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## IMPORTING UNIFORM SALES LAW INTO ARTICLE 2

*Steven Walt\**

Much of the first half-century of Article 2 of the Uniform Commercial Code (“Article 2”) was without a uniform international sales law. Although harmonization efforts at the international level produced the Uniform Law for the International Sales of Goods in 1964, the United States was not among the few countries that ratified the treaty.<sup>1</sup> Uniform sales law came too late and its adoption was too sparse to affect the selection of Article 2’s rules or their initial interpretation and application. Things changed with the increasingly wide adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG),<sup>2</sup> in effect since 1988, and its accompanying case law. Uniform sales law now has a salience that might affect domestic sales law. At a minimum, the CISG’s rules now can serve as a basis—whether as a template or as a foil—on which another attempt at revising Article 2 might be made.<sup>3</sup> Article 2 is unlikely to be revised anytime soon. Perhaps more realistically, the CISG’s wide adoption and deepening case law could affect the interpretation of some of current Article 2’s provisions in its second half-century.

The CISG’s potential impact on Article 2’s interpretation raises a question. Uniform sales law and Article 2 are distinct sources of law, each with its own scope. As a formal matter, the CISG’s provisions and accompanying case law therefore are not legal authority for construction of Article 2’s provisions. Nonetheless, CISG provisions sometimes could serve as elaborations or guides in Article 2’s interpretation, as persuasive authority. Should they do so? Both the CISG and Article 2 consist almost wholly of default rules, many of which are vague. In important instances these vague default rules are the same or similarly formulated. For instance, the CISG and Article 2 have the same default terms covering implied

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1. See JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 SALES CONVENTION 5-6 (H.M. Flechtner ed., 4<sup>th</sup> ed. 2009) [hereinafter “HONNOLD-FLECHTNER”]; John Honnold, *The Uniform Law for the International Sale of Goods: The Hague Convention of 1964*, 30 L. & Contemp. Prob. 326 (1965).

2. United Nations Convention on Contracts for the International Sale of Goods, Aug. 31, 1981, 1489 U.N.T.S. 3, 19 I.L.M. 668 (1980) [hereinafter CISG].

3. For early recommendations about the CISG’s role in the now-withdrawn amendments to Article 2, see Richard E. Speidel, *The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 NW. J. BUS. & L. 165 (1995); PEB Study Group, *Uniform Commercial Code, Article 2 Executive Summary*, 46 BUS. L. 1869 (1990) (describing the role of the CISG in the proposed revision to Article 2). For different accounts of the failed project to revise Article 2, see James J. White, *The Revision of Article 2: Commercial Sellers and Consumer Buyers*, BARRY UNIV. L. REV. (forthcoming 2018); William H. Henning, *Amending Article 2: What Went Wrong*, 11 DUQ. BUS. L.J. 131 (2009).

warranties,<sup>4</sup> delivery obligations,<sup>5</sup> inspection rights,<sup>6</sup> limitations on recoverable damages,<sup>7</sup> and the incorporation of trade usage.<sup>8</sup> Both formulate the standard allowing repudiation of a breached installment contract in a similar fashion.<sup>9</sup> Even the basic scope provision of the two sets of rules is the same.<sup>10</sup> It does not take a legal realist to speculate that a CISG default term might inform a court's construction of a similar Article 2 default term applied to a domestic sale, not as legal authority but as information that influences the court's construction. To date the influence is apparent only in isolated cases. However, as the distinction between domestic and international sales transactions becomes more blurred, the CISG at points might increasingly affect Article 2's interpretation and application.

The reliance on domestic sales law in interpreting CISG's provisions has been noticed and condemned by commentators and some courts. Seldom discussed is the converse possibility: the influence of uniform sales law on Article 2's interpretation. The importation of uniform law in interpreting Article 2 is different from importing domestic law in interpreting uniform law, and doesn't compel the same evaluation of the latter practice a priori. This paper briefly describes relevant (sparse) case law and evaluates the CISG's potential impact on domestic sales law. Part I gives the background against which the question of the CISG's potential influence on Article 2's construction arises. Part II identifies the influence found in the sparse relevant case law to date. Part III briefly argues that the CISG's importation into Article 2 might be a good thing with respect to certain default rules.

## I. TWO CONCEPTS OF AUTONOMOUS INTERPRETATION

The CISG does not allow interpretation of its substantive provisions based on notions rooted in domestic law. Article 7(1) directs that the CISG be interpreted to promote uniformity in its application.<sup>11</sup> For its part, the CISG's preamble declares that uniformity in international sales law promotes the development of international trade. The apparent thought is that diversity among national sales laws creates contracting costs that diminish the gains from international sales contracts. Courts and commentators understand Article 7(1)'s directive to require the CISG to be interpreted "autonomously," not nationalistically.<sup>12</sup> An autonomous interpretation

4. See CISG, *supra* note 2, at art. 35(2)(a); U.C.C. § 2-314(2)(c) (AM. LAW INST. & UNIF. LAW COMM'N 2017) (implied warranty of merchantability); CISG, *supra* note 2, at art. 35(2)(b); U.C.C. § 2-315 (AM. LAW INST. & UNIF. LAW COMM'N 2017) (implied warranty of fitness for a particular purpose).

5. See CISG, *supra* note 2, at art. 31(c); U.C.C. § 2-309(1) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

6. See CISG, *supra* note 2, at art. 58(3); U.C.C. § 2-513(1) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

7. See CISG, *supra* note 2, at art. 74; U.C.C. § 2-715(1) (AM. LAW INST. & UNIF. LAW COMM'N 2017) (limitation on recoverable consequential damages).

