latter. Its application is mandatory, inter alia, on all contracts for carriage of goods by sea from the United States to a foreign port. Thus, it will govern relations between Sam and the carrier, and that application cannot be disturbed by clauses in the bill of lading.

Are Sam’s shipments at all subject to the $500 per package limitation? What are Sam’s options for providing full protection to his customers against harm to the goods during transit?

5. As Tetley notes, COGSA’s limitation of liability to $500 “per package”—which is itself a complicated issue—has eroded in value substantially over the decades. Some courts have responded to this development with the “fair opportunity” doctrine described by Tetley. One court of appeals, however, recently rejected this entire doctrine as contrary to the plain language of COGSA. See Ferrostaal, Inc. v. M/V Sea Phoenix, 447 F.3d 212, 228–229 (3rd Cir. 2006).

The Berisford Metals Corp. case describes another court-created exception to COGSA’s limit on carrier liability. The decisive fact for the removal of the limitation there was that the goods clearly disappeared after delivery to the carrier and before it issued the false bill of lading. But is this the full extent of the exception? Assume, for example, the following slight changes to the Berisford Metals Corp. facts: (a) the shipper was responsible for loading, counting, and weighing the goods, but it in fact loaded only worthless junk, and (b) in reliance on information from the shipper, the carrier stamped on the bill of lading an SLC clause and “said to contain 100 bundles of tin ingots.” With these new facts, could the carrier be certain that COGSA’s $500 per package limitation would apply under the court’s reasoning in Berisford Metals Corp.? See also St. Paul Travelers Ins. Co. v. M/V Madame Butterfly, 700 F. Supp. 2d 496, 506 (S.D.N.Y. 2010)(“Courts have limited the false bill of
lading exception to the COGSA package limitation 'to misrepresentations concerning the physical condition or location of the goods at the time the bill of lading was issued.' "") (quoting an earlier case), aff'd, 2011 WL 1901738 (2nd Cir. 2011).

PROBLEM 4.3 WARS AND OTHER FRUSTRATIONS: OIL FROM ARABY

SECTION I. THE SETTING

Your client, Jean Val Jean, is a heating oil broker in Boston. He was able to obtain a contract to sell a huge amount of heating oil at a respectable profit to Javert in Marseilles, France, this winter—and he thought that this "deal" would make his financial fortune. He made a covering contract to buy heating oil from Gulf Refinery, an oil refining company located in Araby, and made another contract with Constant Carrier to have the oil shipped from Araby to Marseilles. Araby is a small nation located on the Persian Gulf.

The contract between Jean and Gulf Refinery in Araby contains several clauses of interest: One states that Refinery will deliver 100,000 tons of heating oil to Jean in Araby on November 1. Another states a price per bbl. of heating oil. The price is stated to be FOB Refinery in Araby, and is payable in United States dollars. The other clause is a force majeure clause, as follows:

If the performance of any part of this contract by the seller is prevented, hindered, delayed or otherwise made impracticable by reason of any strike, flood, riot, fire, explosion, war or any other casualty or cause beyond the control of seller, and which cannot be overcome by reasonable diligence and without unusual expense, seller shall be excused from such performance to the extent that it is necessarily prevented, hindered or delayed thereby, during the continuance of any such happening or event and for so long as such event shall continue to prevent, hinder or delay such performance. This contract shall be deemed suspended so long as and to the extent that any such cause shall operate to prevent, hinder or delay the performance by seller of its obligations.

The contract with Constant Carrier provides for carriage charges that are dependent upon the time and distance sailed by the vessel used and any tolls paid by the vessel. It also contains an estimate of the charges involved, calculated from the Persian Gulf to Marseilles via the Suez Canal, and including the Suez Canal toll charge. The charges are to be paid in United States dollars. The contract also contains the following "Liberties Clause" (which is identical to the corresponding clause in the Bill of Lading reproduced as Form 11 in Problem 4.0 above):
(1) If at any time the performance of the contract evidenced by this Bill of Lading is or is likely to be affected by any hindrance, risk, delay, difficulty or disadvantage of whatsoever kind which cannot be avoided by the exercise of reasonable endeavors, the Carrier (whether or not the transport has commenced) may without notice to the Merchant treat the performance of this contract as terminated and place the Goods or any part of them at the Merchant's disposal at any port or place whatsoever which the Carrier or Master may consider safe and advisable in the circumstances, whereupon the responsibility of the Carrier in respect of such goods shall cease. The Carrier shall nevertheless be entitled to full freight and charges on Goods received for transportation, and the Merchant shall pay any additional costs of carriage to and delivery and storage at such port or place.

(2) The circumstances referred to in sub-clause (1) shall include, but shall not be limited to, those caused by the existence or apprehension of war declared or undeclared, hostilities, warlike or belligerent acts or operations, riots, civil commotion or other disturbances, closure of, obstacles in or danger to any canal; blockage of port or place or interdict or prohibition of or restriction on commerce or trading; quarantine, sanitary or other similar regulations or restrictions; strikes, lockouts or other labour troubles whether partial or general and whether or not involving employees of the Carrier or his sub-contractors; congestion of port, wharf, sea terminal or any other place; shortage, absence or obstacles of labour or facilities for loading, discharge, delivery or other handling of the Goods; epidemics or diseases; bad weather, shallow water, ice, landslide or other obstacle in navigation or haulage.

The contract between Jean and Javert obligates Jean to provide 100,000 tons of a specified grade of heating oil "c.i.f. Marseilles, France," on or before February 1. The price is fixed and stated in the contract, and there is no "escalator clause". The contract also contains the following "excuse" clause (which Javert found in an old form contract):

Any circumstance beyond the control of the parties, which a diligent party could not have avoided and the consequences of which he could not have prevented, shall be considered a case of relief where it intervenes after the formation of the contract and prevents its fulfillment whether wholly or partially.

Soon after the contracts were all signed, things began to go wrong. First, there was a very bad fire at the Refinery in Araby. Its production capacity was almost destroyed, but is in the process of being repaired and brought back to normal. The Refinery has informed Jean that, due to the fire, there will be a three month delay in delivering his 100,000 tons of heating oil. Jean informs you that the wholesale market for heating oil in Europe ends on or about March 1 each year, because the heavy heating season ends about April 1, and distribution to retailers (and then to consumers) takes about a month.

When Jean informed Constant Carrier of the delay, Constant threatened to cancel the contract due to the scheduling difficulties which the
delay would create. Since then, relations between Jean and Constant have
gone downhill. During November, another Iraq-Iran war started and both
sides began sinking ships of third parties in the Persian Gulf. Three ships
loaded at the Gulf Refinery in Araby were sunk. In December, someone
(unknown) started placing very powerful mines in the Red Sea, which so
far have sunk ten ships which had passed through, or were en route to,
the Suez Canal. Minesweeping efforts have not yet been successful.
Constant Carrier categorically refuses to traverse the Suez Canal, but is
willing to consider taking the heating oil around the Cape of Good Hope.
That voyage will take 40 days instead of ten days, and involve traveling an
80 percent greater distance, so that Constant wants a 25 percent greater
fee for performing the carriage of the goods. In addition, war risk
insurance has become customary for all Persian Gulf voyages, and the war
risk insurance premium has risen from 0.5 to 1.5 percent of the value of
any insured items.

The reduction of the oil supply due to the Gulf Refinery fire, the
sinking of ships in the Persian Gulf, and the Red Sea mines has caused
the price of oil on the Rotterdam “spot” market to increase to its present
price of $150 per bbl. from its price of $100 per bbl. at the time Jean
signed his contract.

Having expounded this litany of woes, Jean seeks your advice. Javert
has stated categorically that deliveries of heating oil will not be accepted
after March 1, and that damages will result if delivery occurs after
February 1. The Araby oil contracted for cannot arrive in Marseilles
before March 10—and it will involve greatly increased freight and insur-
ance charges—and Jean will lose money on the contract. Jean can “cover”
(buy substitute oil) on the Rotterdam spot market, but the price on that
market is so high that Jean is likely to be unable to pay for the oil, and
would have to file a petition in bankruptcy.

Jean sees three possible courses of action and seeks your advice
concerning the best course of action—or, whether there are others:

1. Cancel the contracts with Gulf Refinery, Constant Carrier and
Javert, each on the grounds of “impossibility,” “frustration,” or “com-
mmercial impracticability.” This would lead to no profit, but also no loss to
Jean, if successful—but only if failure to perform each contract were
excused through some legal doctrine.

2. Perform the contract to deliver the oil as soon as possible (March
10) and require Javert to accept the oil, even though delivered late, on the
grounds of “impossibility,” or “frustration,” or “commercial impractica-
bility.” This would lead to a loss on the contract (but a bearable loss), if
successful—but only if Javert can be compelled to accept the late delivery.

3. Cancel the contracts with Gulf Refinery and Constant Carrier, but
buy substitute oil on the Rotterdam spot market and deliver the substitute
on February 1, as per the contract. Jean would then face bankruptcy, so
this alternative should be recommended only if there is no other feasible
course of action.
Jean nonetheless recognizes that he must pursue one of these options—that is, unless Gulf Refinery is not excused from timely performing due to the fire, and is already in breach for failure to deliver on November 1, and is liable to Jean for sufficient damages to cover the losses created by purchasing on the Rotterdam spot market.

If either of the sales transactions is governed by the UCC, it is essential to read UCC § 2–615. If either is governed by CISG, please read CISG art. 79.

SECTION II. FOCUS OF CONSIDERATION

Once a “deal” is made, it is unlikely that everything will go right and remain as the status quo. Thus, the occurrence of unexpected events should be expected, especially in international transactions. The traditional “impossibility” doctrines have not been useful in the commercial context, and have been superceded by doctrines concerning “frustration of contract” and “commercial impracticability.” These doctrines are usually used to “excuse” a failure of a condition of the contract or a failure of performance by one of the parties. Thus, the doctrines can be used either as a shield or as a sword. However, as the cases indicate, the courts allow resort to these doctrines very sparingly—they are not to be used to get out of an obligation merely because it has become an unprofitable bargain. What then are the criteria?

