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**TURKEY’S ACCESSION TO THE CISG:
THE SIGNIFICANCE FOR TURKEY
AND FOR SALES TRANSACTIONS
WITH U.S. CONTRACTING PARTIES**

William P. Johnson*

Abstract

The United Nations Convention on Contracts for the International Sale of Goods (CISG) entered into force for Turkey on August 1, 2011. This article considers the significance of Turkey’s accession to the CISG as part of Turkey’s continuing engagement with systems of international trade, especially as relates to sales transactions with U.S. contracting parties. This article urges the Turkish bar to recognize that the CISG is a viable alternative to various potentially applicable bodies of domestic sales law, and the article offers some guidance regarding proper understanding and application of the CISG. This article also offers comparative analysis of some of the most important differences – and similarities – between the CISG and Article 2 of the Uniform Commercial Code, the primary domestic sales law in force in the United States, including analysis of the broad freedom of contract contained in each.

Keywords: *CISG, freedom of contract, international sales law, international trade, Uniform Commercial Code*

INTRODUCTION

“Turkey is at a crossroads.”¹ So claimed Eric Rouleau in 1996 in the context of analyzing the challenges presented by Turkey’s management of its domestic conflict with the Kurdish Workers’ Party, its joining of the European Customs Union, and its evolving relationship with the United States following the fall of the Iron Curtain.² Some fifteen years later, the crossroads remains, at least in some respects.

Significantly, although Turkey entered into a customs union with the European Union in 1995, it continues to feel its way along the path to EU membership. Turkey obtained status as an EU candidate country more than ten years ago (in December 1999) and entered formal accession negotiations more than five years ago (in October 2005), but it is not yet an EU member state.³ While Turkey has made progress toward EU

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¹ Eric Rouleau, *Turkey: Beyond Atatürk*, FOREIGN POL’Y, Summer 1996, at 70, 70.

² *See id.* at 71-87.

³ *See* European Commission, Commission Staff, *Turk. 2010 Progress Rep. accompany’g the Commc’n from the Comm’n to the Eur. Parl. & the Council – Enlargement Strategy & Main Challenges 2010-2011*, § 1.2, SEC(2010) 1327 (Nov. 9, 2010) [hereinafter Turkey 2010 Progress Report].

membership, it still has work to do, and it experiences setbacks from time to time, some of its own making.⁴

The recent arrest of members of the Turkish press who are associated with the opposition in Turkey is one troubling example of a setback.⁵ While Turkish prosecutors have asserted that the journalists are involved in criminal attempts to overthrow the government (through the organization Ergenekon), critics claim that that is merely a pretext for politically motivated oppression by the government.⁶ In fact, the UN Office of the High Commissioner for Human Rights issued a statement criticizing the lack of transparency in the arrests, and expressing concern that the arrests might be politically motivated and constitute a violation of international law.⁷ Such setbacks hinder Turkey's full participation in international legal systems, including those relating to international trade and commerce. Nevertheless, on balance Turkey appears resolved to continue to proceed down the path of harmonizing its law with international trade law and engaging with the international system of trade and commerce.

One important recent development is Turkey's accession to the United Nations Convention on Contracts for the International Sale of Goods (CISG),⁸ a step of potential significance in the continuing improvement of the legal framework in which international trade in goods takes place. As such, Turkey has made an important decision to play a role in the continuing effort to promote the development of, and to remove barriers to, international trade. This is not the first or the last step Turkey will take, but it is an important step for Turkey and for its trading partners, including the United States.

Fifteen years ago, in reference to Turkey's entry into the customs union with the European Union, Rouleau asserted that "[b]ringing Turkish laws into compliance with those of the EU [would] create a homogenous and stable environment that in turn should provide the necessary security for Turkey's private sector to thrive."⁹ Similarly today, bringing Turkey's sales law into conformity with the emerging dominant body of international sales law in the international system of trade will increase predictability and promote uniformity in respect of international contracts entered into by Turkish buyers and sellers. That increased predictability and uniformity will reduce uncertainty, decrease transaction costs, and allow international trade and commerce involving Turkish buyers and sellers to thrive.

And of course there is potentially more than Turkey's continuing legal and economic growth and development at stake. Turkey has the ability to play an important role and to wield meaningful influence in its region. As Tunisia, Egypt, Libya, Syria, and

⁴ See generally *id.*

⁵ See, e.g., Sebnem Arsu, *7 More Journalists Detained in Turkey*, N.Y. TIMES, Mar. 3, 2011.

⁶ See *id.*

⁷ U.N. Office of the High Comm'r for Human Rights, *UN rights office calls on Turkey to ensure press freedom after journalists' arrest* (Mar. 15, 2011), available at <http://www.un.org/apps/news/printnews.asp?id=37766> (last visited Mar. 17, 2011).

⁸ United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1983), 1489 U.N.T.S. 3, 19 I.L.M. 668 (entered into force Jan. 1, 1988) [hereinafter CISG].

⁹ Rouleau, *supra* note 1, at 81.

other parts of North Africa and the Middle East experience political and social upheaval,¹⁰ the international community should focus intently on how best to bring stability to the region, not only in the near-term future, but also with respect to the long term. Part of the recipe for stability will certainly involve attention to the rule of law, democracy, and human rights.¹¹ But robust trade and commerce can contribute to economic stability, and economic stability in turn has the potential to help reduce sources of unrest. This can ultimately contribute to supporting the rule of law and bolstering the democratic process. After all, “[d]emocracy is bad news for terrorists.”¹² Turkey can play an important role in contributing to that stability.

I. TURKEY AND TRADE

A. Turkey’s Role in International Trade

Turkey’s role in international trade is already significant. Its significance is due to the size of its economy and its volume of trade; its active involvement with international organizations; and its influence in the region. With the seventeenth largest economy in the world,¹³ Turkey is an important and influential actor in world trade and commerce, and its significance seems only to be increasing.¹⁴

1. Trade with the European Union

A member of the European customs unions and a formal candidate for membership in the European Union, a large percentage of Turkey’s total trade is with EU member states. In fact, total trade with EU member states in 2010 was €103,211,000,000 (more than one hundred three *billion* euro),¹⁵ making Turkey one of the EU’s largest trading partners. At the same time, however, despite Turkey’s customs union with the European Union, the European Commission has recently concluded that Turkey’s “[t]echnical barriers to trade are still hampering free movement of goods”¹⁶ and, perhaps of even greater concern, that “new barriers have been added in areas such as pharmaceuticals and construction products.”¹⁷ Still, the European Commission also recognized that the European Union’s customs union with Turkey “continues to

¹⁰ See, e.g., Alan Cowell, *Libyans do what West would not*, INT’L HERALD TRIB., Mar. 5, 2011, at 2.

¹¹ See, e.g., Chris Arsenault, *Brazil’s ‘lessons’ for Arab rebels*, AL JAZEERA, Mar. 4, 2011, available at <http://english.aljazeera.net/indepth/features/2011/03/201134183658331534.html> (last visited Mar. 9, 2011).

¹² Scott Shane, *As Regimes Fall in Arab World, Al Qaeda Sees History Fly By*, N.Y. TIMES, Feb. 27, 2011 (quoting Paul R. Pillar).

¹³ See The World Factbook, Country Comparison: GDP (2010), CENTRAL INTELLIGENCE AGENCY, available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html> (last visited Mar. 25, 2011).

¹⁴ See Landon Thomas Jr., *Turning East, Turkey Asserts Economic Power*, N.Y. TIMES, July 10, 2010.

¹⁵ See EU Bilateral Trade & Trade with the World, Turkey, at 3 (Mar. 17, 2011), available at http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113456.pdf (last visited Mar. 25, 2011).

¹⁶ Turkey 2010 Progress Report, *supra* note 3, § 4.1.

¹⁷ *Id.*

contribute to the enhancement of EU-Turkey bilateral trade”¹⁸ And the fact remains that Turkey is the European Union’s seventh biggest trading partner.¹⁹

While trade with the European Union accounts for a significant amount – approximately 42.9% in 2009 – of Turkey’s trade, Turkey has significant trade balances with non-EU countries as well. Turkey’s other largest trading partners are Algeria, China, Iran, Iraq, Russia, Switzerland, Ukraine, and the United States.

2. Trade with the United States

From a U.S. perspective, Turkey is an important friend and a significant trading partner. In 2010, U.S. exporters exported to Turkey merchandise with an aggregate value of USD \$10,546,388,883, more than ten and a half billion U.S. Dollars.²⁰ And Turkish exporters benefited from robust trade as well, exporting to the United States merchandise with an aggregate value of USD \$4,203,675,173.²¹ Total trade between the United States and Turkey is voluminous, and it has been trending up on an annual basis.²²

Indeed, evidence of Turkey’s importance to the United States is offered by a legislative bill that was introduced in the U.S. House of Representatives in February 2011 to express the sense of the House that the United States ought to initiate negotiations to enter into a bilateral free trade agreement with Turkey.²³ Naturally, much of the resolution focuses on Turkey’s importance in international trade.²⁴ It also recognizes some of the collateral benefits that can flow from robust trade and commerce between independent nations.²⁵ For example, one assumption stated in the proposed resolution is that “closer relations with Turkey through free trade agreements would encourage further privatization in Turkey’s economy.”²⁶

As barriers to trade continue to fall, more and more Turkish entities and U.S. entities will seek good opportunities for profitable commercial relationships and other ways to engage in mutually beneficial business transactions.

¹⁸ *Id.* § 1.3.

¹⁹ *See id.*

²⁰ *See* 2010 Exports to Turkey of NAICS Total All Merchandise, INTERNATIONAL TRADE ADMINISTRATION, <http://tse.export.gov/TSE/TSEHome.aspx> (Click on “National Trade Data”; then click “Product Profiles of U.S. Merchandise Trade with a Selected Market”; under “Trade Partner” select “Individual Countries” and “Turkey”; under “Product” select “Exports”; then click Go) (last visited Mar. 25, 2011).

²¹ *See* 2010 Imports from Turkey of NAICS Total All Merchandise, INTERNATIONAL TRADE ADMINISTRATION, <http://tse.export.gov/TSE/TSEHome.aspx> (Click on “National Trade Data”; then click “Product Profiles of U.S. Merchandise Trade with a Selected Market”; under “Trade Partner” select “Individual Countries” and “Turkey”; under “Product” select “Imports”; then click Go) (last visited Mar. 25, 2011).

²² *See id.* This has been true for several years with the sole exception of 2009, when global trade was generally down due to the global economic crisis. *See id.*

²³ *See* H.R. RES. 103, 112th Cong. (2011).

²⁴ *See id.*

²⁵ *See id.*

²⁶ *Id.*

3. International Organizations

Sometimes the importance of an economic relationship – and the significance of a state – is not measured solely by volume of trade or size of the economy. Turkey is an active participant in the international community. Turkey is a founding member of the Group of Twenty (G-20)²⁷ and of the Organisation for Economic Co-operation and Development (OECD).²⁸ Turkey is also a member of the World Trade Organization and has been since 1995, its first year of operation.²⁹ It is clear that Turkey has a high level of engagement with the major international organizations that influence the world economy.

Turkey is also a very important bridge between the West and the Muslim world and to the Caucasian and Central Asian region in particular. A recent poignant example of Turkey's important role as intermediary between the West and the Muslim world is offered by the current conflict in Libya. Among other things, Turkey has played a neutral role by urging Muammar Qaddafi to step down, on the one hand, while rebuking the West for certain aspects of its involvement in Libya, on the other hand.³⁰ The Turkish embassy in Libya has served as an intermediary for the United States and other Western states,³¹ and it has helped obtain the release of four Western journalists, who were held by Libyan authorities but eventually released into the custody of Turkish diplomats.³² It is noteworthy that Qaddafi, early in the conflict in Libya, announced a press conference in connection with the Libyan uprising and the response of his regime, but then refused to take questions from members of the international media who had been gathered for nearly eight hours for the press conference, yet nevertheless gave a private interview to Turkish television.³³

Some of Turkey's regional leadership arises in the private sector. By way of example, in 1990 the Union of Chambers and Commodity Exchanges of Turkey was a founding member of the Economic Cooperation Organization Chamber of Commerce and Industry (ECO-CCI), which today boasts ten members, all in the Caucasus and Southwest

²⁷ The G-20, which was established in 1999 as a response to the financial crises of the late 1990s, was created “to bring together systemically important industrialized and developing economies” for regular dialogue on key issues related to global economic stability. What is the G-20, http://www.g20.org/about_what_is_g20.aspx (last visited Mar. 10, 2011).

²⁸ See History, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), http://www.oecd.org/pages/0,3417,en_36734052_36761863_1_1_1_1_1,00.html (last visited Mar. 25, 2011); see also OECD, List of OECD Member countries - Ratification of the Convention on the OECD, http://www.oecd.org/document/58/0,2340,en_2649_201185_1889402_1_1_1_1,00.html (last visited Mar. 25, 2011).

²⁹ Turkey has been a member of the WTO since March 26, 1995. See Turkey and the WTO, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/countries_e/turkey_e.htm (last visited Mar. 10, 2011).

³⁰ See Selcan Hacaoglu, *Libyan conflict tests Turkey's regional role*, ASSOC. PRESS, Mar. 25, 2011.

³¹ See *id.*

³² See Jeremy W. Peters, *Freed Times Journalists Give Account of Captivity*, N.Y. TIMES, Mar. 21, 2011.

³³ Uri Friedman, *Qaddafi Spurns Western Media for Turkish TV*, ATLANTIC WIRE, Mar. 9, 2011.

Asia.³⁴ Specifically, in addition to Turkey, the chambers of commerce and industry (or the equivalent) in Afghanistan, Azerbaijan, Kazakhstan, Kyrgyzstan, Pakistan, Tajikistan, Turkmenistan, and Uzbekistan are all part of the ECO-CCI.³⁵ The purposes of the ECO-CCI are to create common policies among its members and to offer guidance to its members; to increase contacts among its members; and to provide a forum for sharing information and experience.³⁶ The organization aims to “[lead] the society in the region.”³⁷ It offers an example of the leadership role Turkey can play in the region.