8. See CISG, *supra* note 2, at art. 9(2); U.C.C. § 1-303(d) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

9. See CISG, *supra* note 2, at art. 73(2); U.C.C. § 2-612(2) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

10. See CISG, *supra* note 2, at art. 1; U.C.C. §§ 2-101, 2-102. Compare CISG, *supra* note 2, at art. 3(2), with *Princess Cruises v. General Electric Co.*, 143 F.3d 828 (4<sup>th</sup> Cir. 1999) and *Bonebrake v. Cox*, 499 F.2d 951 (8<sup>th</sup> Cir. 1974). (the CISG's standard for determining whether hybrid contracts falls within its scope is the same as the judicially created standard the majority of courts use under Article 2).

11. See CISG, *supra* note 2, at art. 7(1).

12. See *Medical Marketing Int'l v. Int'l Medico Scientifica, S.R.L.*, 1999 U.S. Dist. LEXIS 7380, at \*2 (E.D. La., May 17, 1999) (fact finder has duty to take into account the international character of the CISG and the need to

requires interpreting CISG provisions independently of domestic law. It does not permit a court to rely on the meanings attached to particular terms given by domestic law. This holds even if a specific CISG provision and its domestic law counterpart are expressed in the same words.<sup>13</sup>

Commentators have noticed that some U.S. courts have construed certain CISG provisions in accordance with their UCC Article 2 counterparts. In doing this, courts rely on Article 2's provisions to "inform," "guide," or be "helpful" in their interpretation of the CISG's provisions.<sup>14</sup> Where Article 2 is imported into the CISG, the content of the CISG default is the same as that of its comparable Article 2 default. Many commentators attribute this reliance to a "homeward trend": the judicial tendency to be influenced by domestic law, usually a court's own, with which it is familiar.<sup>15</sup> According to them, the homeward trend is inconsistent with the demand that the CISG be interpreted autonomously.<sup>16</sup> As such, it is an improper importation of domestic law into an international treaty.

The homeward trend is a behavioral bias in favor of domestic law. The bias is inconsistent with autonomous interpretation only if that interpretation is understood in a particular way. There are two different ways of understanding the demand for an autonomous interpretation: strong and weak. The strong version directs that the CISG's provisions be interpreted independently of domestic law, so that their interpretation is different from comparable domestic law provisions. In that case the content of the CISG's default rules must not coincide with those of domestic sales law, and the interpretation can be criticized if it does so. The weak version of the demand does not require that the interpretation based on domestic law differ from that of the comparable CISG provision. It only requires that the interpretation not rely on domestic law to give content to CISG's provisions. An interpretation that invokes UCC Article 2 to aid in the interpretation of the CISG, or to confirm an

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promote uniformity in its application); FRANCO FERRARI, *CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: Applicability and Applications of the 1980 United Sales Convention* 12 (2d ed. 2012); PETER SCHLECHTRIEM & INGEBORG SCHWENZER: *COMMENTARY ON THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 16 (I. Schwenzler ed., 4th ed. 2016); Michael Bonell, *Interpretation of the Convention*, in *COMMENTARY ON THE INTERNATIONAL SALES LAW* 65, 75 (C.M. Bianca & M.J. Bonell eds., 1987).

13. See Franco Ferrari, *Homeward Trend: What, Why and Why Not*, in *CISG METHODOLOGY* 171, 175-176 (A. Janssen & O. Meyer eds., 2009) (collecting commentary to this effect).

14. See, e.g., *Delchi Carrier Spa v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2d Cir. 1995); *Chicago Prime Packers v. Northam Food Trading Co.*, 408 F.3d 894, 898 (7th Cir. 2005); *Martina E. Ricci Iamino SPA-Consortile Societa Agricola v. Trinity Fruit Sales Co.*, 30 F. Supp.3d 954, 965 (E.D. Cal. 2014) ("inform"); *Eldesouky v. Aziz*, 2015 U.S. Dist. LEXIS 45990, at \*2 (S.D.N.Y. April 8, 2015); *Raw Materials, Inc. v. Manfred Forberich GmbH & Co.*, 2004 U.S. Dist. LEXIS 12510 at \*3 (N.D. Ill., July 7, 2004) ("guide"); *Schmitz-Werke GmbH v. Rockland Indus., Inc.*, 37 Fed. Appx. 687, 691 (4th Cir. 2002) ("helpful"); *Calzaturificio Claudia S.n.c. v. Olivieri Footwear Ltd.*, 1998 WL 164824, at \*4 (S.D.N.Y. April 7, 1998) (U.C.C. may be used to interpret CISG provisions with similar language).

15. See, e.g., JOHN HONNOLD, *DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES: THE STUDIES, DELIBERATIONS AND DECISIONS THAT LED TO THE 1980 UNITED NATIONS CONVENTION WITH INTRODUCTIONS AND EXPLANATIONS* 1 (1989); Franco Ferrari, *Homeward Trend and Lex Forism Despite Uniform Sales Law*, 13 *Vindobona J. Int'l Comm. L. & Bus.* 15 (2009); Larry Di Matteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 *Nw. J. Int'l L. & Bus.* 299 (1999); Harry Flechtner, *Article 79 of the United Nations Convention on Contracts for the International Sale of Goods as Rorschach Test: The Homeward Trend and Exemption for Delivery of Non-Conforming Goods*, 19 *Pace Int'l L. Rev.* 29 (2007).

16. See HONNOLD-FLECHTNER, *supra* note 1.

interpretation supported independently, doesn't rely on the Article. That interpretation nonetheless can support the same default rule as is incorporated in Article 2.

