

CISG Declarations and Conflict of Laws: A Proposed Approach to Article 96

Thesis for MSt in Legal Research

Joachim Beno Steinberg
St Catherine's College, Oxford

Abstract

The United Nations Convention on Contracts for the International Sale of Goods ('CISG') is one of the most widely accepted and important international private law agreements. It attempts to eliminate written formalities for contracting under its 'freedom of form' provisions, yet it simultaneously allows signatory states to take a reservation, and declare that they do not accept the provisions of the CISG which eliminate these formalities. This leaves open a doctrinal puzzle: how should courts rule when there is a dispute over the existence of a valid contract, there has not been an effective choice of law, and one party is from a declaring state? While most courts have approached this problem through the methodology of private international law, this thesis proposes that the better reading of the CISG will ordinarily favour applying the reservation and using the formalities rules of the reserving state.

Table of Contents

Introduction.....	1
The Problem With Article 96.....	9
The Structure of the CISG and the Freedom of Form Principle	9
Article 7: Internal and External Gaps	14
The Majority Approach: Treat Disputes over the Applicability of Article 96 as External Gaps	17
The Majority Approach.....	17
Private International Law Produces Arbitrary Results.....	20
The Majority Approach’s Resort to Conflicts Leads to Forum Shopping	27
The Majority Approach Fails to Preserve Uniformity	30
The Minority Approach: Treat These Disputes as Internal Gaps.....	36
Existing Case Law and Examples in Practice	36
Disputes Over the Applicability of Article 96 are Internal Gaps.....	42
Article 96 Has Both a Positive and Negative Effect	48
Article 7 and General Principles	57
A General Theory of Reservations.....	66
The Possibility of Fraud.....	71
Conclusion	74

Table of Authorities

Cases

Dulces Luisi v. Seoul International, 30 November 1998.....	62
Tzortzis v. Monark Line A/B 1 WLR 406.....	29
Al Palazzo S.r.l.v. v. Bernardaud de Limoges S.A. Tribunale di Rimini 26 November 2002	29
Asante Technologies Inc v PMC-Sierra Inc	72
Conservas la Costena SA de CV v Lanis San Luis SA & Agro- industrial Santa Adela SA 29 April 1996	38, 74
Delchi Carrier SpA v. Rotorex Corp.,.....	55
Ecofrut c Dole France, Cour de Cassation no. 10-30912	39
Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd	75
Forestal Guarani S.A. v. Daros International, Inc.,.....	passim
Impuls ID International SL v. Psion-Teklogix Inc	72
J.T. Schuermans v. Boomsma Distilleerderij / Wijnkoperij BV.....	18
Milliken v. Pratt, 125 Mass. 374 (1878)	23
Quilmes Combustibles v Vigan SA	3, 19
Rheinland Versicherungen v. Altarex , Tribunale de Vigevano 12 July 2000	35
Tribunal of International Commercial Arbitration (Russian Federation) 10 June 1999....	38, 74
Vital Berry Marketing v. Dira-Frost	39
Zhejiang Shaoxing Yongli Printing and Dyeing Co Ltd v Microflock Textile Group Corporation.....	39

Statutes, Treaties, and Regulations

United Nations Convention for the International Sale of Goods	passim
French Civil Code	76
New York General Obligations Law	29
Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6 (‘Rome Regulation’ or ‘Rome I’)	22, 23, 24
Uniform Commercial Code.....	33, 35, 61

I. Introduction

The United Nations Convention for the International Sale of Goods ('CISG')¹ is often referred to as a 'jigsaw puzzle,' albeit one with some missing pieces.² This thesis addresses one of those missing pieces. While the CISG eliminates requirements for the form of a contract, under what is sometimes called the 'freedom of form principle',³ it simultaneously allows signatory states to make a reservation⁴ under Article 96⁵ and declares that the elimination of form requirements does not apply to them. The freedom of form principle is established by Articles 11 and 29 of the CISG, which states that '[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form',⁶ and that modifications and terminations to a contract do not require writing.⁷ Article 96 permits a state whose law requires contracts to be in writing (or evidenced by writing) to declare that that 'in accordance with Article 12' it will not be bound by the provisions of Articles 11 or 29.⁸

¹ The United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988), 1489 UNTS 3 (CISG).