Moreover, Turkey itself “offers a location that can serve as a springboard for later exports to the countries bordering on the Black Sea to the north, the Caucasian republics and Central Asia to the east, and the oil states of the Middle East to the south.”³⁸

In short, Turkey is in some respects uniquely important to the United States and to the international community.

II. INTRODUCING THE CISG

A. Turkey’s Accession to the CISG

One contribution that Turkey makes is through its participation in international legal systems relating to trade and commerce. The latest development in Turkey’s continuing movement toward harmonization of its laws with international trade law is Turkey’s accession to the CISG. Turkey acceded to the CISG on July 7, 2010, and the CISG will therefore enter into force for Turkey on August 1, 2011.³⁹ Turkey’s accession to the CISG brings to seventy-six the growing number of parties to the CISG, which has included the United States since 1988.⁴⁰

The Deputy Permanent Representative of the Permanent Mission of Turkey to the United Nations, Fazlı Çorman, stated during a session of the United Nations Commission on International Trade Law (UNCITRAL) that took place in New York on July 7, 2010, that “improvement of the legal framework in which international trade operates is a

³⁴ See Economic Cooperation Organization Chamber of Commerce and Industry, ABOUT ECO-CCI, ECO-CCI and Its Activities, <http://www.ecocci.com/NDC/Generic/Content/About.aspx> (last visited Feb. 19, 2011).

³⁵ *Id.*

³⁶ See *id.*

³⁷ *Id.*

³⁸ Rouleau, *supra* note 1, at 82.

³⁹ “When a State ratifies, accepts, approves or accedes to this Convention ... this Convention ... enters into force in respect of that State ... on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.” CISG, *supra* note 8, art. 99(2).

⁴⁰ See United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary General, Chapter X: International Trade and Development, United Nations Convention on Contracts for the International Sale of Goods (Apr. 11, 1980), Status, available at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20X/X-10.en.pdf> [hereinafter CISG Status].

fundamental aspect of” the development of international trade “on the basis of equality and mutual benefit.”⁴¹

B. Background on the CISG

The CISG is an international treaty that provides uniform rules for international sale of goods contracts.⁴² The CISG was adopted to promote friendly relations among countries by contributing to the development of international trade on the basis of equality and mutual benefit.⁴³

1. The CISG and Europe

The CISG is quite clearly relevant within the European Union. Of the twenty-seven EU member states⁴⁴ and four formal candidates for EU membership,⁴⁵ only four countries are not yet parties to the CISG: Ireland, Malta, Portugal, and the United Kingdom.⁴⁶ Thus, a large percentage of the European Union has adopted the CISG. And it is not only the governments of these EU member states and candidate countries that are comfortable enough with the CISG to have become parties. Instead, private parties with their places of business in EU member states, such as Germany, have shown at least some willingness to be governed by the CISG as well.⁴⁷

2. The CISG Outside of Europe

In order to increase the likelihood that the CISG would actually contribute to the development of international trade (and not just trade among Western nations), UNCITRAL desired to obtain broader acceptance by countries of different legal, social and economic systems. One goal of the CISG, after all, is the removal of legal barriers to international trade.⁴⁸ Accomplishing that goal in any sort of meaningful way requires actual participation by countries of different legal, social, and economic systems. Therefore, UNCITRAL endeavored to involve such countries in the preparation of the CISG.

⁴¹ Fazlı Çorman, Deputy Perm. Rep., Chargé d'affaires a.i., of the Perm. Mission of Turk. to the U.N., Statement at the 43rd Session of UNCITRAL (July 7, 2010), *available at* <http://www.uncitral.org/pdf/english/news/Turkey-CISG-statement.pdf> [hereinafter Çorman].

⁴² *See CISG, supra* note 8, pmbl.

⁴³ *See id.*

⁴⁴ The twenty-seven member states of the European Union are Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. *See* Europa, Gateway to the European Union, The member countries of the European Union, http://europa.eu/about-eu/member-countries/index_en.htm (last visited Mar. 25, 2011).

⁴⁵ In addition to Turkey, the three other formal candidates for EU membership are Croatia, the Former Yugoslav Republic of Macedonia, and Iceland. *See id.*

⁴⁶ *See CISG Status, supra* note 40.

⁴⁷ *See* Spagnolo, *supra* note 54, at 138 n.8.

⁴⁸ *See id.; see also id.*, explanatory note by the UNCITRAL Secretariat on the UN Convention on Contracts for the Int'l Sale of Goods, ¶ 3 [hereinafter CISG Explanatory Note]. The CISG Explanatory Note was prepared by the UNCITRAL Secretariat for informational purposes and is not an official commentary to the CISG. *See id.*

Indeed, the CISG is hardly a European or even a Western phenomenon. In fact, one of the purposes of the CISG was to replace two predecessor international sales law treaties that were criticized for “reflecting primarily the legal traditions and economic realities of continental Western Europe,” the region that predominantly prepared the predecessor conventions.⁴⁹ In preparing the CISG and achieving its adoption, UNCITRAL seems to have achieved greater success in wider acceptance, demonstrated by the fact that the original eleven parties to the CISG “included States from every geographical region, every stage of economic development and every major legal, social and economic system.”⁵⁰ And the CISG was notably drafted in six official languages, Arabic, Chinese, English, French, Russian, and Spanish, each of which is equally authentic.⁵¹ As an example of the importance this has for Turkey, among Turkey’s top trading partners outside of the European Union, China, Russia, and Iraq are all already parties to the CISG.⁵²

C. A Work in Progress

While its purposes are laudable, the CISG is a work in progress. It was finalized and first signed in 1980 after years of preparatory work by UNCITRAL, but it did not enter into force until 1988.⁵³ Moreover, in some jurisdictions, notably including the United States, the CISG has been slow to emerge as a viable alternative body of sales law.⁵⁴ This seems to be due more to unfamiliarity with and unfounded suspicion of the CISG than to meaningful analysis of the substantive allocation of risk and responsibility established by the CISG.⁵⁵

This is not the case everywhere, however, as buyers and sellers in some jurisdictions have become quite accustomed to the CISG.⁵⁶ And it is beginning to change in the United States as well, as the U.S. bench and bar become more familiar with the CISG, and as the body of U.S. case law interpreting or analyzing the CISG grows.⁵⁷ And

⁴⁹ CISG Explanatory Note, *supra* note 48, ¶ 3.

⁵⁰ *Id.* ¶ 4. The original eleven parties were Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, the United States, Yugoslavia, and Zambia. *See id.*

⁵¹ *See* CISG, *supra* note 8, signature block.

⁵² *See* CISG Status, *supra* note 40.

⁵³ *See id.* The CISG provides for its entry into force “on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession” CISG, *supra* note 8, art 99(1).

⁵⁴ There is a strong tendency by U.S. lawyers to counsel their clients to exclude application of the CISG. *See* Lisa Spagnolo, *A Glimpse through the Kaleidoscope: Choices of Law and the CISG*, 13 VINDOBONA J. INT’L COM. L. & ARB. 135, 135 & n.2 (2009).

⁵⁵ *See id.* at 137-40.

⁵⁶ *See id.* at 137-38, n.8, n.9 & n.10.

⁵⁷ For years after the CISG entered into force, U.S. courts routinely took note of the relative paucity of decisions by U.S. courts interpreting or applying the CISG. *See, e.g.,* Miami Valley Paper, LLC v. Lebbing Eng’g & Consulting GmbH, No. 1:05-CV-00702, 2009 WL 818618, at *9 (S.D. Ohio Mar. 26, 2009) (acknowledging that the case law interpreting and applying the CISG is sparse); Forestal Guarani, S.A. v. Daros Int’l, Inc., Civil Action No. 03-4821 (JAG), 2008 WL 4560701, at *4 (D.N.J. Oct. 8, 2008), *rev’d on other grounds*, 613 F.3d 395, 396 (3d Cir. 2010) (“Although the CISG has been in force for nearly two decades, there still are few U.S. decisions interpreting the Convention.”). This is beginning to change, however. In 2009 there were thirteen opinions reported by U.S. courts that recognized the application or potential application of the CISG and/or that analyzed the CISG in some way, though most contained little

as more and more countries accede to the CISG and more and more transactions are automatically governed by the CISG, its relevance around the world increases.

D. Moving toward Reducing Uncertainty

So how is the CISG to accomplish the goal of improving the legal framework in which international trade operates? Imagine the following hypothetical situation:

A Turkish buyer negotiates with a U.S. supplier for the purchase of certain capital equipment, which the Turkish buyer will use in its production facility in Istanbul. Following a successful conclusion to the negotiation, the parties enter into a written Capital Equipment Supply Agreement, which identifies the purchase price, method and timing of payments, timeline for performance, provisions for delay liquidated damages, design specifications, warranty terms (including an express disclaimer of implied warranties of merchantability and fitness for any particular purpose), procedures and standards for acceptance testing, and some other general commercial terms, but the written agreement does not include a choice-of-law clause.

The U.S. supplier has an Italian affiliate, and the U.S. supplier subcontracts with its Italian affiliate for the fabrication and delivery of the capital equipment. After fabrication and delivery are complete, the U.S. supplier sends a technical team to erect and start up the capital equipment and to satisfy the agreed-upon acceptance test at the buyer's site in Istanbul. The equipment satisfies the acceptance test, and final payment is made.

While operating the equipment in subsequent weeks, something goes wrong with the equipment, necessitating a shutdown of the equipment and the facility. The Turkish buyer incurs significant costs related to the shutdown, including costs of inspection, repair costs, lost profits, lost customers, and labor costs associated with the shutdown. The Turkish buyer believes that a latent defect in the equipment caused the shutdown and decides to bring a claim against the U.S. supplier.

If the buyer in the hypothetical situation brings a claim (whether in Turkey, in the United States, or somewhere else), one of the threshold questions for the court will be, what law governs the contract and the contract dispute? Is it Turkish law, the law of a U.S. state, Italian law, or some other body of law? A court will use its principles pertaining to private international law (or conflicts of laws, as it is known in the United States) to determine which body of law applies. How a court would answer the question (that is, the principles that it will use) will be very different from one jurisdiction to the

analysis. See William P. Johnson, *U.N. Convention on Contracts for the International Sale of Goods*, in *International Commercial Transactions, Franchising, and Distribution*, 44 INT'L LAW. 238, 239-40 (2010). And in 2010 there were sixteen opinions reported by U.S. courts that contained some analysis or interpretation of the CISG, so the body of U.S. case law is growing.

next. In fact, there are differences among various U.S. states, which can lead to application by different courts of different bodies of law under the same facts and the same set of circumstances.

That threshold determination of applicable law can in turn affect how other important questions are answered: What warranties (statutory, express, or implied) can be shown to have been made? Will the warranty disclaimer effectively exclude implied warranties? Are there statutory warranties that cannot be waived, which might have been breached? How is the seller's performance measured? Does the Turkish buyer have to establish 'fundamental breach' in order to recover damages? What kinds of damages can the buyer claim, if a breach is ultimately shown? For example, are lost profits or other consequential damages recoverable? Will the prevailing party be able to recover attorneys' fees?

How a court would answer these and similar questions will be very different under different bodies of law, and a considerable amount of time, energy, and resources could be spent trying to navigate all of the potentially applicable bodies of law. This uncertainty increases the cost of doing business. And this uncertainty contributed to the United States' decision to ratify the CISG:

International trade now is subject to serious legal uncertainties. Questions often arise as to whether our law or foreign law governs the transaction, and our traders and their counsel find it difficult to evaluate and answer claims based on one or another of the many unfamiliar foreign legal systems. The Convention's uniform rules offer effective answers to these problems.⁵⁸

Now that Turkey is a party to the CISG, the uncertainty and the associated dispute resolution costs are readily reduced or eliminated, as the contract and the contract dispute described in the hypothetical situation would be governed not by domestic sales law, but by the CISG, no matter which court – U.S., Turkish, or Italian – hears the claim.

As the CISG becomes increasingly relevant in the United States and as trade with Turkey continues to rise, Turkey's accession to the CISG therefore creates an important common legal framework for sales transactions between Turkish and U.S. contracting parties, and it has immediate importance for international sale of goods transactions involving counterparties located in numerous jurisdictions that have particular significance for Turkey.

Additionally, it is conceivable that Turkey will pave the way for further expansion of the CISG in the region. Of the nine other countries whose chambers of commerce and industry are members of the ECO-CCI, discussed in Part x, *supra*, so far only two are parties to the CISG: Kyrgyzstan and Uzbekistan.⁵⁹ Given the purposes of the ECO-CCI and the role Turkey plays in the region, it seems likely that Turkey's accession to the

⁵⁸ Letter of Transmittal from President Reagan to the Senate of the U.S. (Sept. 21, 1983), in S. Treaty Doc. No. 98-9, at iii (1983) [hereinafter Letter of Transmittal].

⁵⁹ See CISG Status, *supra* note 40.

CISG will help to pave the way for other Caucasian and Central Asian republics – among others – to follow suit. In fact, Çorman has called on non-signatories to do just that:

Having 74 state parties from every geographical region, every stage of economic development and every major legal, social and economic system clearly demonstrates the objectivism and comprehensive nature of the Convention.

Today Turkey, by submitting the instrument of accession, joins the State Parties of the Convention.

*We would like to call other states that are not party yet to consider becoming parties to the Convention.*⁶⁰

III. MAKING THE CISG MEANINGFUL

Of course, accession to the CISG is the first step only. There are three additional steps to be taken before the CISG can have the positive effect it is designed to have – steps that are, frankly, still in early stages in the United States as well. First, practitioners in Turkey must familiarize themselves with the CISG in order to provide their clients with sound advice regarding whether the CISG or some other body of sales law is the best choice of law to govern any particular agreement. Such advice should not take the form of automatic application or exclusion of the CISG. Rather, to give meaningful advice requires deep understanding of the choices available to the parties, including the CISG, and careful consideration of the circumstances of the transaction that support selection of one body of law over another. Because the CISG automatically applies to certain sale of goods contracts unless the CISG has been excluded by the parties to the contract, such advice must include advice regarding whether to exclude application of the CISG.⁶¹

Second, Turkish courts and other decision-makers must develop the familiarity with the CISG that is necessary to interpret and apply the CISG in good faith, which they are required under international law to do.⁶² International law further requires that a treaty's interpretation be governed by analysis of its text and its context, in light of its object and purpose.⁶³ And the CISG itself specifically requires courts to interpret the CISG with due regard to the international character of the CISG, to the need to apply the CISG uniformly, and “to the need to promote ... the observance of good faith in

⁶⁰ Çorman, *supra* note 41 (emphasis added).