It is not clear that the CISG endorses the strong version of the interpretive demand over the weak version. Certainly there is nothing in the CISG, or its character as uniform sales law, that makes the demand. Although the strong version requires that the interpretation differ from comparable domestic law provisions or notions, the requirement seems questionable. This is because not all of the CISG's defaults are set in a way different from defaults in all national sales law. At least some of them might well coincide with one or more particular domestic sales law. In fact, it would be surprising if all of the CISG's defaults were an amalgam of elements, none of which were a part of some domestic sales law. True, Article 79's exemption from liability arguably describes a standard independent of the law governing exemption in all national sales law (or at least those which have not enacted the CISG as their domestic sales law).<sup>17</sup> But the same probably is not true of all of the CISG's other vague default rules. For instance, it is hard to believe that the defaults setting the time in which performance is to occur or the place at which payment is due aren't shared by one or more national sales law.<sup>18</sup> If so, a default rule within the CISG might reflect a default rule in a particular sales law. In this case that domestic law might at least inform or confirm an interpretation of the CISG's comparable default, because it has the same content. This likely possibility supports the weak version of the CISG's demand for an autonomous interpretation.

U.S. courts generally receive mixed marks from many commentators on their interpretation of the CISG.<sup>19</sup> The distinction between strong and weak versions of the demand for an autonomous interpretation allows a different way of evaluating relevant case law. Some cases ignore both versions of the demand. *Eldesouky v. Aziz*<sup>20</sup> is a fairly recent example. There, after finding that the parties had waived application of the CISG by failing to raise it, the court applied Article 2 to the issue of recoverable damages. Apparently justifying its application of Article 2, the court noted that, in applying the CISG, courts look to Article 2 for guidance.<sup>21</sup> It concluded that whether the CISG or Article 2 therefore controlled was "likely immaterial."<sup>22</sup> Both the strong and weak demands for an autonomous interpretation condemn the court's way of proceeding. By wrongly assuming that the elements of recoverable

17. See Denis Tallon, *Article 79*, in COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* note 12, at 572, 574, (para. 1.3); HONNOLD-FLECHTNER, *supra* note 1, at 476.

18. See CISG, *supra* note 2, at art. 31(c) (delivery); see also CISG, *supra* note 2, at art. 58(1) (payment).

19. See, e.g., Joseph Lookofsky & Harry Flechtner, *Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?*, 9 VINDABONA J. INT'L, COMM. L & ARB. 199 (2005); Larry Di Matteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT'L. L. & BUS. 299 (2004); FERRARI, *supra* note 15; Eric C. Schneider, *Consequential Damages in the International Sale of Goods: Analysis of Two Decisions*, 16 U. PA. J. INT'L BUS. L. 615 (1995).

20. *Eldesouky v. Aziz*, 2015 U.S. Dist. LEXIS 45990, at \*9 (S.D.N.Y. Apr. 8, 2015).

21. *Id.* at \*8.

22. *Id.*; See *Maxxsonics USA Inc. v. Fengshun Peiying Electrical Acoustic Co., Ltd.*, No. 10 C 1174, 2012 U.S. Dist. LEXIS 37938 at \*9 (N.D. Ill., March 21, 2012) (to the same effect).

damages are the same under the CISG and Article 2,<sup>23</sup> the court fails to give an independent interpretation of relevant CISG provisions. This violates the strong demand for an autonomous interpretation. At the same time, the court also violates the weak demand, by relying on Article 2 to guide, rather than confirm or inform, an interpretation of relevant CISG provisions.

Another case that ignores both versions of the demand for an autonomous interpretation is *Orica Australia Pty. Ltd. v. Aston Evaporative Services, LLC*.<sup>24</sup> Finding that the seller's recovery of lost profits under Article 74 required proof of estimated loss, the court relied on U.S. case law: "[c]ourts applying this [i.e., Article 74] have often imported lost-profits standards similar to the standard of relevant state law in the United States."<sup>25</sup> That standard requires sufficient admissible evidence of proof of future damages to compute a fair approximation of loss. Because the court applied the same rule to the CISG, not a different one, the interpretation does not satisfy the strong version of the demand for an autonomous interpretation. But the reliance on U.S. domestic law, without an independent determination of Article 74's requirements (which might be the same as those under U.S. domestic law), also violates the weak demand. Had the court, on independent grounds, determined that Article 74's standard of proof of loss was the same as that under relevant state law, it would have met the weak demand for an autonomous interpretation.

Some tribunals assume that an autonomous interpretation must construe a CISG provision so that its content doesn't coincide with relevant domestic law. This is true only of the strong version, not the weak version, of the demand for an independent interpretation. The *Netherlands Arbitration Institute Case No. 2319*<sup>26</sup> appears to make this assumption. The arbitral tribunal there was required to interpret Article 35(2)(a)'s conformity requirement that the goods be fit for the ordinary purposes to which goods of the description are put.<sup>27</sup> To do so it had to identify the implicit standard of conformity operative in the provision. Reasoning that Article 35(2)(a)'s implicit standard of conformity must be independent of standards operative in domestic law, the tribunal rejected both a merchantability standard and an average quality standard in favor of a "reasonable quality" standard. It is questionable whether the latter describes a distinct standard, as it arguably is merely a different formulation of a merchantability standard of conformity.<sup>28</sup> But the content of the reasonable quality standard aside, the tribunal's assumption on which it construed Article 35(2)(a)'s implicit conformity standard is unsound. A uniform standard, the

23. See CLAYTON P. GILLETTE & STEVEN D. WALT, *THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: THEORY AND PRACTICE* 352-54, 356 (2d ed. 2016); Compare U.C.C. § 2-715(2) (AM. LAW INST. & UNIF. LAW COMM'N 2017), with CISG, *supra* note 2, at art. 74 (consequential damages) (unsettled whether Article 2 and the CISG allow recovery of the attorney fees and prejudgment interest).