This problem attempts to create a number of different events, each of which arguably raises the possibility of using these doctrines in the international setting. The problem also presents the arguments in several different contexts. Some must be considered individually, but can others be considered cumulatively? Do the circumstances create complete or only partial excuses from performance? Jean is attempting to create a shield by claiming to be excused from performing obligations owed. On the other hand, Jean must also worry about whether the other parties to the contracts (especially Refinery and Carrier) are also excused from performing their obligations to him.

And, above all else, will the applications of the doctrines and the determinations of excuse create consistent results? Jean is reasonably well protected if all parties are excused from performing; and is also somewhat protected if no one is excused from performing (the latter protection effectively depending upon both an ability to recover against Gulf Refinery and measurement of damages problems). And, in each circumstance protection of Jean is also dependent upon your advice being based upon correct analysis before the disputes go to negotiation, arbitration or litigation. However, if Refinery’s performance is excused, but Jean’s is not, then Jean is in great trouble.

SECTION III. READINGS, QUESTIONS AND COMMENTS

PART A. PICKING UP THE PIECES

1. The readings provide four different elaborations of the concepts involved. The *Eugenia* sets the context with a typical “commercial impracticability” case in which an English court reasons out the doctrine from basic contract principles. The White and Summers excerpt adds an American view, and problems related to changes in governmental regulations, as well as an indication that the UCC provides no great new strides in the criteria for use of “commercial impracticability” as an excuse. (It does provide strides concerning the mechanisms to be used after an excuse, partial or complete, is determined to be available.)

   The Schwenzer excerpt introduces an international perspective, including the use of more European terminology (“force majeure,” “hardship”) for the same basic concepts. The Honnold and Spivak excerpts then examine the CISG’s approach to this issue of unexpected “impediments.” After Baker guides you through a practical example under the UCC, the French *Code Civil*, and the CISG, Perillo examines “force majeure” and “hardship” under the UNIDROIT Principles.

2. Each of the commercial impracticability cases in this section involves a different *force majeure* clause and each is different. The drafting is often done by a trade association, and reflects that association’s allocation of risks known to have occurred in past transactions, i.e., foreseen risks. However, note that it is likely that only one party is a member of the trade association—and the views of the other party are not represented in the clause.

3. If the goods are not delivered, and the seller is not excused by commercial impracticability or otherwise, the aggrieved buyer has a cause of action for damages. As the Note on Measuring Damages indicates, this requires a careful analysis of the proper date for setting the damages available to the buyer (once that date has passed, the risk of any rise in the market price of the goods will be on the buyer if substitute goods are purchased).

   Modern approaches to this issue permit the buyer to return to the market to replace the non-delivered goods with substitute goods, and then to measure its damages against this “cover” purchase. But these modern approaches, although different in nuance, also require reasonably prompt action to prevent the buyer from “speculating” on future market prices at the seller’s expense. That is sensible if the seller’s failure to perform on time is a breach of contract—but what if the seller claims excuse by “impossibility,” “frustration,” “hardship,” or “commercial impracticability”? Then, the backdrop of the damage measurement rules still seem to put pressure on the buyer to act promptly, even though the buyer may not be certain whether it is aggrieved or not.
4. However, one of the buyer's great concerns continues to be whether it is allowed to purchase substitute goods and hold the seller liable for any damages. This, in turn, depends upon the certainty of application of the doctrines of "frustration" and "commercial impracticability."

**OCEAN TRAMP TANKERS CORP. v. V/O SOVFRACHT (THE EUGENIA)**

_Court of Appeal, 1963._

_[1964] 1 All E.R. 161._

**Lord Denning, M.R.:** On July 26, 1956, the Government of Egypt nationalised the Suez Canal. Soon afterwards the United Kingdom and France began to build up military forces in Cyprus. It was obvious to all mercantile men that English and French forces might be sent to seize the canal, and that this might lead to it becoming impassable to traffic. It was in this atmosphere that negotiations took place for the chartering of the vessel Eugenia. She flew the Liberian flag. The proposal was to charter her to a Russian State Trading Corporation, called V/O Sovfracht. The Russians wanted her to carry iron and steel from the Black Sea to India. The negotiations took place in London between the agents of the parties from Aug. 29 to Sept. 9, 1956. The agents of both sides realised that there was a risk that the Suez Canal might be closed, and each agent suggested terms to meet the possibility. But they came to no agreement. And, in the end, they concluded the bargain on the terms of the Baltic Charter without any express clause to deal with the matter. That meant that, if the canal were to be closed, they would "leave it to the lawyers to sort out". The charterparty was concluded on Sept. 9, 1956, but was dated Sept. 8, 1956. The vessel was then at Genoa. By the charterparty, she was let to the charterers for a "trip out to India via Black Sea". It was a time-charter in this sense, that the charterers had to pay hire for the vessel at a fixed rate per month from the time of the vessel's delivery until her redelivery. The charterers had, however, no wide limits at their disposal. They could not direct her anywhere they wished, but only within the following limits "Genoa via Black Sea thence to India". The charter included the printed war clause without modification. It was in these terms:

21(A) The vessel unless the consent of the owners be first obtained not to be ordered nor continue to any place or on any voyage nor be used on any service which will bring her within a zone which is dangerous as the result of any actual or threatened act of war, war, hostilities, warlike operations * * *(B) Should the vessel approach or be brought or ordered within such zone * * *(i) the owners to be entitled from time to time to insure their interests in the vessel * * on such terms as they shall think fit, the charterers to make a refund to the owners of the premium on demand; and (ii) * * * hire to be paid for all time lost * *
The Eugenia was delivered at Genoa on Sept. 20, 1956. The charterers ordered her to proceed first to Novorossik and then to Odessa (both on the Black Sea) to load. A few days later the charterers sub-chartered her to two other Russian State Trading Corporations who agreed to pay, by way of freight, whatever the charterers had to pay the owners, plus five per cent. The two sub-charterers loaded her with iron and steel goods (joists, girders, etc.). The master signed bills of lading. These made the cargo deliverable to shipper’s order at Vizagapatam and Madras (both on the East Coast of India), freight pre-paid. On Oct. 25, 1956, the Eugenia sailed from Odessa. The customary route at this time to India was still by the Suez Canal. The charterers told the master to cable their agent in Port Said when he was within twenty-four hours’ sailing of Port Said. He did so. The Eugenia arrived off Port Said at 11.00 a.m. on Oct. 30, 1956, and entered port at 4.30 p.m. At that time Egyptian anti-aircraft guns were in action against hostile reconnaissance planes. It was quite apparent that Port Said and the Suez Canal were zones which were “dangerous” within this war clause. Indeed, on the morning of Oct. 30, the owners’ London agent called on the charterers’ London agent to take action under the war clause to ensure that the ship should not enter Port Said or the Suez Canal. The charterers’ agent in London, however, took no action. He let things be. But at Port Said the charterers’ agent had taken action. He boarded the vessel and stated that he had made arrangements for the vessel to enter the canal the next morning. In consequence, the vessel entered the canal at 9.35 a.m. on Oct. 31 and proceeded in convoy fifty-eight kilometres south. Then the convoy tied up to allow a northbound convoy to pass. Soon afterwards English and French aircraft began to drop bombs on Egyptian targets. That evening the Egyptian Government blocked the canal by sinking ships at Port Said and Suez and in the canal and by blowing up bridges. So the Eugenia was trapped where she was. On Nov. 7, 1956, there was a cease-fire. Early in January, 1957, a passage was cleared northwards. But there was no hope of southward passage for a long time. So the Eugenia started to move north. She anchored in Port Said Roads on Jan. 8, 1957. On Jan. 11, 1957, she went to Alexandria and arrived there on Jan. 12, 1957.

Meanwhile, however, the charterers, on Jan. 4, 1957, claimed that the charterparty had been frustrated by the blocking of the canal. The owners denied that it had been frustrated and treated the charterers’ conduct as a repudiuation. So on either view the charter was at an end. On Jan. 15, 1957, the owners entered into a new charterparty direct with the original sub-charterers. This new charter was an ordinary Gencon voyage charter by which the owners agreed to carry the cargo already on board via the Cape of Good Hope to India. The freight was very high, for the freight market had risen rapidly; so much so, that the owners did well out of the new charter. Indeed, they might not have suffered any loss were it not for the long spell during which the ship was trapped in the canal. The owners wish to claim hire so as to cover the period in the canal, but the charterers dispute it. Hence their claim that the charter was frustrated. On Jan. 20,
1957, under this new charterparty, the Eugenia left Alexandria and went round the Cape. She arrived at Vizagapatam about Apr. 5, 1957, unloaded part of her cargo there, then went to Madras and unloaded the rest there, and finished discharging on May 22, 1957. The southern exit from the canal was not cleared until April, 1957. So the Eugenia arrived at her destination earlier by going northward out of the canal than if she had waited to get out by the southern exit.

Such being the facts, the first question is whether the charterers, by allowing the Eugenia to go into the canal on Oct. 31, 1956, were in breach of the war clause. Both the arbitrator and the judge held that they were in breach. * * * I find myself in complete agreement with the arbitrator and the judge on these points.

The second question is whether the charterparty was frustrated by what took place. The arbitrator has held that it was not. The judge has held that it was. Which is right? One thing that is obvious is that the charterers cannot rely on the fact that the Eugenia was trapped in the canal; for that was their own fault. They were in breach of the war clause in entering it. They cannot rely on a self-induced frustration. But they seek to rely on the fact that the canal itself was blocked. They assert that, even if the Eugenia had never gone into the canal but had stayed outside (in which case she would not have been in breach of the war clause), nevertheless she would still have had to go round by the Cape; and that, they say, brings about a frustration, for it makes the venture fundamentally different from what they contracted for. The judge has accepted this view. He has held that, on Nov. 16, 1956, the charterparty was frustrated. The reason for his taking Nov. 16, 1956, was this: Prior to Nov. 16, 1956, mercantile men (even if she had stayed outside) would not have formed any conclusion whether the obstructions in the canal were other than temporary. There was insufficient information available to form a judgment. On Nov. 16, 1956, mercantile men would conclude that the blockage of the southern end would last till March or April, 1957; so that, by that time, it would be clear that the only thing to do (if the ship had never entered the canal) would be to go round the Cape. The judge said:

I hold that the adventure, involving a voyage round the Cape, is basically or fundamentally different from the adventure involving a voyage via the Suez Canal.