⁶¹ *See* CISG, *supra* note 8, arts. 1(1) and 6.

⁶² *See* Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 115 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention]. While Turkey is not a party to the Vienna Convention, the Vienna Convention is widely recognized as codification of customary international law, that is, of the customary law of treaties. To the extent the Vienna Convention is a codification of customary international law, it is binding as a matter of international law even on those states that are not parties to the Vienna Convention. *See, e.g.*, Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179.

⁶³ *See id.*

international trade.”⁶⁴ While U.S. courts continue to find their way, sometimes interpreting the CISG soundly and sometimes not, Turkish courts have a clean slate and an opportunity to establish right away a reputation and tradition of faithful and careful interpretation and application of the CISG, which will greatly enhance predictability and certainty for Turkish parties to international sales contracts.

And third, Turkish law schools must integrate into their curriculum meaningful coverage of the CISG so that the future members of the Turkish bench and bar have received the training and education that will facilitate steps one and two.⁶⁵ After all, “the less exposure a lawyer has had to the CISG at law school, the more inclined the lawyer will be toward exclusion in practice.”⁶⁶ Similarly, the more exposure – through meaningful training and education – a lawyer has had to the CISG while in law school, the more able the lawyer will be to understand the CISG and to provide her client with effective advice regarding its application, its interpretation, its advantages, and its disadvantages.

A. Automatic Application of the CISG

One key aspect of proper understanding of the CISG is to know when it applies and when it does not. Under Article 1(1)(a) the CISG automatically applies to contracts for the sale of goods that are made between parties whose respective places of business are in different countries when the countries are “Contracting States” (that is, parties to the CISG).⁶⁷ Under Article 1(1)(b) the CISG also applies to contracts for the sale of goods between parties whose places of business are in different countries even when one or more of the parties has its place of business in a country that is not a Contracting State, if the “rules of private international law [would] lead to the application of the law of a Contracting State.”⁶⁸ The United States declared when it ratified the CISG that the United States would not be bound by Article 1(1)(b),⁶⁹ a declaration for which the CISG specifically provides.⁷⁰ Article 1(1)(b) is therefore inapplicable in the United States. However, Turkey made no such declaration, and Turkish courts should therefore apply the CISG not only when the parties to the contract for the sale of goods have their respective places of business in different countries that are parties to the CISG, but also when Turkey’s principles pertaining to private international law would lead to application of the substantive law of any party to the CISG, including Turkey.

⁶⁴ See CISG, *supra* note 8, art. 7(1) (“In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.”).

⁶⁵ See Spagnolo, *supra* note 54, at 141-42.

⁶⁶ *Id.* at 142.

⁶⁷ CISG, *supra* note 8, art. 1(1)(a). The term “Contracting States” refers to countries that have signed the CISG and have also ratified, accepted, or approved the CISG, and it refers to non-signatory countries that have acceded to the CISG. See CISG, *supra* note 8, art. 91. Therefore, “Contracting States” is the term used in the CISG to refer to its parties.

⁶⁸ *Id.* art. 1(1)(b).

⁶⁹ See CISG Status, *supra* note 40, at 4.

⁷⁰ See CISG, *supra* note 8, art. 95.

B. Contracts outside the Scope of the CISG

The CISG does not apply to all international sales, however. In fact, there are numerous sales that are expressly excluded from the scope of application of the CISG.⁷¹ Perhaps the most notable exclusion is that the CISG does not apply to sales “of goods bought for personal, family or household use,” unless the seller did not know and had no reason to know at the time the contract was made that the goods sold were intended for any such use.⁷² The CISG also does not apply to mixed sales of goods and services when “the preponderant part of the obligations” of the seller consists in the supply of labor or other services.⁷³ Similarly, the CISG does not apply to toll manufacturing or similar arrangements when the buyer supplies the seller with “a substantial part of the materials necessary” for the manufacture or production of the goods.⁷⁴

In the typical cross-border sales transaction involving non-consumer goods, however, when each party knows the other party is located in a different country, the CISG will usually govern the transaction, if the parties’ places of business that are most directly involved with the transaction are in countries that are parties to the CISG.⁷⁵ Because there are currently seventy-six parties to the CISG,⁷⁶ including most of Turkey’s major trading partners, the CISG is potentially relevant for a very large volume of international trade involving Turkish buyers and sellers.

C. The Effect of Choosing Turkish Law

One source of confusion regarding exclusion of the CISG is the role that a choice-of-law clause should play in a court’s analysis concerning the parties’ intent to exclude application of the CISG. In the United States, some courts have incorrectly reasoned or concluded that a choice-of-law clause that chooses the jurisdiction whose laws are to govern the contract but that is silent on the application of the CISG effectively excludes the CISG.⁷⁷ However, when the parties include a choice-of-law clause in their agreement, if the jurisdiction whose law is selected by the choice-of-law clause is a state within the United States or is a country that is a party to the CISG, including Turkey, then such a choice-of-law clause generally should not have the effect of excluding the CISG

⁷¹ See *id.* arts. 2 and 3.

⁷² *Id.* art. 2(a). Other international sales are specifically excluded from the CISG’s scope because of the nature of the sale (that is, sales by auction and sales on execution or otherwise by authority of law). See *id.* arts. 2(b) and 2(c). And still others are excluded due to the nature of the goods being sold (namely, stocks, shares, investment securities, negotiable instruments, and money; ships, vessels, hovercraft, and aircraft; and electricity). See *id.* arts. 2(d)-2(f).

⁷³ *Id.* art. 3(2).

⁷⁴ *Id.* art. 3(1).

⁷⁵ See *id.* art. 1(1)(a).

⁷⁶ See CISG Status, *supra* note 40.

⁷⁷ See, e.g., *Am. Biophysics Corp. v. Dubois Marine Specialties*, 411 F. Supp. 2d 61, 63 (D.R.I. 2006) (concluding that a choice-of-law clause choosing the laws of the state of Rhode Island – but silent on the CISG – was sufficient to exclude application of the CISG). For criticism of the *American Biophysics* decision, see *Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Technical Fabrics Can. Ltd.*, 474 F. Supp. 2d 1075, 1081-82 (D. Minn. 2007); see also William P. Johnson, *Understanding Exclusion of the CISG: A New Paradigm of Determining Party Intent*, 59 BUFF. L. REV. 213, 230-32 (2011).

when the CISG is otherwise applicable. This is so because the CISG is the law of the selected jurisdiction.⁷⁸

The *travaux préparatoires* of the CISG support the notion that the CISG becomes part of the national laws of a country upon that country's ratification of (or accession to) the CISG.⁷⁹ For example, according to Mr. Plantard of France, "when a State had the Convention ratified by its Parliament, it decided by the same action to incorporate the rules into its legal system."⁸⁰ Similarly, Mr. Shafik of Egypt said that "the provisions of the Convention were incorporated in the national law of a contracting State."⁸¹

Fortunately, a large number of U.S. courts have recognized that a choice-of-law clause selecting the law of a country that is a party to the CISG, or selecting the law of a U.S. state, has the effect of selecting the CISG as well.⁸² One federal appellate court, the U.S. Court of Appeals for the Fifth Circuit, concluded in *BP Oil International, Ltd. v. Empresa Estatal Petroleos de Ecuador* that a choice-of-law clause selecting the laws of Ecuador merely confirmed that the CISG governed the transaction because the CISG is part of the law of Ecuador.⁸³ A significant number of other U.S. courts have taken that position. Recently, in *Remy, Inc. v. Tecnomatic S.p.A.*, a federal court in Indiana considered a choice-of-law clause selecting the laws of the State of Indiana in a

⁷⁸ For jurisdictions within the United States, this is so as a matter of U.S. constitutional law. See U.S. CONST. art. VI. For a more detailed analysis of the effect of a choice-of-law clause on application of the CISG under U.S. constitutional law, see Johnson, *supra* note 77, at 223-28.

⁷⁹ The *travaux préparatoires*, or drafting history, of a treaty is relevant for a court's interpretation of the treaty. See Vienna Convention, *supra* note 62, art. 32.

⁸⁰ *Summary Records of the First Committee, 4th Meeting*, ¶ 40, U.N. Doc. A/CONF.97/C.1/SR.4 (Mar. 13, 1980), reprinted in United Nations Conference on Contracts for the International Sale of Goods, *Official Records*, U.N. Doc. A/CONF.97/19, at 251 (1991).

⁸¹ *Id.* ¶ 35.

⁸² See, e.g., *Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Technical Fabrics Can. Ltd.*, 474 F. Supp. 2d 1075, 1081-82 (D. Minn. 2007) (concluding that mere reference to a specific state's law does not constitute an exclusion of the CISG); *Am. Mint LLC v. GOSoftware, Inc.*, No. Civ.A. 1:05-CV-650, 2006 WL 42090, at *3 (M.D. Pa. Jan. 6, 2006) (concluding that a choice-of-law clause choosing the laws of the State of Georgia but silent as to the application of the CISG would not have the effect of excluding the CISG); *Valero Mktg. & Supply Co. v. Greeni Oy*, 373 F. Supp. 2d 475, 482 (D.N.J. 2005) (concluding that inclusion in an oral agreement of a provision that New York law applied to the agreement did not exclude application of the CISG and that, under New York law, courts would apply the CISG by virtue of the Supremacy Clause of the U.S. Constitution), *rev'd on other grounds*, 242 F. App'x 840, 845 (3d Cir. 2007); *Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd.*, No. 01 C 5938, 2003 WL 223187, at *3 (N.D. Ill. Jan. 30, 2003) (concluding that a choice-of-law clause choosing the laws of Ontario, Canada does not exclude the CISG); *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmbH*, No. 00 CIV. 9344(SHS), 2002 WL 465312, at *3 (S.D.N.Y. Mar. 26, 2002) (recognizing that the CISG is an integral part of German law, and that when parties designate a choice-of-law clause in their contract selecting the law of a country that is a party to the CISG without excluding the CISG, the CISG is the law of the designated country); *Asante Technologies, Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001) (concluding that a choice-of-law clause choosing the law of British Columbia, Canada, chooses the CISG when it is applicable because the CISG is the law of British Columbia, and further concluding that a choice-of-law clause choosing the laws of California also would not exclude the CISG).

⁸³ *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333, 337 (5th Cir. 2003), *as amended on denial of reh'g.*

transaction between an Italian seller and a U.S. buyer.⁸⁴ The court in *Remy, Inc.* reasoned that a choice-of-law provision “that specifies only that a signatory state’s law applies is insufficient [to opt out of the CISG] because the CISG *is* the law of that state.”⁸⁵ Another U.S. federal court recently reasoned that “[a] signatory’s assent to the CISG necessarily incorporates the treaty as part of that nation’s domestic law.”⁸⁶

For Turkish courts considering application of the CISG, the CISG should apply unless the parties have excluded it, and a simple choice-of-law clause choosing the laws of Turkey or the laws of any jurisdiction within the United States – or even a neutral country that is a party to the CISG, such as Germany, for that matter – to govern the agreement should not by itself have the effect of excluding application of the CISG. On the contrary, such a choice-of-law clause would constitute strong evidence of the parties’ intent for their contract to be governed by the CISG.

Except with respect to issues of contract formation, this is the case for any and all contracts entered into on or after August 1, 2011.⁸⁷ This is not automatically the case, however, for any contracts entered into prior to that date. For any such contracts, Turkish courts should apply their traditional private international law principles to determine the applicable body of law. However, if application of principles pertaining to private international law leads to the application of the substantive law of a Contracting State with respect to which the CISG had entered into force at or prior to the time the parties entered into their contract, then pursuant to Article 1(1)(b) the CISG would still govern the contract unless the CISG has been excluded.⁸⁸

D. Effectively Excluding the CISG

It is not enough for Turkish or U.S. courts to understand the CISG’s sphere of application and, therefore, when the CISG would apply by its terms to a contract, however. Rather, courts must also consider whether the parties intended to exclude the

⁸⁴ See *Remy, Inc. v. Tecnomatic S.p.A.*, No. 1:08-cv-1227-SEB-WGH, 2010 WL 4174594, at *1 (S.D. Ind. Oct. 18, 2010).

⁸⁵ *Id.* (emphasis in original).

⁸⁶ *Semi-Materials Co., Ltd. v. MEMC Elec. Materials, Inc.*, No. 4:06CV1426 FRB, 2011 WL 134062, at *1 (E.D. Mo. Jan. 10, 2011). The court consequently granted a motion to exclude testimony of an expert that was sought under a federal rule of civil procedure permitting expert testimony to determine foreign law. See *id.*

⁸⁷ See CISG, *supra* note 8, art. 100(2). The issue of applicability of the CISG is slightly more complicated when the court is dealing with an issue of formation, as opposed an issue of contract interpretation or enforcement, because Article 100 of the CISG makes a distinction between formation issues, on the one hand, and other issues. Under Article 100(1) provides that the CISG “applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the [CISG] enters into force in respect of the Contracting States referred to in [Article 1(1)(a)] or the Contracting State referred to in [Article 1(1)(b)].” CISG, *supra* note 8, art. 100(1). With respect to issues of formation, therefore, the CISG applies only if the date of the proposal for concluding the contract follows the relevant date of entry into force. See *id.* And the date of the “proposal” for concluding the contract refers to the offer in the contract formation process. See *id.* art. 14(1); see also Ronald A. Brand & Harry M. Flechtner, *Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention*, 12 J.L. & Com. 239, 249-50 (1993).