24. See generally *Orica Austl. Pty. Ltd. v. Aston Evaporative Servs., LLC*, 2015 U.S. Dist. LEXIS 98248 (D. Colo. July 28, 2015).

25. See *id.* at \*23 (supporting citations omitted); See also Clayton P. Gillette & Steven D. Walt, *infra* note 28, at 348-351.

26. See generally *Case No. 2319*, Neth. Arb. Inst. (15 October 2002), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/021015n1.html>

27. *Id.*

28. See CLAYTON P. GILLETTE & STEVEN D. WALT, *SALES LAW: DOMESTIC AND INTERNATIONAL* 374-375 (3d ed. 2016).

tribunal thought, must be independent of standards found in national sales laws.<sup>29</sup> This misunderstands the interpretation of CISG provisions. If a particular standard has independent merit as an interpretation of Article 35(2)(a), the fact that the standard is embedded in a domestic sales law is not disqualifying.

## II. IMPORTING THE CISG INTO ARTICLE 2'S INTERPRETATION

Article 2 does not prevent uniform sales law from informing interpretations of its provisions. It does not limit the role of the CISG and its case law in Article 2's interpretation in the way the CISG limits reliance on domestic law. The CISG's declared goal is to make international sales law uniform, and it directs that its construction also be uniform, taking into account the CISG's international character.<sup>30</sup> Where the CISG covers an issue without expressly resolving it, it directs that general principles underlying the CISG be relied on to resolve the issue.<sup>31</sup> Reliance on domestic sales law impairs the CISG's uniformity, and domestic law is unlikely to reflect the general principles underlying the CISG. For both reasons, the CISG restricts the role domestic sales law can play in interpretation of its provisions. As a result, domestic law is unlikely to serve even as merely persuasive authority.

By contrast, Article 2 does not similarly restrict the reliance on non-domestic law, including uniform sales law. UCC 1-103(a) counts among its purposes more than just uniformity in the sales law of the forty-nine states that have enacted Article 2.<sup>32</sup> Supplying efficient contract terms also arguably is among the UCC's purposes.<sup>33</sup> Uniformity in law can conflict with its efficiency. Because harmonization of law is not the UCC's sole purpose, a construction of an Article 2 provision that promotes uniformity in result across enacting states could produce an inefficient rule. For example, 2-509(3)'s risk of loss rule with respect to a nonmerchant seller shifts risk on tender of the goods.<sup>34</sup> Construing the relevant period in which tender occurs as the beginning of the tender period, although arguably inefficient, could convince courts. Conversely, a construction that produces an efficient rule might produce a

29. See Neth. Arb. Inst., *supra* note 26, at para. 108; see also BGH April 3, 1996 (Germany), VIII ZR 51/95, <http://cisgw3.law.pace.edu/cases/960403g1.html> ("cobalt sulfate" case). In the "cobalt sulfate" case the German Supreme Court found that the CISG rejected then-German law under which an *aliud* delivery constitutes non-delivery. It reasoned that the CISG's notion of non-delivery under Article 49(1)(b), which allows the buyer to avoid the contract in the case of non-delivery if the seller does not deliver within the *Nachfrist* period set by the buyer, must differ from that of domestic law: "The CISG is different from German domestic law, whose provisions and special principles are, as a matter of principle, inapplicable for the interpretation of the CISG (Art. 7 CISG). The Court does not need to resolve whether, in the event of a blatant divergence from the contractual condition, a non-delivery [with]in the meaning of Art. 49(1)(b) can arise." *Id.* at 2.b). The Court wrongly assumes that the CISG's notion of non-delivery in Article 49(1)(b) must differ from that of domestic law, including German law. Although its finding might be correct, the CISG does not support the supposition on which the Court relies.

30. See CISG, *supra* note 2, at preamble, art. 7(1).

31. See CISG, *supra* note 2, at preamble, art. 7(2). The provision allows resort domestic law only where general principles underlying the CISG do not resolve the matter ("in conformity with the law applicable by virtue of the rules of private international law").

32. Cf. U.C.C. § 1-103(a)(3) (AM. LAW INST. & UNIF. LAW COMM'N 2017) (U.C.C.'s purpose to make uniform the law among the various jurisdiction).

33. Cf. U.C.C. § 1-103(a)(2) (AM. LAW INST. & UNIF. LAW COMM'N 2017) (U.C.C.'s purpose to expand commercial practices custom, usage and the parties' agreement).

34. See U.C.C. § 2-509(3) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

nonuniform result across states. Even if the UCC's sole purpose were the promotion of uniformity in law, that purpose would not prevent uniform sales law from properly informing the interpretation of specific Article 2 provisions. This is because, unlike the CISG, Article 2 does not constrain the method for interpreting its provisions or limit the sources used in that interpretation. Thus, reliance on the CISG might promote a uniform interpretation of specific provisions in Article 2.

In principle, the ways in which a court could rely on the CISG and its case law are broad. Even as merely persuasive authority, this reliance might range from direct support, additional support, confirmation of a result reached independently, information about a workable possible rule, or a reflection of the rationale underlying comparable provisions.

To date there is sparse case law under Article 2 that relies on the CISG for more than material for a "cf." citation. Several recent bankruptcy cases show more reliance, however. In different ways, they use particular CISG provisions to support conclusions reached on other grounds. *In re Colin*<sup>35</sup> is a bankruptcy case in which neither Article 2 nor the CISG was at issue. The court had to determine in a debtor's bankruptcy case whether a debt owed to his ex-wife was a domestic support obligation, which is non-dischargeable, or a property settlement, which is dischargeable. The debt owed resulted from a settlement agreement between the debtor and his ex-wife as part of their divorce. Noting that the bankruptcy discharge is a matter of federal law, the court determined that the parol evidence rule does not apply to settlement agreements for purposes of determining whether an obligation created there is a domestic support obligation. For additional support it relied on the CISG's rejection of the parol evidence rule as analogous treatment:<sup>36</sup> federal treaty law rejects the parol evidence rule as inapplicable to sales of goods contracts, as does federal bankruptcy law with respect to a separation agreement.