² See eg Benjamin Hayward, 'The CISG in Australia: The Jigsaw Puzzle Missing a Piece' (2010) 14 *Vindobona J Intl Com L & Arb* 193; Errol P Mendes, 'The U.N. Sales Convention & U.S.-Canada Transactions; Enticing the World's Largest Trading Bloc to Do Business Under a Global Sales Law' (1988) 8 *JL & Com* 109 (referring to the creation of international sales law generally as a jigsaw puzzle).

³ See eg Ulrich G Schroeter, 'The Cross-Border Freedom of Form Principle Under Reservation: The Role of Articles 12 and 96 CISG in Theory and Practice' *JL & Com* (forthcoming) <<http://ssrn.com/abstract=2169834>> accessed 26 December 2013. Pinpoint citations to this article refer to the online version. Note also that throughout this thesis access dates refer to the last time the availability of online resources was confirmed.

⁴ The structure of the CISG and technical aspects of reservations are within this thesis at text to nn 51–74.

⁵ Different sources disagree on whether 'article' should be capitalized when discussing discrete provisions of the CISG. This thesis capitalizes the word unless quoting a source that does not do so.

⁶ Art 11 CISG.

⁷ Art 29 CISG.

⁸ Art 96 CISG. This article also excludes Part II of the CISG, which addresses contract formation, but this thesis focuses on the basic issue of written contracts, because that issue subsumes most of the issues of contract formation, as reflected in the case law.

While the CISG thus explicitly permits a state to reject the Convention's freedom of form principle, the effect of a state doing so is not clear.⁹ Scholars and courts have both disagreed as to whether the fact that a state has taken a reservation creates a 'positive effect' or merely a negative one, and what the consequences of these effects would be.¹⁰ In particular, when confronted with disputes over contracts made between parties from different states, where one state, but not the other, has made a reservation pursuant to Article 96, courts have not had a consistent approach. To the extent that a consensus has emerged, courts have tended to use what is sometimes termed 'the majority approach.'¹¹ Under this view, a dispute over the applicability of an Article 96 reservation is treated as an 'external gap,'¹² and is resolved by reference to the principles of private international law.

In the view of this thesis, that approach is incorrect. Rather than use conflict of laws analysis to address this problem, courts should treat disputes over the applicability of Article 96 reservations as internal gaps. In other words, the best reading of Article 96, especially given its interaction with Article 12, supports a reading of the CISG that requires courts, in the absence of an effective choice, to apply the formalities rules of reserving states. In place of the majority approach, this thesis proposes a relatively bright-line rule: absent an effective choice of law,¹³ where either the home state of the buyer or the home state of the seller has made a reservation under Article 96, or when the law governing the contract was that of a

⁹ Schroeter (n 3).

¹⁰ *ibid.*

¹¹ *ibid*; Peter Winship, 'Harmonizing Formal Requirements for Cross-Border Sales Contracts' Intl RL (2012) available at < <http://www.qscience.com/doi/abs/10.5339/irl.2012.6> > accessed 5 January 2014.

¹² An 'external gap' in the CISG is one that is resolved with reference to Private International Law. The term is something of a term of art, and is discussed in more detail at text to nn 77–91.

¹³ Cases where there is an effective choice of law, but no writing that can be maintained under the law of the reserving state will be extremely rare. Nevertheless, because the will of the parties is embodied in an effective choice of law, it is the contention of this thesis that in those rare cases, it ought to be respected.

state that has made a reservation under Article 96, the formalities rules of that jurisdiction would apply.¹⁴

This issue arose in a recent case in the United States, *Forestal Guarani S.A. v. Daros International, Inc.*,¹⁵ when an American buyer refused to pay an Argentine seller, claiming that Argentina's reservation under Article 96 meant that the oral contract between the two parties was unenforceable.¹⁶ In that case, the court used conflict of laws analysis to determine the applicable law, and found that the forum's conflict rules pointed to the application of the CISG as it applied in the United States, specifically in New Jersey, where there was no writing requirement.¹⁷ This is how most courts have chosen to deal with the issue; first the court will declare that the applicability of a reservation is an external gap in the CISG, and then it will use conflict of laws analysis to determine which jurisdiction's version of the CISG governs.