⁸⁸ See *id.*

CISG, because the CISG expressly provides for election not to be bound by the CISG: “The parties may exclude the application of this Convention”⁸⁹

Naturally, the right to exclude application of the CISG begs the question of how the parties are to exclude it. It might be tempting to assume that the only way to exclude application of the CISG is by doing so expressly and, at least when there is a written contract, in writing. Indeed, Turkish practitioners and their clients should be aware that many U.S. courts have suggested that that is the case.⁹⁰ By way of example, earlier this year a federal court in New York reasoned that “intent to opt out of the CISG must be set forth in the contract clearly and unequivocally” in order to exclude the CISG when it otherwise applies.⁹¹

In fact, including an express choice-of-law clause accompanied by an explicit exclusion of the CISG that is clear, conspicuous, and in a writing signed by the parties is arguably the most desirable means of excluding the CISG. And if the parties wish their contract to be governed by the CISG, then it is sensible to include in their written contract an express choice-of-law clause opting for application of the CISG. Additionally, even when the CISG is selected by the parties, the choice-of-law clause choosing the CISG should also clearly choose a domestic body of law as a supplemental body of law, because the CISG itself will not answer every question or resolve every dilemma that the parties might encounter.⁹² In fact, if a question must be answered in order to resolve a dispute and the CISG does not provide the answer, courts are obligated under Article 7(2) to settle such questions “in conformity with the general principles on which [the CISG] is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.”⁹³ Therefore, selecting the body of the law that the court is to use in order to settle such questions is also desirable, establishing at the beginning of the relationship the body of law that will govern the contract and its interpretation in the event that a dispute arises after the parties are no longer interested in cooperating with each other. But it is important to note that the CISG does not require

⁸⁹ *Id.* art. 6.

⁹⁰ *See, e.g.*, *Forestal Guarani, S.A. v. Daros Int’l, Inc.*, Civ. Action No. 03-4821 (JAG), 2008 WL 4560701, at *3 (D.N.J. Oct. 8, 2008) (“The inclusion of an alternate choice of law provision must . . . be announced explicitly in the contract.”); *Sky Cast, Inc. v. Global Direct Distribution, LLC*, Civil Action No. 07-161-JBT, 2008 WL 754734, at *4 (E.D. Ky. Mar. 18, 2008) (“Although the parties to a contract normally controlled by the CISG may exclude the applicability of the CISG to their contract, any such exclusion must be explicit.”); *Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Technical Fabrics Can. Ltd.*, 474 F. Supp. 2d 1075, 1082 (D. Minn. 2007) (concluding that a choice-of-law clause does not exclude the CISG “absent an express statement that the CISG does not apply”); *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmbH*, No. 00 CIV. 9344(SHS), 2002 WL 465312, at *3 (S.D.N.Y. Mar. 26, 2002) (reasoning that German law, and therefore the CISG, was the applicable body of law: “(1) both the U.S. and Germany are Contracting States to [the CISG], and (2) neither party chose, by express provision in the contract, to opt out of the application of the CISG”).

⁹¹ *Hanwha Corp. v. Cedar Petrochems., Inc.*, No. 09 Civ. 10559(AKH), 2011 WL 165404, at *3 (S.D.N.Y. Jan. 18, 2011).

⁹² Like any single body of law, the CISG is limited in its scope, not addressing every contingency or issue that could appear. Indeed, certain items are specifically excluded from its scope, including the effect that the sale of goods contract might have on the property interest in the goods sold, *see* CISG, *supra* note 8, art. 4(b), and liability for death or personal injury. *See id.* art 5.

⁹³ *Id.* art 7(2).

written exclusion of the CISG, nor does it require exclusion to be express. In fact, Article 6 establishes no particular means of exclusion of the CISG.⁹⁴ And Article 11 of the CISG specifically rejects any writing requirement, allowing a contract to be proved “by any means, including witnesses.”⁹⁵

Still, many courts are likely to conclude that exclusion of the CISG must be explicit in order to be effective. While uncertainty can never be absolutely eliminated, it is good practice to include in the written contract an express clause that makes the parties’ mutual intent clear regarding the CISG, whether their intent is to exclude the CISG or for the CISG to apply, and regarding the domestic law that will govern the agreement, whether in lieu of or as a supplement to the CISG.⁹⁶

IV. CHOOSING THE CISG

The analysis regarding choice of law in which a Turkish practitioner should engage is complex. Among other things, the Turkish practitioner must consider whether the relevant contract clauses relating to choice of law are likely to be enforceable in jurisdictions where claims are likely to be filed. In sales transactions with U.S. contracting parties, the Turkish practitioner must in particular consider whether the clauses would be enforced by a U.S. court, because the Turkish contracting party might need to seek the assistance of a U.S. court to enforce a contractual agreement – or to recognize and enforce a foreign judgment or arbitral award – if the U.S. contracting party’s assets are located only within the territory of the United States.

A. Anticipating the Dispute when Times are Good

For some business relationships it might be difficult to persuade the client of the value of taking the time and incurring the expense that may be necessary to reach agreement on certain dispute resolution terms. After all, when Turkish, U.S., and other companies enter into business relationships, the contracting parties often are optimistic about the future of that relationship. Generally, each party expects the business relationship to be beneficial, or the parties would not freely enter into the contract. In the ordinary case, the relationship proceeds without significant dispute, and applicable law never really matters to the parties.

But sometimes contingencies – both foreseeable and unforeseeable – materialize that cause at least one of the parties to no longer wish to perform; to regret the bargain struck; or to suffer significant losses. And sometimes, whether due to cultural differences, language barriers, or haste in the consummation of the transaction, misunderstandings regarding the agreed-upon allocation of risk and responsibility can occur. Such contingencies and misunderstandings can cause the relationship to deteriorate in such a way that the parties no longer expect good things to happen. When

⁹⁴ *See id.* art. 6.

⁹⁵ “A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.” CISG, *supra* note 8, art. 11.

⁹⁶ For additional analysis by the author of effective exclusion of the CISG, *see generally* Johnson, *supra* note 77.

those kinds of situations arise, disputes often follow, and applicable law can matter a great deal.

Of course, contractual disputes, whether domestic or international, are never desirable. Disputes cause delay, disputes can ruin fruitful business relationships, and resolution of disputes is time-consuming and expensive. But international disputes can be especially difficult and costly. In addition to all of the hardship associated with an ordinary domestic dispute, now the parties to the dispute must contend with international discovery, cross-border service of process, foreign legal proceedings, potentially applicable bodies of foreign law and international law, language barriers, cultural differences, and the logistical difficulties of dealing with a dispute that may be taking place in some far corner of the planet.

For these reasons and others, the simple truth is that no amount of planning for dispute resolution can ever assure that a dispute that arises in an international business transaction will be easy or inexpensive to navigate, manage, or resolve. But there are some important items that should be considered and addressed by the parties to any international transaction, and those items should be addressed before the parties enter into any contract, understanding, or arrangement, oral or written, and before they begin to conduct business with each other, or it could be too late to reach agreement once the parties are no longer interested in cooperating with each other.

As the preceding section of this article suggests, one of the items that can and should be addressed in this regard in every international contract is choice of law.⁹⁷

B. Choice of Law

In many jurisdictions the parties have at least some freedom to choose for themselves the body of law that will govern their contract. Under Turkish law, international contracting parties are generally free to choose the law that will govern their contract.⁹⁸ This is so in the United States as well.⁹⁹ Thus, when a Turkish buyer or seller enters into a sale of goods transaction with a U.S. counterparty, the parties might conceivably choose Turkish law, the law of a U.S. state, or the law of a neutral jurisdiction (and, of course, they should also expressly choose to exclude or to be governed by the CISG). However, there are some limits under U.S. law relating to which body of law U.S. contracting parties are able to choose to govern their contract.

⁹⁷ For a description and analysis by the author of some of the dispute resolution issues that should be considered by non-U.S. parties who enter into international business contracts with U.S. parties or that are governed by U.S. law, see William P. Johnson, *Controvérsia no horizonte: Contratação para Resolução Eficaz de Disputas em Transações Comerciais Internacionais. Uma perspectiva norte-americana. [The Dispute on the Horizon: Contracting for Effective Dispute Resolution in International Business Transactions. A U.S. Perspective.]*, 86 REVISTA DE DIREITO DO TRIBUNAL DE JUSTIÇA DO ESTADO DO RIO DE JANEIRO 40 (Alexandre Freitas Câmara & Antonio Carlos Esteves Torres trans., 2011) (Braz.).

⁹⁸ See Prof. Dr. Gülin Güngör, *The Principle of Proximity in Contractual Obligations: The New Turkish Law on Private International Law and International Civil Procedure*, 5 ANKARA L. REV. 1, 6 (2008) (citing Articles 24/1 and 24/2 of Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun [Law on Private International Law and International Civil Procedure] (MÖHUK)).

⁹⁹ See U.C.C. § 1-301(a) (2011).

C. Limits in the United States on Choice of Law

Notwithstanding the freedom of contract generally enjoyed within the United States, discussed in Part x, *infra*, U.S. parties are not free simply to select the law of whatever jurisdiction they wish to select to govern the contract, at least not in purely domestic transactions. This is due to the fact that in the United States there are limits, established on a state-by-state basis, on the parties' freedom to choose the jurisdiction whose laws will govern their transaction. In general there must be some relationship between the transaction and the jurisdiction selected, or some courts in the United States are unlikely to enforce the parties' choice of law.¹⁰⁰

1. Uniform Commercial Code – U.S. Domestic Sales Law

In the United States there is a uniform law known as the Uniform Commercial Code (UCC),¹⁰¹ discussed in greater detail in Part x, *infra*. Under the UCC, the parties are free to choose the state or country whose laws will govern their transaction, as long as the transaction bears a reasonable relation to the state or country selected: "Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties."¹⁰² The official comments to Section 1-301 of the UCC confirm that the parties to a multi-state transaction or a transaction involving foreign trade have the right to choose their own law, but that the right to choose their own law "is limited to jurisdictions to which the transaction bears a 'reasonable relation.'"¹⁰³ The official comments continue:

¹⁰⁰ See, e.g., FLA. STAT. § 671.105(1) (2009).

Except as provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law *either* of this state *or* of such other state or nation will govern their rights and duties. Failing such agreement, this code applies to transactions bearing an *appropriate relation* to this state.

Id. (emphasis added).

¹⁰¹ The UCC has been widely adopted into the law of the states of the United States. Article 2 of the UCC generally applies to all transactions in goods. See U.C.C. § 2-102 (2011). Because Article 2 of the UCC defines "goods" quite broadly and without significant carve-outs, the scope of UCC Article 2 is very broad: "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

Id. § 2-105(1). Article 2 of the UCC has been adopted by every state throughout the United States, other than by the State of Louisiana, making Article 2 of the UCC the primary domestic sales law in the United States. See Uniform Commercial Code Locator, CORNELL UNIVERSITY LAW SCHOOL—LEGAL INFORMATION INSTITUTE, <http://www.law.cornell.edu/uniform/ucc.html#a2> (last visited Apr. 1, 2011). See also Acts, UCC Articles 2 and 2A (2003), UNIFORM LAW COMMISSION, THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, [http://www.nccusl.org/Act.aspx?title=UCC Articles 2 and 2A](http://www.nccusl.org/Act.aspx?title=UCC%20Articles%202%20and%202A) (2003) (last visited Apr. 1, 2011).

¹⁰² U.C.C. § 1-301(a) (2011).

¹⁰³ *Id.* § 1-301 official cmt. 1.

“Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs.”¹⁰⁴

2. Restatement (Second) of Conflict of Laws – U.S. Common Law

When the UCC is not applicable, there are several different approaches under the common law in the United States that are taken by different states for determining whether the parties’ choice of law is enforceable, but more states (though not a majority) follow some version of the approach set forth in the Second Restatement of Conflict of Laws than any other approach.¹⁰⁵ Under that approach, courts may refuse to enforce a choice-of-law clause under two circumstances: first, when there is no reasonable basis for the parties’ choice, and second when application of the chosen law would violate a fundamental public policy of another jurisdiction with a materially greater interest in the dispute.¹⁰⁶ And when the parties and the transaction have no relationship with the jurisdiction selected, many U.S. courts will conclude that there is no reasonable basis for the parties’ selection, making the selection unenforceable.

But when there is any reasonable basis for the selection, U.S. courts will generally respect the parties’ choice. A choice-of-law clause choosing the laws of Turkey would almost certainly be enforced, especially when the buyer or seller has its place of business in Turkey or performance is to occur there. Similarly, applying traditional choice-of-law rules, U.S. courts would enforce with little or no hesitation the parties’ selection of the law of any U.S. state where the U.S. counterparty has a place of business or where performance occurs or is to occur.

¹⁰⁴ *Id.*

¹⁰⁵ Restatements of the Law, including the Second Restatement of Conflict of Laws, are produced by the American Law Institute, an independent organization in the United States made up of lawyers, judges, and law professors. See The American Law Institute, About ALI, ALI Overview, <http://www.ali.org/index.cfm?fuseaction=about.overview>. The Restatements are produced in an effort to explain what the common law is, but the Restatements are not themselves binding law. They nevertheless can have considerable influence on the decisions of U.S. courts.

¹⁰⁶ The Second Restatement provides in relevant part as follows:

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement (Second) of Conflict of Laws § 187 (1971).