Another bankruptcy case, *In re Escalera Resources Co.*,<sup>37</sup> uses the CISG to support a conclusion reached on independent grounds. The question there was whether a claim for the sale of electricity was allowable as an administrative expense under Bankruptcy Code § 503(b)(9). Section 503(b)(9) gives an administrative expense in the amount of the value of goods delivered within twenty days of the debtor's bankruptcy, that have been sold to the debtor in the ordinary course of its business.<sup>38</sup> Noting that the Bankruptcy Code leaves the term "goods" undefined, the court looked to Article 2's definition of the term.<sup>39</sup> After concluding that the electricity is a good under UCC 2-105(2), the court surveyed different federal laws governing goods. The court found that all "confirmed" the treatment of electricity as a good.<sup>40</sup> Unlike *In re Colin*, which used for support the CISG as analogous law, *In*

35. 546 B.R. 455 (Bankr. M.D. Ala. 2016), *rev'd on other grounds*, *Edwards v. Colin*, 2017 U.S. Dist. LEXIS 68834 (M.D. Ala. 2017).

36. *See id.* at 462 (citing *MCC Marble Ceramic Center Inc. v. Ceramica Nuova d'Agostino, SpA*, 144 F.3d 1384 (11th Cir. 1998) for the proposition).

37. 563 B.R. 336 (Bankr. D. Colo. 2017).

38. *See* 11 U.S.C. § 503(b)(9) (2012).

39. *See Escalera Resources*, 563 B.R. at 354 (UCC § 2-105(1)) (discussing *In re Erving Indus., Inc.*, 432 B.R. 354, 364–65 (Bankr. D. Mass. 2010)).

40. *Id.* at 360.

*re Escalera Resources* uses the CISG to verify its interpretation. Article 2(f) of the CISG makes the CISG inapplicable to sales of electricity. The court reasoned that the Article's exclusion assumes that electricity is a good. According to the court, its exclusion is based instead on the particular nature of electricity as a good.<sup>41</sup>

The court reads more into Article 2(f)'s exclusion than the provision will bear. Article 2's structure does not support the assumption that the CISG considers electricity to be a good. The Article excludes different specified sorts of sales, including a sale of electricity. Some of these sales, such as sales of investment securities, clearly are not sale of goods.<sup>42</sup> Other excluded sales clearly are sales of goods.<sup>43</sup> Electricity does not easily fall into either category. As a result, Article 2(f) might make the CISG inapplicable to sales of electricity either because electricity is not a good or because it is a good whose particular nature warrants exclusion from the CISG's scope. As far as Article 2(f)'s exclusion goes, electricity might be a good or a nongood. As with several other provisions of the CISG, Article 2(f)'s agnosticism reflects the decision of the CISG's drafters to leave a potentially controversial question unresolved by the CISG.<sup>44</sup>

To support its construction of Article 2(f), the court relies on the UNCITRAL Secretariat's explanatory note to the effect that the exclusion reflects the special nature of electricity as a good.<sup>45</sup> The note goes past Article 2(f)'s language. It also arguably is inconsistent with the UNCITRAL Secretariat's Commentary on a late draft of the CISG, which explains that the exclusion reflects the understanding in many legal systems that electricity is not a good.<sup>46</sup> Still, although the CISG's text does not confirm that electricity is a good, it is consistent with that view. *Escalera Resources* better supports the weaker proposition that electricity is a good under Article 2, which is not in conflict with its treatment under Article 2(f) of the CISG.

### III. EVALUATING IMPORTATION THROUGH INTERPRETATION

Should courts rely on the CISG and its case law to interpret Article 2's provisions? Even if there is no legal bar to doing so, is construing specific provisions of Article 2 in light of comparable CISG provisions a good idea? This Part briefly argues that, under specified conditions, the CISG usefully could inform interpretations of particular sorts of Article 2's default rules. Where the CISG's

41. See *id.* at 367-368.

42. See CISG, *supra* note 2, at art. 2(d).

43. See CISG, *supra* note 2, at art. 2(a), (e).

44. The CISG's treatment of irrevocable offers is another instance of the same phenomenon. Article 16(a)(1)'s ambiguous language specifying when an offer is irrevocable apparently reflects a political compromise to retain the ambiguity; see Gyula Eorsi, *A Propos for the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 AM. J. COMP. L. 333, 348-349 (1983); GILLETTE & WALT, *supra* note 28, at 94.

45. See *Escalera Resources*, 563 B.R. at 368; see also UNCITRAL Secretariat, Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods, para. 10, U.N. Doc V.89-53886 (June 1989), <https://www.cisg.law.pace.edu/cisg/text/p23.html>.

46. See Commentary on the Draft Convention on Contracts for the International Sale of Goods Article 2, para. 10, A/CONF.97/5 (March 14, 1979), reprinted in Official Records 14-66 (A/CONF.97/1; Sales No. e.82 V.5) ("This paragraph excludes sales of electricity from the scope of the Convention on the ground that in many legal systems electricity is not considered to be goods."). UNCITRAL has indicated that the Secretariat's explanatory note is not an official commentary on the CISG's provisions; see UNCITRAL Secretariat, *supra* note 45 (heading material).

comparable defaults describe vague standards, the CISG's relevant case law sometimes can clarify the content of these standards. The benefit of increased clarity is likely to be significant in both domestic and international sales transactions. Although incorporation through interpretation risks supplying inefficient default rules for domestic transactions, interpretive techniques or contract planning can reduce them. Overall, there are likely interpretive gains in importing the CISG or its case law in limited circumstances to construe certain Article 2's provisions.