So he held that the contract was frustrated. He was comforted to find that, in Société Franco Tunisienne D’Armement v. Sidermar S.P.A., Pearson, J., came to a similar conclusion. I must confess that I find it difficult to apply the doctrine of frustration to a hypothetical situation, that is, to treat this vessel as if she had never entered the canal and then ask whether the charter was frustrated. The doctrine should be applied to the facts as they really are. But I will swallow this difficulty and ask myself what would be the position if the vessel had never entered the canal but stayed at Port Said. Would the contract be frustrated? This means that, once again, we have had to consider the authorities on this vexed topic of
frustration. But I think that the position is now reasonably clear. It is simply this: If it should happen, in the course of carrying out a contract, that a fundamentally different situation arises for which the parties made no provision—so much so that it would not be just in the new situation to hold them bound to its terms—then the contract is at an end.

It was originally said that the doctrine of frustration was based on an implied term. In short, that the parties, if they had foreseen the new situation, would have said to one another: "If that happens, of course, it is all over between us". But the theory of an implied term has now been discarded by everyone, or nearly everyone, for the simple reason that it does not represent the truth. The parties would not have said: "It is all over between us". They would have differed about what was to happen. Each would have sought to insert reservations or qualifications of one kind or another. Take this very case. The parties realised that the canal might become impassable. They tried to agree on a clause to provide for the contingency. But they failed to agree. So there is no room for an implied term.

It has frequently been said that the doctrine of frustration only applies when the new situation is "unforeseen" or "unexpected" or "uncontemplated", as if that were an essential feature. But it is not so. It is not so much that it is "unexpected", but rather that the parties have made no provision for it in their contract. The point about it, however, is this: If the parties did not foresee anything of the kind happening, you can readily infer that they have made no provision for it. Whereas, if they did foresee it, you would expect them to make provision for it. But cases have occurred where the parties have foreseen the danger ahead, and yet made no provision for it in the contract. Such was the case in the Spanish Civil War when a ship was let on charter to the Republican Government. The purpose was to evacuate refugees. The parties foresaw that she might be seized by the Nationalists. But they made no provision for it in their contract. Yet, when she was seized, the contract was frustrated. So, here, the parties foresaw that the canal might become impassable. It was the very thing that they feared. But they made no provision for it. So the doctrine may still apply, if it be a proper case for it.

We are thus left with the simple test that a situation must arise which renders performance of the contract "a thing radically different from that which was undertaken by the contract". To see if the doctrine applies, you have first to construe the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it, the contract must govern. There is no frustration. If they have not provided for it, then you have to compare the new situation with the old situation for which they did provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound. It is often difficult to draw the
line. But it must be done, and it is for the courts to do it as a matter of law.

Applying these principles to this case, I have come to the conclusion that the blockage of the canal did not bring about a "fundamentally different situation" such as to frustrate the venture. My reasons are these: (i) The venture was the whole trip from delivery at Genoa, out to the Black Sea, there load cargo, thence to India, unload cargo, and re-delivery. The time for this vessel from Odessa to Vizagapatam via the Suez Canal would be twenty-six days, and via the Cape fifty-six days. But that is not the right comparison. You have to take the whole venture from delivery at Genoa to re-delivery at Madras. We were told that the time for the whole venture via the Suez Canal would be 108 days, and via the Cape 138 days. The difference over the whole voyage is not so radical as to produce a frustration. (ii) The cargo was iron and steel goods which would not be adversely affected by the longer voyage, and there was no special reason for early arrival. The vessel and crew were at all times fit and sufficient to proceed via the Cape. (iii) The cargo was loaded on board at the time of the blockage of the canal. If the contract was frustrated, it would mean, I suppose, that the ship could throw up the charter and unload the cargo wherever she was, without any breach of contract. (iv) The voyage round the Cape made no great difference except that it took a good deal longer and was more expensive for the charterers than a voyage through the canal.

J. WHITE AND R. SUMMERS, UNIFORM COMMERCIAL CODE
§ 4.10 (6th ed., 2010).*

Students who have concluded a first year contracts course in confusion about the doctrine of impossibility and have since had difficulty mastering 2–615 or have found that the cases somehow slip through their fingers when they try to apply them to new situations, may take some comfort in knowing that they are in good company.

* * *

If performance is rendered impracticable by a governmental regulation or order, the seller is freed from his obligation without reference to the language of 2–615 concerning contingency and basic assumption. Of course it is still necessary that the regulation itself and not the seller’s fault cause the impracticability. If, for example, the seller could have escaped the effect of a government regulation, it will not be freed. * * *

* * * One court has summarized the statute as follows:

Three elements must be proven before excuse or adjustment becomes available under § 2–615: (1) the seller must not have assumed the risk of some unknown contingency; (2) the nonoccurrence

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of the contingency must have been a basic assumption underlying the contract; and (3) the occurrence of that contingency must have made performance commercially impracticable.

Of course determining whether the seller has "assumed the risk" is often very much like trying to determine whether or not the occurrence was foreseeable. Obviously if a seller has explicitly assumed the risk, it has foreseen it. * * *

The rub comes in determining which "nonoccurrences" were "basic" assumptions and which were not. In some cases this interpretative difficulty is compounded by the necessity of also deciding whether the performance has been made "impracticable" or not. Assume for example that seller has entered into a long-term contract to deliver fuel oil of a specified grade to buyer. The seller argues that his performance has been made impracticable because his cost of oil has gone out of sight. The language of the Code does not carry one far in determining whether this seller's performance has been made "impracticable", and if so, whether the "basic assumptions" of the parties extended to the nonoccurrence of the Arab Oil Embargo, the Iranian revolution and attendant general market disruptions.

To assist in answering such questions, it may be helpful to follow an analysis suggested by Professor Farnsworth. In his view, impracticability cases are really cases where the parties have failed adequately to state their intentions. If in our foregoing case the seller had agreed that it would provide the oil or pay damages notwithstanding war, embargo or any other disruption, there would be no impracticability problem. The seller would be liable for breach. Our problem arises because the parties did not foresee the eventuality or if they foresaw it, did not incorporate a governing clause. Professor Farnsworth suggests that a court faced with our problem should first attempt to determine whether the contingency was one that was in fact foreseen by the parties. If it was foreseen by them, he suggests that the courts should then attempt to determine the parties' actual expectations. Their expectations might be revealed by the course of the negotiations, including the various proposals that the seller may have made concerning different prices based upon different contingencies, or by trade usage. If any of these sources adequately reveals the parties' expectations, it should govern.

More commonly, however, the contingency will be one not foreseen by the parties and about which they had no expectations. In that case it would be fictional to purport to carry out their expectations. Here the court is not called upon to interpret the contract; its job is to direct a just and reasonable result. In light of the terms on which the parties did agree, what would reasonable persons have further agreed if they had contemplated this contingency?

Perhaps the most significant factor in this analysis is the foreseeability of the contingency that actually occurred. If it was foreseeable that soybeans would be in short supply because of bad summer weather, that
the Suez Canal would be closed because it had been closed once ten years earlier when the Arabs and Israelis were at war, or that copper would be hard to buy because of continuous political unrest in Peru and Chile, the parties should be held to have foreseen those contingencies and to have made their contract with the expectation that such contingencies might occur. In that case it is usually appropriate to hold the seller liable notwithstanding the occurrence. [Put] in Code terms, if the parties made the contract with the understanding that the Peruvian mines might well be closed, the closing of the mines is not a "contingency the nonoccurrence of which was a basic assumption * * *" thus 2-615 does not apply, and the seller is liable in damages notwithstanding its inability to deliver Peruvian copper. Put another way, the seller's agreement to a fixed quantity, fixed price contract allocates the risk of shortages to the seller.

* * *

The most persistent problem under 2-615 in the last forty years has been the question whether a radical rise in a seller's costs frees seller from its obligation to perform. This was the issue with respect to uranium in the famous Westinghouse case; it was raised by Gulf Oil in Eastern Air Lines, Inc. v. Gulf Oil Corp. concerning aviation fuel; by Atlas Corporation in Iowa Electric Light and Power Co. v. Atlas Corp.; by Alcoa in Aluminum Co. of America v. Essex Group, Inc. and by others in similar circumstances. Many of these cases were somehow related to the radical increase in the price of crude oil that has occurred since 1972. With rare exceptions the courts have rejected the sellers' 2-615 arguments. For example, in the Sabine case, the court held a two-fold increase in cost of performance no excuse.

* * *

As commerce grows more sophisticated and multinational it becomes more vulnerable to disruption from embargoes, wars, revolutions, and terrorism in countries producing natural resources. It is paradoxical that with each disruption, subsequent disruptions become more foreseeable and therefore less likely to provide a basis for escape from a contract under 2-615. No one remotely related to the petroleum or uranium industry will be able to argue persuasively for the foreseeable future that it should be freed from its contract obligation because of an unforeseen rise in price or cost. If anything is certain and foreseeable, it is that prices in those markets will experience periodic radical changes.

We would not argue that a seller should never be excused from its obligations because of cost increases, however we agree with the thrust of the cases discussed above. In our judgment an increase in price, even a radical increase in price, is the thing that contracts are designed to protect against. * * *
SCHWENZER: FORCE MAJEURE AND HARDSHIP IN INTERNATIONAL SALES CONTRACTS


Unforeseeable changed circumstances are probably one of the major problems parties—especially those who are party to a long or longer term complex contract—may face in international trade. Indeed, with globalisation these problems are increased as the involvement of more and more countries in production and procurement entails even greater imponderables. Natural disasters or changes of political and economic factors may considerably affect the very basis of the bargain. There may be an earthquake, a flood or a civil war in one of the production countries, forcing the producer to resort to countries with much higher production costs; import or export bans may hinder the envisaged flow of goods; or price fluctuations that were not foreseeable at the time of the conclusion of the contract make the performance by the seller unduly burdensome or devaluate the contract performance for the buyer.