3. International Transactions

Moreover, in international contexts, U.S. courts have shown willingness to respect the parties' choices regarding forum and law, even when there is no apparent nexus with the selected jurisdiction, suggesting that U.S. courts will allow greater freedom to choose the laws of a neutral jurisdiction when the transaction is international.¹⁰⁷ In the seminal case on forum selection, *M/S Bremen v. Zapata Off-Shore Co.*, the U.S. Supreme Court held that the trial court gave too little weight and effect to a forum selection clause that appeared to designate the High Court of Justice in London as the exclusive forum for dispute resolution.¹⁰⁸ And the Court concluded that the forum clause should control absent a strong showing setting it aside, a conclusion reached even though there was no apparent nexus with the jurisdiction selected.¹⁰⁹ The court reasoned that “expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.”¹¹⁰

While *M/S Bremen* is a case primarily concerned with recognition and enforcement of a forum selection clause, the Court conducted its analysis under the apparent presumption that the English court would apply English law:

[W]hile the contract here did not specifically provide that the substantive law of England should be applied, it is the general rule in English courts that the parties are assumed, absent contrary indication, to have designated the forum with the view that it should apply its own law. It is therefore reasonable to conclude that the forum clause was also an effort to obtain certainty as to the applicable substantive law.¹¹¹

The Court's reasoning therefore ought to apply with equal force to enforcement of choice of law. And though the case was concerned with federal admiralty law (and not state contract law), state courts have nevertheless adopted the reasoning of *M/S*

¹⁰⁷ See, e.g., *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S. Ct. 1907, 1916 (1972); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629, 105 S. Ct. 3346, 3355 (1985) (recognizing broad discretion to select the method and forum of dispute resolution in the international context); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516, 94 S. Ct. 2449, 2455-56 (1974), *rehearing denied* (enforcing a forum selection clause that had been agreed upon by an Austrian company and a U.S. Company, which provided for arbitration in Paris, France, and reasoning that, in the absence of a forum selection clause, considerable uncertainty “will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules”); *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 2d 1229, 1241 (S.D.N.Y. 1992) (enforcing an agreement to arbitrate in Russia that was entered into between Italian and U.S. counterparties).

¹⁰⁸ 407 U.S. at 8, 92 S. Ct. at 1912.

¹⁰⁹ See *id.* at 15, 92 S. Ct. at 1916.

¹¹⁰ *Id.* at 9, 92 S. Ct. at 1912.

¹¹¹ *Id.* at 13 n.15, 92 S. Ct. at 1915 n.15 (citations omitted); see also *id.* at 9, 92 S. Ct. at 1913 (“We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.”); see also *id.* at 8 n.8, 92 S. Ct. at 1912 n.8 (noting that “the limitation fund in England would be only slightly in excess of \$80,000 *under English law*”) (emphasis added).

Bremen.¹¹² An express choice-of-law clause selecting the laws of a neutral third country is therefore likely to be enforced by U.S. courts in the context of an international commercial transaction, even in the absence of any relationship with the selected jurisdiction.

D. Choosing U.S. Law

When the parties agree to select U.S. law, however, the parties must select the particular U.S. state whose laws will govern the contract, for contract law is largely state – not federal – law in the United States. The U.S. counterparty might initially negotiate for application of the law of its home state, due to familiarity and comfort with the law of the home state. But it is very common for parties to international business transactions that are to be governed by U.S. law to choose New York as the state whose law will govern the transaction. And this is so whether or not the transaction has any relationship with the State of New York. While the reasons for choosing New York law to govern a transaction may be varied and complex, there are three reasons either that contribute to the practice of choosing New York law to govern international business transactions or that make the choice a sensible choice (or both).

1. Why New York?

First, when U.S. lenders are involved in financing a transaction or a project, the lenders will often insist on New York law as the law that is to govern the contract documents.¹¹³ And this applies not only to those contract documents that relate directly to the contractual relationship between the lender and the borrower, but also to contract documents entered into by the borrower with third parties who will perform for the borrower. U.S. lenders do this for a variety of reasons, including consistency and predictability. But one significant reason is to be confident that the security interest that the lenders take as protection against the risk of payment default will be recognized and enforceable – against all interested parties – under applicable law. By consistently selecting New York law and following the rituals prescribed by New York law, the U.S. lenders reduce the risk of a security interest not being recognized or enforced.

Second, even when U.S. lenders are not involved in the transaction, New York law is still often selected. It seems that New York is a jurisdiction with which non-U.S. parties to international transactions tend to be more comfortable. This could be due to general familiarity with New York (and a lack of familiarity with other U.S. states) or to prior experience with New York law. Or it could be due to a perception that New York is a sophisticated jurisdiction with a highly developed body of commercial law and finance

¹¹² See, e.g., *Prof'l Ins. Co. v. Sutherland*, 700 So. 2d 347, 350 (Ala. 1997); *Smith, Valentino & Smith, Inc. v. Superior Court*, 551 P.2d 1206, 1208-09 (Cal. 1976); *Jacobson v. Mailboxes Etc. U.S.A., Inc.*, 646 N.E.2d 741, 743-44 (Mass. 1995); *Micro Balanced Prods. Corp. v. Hlavin Indus. Ltd.*, 238 A.D.2d 284, 285 (N.Y. App. Div. 1997).

¹¹³ See generally Kimmo Mettälä, *Governing-Law Clauses of Loan Agreements in International Project Financing*, 20 INT'L LAW. 219 (1986).

law.¹¹⁴ Whatever the reasons, non-U.S. parties seem to be more comfortable agreeing to New York law than to the laws of other, less familiar U.S. states, so if the non-U.S. party is persuaded to agree to U.S. law, that often means, specifically, New York law.

Third, there is a statutory basis for the selection of New York law. There is a New York statute that provides that “[t]he parties to any contract, agreement or undertaking ... may agree that the law of [New York] shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to [the state of New York],” as long as the contract, agreement or undertaking involves a transaction of at least \$250,000 US Dollars.¹¹⁵ From New York’s perspective, there is no need for any relationship between such a transaction and the State of New York for the parties to choose New York law.

2. Differences among U.S. States

For some aspects of a business transaction, the state whose law is selected might matter a great deal, because some laws vary quite dramatically among U.S. states. For example, some states within the United States offer varying degrees of protection to certain kinds of sales intermediaries,¹¹⁶ and it is conceivable that a protective statute could apply because of a choice-of-law clause when the protective statute would not have otherwise applied by its terms. Also, enforcement of restrictive covenants is approached very differently by different states within the United States. A covenant not to compete might not be enforceable at all under one state’s laws and might be fully enforced under another. The State of California, for example, is generally much less permissive of covenants not to compete than other states.¹¹⁷

3. Uniformity among States: Article 2 of the UCC

When it comes to transactions involving sales of goods, whether the parties choose to be governed by the law of the U.S. party’s home state, New York law, or the law of some other U.S. jurisdiction (with the sole exception of Louisiana), it is unlikely to make much difference for the body of substantive law governing the sales transaction. It will not matter all that much because in each case, the transaction will be governed by Article 2 of the UCC (together with Article 1 of the UCC),¹¹⁸ as adopted by the

¹¹⁴ When New York enacted New York General Obligations Law Section 5-1401, it specifically “sought to secure and augment its reputation as a center of international commerce.” *Lehman Brothers Commercial Corp. v. Minmetals International Non-Ferrous Metals Trading Co.*, 179 F. Supp. 2d 118, 136 (S.D.N.Y. 2000) (citing Edith Friedler, *Party Autonomy Revisited: A Statutory Solution To a Choice-of-Law Problem*, 37 KAN. L. REV. 471, 497-98 (1989)).

¹¹⁵ N.Y. GEN. OBLIG. LAW § 5-1401(1).

¹¹⁶ *See, e.g.*, Wisconsin Fair Dealership Law, WIS. STAT. § 135.01 *et seq.*

¹¹⁷ *See* CAL. BUS. & PROF. CODE § 16600 (“Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”).

¹¹⁸ *See* U.C.C. § 1-102 (2011) (“This article applies to a transaction to the extent that it is governed by another article of [the Uniform Commercial Code].”) (bracketed text in original).

applicable state, and as supplemented by that state’s common law.¹¹⁹ Thus, if a transaction is a sale of goods transaction that is to be governed by domestic U.S. law, it probably will not matter all that much for the commercial aspects of the transaction whether it is governed by the laws of Florida, New York, New Jersey, Wisconsin, or any other U.S. state (other than Louisiana).¹²⁰ If the parties to a transaction between Turkish and U.S. buyers and sellers agree to opt for U.S. law (and to exclude the CISG), then for a sale of goods, that means that Article 2 of the UCC, as codified in the relevant state and as supplemented by that state’s common law, will govern.

V. COMPARING THE CISG AND ARTICLE 2 OF THE UCC

Of course, contracting parties should take advantage of freedom of contract to decide for themselves how to allocate risk and responsibility, as discussed in Part x, *infra*. But no matter how much time and energy the parties put into their carefully drafted written agreement, there will always be a possibility that some unimagined contingency, not addressed in the contract, materializes. And there may be some terms that the parties simply do not take time to address expressly in the written agreement. When the contingency materializes or the unaddressed terms become relevant and the parties find themselves in dispute resolution, courts and other decision-makers will resort to applicable law to supply terms the parties have not themselves supplied.¹²¹ For the Turkish practitioner who is counseling a client entering into a transaction with a U.S. counterparty, there are several reasonable possibilities as to the law that could be selected to fill the gaps left by the parties. Among these are domestic sales law of the counterparty’s jurisdiction, Turkish domestic sales law, and the CISG. With respect to transactions with U.S. contracting parties, it is therefore important to consider the differences and similarities between the CISG and Article 2 of the UCC, as two potentially applicable bodies of sales law, in order to make a good choice.¹²²

¹¹⁹ See *id.* § 1-103(b) (“Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.”) (bracketed text in original).

¹²⁰ The State of Louisiana is unique among the fifty states in that Louisiana is a civil law jurisdiction, so it presents a host of differences from other states of the United States. For that reason, U.S. practitioners outside of Louisiana tend to avoid choosing the laws of Louisiana to govern their clients’ transactions.

¹²¹ For example, in Turkey the judge “is under a duty to apply Turkish choice-of-law rules and, *sua sponte* to determine which foreign law should be applied in accordance with these rules.” Güngör, *supra* note x, at 3 (citing MÖHUK Art. 2/1). And the body of law to be applied “may govern the whole or a part of their contract.” *Id.* at 6 (citing MÖHUK Art. 24/2). Similarly, under U.S. domestic sales law the “contract” between the parties is defined to mean “the total legal obligation that results from the parties’ agreement as determined by [the Uniform Commercial Code] as supplemented by any other applicable laws.” U.C.C. § 1-201(12) (2011) (bracketed text in original).

¹²² For the Turkish practitioner, it is also important to consider the differences between the CISG and Turkish sales law. For a basic comparison of remedies under the CISG and remedies under Turkish law, see Cagdas Evrim Ergun, *Comparative Study on the Buyer’s Remedies Under the 1980 Vienna Sales Convention and the Turkish Sales Law* (2002), available at <http://www.cisg.law.pace.edu/cisg/biblio/ergun.html> (last visited Mar. 30, 2011).

A. Similarities

As some U.S. courts, as well as some commentators, have noted, there are analogous provisions between the CISG and Article 2 of the UCC.¹²³ Indeed, the similarities between the CISG and the UCC contributed to the United States' willingness to ratify the CISG.¹²⁴ In its report on the CISG, the U.S. Senate Committee on Foreign Relations observed that “[the CISG] offers agreed substantive rules to govern the formation of international sales contracts and the rights and obligations of the buyer and seller that are in many respects similar to the concepts and approach of the U.S. Uniform Commercial Code.”¹²⁵

B. The Danger of Analogous Provisions

Nevertheless, it is a mistake to assume that similar provisions should be treated the same. This view on the similarities between the CISG and Article 2 of the UCC, whether correct or incorrect, has led to two harmful consequences relating to interpretation of the CISG.

First, U.S. courts have not always looked carefully at the precise text of the CISG itself, which courts are required by international law to do,¹²⁶ and which is a fundamental rule of statutory interpretation in the United States. Instead of focusing first on the text of the treaty, U.S. courts have at times simply engaged in a UCC-like analysis of CISG provisions the court believes to be analogous to provisions of Article 2 of the UCC.¹²⁷ This seems to occur when no U.S. court has previously analyzed a CISG provision, and the CISG provision looks similar to the UCC provision.

Second, focusing on UCC analysis of CISG provisions causes a U.S. court to fail to fulfill its responsibility under Article 7(1) to interpret the CISG with regard for its international character and “the need to promote uniformity in its application.”¹²⁸ Uniformity in the application of the CISG will only occur if courts across borders recognize their responsibility to consider how the CISG has been interpreted by courts in

¹²³ See, e.g., *Schmitz-Werke GmbH & Co. v. Rockland Indus., Inc.*, 37 F. App'x 687, 691 (4th Cir. 2002); *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2d Cir. 1995); *Hanwha Corp. v. Cedar Petrochems., Inc.*, No. 09 Civ. 10559(AKH), 2011 WL 165404, at *3 (S.D.N.Y. Jan. 18, 2011); *Raw Materials, Inc. v. Manfred Forberich GmbH & Co.*, No. 03 C 1154, 2004 WL 1535839, at *3-4 (N.D. Ill. July 7, 2004); see also JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG § 2.13 n.250 (3d ed. 2008).

¹²⁴ See, e.g., Letter of Submittal from George P. Schultz, U.S. Sec'y of State, to Ronald Reagan, President of the United States of Am. (Aug. 30, 1983), in S. Treaty Doc. No. 98-9, at vi (1983) (“It will be noted that the Convention embodies the substance of many of the important provisions of the UCC and is generally consistent with its approach and outlook.”).

¹²⁵ S. EXEC. REP. NO. 99-20, at 1 (1986).

¹²⁶ See Vienna Convention, *supra* note 62, art. 31 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”) (emphasis added).

¹²⁷ See, e.g., *Schmitz-Werke GmbH & Co.*, 37 F. App'x at 691; *Raw Materials, Inc.*, 2004 WL 1535839 at *3-4.

¹²⁸ CISG, *supra* note 8, art. 7(1).

other jurisdictions. Such recognition has happened only very little in the United States so far.¹²⁹

C. Important Differences

Moreover, while the CISG arguably bears some resemblance to Article 2 of the UCC, it varies from Article 2 in some very important ways.¹³⁰ For example, under Article 42 of the CISG the seller of the goods is deemed to give a warranty against infringement, similar to the warranty against infringement that a merchant seller is deemed to give under Section 2-312(3) of the UCC. But the non-infringement warranty under the CISG is limited to third-party claims of which “the seller knew or could not have been unaware” at the time of the conclusion of the contract.¹³¹ Under the UCC, there is no knowledge requirement,¹³² making the potential scope of the seller’s obligations significantly greater under the UCC, and the potential scope of the buyer’s protection significantly less under the CISG, in respect of third-party infringement claims.