To begin, the case for importing the CISG into Article 2's interpretation is limited to vague Article 2's default rules. Because crisp defaults have a precise content, they do not require clarification by other sources, including the CISG. In addition, interpretation of a CISG provision that is inconsistent with an Article 2 provision, or authoritative case law, will not supply information that could usefully inform an interpretation of the Article 2 provision. Similarly, a CISG provision that has no counterpart in Article 2 cannot serve as a source useful to Article 2's interpretation. For instance, the construction of a buyer's remedy of price reduction under the CISG will not inform an interpretation of the buyer's right to deduct damages from the contract price.<sup>47</sup> For the same reason, an interpretation of the CISG's treatment of an offer-varying acceptance will not be useful to Article 2 handling of the same phenomenon.<sup>48</sup> The case for importation in interpretation applies to comparable default rules in the CISG and Article 2.<sup>49</sup> Although it might also apply to vague terms embedded in comparable mandatory rules, the argument below is made with respect to comparable vague default rules. The limitation still leaves a significant number of provisions to which the CISG and its case law are potentially useful. These include defaults covering implied warranties,<sup>50</sup> delivery obligations,<sup>51</sup> inspection rights,<sup>52</sup> limitations on recoverable damages,<sup>53</sup> the incorporation of trade usage,<sup>54</sup> and the standard governing repudiation of a breached installment contract.<sup>55</sup>

The argument for importation is that the CISG and its case law can help reduce the vagueness in Article 2's vague defaults. Although case law construing Article 2 can do so too, the CISG and its decisional law are an additional useful source of information that can help make Article 2's defaults more precise. This promotes uniformity in the application of these defaults. Because the CISG's defaults do not have a determinate content, they are malleable in the hands of courts applying them. Case law under the CISG over time therefore might produce optimal defaults—or at

47. See CISG, *supra* note 2, at art. 50; UCC § 2-717 (AM. LAW INST. & UNIF. LAW COMM'N 2017).

48. See CISG, *supra* note 2, at art. 19; UCC § 2-207 (AM. LAW INST. & UNIF. LAW COMM'N 2017).

49. See, e.g., *Perine Int'l, Inc., v. Bedford Clothiers, Inc.*, 40 N.Y.S.3d 27 (N.Y. Sup. Ct. App. Div., 2016) (reasonable time in which to reject the goods under UCC § 2-607(3) compared to reasonable time in which to avoid the contract under CISG Art. 49(2)(a)).

50. See CISG, *supra* note 2, at art. 35(2)(a); U.C.C. § 2-314(2)(c) (AM. LAW INST. & UNIF. LAW COMM'N 2017) (implied warranty of merchantability); CISG, *supra* note 2, art. 35(2)(b); U.C.C. § 2-315 (AM. LAW INST. & UNIF. LAW COMM'N 2012) (implied warranty of fitness for a particular purpose).

51. See CISG, *supra* note 2, at art. 31(c); UCC § 2-309(1) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

52. See CISG, *supra* note 2, at art. 58(3); UCC § 2-513(1) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

53. See CISG, *supra* note 2, at art. 74; UCC § 2-715(1) (AM. LAW INST. & UNIF. LAW COMM'N 2017) (limitation on recoverable consequential damages).

54. See CISG, *supra* note 2, at art. 9(2); UCC § 1-303(d) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

55. See CISG, *supra* note 2, at art. 73(2); UCC § 2-612(2) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

least improve their efficiency. For both reasons of uniformity and efficiency, construction of the CISG's defaults should inform the interpretation of comparable provisions of Article 2.

The argument makes four assumptions: (1) the sales contracts to which the CISG and its case law govern are primarily between legally sophisticated and knowledgeable parties; (2) parties to these contracts enjoy significant gains from the clarification of vague default rules that apply to their contracts; (3) the CISG supplies specific default rules that are limited to only certain aspects of sale of goods contracts; and (4) the CISG's defaults, as construed by relevant case law, over time likely reflect the preferences and commercial norms of parties who engage in sales of goods contracts. These assumptions are defended and elaborated on below, in order of their listing.

(1) The parties to sales contracts governed by the CISG likely are knowledgeable commercial parties. This is because the CISG does not apply to a sale of goods bought for consumer purposes.<sup>56</sup> To be sure, even commercial parties might not be legally sophisticated. They and their legal counsel might be unaware that the CISG applies to their sales contracts. Although the case law reveals instances in which one or both parties fail to realize that the CISG controls the contract,<sup>57</sup> the phenomenon should disappear as trading parties become more informed about uniform sales law. Legally sophisticated parties will leave their contract subject to the CISG's defaults unless opting out of them promises a more valuable contract.

The incorporation in Article 2 of the CISG's defaults might appear to create a problem of mismatch. Article 2's provisions apply generally to both sophisticated and unsophisticated parties, with few exceptions. If the CISG's defaults apply primarily between legally sophisticated parties, its defaults might be inappropriate to inform Article 2's defaults. But the mismatch problem is not a serious one. Aside from a few merchant- or consumer-specific provisions,<sup>58</sup> most of Article 2's provisions apply across the full range of buyers and sellers. For better or worse, Article 2 generally leaves consumer protection to other laws. Thus, in the main Article 2 assumes that its defaults are appropriate for all contracting parties, including well informed ones.