The paradigm of pacta sunt servanda or sanctity of contract simply places the burden of such a change of circumstances upon the party on which it falls. However, since the old Roman days the principle of impossibilium nulla est obligatio, or there is no obligation to perform impossible things, has been recognised. * * * Furthermore, under the doctrine of rebus sic stantibus developed by the Roman praetor, an unforeseeable and extraordinary change of circumstances rendering a contractual obligation extremely burdensome could be recognised. Since these days, impossibility, force majeure or the like have become grounds for exemption in every legal system. * * *

II. SOME DOMESTIC SOLUTIONS

The position of French law represents one extreme and it is well documented. Whereas the rule for force majeure is laid down in Article 1148 of the Code Civil (CC), neither general civil law nor commercial law has been favourable to the concept of hardship. The famous theory of imprévision that allows a contract to be modified in case of a change of circumstances has been applied to administrative contracts only. However, the Cour de Cassation has apparently moved away slightly from the strict pacta sunt servanda principle; it appears to be heading in the direction of eventually recognising some kind of hardship.

Many continental legal systems, however, accept the theory of hardship, among them Germany, The Netherlands, Italy, Greece, Portugal, Austria as well as the Scandinavian countries. The most recent acknowledgement by statute can be found in Germany. The Statute on the Modernisation of the Law of Obligations in 2001 finally codified the right to have the contract adapted to the changed circumstances in section 313

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of the Bürgerliches Gesetzbuch [German Civil Code; the doctrine is known in German as Wegfall der Geschäftsgrundlage—the Authors].

English law seems to reject any notion of relief for changed circumstances that do not amount to impossibility. However, in case of frustration of contract—that means where the contract is rendered useless by the change of circumstances—an exception is granted to this general rule. In the United States, the Uniform Commercial Code has enacted the general doctrine of impracticability.

III. INTERNATIONAL APPROACHES


The Convention on the International Sale of Goods (CISG), however, does not contain a special provision dealing with questions of hardship. It does not mention either force majeure or hardship. Article 79 of the CISG relieves a party from paying damages only if the breach of contract was due to an impediment beyond its control. The drafting history of this provision is not quite clear. During the preparations of the CISG, the question of whether economic difficulties should give rise to an exemption was a highly controversial one. *

Today, however, it is more or less unanimously accepted in court and arbitral decisions, as well as in scholarly writing, that Article 79 does indeed cover issues relating to hardship. Accordingly, first and foremost, there is no room to resort to domestic concepts of hardship as there is no gap in the CISG regarding the debtor’s invocation of economic impossibility and the adaptation of the contract to changed circumstances. If one were to hold otherwise, unification of the law of sales would be undermined in a very important area. Domestic concepts such as frustration of purpose, rebus sic stantibus, fundamental mistake or Wegfall der Geschäftsgrundlage would all have to be considered.

HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION

616, 623, 627-630 (H. Flechtner ed., 4th ed. 2009).*

Article 79 of the Convention follows the approach of important civil law systems in extending the rules on excuse to all aspects of a party’s performance. Under paragraph (1) either party may be excused from liability “for a failure to perform any of his obligations.” On the other hand, UCC 2-615 provides excuse only for the seller, and then only with

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respect to *two aspects* of performance—"delay in delivery" and "non-delivery."

**(a) Defective Goods.** The differing scope of the provisions on exemption in the Convention and in the UCC leads to this question: May a nonnegligent seller be excused from liability when he delivers defective goods? Under the UCC, the answer is No, since the situation involves neither "delay" nor "non-delivery." Under the Convention the answer is not so obvious, since exemption may apply to a party's failure to perform *any* of his obligations.

* * *

Attention has been drawn * * * to the danger that local tribunals may unconsciously read the patterns of their domestic law into the general language of the Convention—an approach that would be inconsistent with the Convention's basic goal of international unification (Article 7(1)). And deliberate recourse to the exemption rules of a single domestic system would flagrantly violate the Convention. As we have seen, Article 7(2) permits recourse to "the law applicable by virtue of the rules of private international law" only as a last resort—that is, when questions are "not expressly settled" by the Convention and cannot be "settled in conformity with the general principles on which it is based." The fact that a provision of the Convention presents problems of application does not authorize recourse to some one system of domestic law since this would undermine the Convention's objective "to promote uniformity in its application" (Article 7(1)). However, no such difficulty arises from a comparative law approach that seeks guidance from the prevailing patterns and trends of modern domestic law.

* * * However, the language of Article 79(1) seems to leave room for exemptions based on economic dislocations that provide an "impediment" to performance comparable to non-economic barriers that excuse failure of performance. From this view, which is widely but not universally shared, the standard for exemption is not strict impossibility, but rather such extreme difficulty in performance as amounts to impossibility from a practical (although not technical) viewpoint.

Assume that the supply of a material needed for performance of a contract unexpectedly becomes so reduced in quantity and inflated in price that only a minority of producers that need this material can continue in production. This situation clearly constitutes an "impediment" rendering performance impossible for most producers whose contracts to sell the goods overlap the onset of the shortage; requiring production by only one (or a minority) unfairly prejudices some in favor of their competitors.

* * *

The question whether something less than literal impossibility of performance (such as in extreme increase in the cost of performance) can satisfy the requirements of Article 79 raises the question of the applicability of "hardship" doctrine in transactions governed by the CISG. Civil law
hardship doctrine requires the parties to negotiate an adjustment to a contract—and, if they fail to reach a negotiated adjustment, permits a court to end the contract or even impose a judge-made adjustment—when the contract’s economic balance is severely disrupted by unforeseen developments. **Proposals to include a hardship-like doctrine aimed at adapted performance of an economically disrupted contract were rejected during the drafting of Article 79. Thus such doctrines should have no application in contracts governed by the CISG. Extreme price and (especially) currency dislocations may be sufficiently widespread to lead to laws or administrative regulations that require contract adjustment. Although the Convention does not displace domestic rules of “validity” unless it has “expressly provided” for an issue (Article 4(a)), Article 79 comprehensively regulates the impact of changed circumstances on the parties’ obligations and should be read to pre-empt domestic rules on this question.

**SPIVACK, OF SHRINKING SWEATSHIRTS AND POISON VINE WAX: A COMPARISON OF BASIS FOR EXCUSE UNDER UCC § 2–615 AND CISG ARTICLE 79**


This article compares CISG and U.C.C. jurisprudence on excuse for nonperformance and argues for an application of the CISG in excuse cases which is stricter than the U.C.C. and, I suggest, is more consistent with the drafters’ intent and the goals of the Treaty. As I will discuss, the CISG’s Article 79 seems to set out much narrower grounds for excuse than does U.C.C. § 2–615 (2005). In practice, however, cases in the two jurisdictions diverge less than the wording of the two statutes might lead one to expect, evincing comparable reluctance to excuse nonperformance. There are two reasons for this similarity: first, U.S. courts construe U.C.C. § 2–615 more narrowly than its language might predict; second, tribunals applying the CISG hear more bases for excuse than Article 79, based on its drafters’ intentions, probably allows. In other words, U.S. courts construe U.C.C. § 2–615 more narrowly than its wording seems to allow, while tribunals applying the CISG apply Article 79 more broadly than its wording seems to justify. The result is that Article 79 tribunals hear cases for excuse that would seem to be acceptable only under the U.C.C., while cases actually decided under the U.C.C. do not show any tendency to excuse nonperformance more often than the CISG.

**International business deals tend to consist of what are called “relational contracts”: they extend over many years; involve series of transactions rather than single isolated deals; and rest upon a strong relationship between the parties involved. First of all, because they are long-term, such**

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contracts face a high risk of being disrupted by a vast array of changing political and economic factors. To enter into such long-term agreements, parties on both sides need some assurances of stability despite this risk. Article 79, if applied consistently with its wording, renders most of the political and economic vicissitudes attendant on transborder sales unavailable as excuses for nonperformance—in fact, it would deny them a forum to be heard. As a consequence, Article 79 gives parties to a contract incentive to write into the agreement details about what changes in circumstance will permit renegotiation or modification, and the requirement that such modification be negotiated between the parties rather than in litigation. Renegotiation during the life of a contract is the norm in international business transactions and the more the parties can anticipate and provide for it, the less painful and disruptive it need be. The CISG language may also move parties to include some kind of renegotiation clause, which would allow for the contractual relationship to continue rather than falter—clearly promoting the CISG’s goals. Knowing that the CISG offers no recourse in times of change, the parties, who are in a much better position to do so than a tribunal brought in after the fact, will work to anticipate possible events which might change the nature of the deal and write provisions for dealing with them into the contract.

* * *

For cases decided under the CISG, I turn to European arbitration tribunals, which so far have far outstripped U.S. courts in deciding cases under the Treaty. So far, tribunals in Bulgaria, France, Germany, and Russia, as well as at the International Chamber of Commerce, have refused to excuse performance due to changed market conditions. This makes perfect sense—even more so than under the U.C.C.—based on the wording of the treaty and in the context of trans-border sales. First, it is unlikely that a mere market change could impose the kind of physical impossibility that the wording of Article 79 seems to require. Second, in the context of trans-border sales, parties need to be assured that the fluctuations of national markets will not put their contracts at risk. Only a strict policy in this regard would further the CISG’s stated goal of promoting international sales: a seller or buyer who had to worry about every shift within a country’s borders would endanger the contract would be unwilling to take the risk.

Tribunals applying the CISG have so far looked upon market failure defenses unsympathetically but have allowed them to be heard, despite indications that Article 79 was not meant to cover this defense at all. CISG commentators have suggested that increased costs of one hundred percent may offer a basis for excuse, and that even less than that might be considered under certain circumstances. On the other hand, there is a consensus that fluctuations of up to fifty percent are insufficient. Moreover, as mentioned supra, some commentators argue that the word “impediment” was chosen to limit the application of the section to cases when
a physical hindrance literally makes performance impossible, and that economic hardship is not covered by the section at all. The ultimate goal of the CISG in this regard is to force parties to negotiate into their contracts hardship clauses specifically designed to reflect and allocate the risks attendant upon the particular enterprise, rather than using a “one size of economic risk fits all” approach.