1. The Role of the Writing and Determining Party Intent

There are some provisions of the CISG that are quite clearly different from seemingly analogous provisions of the UCC, sometimes reflecting the influence of civil law jurisdictions, for example. None represents a more important difference from the UCC than that of Article 8.

To understand the importance of Article 8 and its departure from the U.S. legal tradition, it is helpful to begin with the role of the writing in the United States. Section 2-201 of the UCC contains the UCC statute of frauds, which establishes a writing requirement for contracts for the sale of goods for a price of \$500 or more.¹³³ Article 11 of the CISG, on the other hand, specifically rejects any writing requirement or any other

¹²⁹ For an example of a U.S. court considering in its analysis the reasoning of a foreign court, *see* *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 320 F. Supp. 2d 702, 712-13 (N.D. Ill. 2004).

¹³⁰ *See, e.g.*, *Miami Valley Paper, LLC v. Lebbing Eng’g & Consulting GmbH*, No. 1:05-CV-00702, 2009 WL 818618, at *4-*5 (S.D. Ohio Mar. 26, 2009).

¹³¹ CISG, *supra* note 8, art. 42.

¹³² *See* U.C.C. § 2-312(3) (2011).

¹³³ *See* U.C.C. § 2-201(1) (2011). The common law also establishes a variety of statutes of frauds. *See* Restatement (Second) of Contracts § 110 (1981). At least one such statute of frauds could be relevant for a sale of goods transaction. *See id.* § 130. Notably, the UCC statute of frauds does not require the entire agreement to be in writing; it merely requires *a* writing, which need not even be accurate or complete:

Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

U.C.C. § 2-201(1) (2011).

requirement as to form, providing that a contract “need not be concluded in or evidenced by writing” in order to be enforceable and may instead be proved by any means.¹³⁴

Similarly, in the United States when there is a written agreement, the “parol evidence rule” makes it difficult or impossible to introduce evidence of the parties’ intent from outside the four corners of that agreement.¹³⁵ Under the parol evidence rule U.S. courts will give significant deference to a written agreement when the agreement is determined to be integrated.

The approach under the CISG is different. Specifically, courts are called upon to consider “all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties” to determine the parties’ intent.¹³⁶ Thus, even when there is a written contract with contents that suggest a particular intent of the parties, the CISG requires courts to consider evidence that could show that the parties nevertheless actually intended something different from that indicated in the writing. This is an exercise that is squarely outside the American legal imagination.

These U.S. concepts, and the underlying emphasis on putting a final agreement in writing and deferring to that written agreement, are simply assumed by many U.S. practitioners and courts. The CISG requires a different approach, reflecting a different legal philosophy that tells us, whether correctly or incorrectly, that written agreements should be viewed with some skepticism. And if the parties’ actual intent – which may be contrary to the objective manifestation of intent evidenced by the writing – can be determined, then the actual intent prevails over a contrary objective intent under the CISG. This is a difference of significance between the CISG and Article 2 of the UCC with respect to how a court will interpret the parties’ agreement.

2. Battle of the Forms

The failure of U.S. courts to conduct careful interpretation of CISG provisions in light of their context has led to misunderstanding regarding both similar and dissimilar provisions of the CISG. The battle of the forms, which is addressed under the UCC in Section 2-207, provides an easy example of this.¹³⁷ Section 2-207 of the UCC provides for a contract to form even when an apparent acceptance of an offer contains terms that are different from or in addition to the terms contained in the offer.¹³⁸ This is a departure from the “mirror image rule” of the common law, which would automatically treat such a

¹³⁴ CISG, *supra* note 8, art. 11. Article 29 of the CISG further demonstrates the CISG’s rejection of adherence to requirements as to form, in favor of considering extrinsic evidence, including conduct of the parties, when determining the terms of the parties’ agreement. *See id.* art. 29. Specifically, Article 29 provides that even when a written contract contains a provision requiring any modification or termination by agreement to be in writing, “a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.” *Id.* art. 29(2).

¹³⁵ *See, e.g.*, Restatement (Second) of Contracts § 213 (1981); *see also id.* §§ 209 & 210; U.C.C. § 2-202 (2011).

¹³⁶ *See* CISG, *supra* note 8, art. 8.

¹³⁷ *See* U.C.C. § 2-207 (2011).

¹³⁸ *See id.* § 2-207(1).

purported acceptance as a counteroffer, which would operate as a rejection of the offer and would be subject to acceptance before a contract would form.¹³⁹

Under the CISG the battle of the forms is addressed in Article 19.¹⁴⁰ It is generally more difficult under Article 19 of the CISG than under Section 2-207 of the UCC for a contract to form when a purported acceptance of an offer contains additional or different terms, but it is marginally easier for a purported acceptance containing additional terms to constitute an acceptance under the CISG than under the common law. Yet, some U.S. courts have been unable to analyze formation under Article 19 without resorting to American concepts.

With those distinctions between the two approaches in mind, a U.S. federal court, in *Filanto, S.p.A. v. Chilewich International Corp.*, reasoned that Article 19(1) of the CISG “reverses the rule of Uniform Commercial Code § 2-207, and reverts to the common law rule”¹⁴¹ That is simply not correct. The CISG provisions dealing with the battle of the forms take an approach that is different from both Section 2-207 of the UCC and the mirror image rule of the common law.

Article 19(1) of the CISG at first blush appears to adopt a rule that is the equivalent of the mirror image rule: “A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.”¹⁴² If the CISG battle of the forms analysis ended there, then the analysis would look very similar – perhaps equivalent – to the common law analysis under the mirror image rule. But the CISG does not end there. The next paragraph continues:

However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.¹⁴³

¹³⁹ See Restatement (Second) of Contracts § 59 (1981) (“A reply to an offer which purports to accept it but is conditional on the offeror’s assent to terms additional to or different from those offered is not an acceptance but is a counteroffer.”).

¹⁴⁰ Article 19 provides in relevant part:

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

CISG, *supra* note 8, art. 19.

¹⁴¹ *Filanto, S.p.A. v. Chilewich Int’l Corp.*, 789 F. Supp. 2d 1229, 1238 (S.D.N.Y. 1992).

¹⁴² CISG, *supra* note 8, art. 19(1).

¹⁴³ *Id.* art. 19(2).

Thus, a contract can form under the CISG on the exchange of documents that are not the mirror image of one another. That concept is similar to the concept set forth in Section 2-207 of the UCC, but the language of Article 19 – and therefore the analysis that is necessary and appropriate under Article 19 – is different from (and generally less permissive than) the language of Section 2-207 of the UCC.

Moreover, if a contract does not form by the exchange of documents but the parties behave as if there is a contract, then under Subsection (3) of Section 2-207 of the UCC, the contract is made up of the terms on which the writings of the parties agree (if any), together with supplementary terms under the UCC.¹⁴⁴ That, too, is a departure from the common law, where the “last shot rule” provides that whoever fired the last shot (that is, sent the last offer) prior to performance typically wins the battle of the forms. This is so because each counteroffer operates as a rejection of the previous offer.¹⁴⁵ But at some point one party performs and the other party acquiesces in the performance, signaling that there is a contract between the parties. In the ordinary case under the common law, the final counteroffer made – because it has not been rejected by a subsequent counteroffer – is deemed to have been accepted by performance.¹⁴⁶ And the last shot that is fired would win the battle of the forms under the common law. Subsection (3) of Section 2-207 of the UCC changes that result, rejecting the last shot rule of the common law.

The CISG has no equivalent to Subsection (3) of Section 2-207 of the UCC, and it might be easy to reach the conclusion that the CISG therefore adopts the common law last shot rule.¹⁴⁷ That, too, is not correct.

There is provision in the CISG for acceptance by performance.¹⁴⁸ But the provision identifies the limited circumstances when the offeree has the ability to indicate assent to the offer by performance of an act, and the ability to accept by performance under Article 18 exists only if it arises “by virtue of the offer or as a result of practices which the parties have established between themselves or of usage”¹⁴⁹ And if those circumstances are not specifically present, then the last shot rule should not be used by a court to conclude that the final counteroffer automatically constitutes the agreement between the parties. Rather, the court should use other applicable provisions of the CISG, including Article 8, to determine the intent of the parties, an exercise that does not have an exact corollary in the American legal tradition.

3. Other Differences

There are numerous other differences between the CISG and Article 2 of the UCC, including other rules of contract formation,¹⁵⁰ the buyer’s right of rejection of

¹⁴⁴ U.C.C. § 2-207(3) (2011).

¹⁴⁵ See Restatement (Second) of Contracts § 39(2) (1981); see also *id.* § 36(1)(a).

¹⁴⁶ See *id.* § 50(2).

¹⁴⁷ See, e.g., *Miami Valley Paper, LLC v. Lebbing Eng’g & Consulting GmbH*, No. 1:05-CV-00702, 2009 WL 818618, at *4 (S.D. Ohio Mar. 26, 2009).

¹⁴⁸ See CISG, *supra* note 8, art. 18(3).

¹⁴⁹ *Id.*

¹⁵⁰ Compare U.C.C. §§ 2-204, 2-206 & 2-207 (2011) and CISG, *supra* note 8, arts. 18 & 19.

nonconforming goods,¹⁵¹ and the remedies that are made available for breach, among other things.

In addition to applying rules of treaty interpretation under international law, there are two fundamental things that are essential for courts to do. First, courts must resist the temptation simply to apply domestic law analysis to provisions of the CISG that appear to the court to be analogous to provisions of domestic law. Second, courts must consider how other courts in other jurisdictions have analyzed the CISG as one aspect of the court's own analysis. While courts are not bound by the decisions of foreign courts, considering the analysis of foreign courts can greatly help to facilitate uniformity – and therefore predictability – in the application of the CISG across borders.

D. Acknowledging the Differences

Ultimately, while the CISG resembles Article 2 of the UCC in some ways, the CISG actually varies from Article 2 of the UCC in some very important ways. Differences between the CISG and UCC Article 2 lead to different results, sometimes of critical importance.

Fortunately, this simple truth has been recognized by some U.S. courts and commentators.¹⁵² In *Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH*, the court conducted a careful analysis of the CISG and its application to the facts of that case in its consideration of a motion for partial summary judgment brought by the plaintiff, a U.S. buyer, and a motion for summary judgment brought by the defendant, a German seller.¹⁵³ The dispute arose out of the sale to the U.S. buyer by the German seller of a paper winding machine.¹⁵⁴ Some of the issues before the court depended on the terms of the contract between the parties.¹⁵⁵ However, the arrangement between the parties involved a battle of the forms, and the exchange of documents that created the

¹⁵¹ Compare U.C.C. § 2-601 (2011) (requiring perfect tender by the seller or the buyer may reject the goods) and CISG, *supra* note 8, arts. 70, 72 & 73 (requiring “fundamental breach” before certain remedies are available to the buyer).

¹⁵² See, e.g., *Chateau des Charmes Wines Ltd. v. Sabaté USA Inc.*, 328 F.3d 528, 531 n.3 (9th Cir. 2003) (noting that the outcome under the CISG is different from the outcome that would likely have been appropriate under Article 2 of the UCC); *Miami Valley Paper, LLC v. Lebbing Eng'g & Consulting GmbH*, No. 1:05-CV-00702, 2009 WL 818618, at *4-5 (S.D. Ohio Mar. 26, 2009) (“There are several critical differences between the law governing contract formation under the CISG and the more familiar principles of the Uniform Commercial Code.”); *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1238 (S.D.N.Y. 1992) (recognizing that the CISG “varies from the Uniform Commercial Code in many significant ways.”); Louis F. Del Duca & Patrick Del Duca, *Selected Topics Under the Convention on International Sale of Goods (CISG)*, 106 DICK. L. REV. 205, 207 (2001); see also Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc., 254 F. App'x 646, 647 (9th Cir. 2007) (reversing district court's grant of summary judgment when the district court erred in failing to first analyze under the CISG the formation of the underlying contract).

¹⁵³ *Miami Valley Paper, LLC v. Lebbing Eng'g & Consulting GmbH*, No. 1:05-CV-00702, 2009 WL 818618, at *1 (S.D. Ohio Mar. 26, 2009).

¹⁵⁴ *Id.* at *1-*2.

¹⁵⁵ *Id.* at *5-*8.

battle of the forms therefore affected the formation of the contract between the parties and, accordingly, its terms.¹⁵⁶

In resolving the parties' cross-motions, the court noted three specific differences in respect of contract formation between the CISG and the UCC.¹⁵⁷ First, the court correctly recognized a difference with respect to the battle of the forms, though it incorrectly characterized the difference, finding that, unlike the UCC, which has abrogated the mirror image rule under Section 2-207, the CISG applies the mirror image rule.¹⁵⁸ Regrettably, the court failed to note that Article 19 of the CISG varies from the common law mirror image rule, as discussed in Part x, *supra*.¹⁵⁹ Second, the court noted that the CISG has no statute of frauds.¹⁶⁰ Third, the court noted that the CISG contains no parole evidence rule and instead allows the court to consider statements or conduct to establish, modify, or alter the terms of a contract.¹⁶¹ Thus, some U.S. courts have recognized that the CISG is different from Article 2 of the UCC, and the analysis required under the CISG is therefore also different.

E. Different Provisions – Different Outcomes

For courts and decision-makers, what is at stake? In addition to the clear problem of failure to comply with requirements of international law, there is the practical consideration that importing a domestic sales law analysis can lead to serious consequences for one of the parties to a contract dispute governed by the CISG. One poignant example of this is offered by *Beijing Metals & Minerals Import/Export Corp. v. Am. Bus. Ctr., Inc.*, a decision of the U.S. Court of Appeals for the Fifth Circuit.¹⁶²

Beijing Metals & Minerals Import/Export Corp. (Beijing Metals) entered into a business relationship with American Business Center, Inc. (ABC) for development of the fitness equipment market in the United States and Canada.¹⁶³ Beijing Metals agreed to manufacture goods for ABC to specification and in accordance with other requirements.¹⁶⁴ Initially, ABC paid in advance for each shipment.¹⁶⁵ Eventually, the parties changed the payment terms to 90-day payment terms, and ABC subsequently defaulted on its payment obligations.¹⁶⁶ ABC and Beijing Metals agreed on a payment plan, and in their written payment plan agreement, which the parties signed, ABC acknowledged amounts owed and the parties established a payment schedule.¹⁶⁷

¹⁵⁶ *Id.* at *1-*2.