(2) Contracting parties whose contracts are subject to vague defaults will be uncertain about how the defaults will be enforced. The opacity in these terms also allows parties to game their performance of the contract, particularly if a party is confident that its conduct will not be found *ex post* to be in breach.<sup>59</sup> For both reasons, vague defaults create costs most parties will prefer not to bear.<sup>60</sup> Parties will

56. See CISG, *supra* note 2, at art. 2(a).

57. See, e.g., *GPL Treatment, Ltd. v. Louisiana-Pacific Corp.*, 894 P.2d 470, n.4 (Or. Ct. App. 1995); *Tribunale di Padova (Italy)*, 25 February 2004 (SO. M. AGRI s.a.s. di Ardina Alessandro & C. v. Erzeugerorganisation Marchfeldgemüse GmbH & Co. KG), available at <http://cisgw3.law.pace.edu/cases040225i3.html>.

58. See, e.g., U.C.C. §§ 2-205, 2-207(2), 2-314(2), 2-509(3), 2-719(3) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

59. See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *Yale L. J.* 541, 551 n.17 (2003).

60. For the role of contractually selected vague terms in improving contractual performance, see Albert Choi & George Triantis, *Completing Contracts in the Shadow of Costly Verification*, 37 *J. LEGAL STUD.* 503, 509 (2008); George G. Triantis & Robert E. Scott, *Anticipating Litigation in Contract Design*, 115 *YALE L. J.* 814, 814 (2006).

contract around these defaults or make them more precise if doing is cost-justified for them. Judicial interpretation of CISG provisions that state vague default rules is an alternative way of making these rules more precise. It can reduce the uncertainty in the enforcement of these provisions, particularly when followed in a line of cases. This saves the parties the cost of contracting around or including provisions in their contract that clarify vague defaults. Although some parties still might prefer to opt out of these clarified default rules, many others might find that the clarified defaults suit their contracts. For example, Article 39(1) requires the buyer to give notice of nonconformities in the goods within a reasonable time after he has discovered or ought to have discovered them. Decisional law might declare that a one-month period, as an average, is a reasonable time in which notice must be given.<sup>61</sup> The declaration reduces the uncertainty in the Article's application by restricting the range of subsequent judicial interpretations of the Article. A court interpreting a comparable provision of Article 2<sup>62</sup> could use relevant CISG case law to reduce uncertainty around the provision left by existing case law under Article 2.

Cross-border sales contracts often will have a high value, so that clarification of vague default rules to which the contracts are subject potentially produces significant benefits for the contracting parties. The contract planning of sellers and buyers considering similar contracts also is made easier. The reduction in uncertainty brought by judicial interpretation allows potential transactors to better price default terms and compare them to an array of alternative terms. As important, the interpretation of the CISG's defaults occurs across national courts and arbitral tribunals. Decentralized interpretive tribunals produce a large supply of interpretations of the same provisions. Although this risks the disparate construction of the same provision, decentralization also makes possible a convergence in result over time.

(3) The CISG limits the transactions to which it applies.<sup>63</sup> Its default rules govern other sorts of transactions, if at all, only by analogy. Judicial construction of these rules therefore does not risk elaborating default terms that are unsuitable for service contracts, leases, licensing or the sale of intellectual property. In addition, the CISG applies only to certain aspects of sales contracts within its scope. It does not regulate issues of validity, title in the contract goods or the rights of third parties with respect to them.<sup>64</sup> These are potentially controversial issues addressed by Article 2 or other domestic law.

The limitations on the CISG's scope avoids problems of mismatch with Article 2. Because both the CISG and Article 2 govern sale of goods contracts, the two cover the same sort of transactions. In addition, the CISG's restricted scope isolates its provisions from those often found in sales laws with broader scope. This helps courts and parties compare the CISG and Article 2s' counterpart provisions by

61. See BGH Nov. 3, 1999 (Germany), VIII ZR 51/95, <http://cisgw3.law.pace.edu/cases/991103g1.html>; LG Oct. 15, 2009, 39 O 31/09 KfH, <http://cisgw3.law.pace.edu/cases/091015g1.html>. The trend in relevant CISG case law has rejected a firm time period in favor of a flexible one; see also, GILLETTE & WALT, *supra* note 28, at 168-169.

62. See U.C.C. § 2-607(3)(a) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

63. See CISG, *supra* note 2, at art. 1(1).

64. See CISG, *supra* note 2, at art. 4(a), (b).

excluding transactions that could make their interpretation and application otherwise more difficult. It allows them to more reliably gauge the impact of relying on an interpretation of a CISG provision to inform its Article 2 counterpart. For example, isolation of sets of defaults makes it easier to estimate the effect of each set of terms on the contract price without the “noise” of other terms. Easing the burden of comparing of CISG and Article 2’s provisions can improve the quality of the interpretation of Article 2’s provisions.

(4) The argument above assumes that over time judicial interpretations of the CISG’s vague default rules likely reflect the preferences and commercial norms of contracting parties. Whether these interpretations in fact will do so depends on the particular mechanism that produces them, including the motivations of tribunals and choices of nations that have enacted the CISG.<sup>65</sup> The mechanism may or may not produce optimal default rules. Although arbitral tribunals can be expected to be responsive to arbitrating parties’ desires, taking into account relevant commercial norms, the incentives of courts may be different. A court that decides few CISG cases might incur few reputational or other costs in construing a CISG default without seriously inquiring into the commercial norms that inform its content. Thus, the argument for importation does not demonstrate that the CISG’s default rules, as clarified by judicial interpretation, are optimal. However, even judicial interpretations that produce suboptimal default rules still might clarify the interpretation of comparable Article 2 default rules that case law leaves indeterminate in content.