BAKER, “A HARD RAIN'S A-GONNA FALL”—TERRORISM AND EXCUSED CONTRACTUAL PERFORMANCE IN A POST SEPTEMBER 11TH WORLD


III. A HYPOTHEtical

In the pre-September 11th World Trade Center, resides Tech Chef Co., an American software company. Tech Chef Co. has developed a prototype of a highly specialized cooking software, with the intent to distribute the software in the U.S. and abroad. This software product, The Tech ChefTM, creates a new kitchen management system that allows orders to be transmitted to and from the kitchen more efficiently, thus increasing restaurant profitability. At this juncture, the product is virtually complete; however it is necessary to have optimizing algorithms imbedded by its inventor Bob Smith, the CTO of Tech Chef Co. It is widely known that French chefs are among the best in the world, however, they lack the business acumen to produce food efficiently. Due to these factors, Tech Chef Co. feels that their new software is a perfect fit for French kitchens. Franco Tex S.A., a public corporation based in Vichy, France, has contracted with Tech Chef Co. to distribute the new software in France. As a distributor, Franco Tex S.A. will order, pay for, and take title of the goods it distributes. As the news of the new software quickly spread, Franco Tex S.A. has already taken 800 orders for The Tech ChefTM. These orders, along with arrangements for payment, have been passed along to Tech Chef Co. to be filled and shipped by September 20, 2001.

The day is September 11, 2001. An unexpected terrorist attack is launched against the United States. [In the attack on] the World Trade Center towers, Tech Chef Co.’s offices are destroyed along with its entire inventory. * * * The software will have to be completely rebuilt, along with the rest of the company. In the late afternoon of September 11th, while * * * watching CNN worldwide, Mr. Piastra, CEO of Franco Tex S.A., is horrified by the unfolding events. [After the shock slowly wears off,] he becomes aware of the effect the attack could have on his business and his customers. The next day, Mr. Piastra e-mails Tech Chef Co. hoping to get answers regarding their functionality. A week later, Mr. Piastra receives the following response:

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Sept. 19, 2001

My Dear Monsieur Piastra,

Please excuse my delay in responding to your e-mail dated September 12, 2001. As you are aware, the tragic events of September 11th have caused great turmoil for this company and this country. I am sorry to report we lost approximately half of our staff and most of our hardware and software in the attack. Bob Smith, our CTO whom you have worked with for the last eight months, was one of the victims. On the business front, I regret to report that our product has been completely wiped out and therefore none of the goods that you have ordered for the September 20th delivery can be shipped. In fact, as we assess our losses, it is apparent that we may have to recreate The Tech ChefTM software from scratch. I have, as you can understand, virtually no idea how long this will take, and therefore would not speculate as to a future delivery date. I know this will affect your company and your customers greatly, especially since The Tech ChefTM software is the only product that can fulfill the needs of your clientele. I sincerely wish that I could reimburse your company for any financial losses caused by our inability to deliver, but unfortunately, the disaster has crippled Tech Chef Co. not only emotionally and physically, but also financially. Truthfully Sir, I am at a complete loss and await your reply.

Mr. Hamilton Berger, CEO Chef Tech Co.

The legal questions which are posed herein are cogent and worthy of inquiry. What are the rights and responsibilities of parties when an unanticipated terrorist attack occurs which prevents performance? More specifically, what will happen if Franco Tex S.A. sues Tech Chef Co. for breach of contract? What are the legal consequences under principles of common law, the American Uniform Commercial Code and International Law?

* * *

V. THE UNIFORM COMMERCIAL CODE

The doctrine of impossibility has been expanded over the years to include a broader spectrum of intervening circumstances that could give rise to contractual discharge. One expansion of the doctrine includes commercial impracticability which first came into existence in 1916. Governing bodies have set out statutory guidelines concerning such cases that codify and expand on existing common law, and provide tests for the validity of impossibility-like defenses.

As our hypothetical contract involves the sale of goods, the Uniform Commercial Code ("UCC") may apply. * * *

Courts have said that "[t]hree conditions must be present before a seller is excused from performance under the UCC: (1) a contingency must occur, (2) performance must thereby be made 'impracticable' and (3) the nonoccurrence of the contingency must have been a basic assumption on which the contract was made." A party asserting an impracticability
defense has the burden of proof on these three requirements. However, the UCC does not provide a comprehensive list of contingencies that would warrant excuse due to commercial impracticability. Instead, a court should look to the specific circumstances surrounding the frustrating occurrence in each case.

The text of the UCC sets out two requirements that must be fulfilled in order to assert an impracticability defense pursuant to section 2-615. First, the defaulting party must not have assumed any greater obligation than imposed by section 2-615 which would allocate the risk of the contingency’s occurrence to her. To determine whether a party assumed obligations additional to those in section 2-615, a court will look to both the language of the contract, and the circumstances surrounding contractual negotiations.

Courts may also look at a seller’s conduct that implies a greater obligation has been assumed. In United States v. Wegematic Corp., an electronics manufacturer contracted with the government to create a general computing system. In winning the bid for the contract, Wegematic advertised their system as “a truly revolutionary system utilizing all of the latest technical advances.” Wegematic delayed the nine-month delivery deadline twice before finally communicating to the government that engineering difficulties had made it impracticable to create and deliver the computing system. The court ruled that there was “no basis for thinking that when an electronics system is promoted by its manufacturer as a revolutionary breakthrough, the risk of the revolution’s occurrence falls on the purchaser; the reasonable supposition is that it has already occurred or, at least, that the manufacturer is assuring the purchaser that it will be found to have when the machine is assembled.” The court went on to say that ruling for the seller would make a manufacturer “free to express what are only aspirations and gamble on mere probabilities of fulfillment without any risk of liability.”

The second requirement included in the text of section 2-615 is a condition that the seller must seasonably notify the buyer if there will be a delay of, or failure to, deliver. Seasonable notification has been construed differently on the basis of the specific facts of each case. “Whether a seller’s communication to a buyer constitutes seasonable notification will depend upon various factors, including whether the buyer had actual notice, the specific content of the transmission, and whether notice was delivered in a timely fashion allowing the buyer opportunity to make other arrangements.”

As described above, section 2-615 does not include an exhaustive list of contingencies that would bring about a commercial impracticability defense. A commonality of contingencies that has given rise to a section 2-615 defense is their relative unforeseeability at the time the contractual negotiations took place. If the contingency was foreseeable, parties may provide for it in the contract. Thus, if a party agrees to perform despite this contingency, impracticability may not be used as a defense for non-
performance. However, a strict requirement of unforeseeability to support a commercial impracticability defense would serve to nullify the doctrine as anything and everything could conceivably be foreseen. As stated succinctly by the Second Circuit, to require absolute unforeseeability would:

practically destroy the doctrine of supervening impossibility, notwithstanding its present wide and apparently growing popularity. Certainly, the death of a promisor, the burning of a ship, the requisitioning of a merchant marine on the outbreak of a war could and perhaps should, be foreseen. In fact, the more common expression of the rule appears to be in terms which tend to state the burden the other way, e.g., that “the duty of the promisor is discharged, unless a contrary intention has been manifested” or “in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty.”

Returning to our hypothetical, given the text of UCC section 2–615, and the surrounding case law, it appears that if decided under U.S. law Tech Chef Co. should be excused from its contractual obligations to Franco Tex S.A. The three conditions for a section 2–615 commercial impracticability defense are present. First, a contingency has occurred with the attack on the World Trade Center. Second, performance of the contract has been made impracticable due to the contingency because Tech Chef Co. has lost half of its workforce including its CTO, its principle place of business, all equipment, and virtually all existing inventory, including the software on which the contract was based. Third, the nonoccurrence of the contingency was a basic assumption on which the contract was made because presumably, neither Tech Chef Co., nor Franco Tex S.A. would have entered the contract if they assumed otherwise.

Additionally, Tech Chef Co. has met the two textual requirements of section 2–615. Tech Chef Co. has not expressly or impliedly taken on any additional obligations not imposed by section 2–615. Based on the severity of the attack, and the relatively prompt response which arrived prior to the agreed upon delivery date, Tech Chef Co. has probably given Franco Tex S.A. seasonable notification of its non-delivery. As to the foreseeability of the attack, an area to which many courts look, Tech Chef Co. might fail a strict requirement of unforeseeability. In a world in which terrorist threats have become a global and real threat to governments, businesses, and individuals alike, one might say that contracting parties could very easily foresee the possibility of a terrorist attack affecting their infrastructure, employees, suppliers, and means of delivery. However, as noted above, a strict requirement of unforeseeability would drive a stake through the heart of the doctrine of commercial impracticability. Although terrorist attacks have become increasingly commonplace, their frequency and predictability have not risen to a level at which they could be reasonably and accurately foreseen. It is arguably unreasonable to impose
hardship on contracting parties who have not expressly or impliedly negotiated on the subject of terrorist attacks.

VI. THE FRENCH SYSTEM AND THE CODE CIVIL

The French system interprets the concept of impossibility narrowly. If the impossibility is total, the debtor is relieved of all contractual duties and any damages resulting from non-performance. This system is in line with the common law of England and most of the United States in holding that an accidental destruction of a thing, caused by something other than the fault of the obligor, excuses the obligation to convey that thing in an executory contract. Anything less than total impossibility however, does not excuse the debtor from the contract. The parties are expected to perform their duties under the contract even when performance would be ruinous to them. The French system refuses to give the judge any power to alter the contract upon equitable consideration. If the hypothetical were to be based on French law, the Code Civil would apply.

The applicable articles of the Code Civil are articles 1147 and 1148 which provide:

Article 1147: The debtor is liable, where appropriate, to pay damages, either because he has not performed an obligation or he was late in performing, in all cases in which cannot prove the non-performance resulted from a cause étrangère for which he was not responsible and also that there is no bad faith on his part.