¹⁵⁷ *Id.* at *4-*5.

¹⁵⁸ *Id.* at *4 (citing Article 19 of the CISG).

¹⁵⁹ *See id.*

¹⁶⁰ *See id.* at *5.

¹⁶¹ *Id.*

¹⁶² 993 F.2d 1178 (5th Cir. 1993)

¹⁶³ *See id.* at 1179.

¹⁶⁴ *See id.* at 1180.

¹⁶⁵ *See id.*

¹⁶⁶ *See id.*

¹⁶⁷ *See id.*

However, ABC asserted that there were also two oral agreements entered into concurrently with the written payment plan.¹⁶⁸ Specifically, ABC claimed that Beijing Metals also agreed that Beijing Metals, first, would ship goods to compensate for nonconforming and defective goods and shortages, and second, would begin making shipments on 90-day payment terms.¹⁶⁹ Subsequently, the parties exchanged letters that arguably offered evidence of those oral agreements.¹⁷⁰

ABC eventually refused to make payments in accordance with the payment schedule established by the payment agreement, and Beijing Metals filed a claim to recover the amounts described in the payment agreement.¹⁷¹ ABC raised the defense that its payment obligations under the payment agreement were only one part of a three-part understanding, the other two parts consisting of the two claimed oral agreements, and ABC further claimed that Beijing Metals was in breach of its obligations under the two oral agreements.¹⁷² But the district court refused to allow evidence of the two claimed oral agreements, concluding that the parol evidence rule prevented admission of evidence of those agreements, thereby preventing the claimed oral agreements from being a defense to ABC’s payment obligations under the payment agreement.¹⁷³

On appeal, the Fifth Circuit applied the parol evidence rule under Texas common law.¹⁷⁴ ABC argued for application of the CISG, while Beijing Metals argued for (domestic) Texas law.¹⁷⁵ The Fifth Circuit reasoned that it was not necessary to resolve the choice-of-law issue, because the parol evidence rule of the Texas common law “applies regardless.”¹⁷⁶

Because the agreement at issue could reasonably be characterized simply as a settlement agreement and not a contract of sale of goods for purposes of the CISG, it is possible that a court could reasonably conclude that the CISG did not apply to the dispute concerning nonpayment under the payment agreement. On the other hand, a court could conclude that the payment agreement was one aspect of a larger sale of goods contract that fell within the sphere of application of the CISG. If a court were to so conclude, then the Fifth Circuit’s statement that the parol evidence rule “applies regardless” is incorrect, as discussed in Part x, *supra*.¹⁷⁷

In this case, there was evidence tending to show that the claimed oral agreements actually had been entered into by the parties.¹⁷⁸ Such evidence included testimony of ABC executives regarding the negotiations, a letter sent by Beijing Metals to ABC following the negotiations, and two letters sent by ABC to Beijing Metals following the

¹⁶⁸ *See id.*

¹⁶⁹ *See id.*

¹⁷⁰ *See id.* at 1180-81, n.5, n.6 & n.7.

¹⁷¹ *See id.* at 1181.

¹⁷² *See id.* at 1182.

¹⁷³ *See id.*

¹⁷⁴ *See id.* at 1182-83.

¹⁷⁵ *See id.* at 1182 n.9.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *See id.* at 1180-81, n.5, n.6 & n.7.

negotiations.¹⁷⁹ That evidence clearly would have been admissible under the CISG.¹⁸⁰ Indeed, the court would have been required under Article 8(3) to give all of the evidence “due consideration.”¹⁸¹

Under the parol evidence rule of Texas common law, the evidence was excluded.¹⁸² But under the Supremacy Clause of the U.S. Constitution,¹⁸³ Article 8(3) of the CISG, when applicable, prevails over the parol evidence rule of Texas common law, and the parol evidence rule therefore would not have applied ‘regardless,’ as asserted by the court. Unfortunately, the Fifth Circuit failed to recognize that and, as a consequence, failed to engage in the analysis necessary to determine whether the dispute arose from a mere settlement agreement that did not constitute a contract for the sale of goods for purposes of the CISG or, instead, arose from one part of a contract of sale of goods, making the CISG relevant for the analysis.¹⁸⁴

VI. ESTABLISHING CONTRACT TERMS BY MUTUAL AGREEMENT

Fortunately for Turkish and U.S. parties to sales transactions, one important similarity between the CISG and the UCC is that both establish a broad freedom of contract. With some important exceptions, parties are free to define for themselves their contractual rights and duties and the terms of their contractual relationship. This is especially important in the context of international business transactions, where the parties are likely to encounter a complex web of local, national, foreign, and international laws and regulations.

A. The Benefit of a Writing

In modern commercial transactions, the parties do not always take the time to reduce to an integrated writing the terms of their agreement. The speed of a time-sensitive transaction may make it impractical; the value of a low-value transaction may make it cost ineffective; and the desire to preserve a perception of mutual trust may cause some contracting parties to prefer a less formal arrangement.

Some transactions, on the other hand, more clearly justify the time and cost necessary to finalize a written agreement that is mutually agreeable. This might be due to the uncertainty surrounding the counterparty’s ability or willingness to perform; it could

¹⁷⁹ *See id.*

¹⁸⁰ *See CISG, supra* note 8, art.8(3); *see also id.* art 9(1).

¹⁸¹ *Id.* art. 8(3).

¹⁸² *See* 993 F.2d at 1182-83.

¹⁸³ U.S. CONST. art. VI.

¹⁸⁴ The court did reject by footnote an argument that the parol evidence rule of Article 2 of the UCC, rather than the parol evidence rule of the Texas common law, was the appropriate parol evidence rule to apply. *See* 993 F.2d at 1183 n.3. But it did so by conclusorily stating that the court would apply the parol evidence rule developed by Texas common law “[b]ecause the [payment] agreement, on its face, is limited to a payment schedule for overdue invoices, and more closely resembles a settlement agreement, as opposed to a sale of goods.” *Id.* And the court engaged in no analysis to show that its conclusion was sound.

be due to a high-risk good constituting part of the transaction; it could be due to the value of the transaction.

One clear justification for taking the time to enter into a written agreement is when a sale of goods transaction is international, that is, when the buyer and seller have their respective places of business in different countries. When that is the situation, then the potential for risk and uncertainty increases exponentially due to the myriad of laws that become relevant or potentially relevant for the transaction. One way that parties can reduce uncertainty and allocate risk in a way that is sensible for that particular transaction is by taking the time to enter into a robust written agreement.

B. The UCC Freedom of Contract and its Limits

The freedom of contract appears to be a familiar concept in Turkey, where parties to international contracts generally have the freedom to choose the law that will govern their contract, and where transactions are upheld whenever possible.¹⁸⁵ Similarly, the United States has a reputation as a jurisdiction where contracting parties enjoy a broad freedom of contract. And in fact, Article 1 of the UCC specifically provides that “the effect of provisions of [the Uniform Commercial Code] may be varied by agreement.”¹⁸⁶ The freedom of contract in the United States is not absolute, however. In fact, this is made clear in the freedom of contract clause itself, which begins with the qualifier, “[e]xcept as otherwise provided . . .”¹⁸⁷

1. Non-Derogable Provisions

Notably, the UCC’s obligations of “good faith, diligence, reasonableness, and care” may not be disclaimed by agreement.¹⁸⁸ Even so, the parties are permitted to establish the standards by which performance of those obligations is to be measured, as long as the standards the parties establish are not “manifestly unreasonable.”¹⁸⁹

Similarly, notwithstanding the freedom of contract, some provisions of Article 2 are more difficult than others to vary. The most important examples arise in the context of the seller attempting to place limits on the seller’s potential liability by means of exclusions of warranties or disclaimers of damages.

¹⁸⁵ See Güngör, *supra* note 98, at 6 (citing MÖHUK arts. 7 & 24/2).

¹⁸⁶ U.C.C. § 1-302(a) (2011) (brackets in original). Although Article 2 of the UCC is the article that applies to sale of goods transactions, Article 1 of the UCC also applies to a transaction, to the extent the transaction is governed by any other article of the UCC, including Article 2. *See id.* § 1-102.

¹⁸⁷ *Id.* § 1-302(a).

¹⁸⁸ *Id.* § 1-302(b).

¹⁸⁹ *Id.*

2. Implied Warranties

Article 2 of the UCC establishes three implied warranties relating to the quality of the goods sold, and the implied warranties may not be excluded by simple means.¹⁹⁰ The implied warranty of merchantability, for example, is implied in all contracts for the sale of goods when the seller is a merchant with respect to goods of that kind.¹⁹¹ That means that merchant sellers are deemed to have promised by contract that their goods are merchantable. In order to be merchantable, goods must at least satisfy a list of requirements, including that the goods must pass without objection in the trade under the contract description, be fit for the ordinary purposes for which such goods are used, and, in the case of fungible goods, be of fair average quality within the description (among other things).¹⁹² The list is non-exhaustive, and other attributes of merchantability could arise by virtue of usage of trade or through case law.¹⁹³

From the seller's perspective, it is plain to see that inclusion of the implied warranty of merchantability in a contract for the sale of goods could open the door to potential liability for breach of warranty even when the goods conform to agreed-upon specifications and are free from defects in material and workmanship, if the buyer can persuade the decision-maker that the goods are nevertheless not merchantable for some reason. Consequently, U.S. sellers tend to attempt to disclaim the implied warranty of merchantability in order to reduce risk exposure and to increase certainty.

In fact, the implied warranty of merchantability may be excluded by contract, but exclusion requires specific steps.¹⁹⁴ If those steps are not followed, then the warranty has not been excluded, no matter the freedom of contract.

Similarly, the UCC establishes an implied warranty that goods will be fit for a buyer's particular purpose for the goods, when the seller has reason to know the particular purpose and also has reason to know that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods.¹⁹⁵ The particular purpose for the goods differs from the ordinary purpose for the goods "in that it envisions a specific use

¹⁹⁰ The UCC implied warranties are (1) the implied warranty of merchantability, U.C.C. § 2-314(1) (2011), (2) the implied warranty of fitness for particular purpose, *id.* § 2-315, and (3) implied warranties arising from course of dealing or usage of trade, *id.* § 2-314(3).

¹⁹¹ U.C.C. § 2-316(1) (2011). The UCC defines the term "Merchant" as follows:

"Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Id. § 2-104(1).

¹⁹² *See id.* § 2-314(2).

¹⁹³ *See id.* § 2-314 official cmt. 6.

¹⁹⁴ There are two ways to exclude by contractual agreement the UCC implied warranty of merchantability. First, "to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous" *Id.* § 2-316(2). Second, all implied warranties, including the implied warranty of merchantability, are excluded by expressions like 'as is', 'with all faults' or other similar language. *Id.* § 2-316(3)(a).

¹⁹⁵ *Id.* § 2-315.

by the buyer which is peculiar to the nature of his business”¹⁹⁶ Thus, a seller might furnish goods that are perfectly suitable for their ordinary purposes and nevertheless face a claim for breach of warranty, if the buyer can show that the implied warranty of fitness for particular purpose was made and breached. As a consequence, sellers tend to attempt to exclude the implied warranty of fitness for particular purpose as well.

In fact, the implied warranty of fitness for particular purpose may be excluded by contract as well, but exclusion requires specific steps.¹⁹⁷ And, like the implied warranty of merchantability, if the steps are not followed, then the warranty is not excluded by contract.

3. Express Warranties

In addition to implied warranties, the UCC also provides for express warranties.¹⁹⁸ Express warranties can arise from promises made by the seller to the buyer that relate to the goods, affirmations of fact made by the seller to the buyer that relate to the goods, descriptions of the goods, and samples or models of the goods, in each case, when made part of the basis of the bargain.¹⁹⁹ Once made, an express warranty cannot be disclaimed.²⁰⁰ Of course, an express warranty made as part of a negotiation could be bargained away prior to finalization of the agreement. But if not bargained away, then Section 2-316(1) of the UCC provides that when both an express warranty and a purported disclaimer of the express warranty are part of the agreement between the parties and the two terms cannot be reconciled, the express warranty will prevail over the purported disclaimer.²⁰¹ However, if the express warranty was made separate from an integrated writing, then the buyer has the practical difficulty of overcoming the parol evidence rule in order to prove that the express warranty was made, an unlikely – if not impossible – prospect.²⁰²

4. Warranty of Title

Finally, the UCC also establishes a warranty of title, a warranty that is especially difficult to modify or exclude.²⁰³ A general disclaimer of implied warranties will not

¹⁹⁶ *Id.* § 2-315 official cmt. 2.

¹⁹⁷ There are two ways to exclude by contractual agreement the UCC implied warranty of fitness for particular purpose. First, “to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.” *Id.* § 2-316(2). Second, all implied warranties, including the implied warranty of fitness for particular purpose, are excluded by expressions like ‘as is’, ‘with all faults’ or other similar language. *Id.* § 2-316(3)(a).

¹⁹⁸ *Id.* § 2-313.

¹⁹⁹ *Id.* § 2-313(1).

²⁰⁰ *See id.* § 2-316(1).

²⁰¹ *See id.*

²⁰² *See id.*; *see also id.* § 2-202.