The fourth assumption is open to a possible objection when used to justify importing interpretation of the CISG into Article 2. The assumption supposes that over time interpretation of the CISG’s defaults will reflect the preferences and commercial norms of contracting parties. The CISG governs cross-border transactions between parties whose commercial practices are subject to transnational norms. But there is no reason to believe that these commercial norms are the same as the norms that govern parties in domestic sales or are otherwise appropriate for these sales. Even if judicial interpretation of the CISG’s norms produce optimal defaults for cross-border sales, the defaults might not be optimal for domestic sales. This problem of a potential mismatch is on balance not serious, for two reasons. First, the distinction between cross-border and domestic sales is artificial in the CISG’s case. For purposes of the CISG’s application, a sale is international if the seller and buyer have their places of business in different nations that have enacted the CISG.<sup>66</sup> The CISG therefore can apply to a sales contract even if its negotiation, conclusion and performance all take place within a single nation. However, where the parties have their places of business in the same nation that has enacted the CISG, the CISG is inapplicable even if all aspects of the sales contract are international in a recognizable sense.<sup>67</sup> There are good reasons for the CISG and other UNICTRAL

65. For the possible role of contractual choice of law and jurisdictional competition in producing optimal rules, see Erin O’Hara O’Connor, *The Role of the CISG in Promoting Healthy Jurisdictional Competition for Contract Law*, 21 UNIF. L. REV. 41 (2016).

66. See CISG, *supra* note 2, at art. 1(1)(a); *cf.* CISG, *supra* note 2, at art. 1(1)(b) (CISG applies to contracts for the international sale of goods where rules of private international law select the law of a contracting state).

67. See CISG, *supra* note 2, art. 1(1)(a).

model laws to rely on the parties' place of business as a criterion of internationality. But the criterion does not track closely the distinction between cross-border and domestic commercial norms.

Second, the argument for importation can acknowledge any difference between the sorts of commercial norms. Article 2 is not limited in application to domestic sales contracts, and its vague defaults are applicable to both domestic and cross-border sales.<sup>68</sup> Accordingly, courts applying Article 2's defaults need not ignore the distinction between cross-border and domestic commercial norms. A court considering importing an interpretation of the CISG into Article 2 could take into account the international nature of certain norms in that interpretation. For example, a trade usage recognized under the CISG, which requires that the usage be international,<sup>69</sup> might not be a practice followed domestically.<sup>70</sup> The incorporation of transnational commercial norms into a default term of domestic law need not be automatic and indiscriminating.

The case for importation assumes that U.S. courts will be the primary users of the interpretive strategy it recommends. But foreign tribunals sometimes will have to apply Article 2 to a sales contract too. A worry might be that their construction of Article 2's vague defaults through the lens of the CISG could distort their interpretation. Assume that a foreign court's conflict of laws rules select Article 2 as applicable to a sales contract. Also assume that the court is required to construe a vague Article 2 default that has a CISG counterpart. The concern is that the court's familiarity with the CISG provision and relevant case law might lead it to misconstrue the meaning of the Article 2 default. The feared phenomenon is the domestic law analogue of the homeward trend in the CISG's interpretation: the judicial tendency to misconstrue Article 2 by relying on the CISG's law notions.

Although possible, reliance on the CISG and its case law is unlikely to distort interpretation of Article 2's default rules. Instead, the reliance likely increases the precision of Article 2's defaults. This is because foreign case law interpreting CISG's defaults provides information to prospective contracting parties that reduces their uncertainty about how the defaults will be enforced. When that case law informs the construction of Article 2's counterpart provisions too, it does the same with respect to these provisions. The risk that the CISG's interpretation will distort the interpretation of Article 2 is real where an Article 2 provision conflicts with, or lacks a counterpart in, the CISG.<sup>71</sup> In these instances an interpretation of the CISG provision is unlikely to accurately construe the meaning of the Article 2 provision. This is not the case with a construction of Article 2's vague defaults. Because the CISG and Article 2's vague defaults are comparable, there is no reason to suppose that a foreign court's interpretation of CISG provision fall outside the range of plausible constructions of Article 2's counterparts. In addition, contracting parties concerned about the tendency of a foreign court to distort interpretation of Article 2

68. See U.C.C. § 2-102 (AM. LAW INST. & UNIF. LAW COMM'N 2017).

69. See CISG, *supra* note 2, at art. 9(2) (“[A] usage...which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the trade concerned.”).

70. See U.C.C. § 1-303(c) (AM. LAW INST. & UNIF. LAW COMM'N 2017) (“[A]ny practice...having such regularity of observance in a place, vocation or trade...”).

71. See *supra* note 2, and accompanying text.

can avoid the risk easily. They can include a forum selection clause in their contracts that assures that a dispute under a contract will not be litigated in a foreign forum.

### **CONCLUSION**

The judicial tendency to import domestic law notions into the CISG's interpretation has occupied case law and commentary in the CISG's first half-century. The converse possibility remains open in Article 2's second half-century: importing interpretations of uniform sale law into interpretations of comparable default provisions of Article 2. Arguments against a "homeward trend" in the CISG's interpretation do not carry over when the CISG and its case law is used to interpret domestic law. There is no case for importing uniform sales law where Article 2 and its case law leave no gap or resolve uncertainty in the application of Article 2's provisions. However, case law under Article 2 leaves a number of its vague defaults uncertain in application. Comparable defaults in the CISG and its case law, under certain conditions, could help clarify the content of these Article 2 defaults. It could provide a more determinate content to Article 2's defaults. There is nothing objectionable, and something useful, about relying on interpretations of uniform sales law to inform the interpretation of comparable defaults in Article 2.