Article 1148: There will be no damages when as a result of force majeure or cas fortuit the debtor has been prevented from delivering or doing that which he was obliged to deliver or do or has done that which is forbidden.

For an event to constitute force majeure in France, case law has traditionally required it to be irresistible, unforeseeable, and external to the party seeking excuse from the contract. The foreseeability of a contingency is not a substantive requirement, but instead becomes a condition of admissibility. An event cannot be avoided if it was not foreseen. However, some foreseeable events may constitute force majeure if the event is inevitable or impossible to resist. If a party foresees an inevitable event, he must take precautions “necessitated by its foreseeability.”

In the hypothetical, Franco Tex S.A. may have a stronger claim in France than in the United States. First, since the software is not completely destroyed, Franco Tex S.A. may argue that it is not impossible for Tech Chef Co. to replace it. While forcing the company to rebuild the software from scratch may be ruinous for a small company, this would not excuse performance under French law. Second, Franco Tex S.A. may be able to argue that the terrorist event was foreseeable and therefore, cannot constitute force majeure. Again, we are confronted with the foreseeability question. Was a terrorist attack on the World Trade Center foreseeable to this small company? One would most probably find such
foreseeability doubtful. Even if Tech Chef Co. cannot prove that the event was unforeseeable, it can try to show that the attack was inevitable. In this scenario, Franco Tex S.A. may be able to assert that while Tech Chef Co. could not have taken precautions to avoid terrorism, the company could have taken precautions to guard against the destruction of the software. In response, Tech Chef Co. can show that the terrorist attack was not resistible by showing that the attack was unavoidable by the ordinary person exercising reasonable care. A normal person in Tech Chef Co.’s position would not be able to resist a terrorist attack. Tech Chef Co. can also show that the attack was external because it had not control over the attack.

Franco Tex S.A. would have a stronger case under the first approach, rather than the second; by showing a court that, while the terrorist attack may have resulted in problematical performance for Tech Chef Co., it is still less than total impossibility. The French system has rejected the theory of imprévision in civil law. As a result, the terrorist attack would not constitute an event excusing Tech Chef Co. from delivering the software.

VII. INTERNATIONAL LAW, EUROPEAN LAW, AND THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

* * *

Perhaps the most universally followed doctrine of contractual impossibility emanates from the United Nations. The United Nations Convention on Contracts for the International Sale of Goods (“CISG”) was adopted at a 1980 United Nations Diplomatic Conference in Vienna. Over fifty countries, including the United States, have adopted the CISG since the time of its creation. The CISG is a multilateral treaty that governs international contractual obligations, and it seems to constitute the international equivalent to the UCC. The CISG will apply to a contract, in the absence of a choice of law provision, when both principle places of business for the contracting parties are in different nations and those nations have adopted the convention. The CISG also provides conflict of law regulations, which would also allow it to apply to some contracts when only one of the contracting parties is from an adopting CISG nation. The United States has taken exception to the conflict of law regulations. Contractual impossibility is addressed in Section IV of CISG article 79.

* * *

It is worth noting that the UCC section 2-615 and CISG article 79 differ in several important respects. Most notably, article 79 provides an excuse for impossibility while the UCC has adopted the less stringent test of commercial impracticability. The degree of this difference is very much dependent upon the court’s interpretation of impracticability. If, for example, a court defines impracticability objectively, where no one would be able to perform the contract, then the degree of difference is minimal. However, if a court defines impracticability as the occurrence of a contin-
gency, the non-occurrence of which is a basic assumption of the contract, more events will fit into the definition, excusing performance in more contracts. The second difference is to whom the defense applies. The CISG applies to both parties whereas the language of section 2-615 would indicate that it is only applicable to sellers of goods. Third, the instances that could give rise to a CISG article 79 defense are much broader than those of the UCC. The CISG applies to all aspects impeding contractual performance, while the UCC limits its defense to situations involving delay, or non-delivery. Also, importantly, the CISG allows excuse for "impediments beyond [the contracting party's] control." This seems to be a much more lenient standard than section 2-615's requirement that the "non-occurrence of the event that occurs be a basic assumption on which the contract is based to excuse performance."

To assert an impossibility defense under the CISG, a party must show three things: (1) failure was due to an external impediment beyond the party's control; (2) the impediment was not reasonably foreseeable at the time the contract was made; and (3) both the impediment and its effects were unavoidable. Further, a party seeking a CISG discharge must also have notified the non-breaching party within a reasonable time after learning of the impediment.

* * *

Returning to the hypothetical, CISG article 79 would apply to the case, as the contract in question is a sale of goods between parties whose principle places of business are in different states which are parties to the Convention. It will probably render the same result as that under UCC section 2-615. The three showings required by the convention are present in Tech Chef Co.'s case. The terrorist attack on the World Trade Center will most definitely be considered an external impediment to Tech Chef Co.'s performance as it has completely devastated the company. Furthermore, it would be very difficult for a court to find that Tech Chef Co., a small software company, could have had any control over the occurrence or non-occurrence of the attack. With regard to the foreseeability requirement, it is arguable that Tech Chef Co. could have foreseen the possibility of the attack, but it would not be reasonable to assume that such a small company should have foreseen the possibility of the attack. Indeed, for Tech Chef Co. to forgo entering the contract with Franco Tex S.A. due to the remote possibility of a terrorist attack would be thought to be unreasonable. Finally, there is nothing that Tech Chef Co. could do to avoid the attack or its consequences. It would be irrational to think that a small software company could avoid this terrorist attack when the United States' and world's intelligence community was unable to prevent it. Tech Chef Co. was also left with no way to avoid breaching its contract as its place of business was destroyed, it had lost key employees, and the goods it contracted to sell were destroyed and not easily replaceable. Further, Tech Chef Co. notified Franco Tex S.A. within seven days of the attack; a very reasonable amount of time given the severity of the damage caused. As Tech Chef Co.'s predicament meets the three requirements for dis-
charge, and the company seasonably notified Franco Tex S.A. of its inability to perform, Tech Chef Co. arguably should be discharged from its contractual duties under CISG article 79.

Notwithstanding the arguments presented above, it is important to note that a court may not find this situation to constitute one of total impossibility. Franco Tex S.A. may argue that while the terrorist attack was external, it was not an impediment making performance totally impossible. Mr. Berger has stated that Tech Chef Co. may have to rebuild the product from scratch and that he does not know how long this will take. He has not said that it would be impossible to rebuild the product. Surely, in time a substitute product can be created. This may be seen as a temporary impediment, excusing performance for the duration of the impediment, or it may be seen as hardship. If a court finds the latter, Tech Chef Co. would be required to perform the contract regardless of how impracticable. As mentioned above, Tech Chef Co. may have much difficulty in replacing the software or finding a company who can, but this difficulty is less than total impossibility. If a court finds the impediment to be temporary the company’s performance is excused the length of time to rebuild the software, but ultimately Tech Chef Co. must still deliver the product.

**PERILLO, FORCE MAJEURE AND HARDSHIP UNDER THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS**


The UNIDROIT Principles deal with force majeure in the chapter on nonperformance. Hardship is dealt with in the chapter on performance. The logic of this divided treatment is clear. If performance is impossible it will not be performed; whether the nonperformance is excused or will be the basis for a money judgment for damages or restitution is a question dealt with under nonperformance. If performance is burdensome, the consequences of the burden are dealt with as an aspect of performance.

The provisions on force majeure are rigid. Nothing less than total impossibility will suffice as a predicate for an excuse. There must have been an “impediment beyond [the party’s] control” and the party “could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.” * * *

* * *

In Canadian Industries Alcohol Co. v. Dunbar Molasses Co., OFN., apparently involving international commerce, a middleman promised delivery to the buyer of one-and-a-half million gallons of blackstrap molasses from a specific sugar refinery. The seller failed to deliver and, in defense

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of a breach of contract action, argued impossibility, proving that the specified refinery did not produce a sufficient quantity to fulfill the contract. The defense was unsuccessful as the seller failed to show what efforts it had made to attempt to secure a contract for the production and delivery of sufficient molasses from the operator of the refinery.

What if the impediment is caused by the party’s financial embarrassment? Neither Article 7.1.7, nor the commentary to it, refers to this kind of impediment. Under American law, it is quite clear that financial impediments provide no excuse; these are regarded as “subjective” rather than “objective” impossibility and there is unanimity in the case law and in doctrine that subjective impossibility provides no excuse, whether or not it was the result of conditions outside the control of the obligor. It is generally believed that the risk of financial ability to perform is such a basic assumption underlying all contracts that it cannot be excused, except by a decree in a bankruptcy proceeding. It is hard to believe that this general belief is suspended in international trade.

* * *

D. Hardship

The provisions on “hardship” contained in the chapter on performance should be compared with the provision on “force majeure,” contained in the chapter on nonperformance. The rule of force majeure is draconian and unforgiving. Nothing short of total impossibility will excuse nonperformance or partial nonperformance. Impracticability will not suffice as an excuse. Rather, impracticability as well as hardship far short of impracticability must be tested under the hardship articles. Hardship alone never forgives nonperformance. It instead compels renegotiation and authorizes courts to “adapt” (revise) the contract to take the hardship into account. Nonetheless, the hardship provision starts with the caption: “Contract[s] to be observed.” Article 6.2.1 provides that “[w]here the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.”

Hardship: The Factual Predicate

The definition of hardship, which appears in Article 6.2.2, is complex, because it not only defines the nature of the burden, but also other factors that must coexist with the burden to make it legally relevant. As a predicate to legally relevant hardship there must have been “the occurrence of events fundamentally alter[ing] the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished. . . .” When is the equilibrium of a contract fundamentally altered? * * * [O]ne illustration involves a ten-year contract for the sale of uranium at fixed prices in U.S. dollars payable in New York. The currency in the buyer’s country declines to 1% of the value that it had at the time of contracting. The buyer cannot invoke force majeure. Similarly, if the price is increased
tenfold because some Texans have almost cornered the market, force majeure is not present. Nonetheless, the buyer may have redress under the hardship provisions. In addition, it must be shown that the events could not reasonably have been taken into account, are not within the party’s control, and the risk was not assumed.