²⁰³ Article 2 of the UCC establishes the following warranty of title:

Subject to subsection (2) there is in a contract for sale a warranty by the seller that (a) the title conveyed shall be good, and its transfer rightful; and (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

U.C.C. § 2-312(1) (2011).

disclaim the warranty of title, and even an “as is, with all faults” clause will not disclaim the warranty of title under ordinary circumstances.²⁰⁴ Rather, exclusion of the warranty of title occurs only by two possible means:

A warranty [of title] will be excluded or modified *only* by specific language *or* by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.²⁰⁵

Thus, to disclaim the warranty of title requires either “specific language” or existence of the rather limited circumstances that specifically give the buyer reason to know that the person selling does not claim title.²⁰⁶ Such limited circumstances include “sales by sheriffs, executors, certain foreclosing lienors and persons similarly situated” when made out of the ordinary commercial course in a way that makes their peculiar character immediately apparent to the buyer.²⁰⁷

5. Disclaiming Damages

One common method used by U.S. sellers to limit potential liability is by disclaiming certain categories of damages. The UCC specifically provides for recovery by an aggrieved buyer of not only direct damages, but also incidental damages and consequential damages.²⁰⁸ Such damages can be quite large, when an aggrieved buyer claims lost profits, for example.²⁰⁹ As a consequence, U.S. sellers frequently disclaim both categories of damages, and the UCC provides for such disclaimer.²¹⁰ But the seller’s freedom to disclaim consequential damages is another example of a freedom that is not absolute under the UCC.²¹¹ Specifically, while the seller may disclaim consequential damages as a general rule, such a disclaimer is not effective if the purported limitation or exclusion is unconscionable.²¹² And any purported limitation of consequential damages for personal injury in the case of consumer goods is *prima facie* unconscionable.²¹³

²⁰⁴ *See id.* § 2-312 official cmt. 6 (“The warranty [of title] is not designated as an ‘implied’ warranty, and hence is not subject to Section 2-316(3). Disclaimer of the warranty of title is governed instead by subsection (2) [of Section 2-312], which requires either specific language or the described circumstances.”).

²⁰⁵ *Id.* § 2-312(2) (emphasis added).

²⁰⁶ *See id.*

²⁰⁷ *Id.* official cmt. 5.

²⁰⁸ *See id.* §§ 2-712(2), 2-713(1), & 2-714(3).

²⁰⁹ *See id.* § 2-715. Incidental damages can include “expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.” *Id.* § 2-715(1). Consequential damages can include any foreseeable loss resulting from the seller’s breach, as well as any “injury to person or property proximately resulting from any breach of warranty,” whether foreseeable or not. *Id.* § 2-715(2).

²¹⁰ *See id.* § 2-719(1)(a).

²¹¹ *See id.* § 2-719(3).

²¹² *Id.*

²¹³ *Id.*

Each of these permitted limitations on the seller's liability or potential liability may be accomplished by express clauses in the parties' agreement, but only if the statutory requirements are satisfied. If the statutory requirements are not satisfied, then, notwithstanding the freedom of contract and the actual intent of the parties, a court is likely to conclude that the clauses are simply ineffective.

C. Freedom of Contract under the CISG

Like the UCC, the CISG explicitly establishes a broad freedom of contract, a point that was not lost on the United States. In transmitting the CISG to the U.S. Senate for its advice and consent following U.S. signature of the CISG, President Ronald Reagan noted that, "[w]orthy of emphasis is the international deference that the Convention accords to the contract made by the parties to an international sale. The parties may agree that domestic law rather than the Convention will apply, and their contract may modify or supplant the Convention's rules."²¹⁴ Indeed, Article 6 of the CISG provides that the parties to any contract governed by the CISG may, subject to Article 12, "derogate from or vary the effect of *any* of its provisions."²¹⁵

Unlike the UCC's broad categories of non-derogable terms of good faith, reasonableness, and the like, the CISG's non-derogable provisions are quite limited. Specifically, Article 12 establishes the fundamental non-derogable terms of the CISG:

Any provision of article 11,²¹⁶ article 29²¹⁷ or Part II²¹⁸ of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention.²¹⁹ The parties may not derogate from or vary the effect of this article.²²⁰

Neither Turkey nor the United States has made a declaration under Article 96,²²¹ so the fundamental non-derogable provision of the CISG is not even applicable for sales

²¹⁴ Letter of Transmittal, *supra* note 58, at iii.

²¹⁵ CISG, *supra* note 8, art. 6 (emphasis added).

²¹⁶ "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." *Id.* art. 11.

²¹⁷ Article 29(1) provides that "[a] contract may be modified or terminated by the mere agreement of the parties." *Id.* art. 29(1). Paragraph (2) of Article 29 continues:

A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

Id. art. 29(2).

²¹⁸ Part II of the CISG is concerned with formation of the contract. *See id.* pt. II.

²¹⁹ Article 96 allows Contracting States to declare that domestic writing requirements, such as a domestic statute of frauds, will be effective, notwithstanding the terms of the CISG that reject writing requirements. *See id.*

²²⁰ *Id.* art. 12.

²²¹ *See* CISG Status, *supra* note 40.

transactions between Turkish and U.S. contracting parties. Thus, the CISG offers the parties great freedom of contract.

Moreover, the CISG simply does not contain the same hurdles to modification of certain important terms, such as warranty terms, that the UCC contains. On the contrary, in the warranty provisions of the CISG, the CISG expressly contemplates modification by the parties without establishing any particular means of modification: “*Except where the parties have agreed otherwise, the goods do not conform to the contract unless they [satisfy the list of requirements established by Article 35].*”²²²

Now, if the parties draft their written agreement carefully and are mindful of the hurdles created by domestic sales law, such as the relevant provisions of the UCC, then the same effect can be achieved under U.S. domestic sales law (with respect to exclusion of warranties under Article 2 of the UCC, for example) as can be achieved under Article 6 (and Article 35(2)) of the CISG. But varying the provisions of applicable law is less complicated under the CISG, and there is generally less risk of an ineffective disclaimer or an unenforceable term under the CISG than under the UCC.²²³

D. The Risk of Invalidity under the UCC

In addition to the risk that a contract clause might be deemed to be ineffective because it fails to follow a prescribed formula or otherwise to satisfy a statutory requirement, there is a distinct parallel risk under the UCC that some allocations of risk or assignments of responsibility might be deemed simply to be invalid, usually because of the circumstances under which the contract was entered into. There are essentially two ways that a contract, or an agreed-upon contract clause, can be rendered unenforceable by a court under Article 2 of the UCC: if it is deemed by the court to be unconscionable, or if an equitable principle renders it invalid.

1. Unconscionability

With respect to the doctrine of unconscionability, Article 2 of the UCC provides as follows:

²²² CISG, *supra* note 8, art. 35(2).

²²³ For a contrary view, see LOOKOFSKY, *supra* note 123, 165 (“The validity (enforceability) of a standard term which (e.g.) purports to disclaim the obligations set forth in Article 35(2) and/or limit liability in the event of breach is a question outside the CISG: the Convention is simply ‘not concerned with’ the validity of clauses like these.”). This view of the CISG is not supported by its text. It is true that the CISG is not concerned with the validity of the contract or of any of the contract’s provisions. See CISG, *supra* note 8, art. 4. But that is so with respect to the validity of any clause in the contract; there is no special treatment accorded to clauses purporting to limit either party’s liability. Indeed, the CISG contemplates in other sections of the CISG that a contract could include such a clause. See, e.g., *id.* art. 19(3) (addressing how a contract term relating to the “extent of one party’s liability to the other” should be analyzed in the battle of the forms). The explanatory note supports this as well: “[W]hen a question concerning a matter governed by this Convention is not expressly settled in it, the question is to be settled in conformity with the general principles on which the Convention is based. *Only* in the absence of such principles should the matter be settled in conformity with the law applicable by virtue of the rules of private international law.” *Id.*, Explanatory Note, ¶ 14.

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.²²⁴

In practice, a finding of unconscionability is rare, especially in a business transaction that does not involve a consumer buyer. Some courts require a finding of both procedural and substantive unconscionability for unconscionability to be found.²²⁵ And regardless, the various standards used by U.S. courts in different jurisdictions tend to be quite high.²²⁶

Nevertheless, it is important to be aware that the doctrine exists under the UCC, which leaves the door open for a court to refuse to enforce a contract clause that was agreed upon by the parties, but that one party comes to regret, if the regretful party can persuade the court that the clause is unconscionable.

2. Equitable Principles of Invalidity

Second, the UCC expressly incorporates supplementary equitable principles pertaining to validity and invalidity, to the extent not displaced by particular provisions of the UCC:

Unless displaced by the particular provisions of the [Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.²²⁷

Thus, the UCC specifically contemplates the possibility of invalidation of a contract, in whole or in part, under the doctrine of unconscionability, as well as under traditional equitable principles of invalidity, such as fraud.

E. Invalidity and the CISG

The CISG by contrast does not itself expressly provide for the possibility of invalidation of a contract, in whole or in part, under the doctrine of unconscionability or any other principle. This makes sense, at least to some extent, because the CISG does not apply to consumer transactions. That is, the CISG excludes from its sphere of application

²²⁴ U.C.C. § 2-302(1).

²²⁵ *See, e.g.*, *Williams v. Walker-Thomas Furniture*, 350 F.2d 445, 449-50 (D.C. Cir. 1965).

²²⁶ *See, e.g.*, *BMW Fin. Servs. V. Smoke Rise Corp.*, 486 S.E.2d 629, 630 (Ga. Ct. App. 1997) (ruling in the context of a lease transaction that unconscionability is evaluated by “determining whether ... the agreement is one which no sane man not operating under a delusion would make and ... no honest man would take advantage of.”) (internal quotation marks omitted).

²²⁷ U.C.C. § 1-103(b) (2011) (bracketed text in original).

contracts for the sale of goods “bought for personal, family or household use,” unless the seller did not know and ought not to have known the goods were purchased for the personal, family or household use.²²⁸ Article 2 of the UCC, on the other hand, applies to all sales of goods, including sales of goods to consumer buyers, and no matter the use for which the goods are purchased.²²⁹ Because the CISG applies by its terms only to non-consumer goods transactions, there is less need for paternalistic interference in the bargain struck by the parties.²³⁰

On the other hand, the CISG provides that “it is not concerned with (a) the validity of the contract or any of its provisions”²³¹ And the CISG further provides for questions concerning matters not settled by the CISG to be settled by the law applicable by virtue of the rules of private international law.²³² That could allow principles of domestic law relating to the validity of the contract or any of its provisions, such as the doctrine of fraud, to supplement the CISG.

Still, any such domestic doctrine of invalidity should be applied (if at all) only after the applicable provisions of the CISG, including Articles 6, 8 and 9, among others, have been considered and applied. But if a case for fraud can be made, then the CISG would not prevent a court from concluding that the contract is invalid, nor should it.

F. Balancing Freedom of Contract and Finality of the Writing

In short, both the CISG and the UCC afford the parties a very broad freedom of contract. The UCC creates some hurdles that must be cleared for effectiveness of certain clauses, especially those that purport to limit the seller’s potential liability. But the attentive practitioner can clear those hurdles by means of careful drafting, and in such a case, the statutory requirements under the UCC that must be satisfied in order to take advantage of the freedom of contract should not matter all that much.

On the other hand, there is greater risk under the CISG that the writing – including a writing that has been carefully drafted by both parties – will be disregarded in favor of some subjective intent, if one party is able to show to the court’s satisfaction that the claimed subjective intent was shared by the parties. When a written agreement is well drafted and complete, that aspect of the CISG should not play a significant role, as the written agreement itself ought to offer the very best evidence of the parties’ mutual subjective intent. But the risk (or opportunity, depending on the perspective of the party) exists nevertheless.

At the same time, while a Turkish commercial lawyer who values the certainty offered by a robust written agreement might legitimately be concerned about the

²²⁸ CISG, *supra* note 8, art. 2(a).

²²⁹ See U.C.C. § 2-102 (scope of application) and § 2-105 (definition of “goods”) (2011).

²³⁰ For an alternative viewpoint, see Michael B. Lopez, *Resurrecting the Public Good: Amending the Validity Exception in the United Nations Convention on Contracts for the International Sale of Goods for the 21st Century*, 10 J. BUS. & SEC. L. 133 (2010).

²³¹ CISG, *supra* note 8, art. 4.

²³² See *id.* art. 7(2).

uncertainty presented by Article 8 of the CISG, the ability to introduce extrinsic evidence under the CISG could cut in favor of a Turkish contracting party, especially when the memory of the U.S. contracting party is faulty. For example, if the parties use the U.S. contracting party's standard form as part of their written agreement and the standard form does not represent in a complete way the agreed-upon terms, then the CISG will generally allow the Turkish contracting party a better chance of showing that the form is inaccurate or incomplete, and that the parties actually shared some different intent.

All of the foregoing shows that a careful decision as to choice of law should be made for each international sales transaction that a Turkish buyer or seller enters into, a decision that should be based on the facts and circumstances of that transaction.

CONCLUSION

“Turkey is a democratic, secular, unitary, constitutional republic, with an ancient cultural heritage ...”²³³ and is an important friend to and trading partner with the United States. Even without a common legal framework in place, trade in goods between the two countries has been robust. Now that Turkey is a party to the CISG, predictability in the context of sales of goods should increase and transaction costs should decrease.

Moreover, Turkey's accession to the CISG is an important step toward ongoing harmonization of Turkey's laws relating to international trade and its integration into the international system of trade and commerce. It is an important contribution to the goal of removal of legal barriers to trade and promotion of the ongoing development of trade.

But accession is only the first step Turkey must take in order to fully realize the benefits of becoming a party to the CISG. Three additional things must occur for Turkey's accession to be meaningful and to bear fruit.

First, the Turkish bar must become familiar with the CISG and must become familiar with the differences between the CISG, on the one hand, and Turkish domestic sales law or other domestic sales laws, such as the United States' UCC, on the other hand. Only by becoming familiar with the CISG and the differences it offers will the Turkish bar be in a position to render thoughtful and effective advice regarding whether or not to exclude the CISG on a case-by-case basis.

Second, the Turkish bench and other decision-makers, such as arbitrators, must interpret and apply the CISG faithfully. Not only are Turkish courts required to do so by international law, but it is essential that they – and U.S. courts, for that matter – do so, to make their respective contributions to the continuing development of the legal framework necessary to facilitate efficient, predictable, and mutually beneficial trade and commerce.

Third, Turkish law schools must play their part in facilitating understanding of the CISG by preparing tomorrow's members of the bar to give their clients good advice and by preparing tomorrow's members of the bench to render good decisions, thus propelling

²³³ H.R. RES. 103, 112th Cong. (2011).

Turkey steadfastly along its path of meaningful engagement with the international system of trade and commerce.