* * *

“The events are beyond the control of the disadvantaged party....”

The Principles give no illustration of this subdivision. I will construct a hypothetical. A middleman contracts to deliver goods in the future that he does not have and has no contract with a supplier for the acquisition of them. He could immediately contract for the goods from a manufacturer at a price that would make the resale profitable. Instead, speculating that the manufacturer will lower its price, the middleman takes no action to secure the goods. Because of changing market conditions, the manufacturer raise[s] its prices dramatically. The middleman can only fulfill its contract at a considerable loss. Hardship cannot be invoked, because the reseller could have avoided the loss by promptly entering into a contract with the manufacturer.

“The risk of the events was not assumed by the disadvantaged party.”

The contract may expressly allocate the risk of supervening hardship, in which case the contract itself supersedes the rules of hardship in the Principles. However, it is clear from the nature of the hardship doctrine, that, unlike American law, the mere fact that the contract contains a fixed price does not allocate that risk.

[Authors’ Note: In 2004 and 2010, UNIDROIT issued a revision of the Principles of International Commercial Contracts. However, the revisions made no changes to the text of the provisions discussed by Perillo.]

**Comment on Measuring Damages for Non-Delivery**

1. In order to appreciate the full complexity of a contractual relationship (potentially) influenced by unforeseen circumstances, we must also consider the situation of the party whose performance is not directly affected. Consider, for example, the position of a buyer where the seller asserts that an unforeseen event establishes an excuse based on frustration or commercial impracticability. How is the buyer to know whether such a claim is well-founded or instead represents a breach of contract by seller? And in order to decide on a course of action, the buyer also will need to know what its rights are—especially the amount of recoverable damages—in the event of a wrongful non-delivery of the goods by the seller.

When a seller fails to deliver on the contract date, the standard remedy at common law is an award of damages. (Although it is commonly said that the standard remedy is specific performance in civil law countries such as Germany and France, in practice damages for breach of contract are “by far the dominant form of relief” there as well. See Lando and Rose, *On the Enforcement of Specific Performance in Civil Law Countries*, 24 Int’l Rev. L. & Econ.
The damage award is intended to allow the buyer to use the marketplace to replace the non-delivered goods without economic loss. The traditional damage calculation is the difference between the contract price and the market price at the time and place for delivery under the contract.

2. The United Kingdom’s Sale of Goods Act, art. 51(3), thus provides that damages are measured as of the time the goods “ought to have been delivered” under the contract. In the case of a documentary sale, the traditional common law view in England refined this rule to require measurement of the damages as of the time when the seller should have delivered the shipping documents covering the goods. See C. Sharpe & Co., Ltd. v. Nasawa & Co., [1917] 2 K.B. 814.

3. The UCC in the United States, however, introduced more flexibility for an aggrieved buyer in the event a seller fails to deliver. Of special importance, it permits the buyer, as an alternative, to measure damages according to the actual cost of purchasing replacement goods. See UCC §§ 2–711, 2–712. Under the UCC, after the seller’s “breach,” the buyer may “without unreasonable delay” purchase substitute goods and recover the difference between the contract price and the “cost of cover.” Thus, if the aggrieved buyer does purchase cover, the UCC allows it to obtain sufficient damages to cover its economic loss.

Even in cases where the buyer does not purchase cover, UCC § 2–713 provides a different rule for measuring damages. Under that section the proper measure is the difference between the contract price and the market price “at the time when the buyer learned of the breach” (emphasis added). This change of the date for measurement is part of a larger UCC effort to reduce the effect of “title” concepts on unrelated, and separable, rules. The result is that the buyer has no risk of a rising market in the price of the goods until it learns of the breach, but thereafter is not allowed to speculate at the seller’s risk (unless cover is timely purchased under § 2–713).

4. The CISG follows a similar approach. CISG Article 75 also permits damages to be measured by the difference between the contract price and the “price in the substitute transaction,” if the buyer purchases substitute goods “within a reasonable time after avoidance.”

CISG Article 76 applies in cases where the buyer does not purchase substitute goods “under Article 75.” Article 76(1) specifies use, for measuring damages, of the market price “at the time of avoidance” of the contract. This rule is well adapted to anticipatory repudiation by the seller or to rightful rejection of delivered goods by the buyer. See Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention 587–589 (H. Flechtner ed., 4th ed. 2009).

5. Under both the UCC and the CISG, however, the buyer’s right to measure damages as against the cost of cover is limited by a general requirement of reasonably prompt action. See UCC § 2–712; CISG Arts. 75 and 77. See also UCC § 2–610 (requiring in the event of an anticipatory repudiation that buyer decide on its contract remedies within “a commercially reasonable time”); on the CISG see Fountoulakis, art. 72, para. 37, in Schechtriem and Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG) (3rd ed., 2010) (stating that a declaration of avoidance for
anticipatory breach "must be made without delay" in order to prevent "speculation . . . at the expense of the party in breach").

This poses special challenges for a buyer when the price of the relevant goods is rising. Simply stated, if the buyer waits too long to cover in a rising market, it runs the risk that the damages will be measured against an earlier, and thus lower, market price. On the other hand, this approach also protects the seller against strategic speculation by the buyer, who otherwise might base its cover decision solely on future changes in the market price.

The counseling point should be clear, however. The buyer can, and usually should, protect itself by purchasing substitute goods reasonably promptly after seller’s breach becomes clear. This seems to be the only method under CISG which measures damages in such a way as to give the buyer complete protection in a rising market.

**QUESTIONS AND COMMENTS**

1. *The Governing Law.* What law governs the two sales transactions? Both France and the U.S. have ratified CISG, but Araby’s status is not known. If Araby also has ratified the CISG, things are somewhat clearer for Jean, at least with respect to the governing law. Recall (from Problem 4.1) that under the basic rule of CISG Article 1(1)(a), the CISG applies to contracts “between parties whose places of business are in different states” if both of those states are CISG “Contracting States.” Why does this rule mean that the CISG should then apply to both the Jean–Gulf Refinery contract and the Jean–Javert contract?

   (a) If Araby is not a CISG Contracting State, however, determination of the governing law may depend on where the lawsuit is filed. For Jean’s sales contract with Javert, the CISG should still govern under Article 1(1)(a), as long as the related lawsuit is filed in either France or the U.S. But please explain why this is so, under Article 1(1)(a), even though Gulf Refinery (in Araby) is the “ultimate” supplier of the oil.

   (b) Now turn to Jean’s contract to purchase oil from Gulf Refinery. In the unlikely event that a lawsuit were allowed in France, the French court should apply the domestic law of Araby. This is so because, as we saw in Problem 4.1, the E.U. Rome I Regulation (2008) selects the law of the “habitual residence” of the seller of goods. *See Art. 4.1(a).* Here, Gulf Refinery—the seller to Jean—is located in Araby (and Araby is not a CISG Contracting State).

   But what if the lawsuit were filed in the United States? Could a court in Massachusetts conclude that the Jean–Gulf Refinery transaction bears an “appropriate relation” to Massachusetts under UCC § 1–105 (Rev. § 1–301) and thus apply the UCC? Or could it instead find that the “most significant relationship” is with Araby? Or France? As to the latter possibility, recall that, although France is a CISG Contracting State, CISG Article 1(1)(b) does not apply for courts in the United States. (Again, see Problem 4.1.)

   Finally, you likely have no way of even knowing what law an Araby court would apply if a lawsuit were filed there.
This all leads to the essential question: Why does it matter to Jean that different substantive law might govern its contract with Javert as compared to the one with Gulf Refinery?

2. This legal uncertainty is highlighted when we focus on the category of related doctrines known by the various names impracticability, frustration, force majeure, and hardship. In order to advise Jean about his legal situation regarding the three separate contracts, you may need to analyze (as applicable) some or all of the following rules discussed in the Readings: (1) the general approach as reflected in The Eugenia, (2) the UCC rule in the United States, (3) the approach of French courts under the Code Civil, and (4) the rule under the CISG.

But first, identify the specific test for excuse under each of these bodies of law. The basic tests for the UCC (see White and Summers) and for the CISG and French law (see Baker) are set forth in the Readings. For the CISG, the Schwenzer excerpt makes clear that the concept of an “impediment” under Article 79 extends to the substantive notion of an economic “hardship” for performance. But the same author also notes in an influential treatise that even price fluctuations “amounting to over 100 per cent do not yet constitute a ground for exemption” and that in speculative transactions “a party may have to accept even a tripled market price.” Schwenzer, art. 79, para. 30, in Schechter and Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG) (3rd ed., 2010).

The Eugenia reflects a traditional common law approach to the doctrine of “frustration.” What test does it ultimately employ? In specific, must a party demonstrate only that a “fundamentally different situation” arose in order to be excused from its contractual obligations?

3. The Jean–Gulf Refinery Contract. Now turn to the first link in the Jean’s chain of contracts. Will the various doctrines discussed above provide a valid excuse for Gulf Refinery for not delivering the oil on the contract date? In specific, note that timely delivery may not be technically “impossible,” because this contract is for generic heating oil and Gulf Refinery could purchase substitute oil on the Rotterdam “spot” market. Does that option alone preclude Gulf Refinery from asserting a valid impracticability or frustration excuse? How certain are you of your answer?

On the other hand, Gulf Refinery is not seeking a complete excuse, but only a right to delay delivery beyond the contract date. Note that UCC § 2–615 expressly extends to a “delay in delivery” and that CISG Article 79(1) refers to a failure to perform “any” obligation. Is the threshold for excuse lower if a party only wishes to delay performance?

Finally, what is the role of the force majeure clause in the Jean–Gulf Refinery contract? That clause expressly addresses the possibility of a “fire” and provides an excuse, including a temporary one, if the event cannot be overcome “without unusual expense.” The relationship between such contractual clauses and the general legal doctrines discussed above is a recurrent issue in excuse cases. The specific question you must resolve is this: Which has priority? In specific, would Gulf Refinery merely have to prove that its expenses have become “unusual” as opposed to the seemingly higher thresholds of the general legal doctrines?
4. The Jean–Constant Carrier Contract. Now analyze whether Constant Carrier may have an excuse for the carriage contract with Jean because of the events in the Middle East. Neither the UCC nor the CISG will apply to this service contract, so you must resort to general contract doctrines as reflected in The Eugenia, the French Code Civil and U.S. common law. (The general law in the United States similarly requires an “extreme and unreasonable” hardship or expense; see American Trading & Production Corp. v. Shell Intern. Marine Ltd., 453 F.2d 939, 943–944 (2nd Cir. 1972)). Based on those general doctrines, would Constant Carrier have a right either to take a longer route or raise its rate (or both)? Note that, for Jean’s purposes, the delay caused by the longer voyage, if permitted, may be more important than the extra freight charges.

But again, the most important question is likely to be the effect of the contract’s “Liberties Clause,” which is simply another form of a force majeure clause. The broad, one-sided language of this clause is common in carriage contracts. Constant Carrier certainly will argue that the various events in the Middle East reflect a “hindrance, risk, delay, difficulty or disadvantage of whatsoever kind” that cannot be avoided “by the exercise of reasonable endeavors.” As Jean’s attorney, how would you respond to this argument? Even under this clause, does Carrier have a legal right to hold Jean to the contract and assess additional freight charges if it unilaterally chooses to take the longer route?

5. The Jean–Javert Contract (for which, as noted above, the CISG should govern). If either Gulf Refinery or Constant Carrier has a strong excuse argument, will Jean in turn have a valid excuse for his inability to deliver the oil to Javert in Marseilles on time?

The place to begin, again, is the effect of the force majeure clause in the contract between Jean and Javert. This is a much more balanced clause (and in fact comes from a form contract drafted by a UN agency some time ago). But how effectively does it consider, define, and allocate the likely risks of future events that may affect contracts for the sale and delivery of oil? In Jean’s case, are the various events in the Middle East “circumstances” that “prevent” fulfillment of the contract with Javert “whether wholly or partially”?

6. Jean may seek, however, not a complete excuse from the obligation to deliver oil, but only an excuse to delay delivery beyond the contract date—a delay which is coextensive with the delay allowed to Refinery or Constant. See CISG Art. 79(3). Can you be certain whether the obligation to deliver by the contract date is excused?

In any of the above authorities, is an excuse of performance by one party expressly linked to an excuse of performance by another party? Should it be?

Consider again the language of the “excuse clause” in Jean’s sales contract with Javert. Does that clause expressly link excuse of performance by one party to an excuse of performance by another party?

7. If Jean has a valid excuse for delivering the oil after March 1, what would be the legal consequence? In response, Javert will claim that he has no use for the oil after the winter heating season and that, therefore, such a late
delivery would substantially deprive him of what he was entitled to receive under the contract in the first place. The claims by Jean and Javert would obviously lead to a conflict. The CISG addresses such conflicts directly in Article 79(5), which provides that even a valid excuse only relieves a party from liability for damages. (As the Honnold excerpt notes, the civil law remedy of a required adjustment of the contract in impediment cases was rejected in the drafting of the CISG.)

Thus, for example, if the desired late delivery by Jean would otherwise amount to a fundamental breach, Javert retains his right to avoid the entire contract. See also CISG Articles 25 and 49. The UCC in contrast suggests that a court may have the right to “adjust” a contract in furtherance of “commercial standards and good faith,” see UCC § 2-615, comment 6; but to put it mildly, courts have been very reluctant to do so. Even with this further information, how certain can you be of your advice to Jean regarding performance of the contract with Javert?

8. Now read the second paragraph of CISG Article 79. This provision seems to address the modern phenomenon of a series of interrelated contracts. But read the provision carefully. Does it apply in a situation such as Jean’s, where a seller under one contract purchases goods from an upstream supplier? Has Jean “engaged [Gulf Refinery] to perform” Jean’s contract with Javert?

9. Finally, to step back a bit, what is the essence of the related group of excuses we have been discussing here? After surveying a variety of different jurisdictions, one scholar some time ago offered the following summary: “[I]t seems that, despite the differences, the following general characteristics can be traced in all jurisdictions: (a) occurrence of an event after the making of the contract; (b) exceptionality and unforeseeability of the event; (c) alteration of the contract in an intolerable degree; and (d) no fault on the obligor’s part.” Rapsomanikis, Frustration of Contract in International Trade Law and Comparative Law, 18 Duq. L. Rev. 551 (1980).

But also read again the White and Summers excerpt. Their analysis concentrates on the practical aspects of a transaction: A court should first seek to determine whether the parties consciously allocated between them the risk of the event that ultimately occurred—in practical terms, whether at the time the parties made their contract the adversely affected party consciously assumed the risk. If so, the court should enforce the parties’ expectations and not recognize an excuse. If not, the court should decide which party should bear the unforeseen risk not merely by looking at the words of the contract, but also at the entire contextual background of the transaction. That all sounds pragmatic, but also highly subjective. Does it lead to unpredictable results?

10. If this case goes to arbitration, UNIDROIT’s Principles of International Commercial Contracts may be consulted. The examination of “force majeure” under the Principles will be similar to the doctrines already discussed. However, the doctrine of “hardship” is different and requires a separate analysis. An original comment (since deleted) to Principle 6.2.2 suggested that a price or cost change “amounting to 50% or more” is “likely” to amount to a “fundamental alteration.” But even with that perspective, the
prices on the Rotterdam “spot market” may be fluctuating wildly, sometimes below and sometimes well above this possible “limit of sacrifice.” What is your advice to Jean about the likelihood of success on this element? (Note that the comment to 6.2.2. now states simply that “[w]hether an alteration is ‘fundamental’ in a given case will of course depend on the circumstances.”) Also, was this risk assumed by Jean or not? Note that we are again back to concepts analyzed earlier. The primary concept to grasp from the Principles, however, is that the aggrieved party is not excused from the performance by hardship, but only has a right to “request renegotiation” of the contract.

In such a renegotiation concerning the Gulf Refinery–Jean contract, must the refinery purchase oil on the Rotterdam “spot market”? Must it negotiate with Jean about whether, when and how much of such oil to purchase? Although the fire may be “beyond the control of” the Refinery, any purchases on the spot market are not. Was the risk of fire “not assumed” by Refinery? Was the risk also “not assumed” by Jean? There is a clause in the contract. What is its effect on the concepts in the UNIDROIT Principles?

**PART B. COUNSELLING DURING CONTRACT DRAFTING**

Suppose Jean had consulted you before any of the contracts were signed. What changes could you have made in the overall pattern of this transaction which would have protected Jean when the present problems arose?

**QUESTIONS AND COMMENTS**

1. The primary objective of Jean should be to avoid having one *force majeure* clause excuse his obligor, while his obligations are not excused under another such clause.

2. One method of attempting to accomplish this objective is to try to draft all the *force majeure* clauses in each of the contracts to be identical. However, some of these clauses are established by trade groups, and it will be almost impossible to negotiate a change. Thus, to succeed in this method, one might have to allow the draftmanship of one trade group to prevail over other contracts. A further problem with this approach would be that the formula adopted by one trade group (e.g., carriers) might not be useful when applied to other contracts, such as contracts for the sale of goods.

One possible solution comes from the International Chamber of Commerce, which has published a model ICC Force Majeure Clause 2003 and a model ICC Hardship Clause 2003. Like the Incoterms from Problem 4.2, parties may adopt these detailed terms through a mere general reference in their contract.

3. Another approach would be to include in *force majeure* clauses an express reference to other contracts upon which Jean’s performance is dependent, thus expressly creating an excuse for Jean if one of his suppliers is excused. Does this create problems of its own? If you were Javert’s attorney, would you agree to such a clause in the contract? Under what conditions?

4. Would the introduction of the “hardship” concepts from the UNIDROIT Principles be helpful here, and especially the concept of renegotiation?
Into which contract(s) would you want them included? What is the likelihood of their inclusion in any contract? In any event, remember that business persons are interested in transactions, not lawsuits. Thus, as Spivak notes, "renegotiation during the life of a contract is the norm in international business transactions."

5. Another standard lawyer’s approach is to obtain insurance against the perceived risk. The problem with this approach is that insurance companies do not seem to issue policies to cover the types of risks that concern your client, Jean. For example, if Jean tries to insure Gulf’s refinery against loss due to fire, an insurance company is likely to reject the application, since Jean does not own the refinery.

6. Are there mechanisms to compensate Jean for this type of loss which are not called “insurance”?

**PROBLEM 4.4 ELECTRONIC COMMERCE: OUTBOUND ORGANICS COMPANY AND DIGITAL PRODUCTS LTD.**

**SECTION I. FACTS**

The Outbound Organics Company is a family partnership run from a farm in Maryland that grows and sells organic produce. Outbound Organics’ produce acquired an excellent reputation over time, and its products are now in great demand. One of the partners decided to take advantage of the company’s growing reputation, and to further expand sales by designing a website to take orders “online” that runs on a personal computer at the family farm. A list of available products is posted on the website. Customers place orders by simply clicking on an icon for the products they wish to purchase, and then filling in their credit card and shipping information on an automatically generated online form which includes the pricing information for the selected products. Other than a notice that shipment of the goods is “subject to availability” and that “all sales are final” which appear on the online order form, no other “contractual” terms and conditions appear. With the new popularity of their produce, the family also started selling their own special recipes in the *Outbound Organics Family Cookbook*—either in a hardcopy signed by each of the family members, or in an electronic version that can be downloaded directly and automatically from their website. Soon after the website and ordering system went online, Outbound Organics was surprised—and pleased—to see that they were receiving substantial orders for their products from France.

The new computerized ordering system also provided a convenient excuse to buy a very large high-end flat panel display monitor. The new display monitor is used to help with Outbound Organics online business operations, but is also part of the home entertainment system in the family room at the farm. The best computer or video monitor on the market is the Sony “Super Screen High Definition Display” which has a