But while this approach appears to have worked in this case, it leaves open the possibility of decisions that are far less palatable. The decision is dependent upon the forum's conflicts rules, as well as the correct application of those rules. As such, it encourages forum shopping, and could lead to inconsistent results, even within the same forum. Most importantly, the decision cannot be reconciled with the CISG itself, and effectively ignores the ability of signatory states to make reservations under Article 96. This thesis addresses this

¹⁴ Cases where the law governing the contract are those of the reserving state is that of the reserving state already enforce the reservation. See eg *Quilmes Combustibles v Vigan SA* Argentina 15 March 1991 *Cámara Nacional de Apelaciones en lo Comercial* (Second Instance Court of Appeal) available at <<http://cisgw3.law.pace.edu/cases/910315a1.html>> accessed 3 January 2014. They are mentioned here in the interest of comprehensiveness.

¹⁵ 613 F.3d 395 (3d Cir. 2010) There is some dispute in the record as to the spelling of the plaintiff's name. The circuit court settled on 'Forestal'. *ibid* 396 n 1.

¹⁶ *ibid* 396–97.

¹⁷ *ibid* 399–401.

missing piece of the CISG puzzle, and argues that what it will call the ‘majority approach’ to Article 96 reservations is deeply flawed.

The proposed rule in this thesis would resolve these disputes by applying the reserving state’s formalities rules. This would be preferable to the existing majority approach for several reasons. It would be more predictable, both in terms of parties’ expectations entering into a contract and in terms of anticipating the likely outcome of litigation. As a result of this predictability, it would also be more efficient on aggregate, both in individual litigation disputes and in the global system of litigation, because there would be clearer rules *ex ante*. It would also support the goals of the CISG, particularly uniformity in interpretation, and finally, it is a stronger reading of the text of the CISG itself.

In *Forestal Guarani S.A. v. Daros International, Inc.*,¹⁸ a United States Court of Appeals confronted the question of whether a declaration to the CISG made by a party’s home state¹⁹ would automatically apply to a dispute. In that case, an Argentine seller of wooden finger-joints, Forestal, sued a New Jersey (USA) buyer, alleging breach of contract because Daros refused to pay the balance of the agreed sales price.²⁰ There was no written contract between the two parties,²¹ and neither party disputed that the CISG applied.²²

The crux of the dispute was the applicability of Argentina’s declaration to Articles 11 and 29 of the CISG.²³ Article 11 states that ‘[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved

¹⁸ *ibid.*

¹⁹ In this case, home nation appears to have been place of incorporation. *ibid* 396–97.

²⁰ The suit was filed in New Jersey state court, and removed to federal court on the basis of diversity of citizenship. *ibid.*

²¹ *ibid.*

²² *ibid.*

²³ *ibid.*

by any means, including witnesses’²⁴ while Article 29 states that ‘[a] contract may be modified or terminated by the mere agreement of the parties’²⁵ and that ‘[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.’²⁶ Article 96 permits states to make declarations concerning these two provisions.²⁷ Argentina had made such a declaration, while the United States had not.²⁸ Daros claimed that because of Argentina’s declaration, there was a writing requirement, and that therefore there was no enforceable contract between the two parties. It is perhaps worth noting that Daros’s claim appears weak at the outset, so one might expect a court to be sympathetic to the adverse party, yet the district court agreed with the claim that there was no contract.²⁹

On appeal, the Third Circuit rejected this approach.³⁰ The appeals court conceded that there was almost no case law governing this question.³¹ After reviewing both United States and international case law, the court suggested two possible approaches.³² The first, which they termed the majority approach, was that a court should conduct conflict analysis and determine which country’s law applied.³³ The second, minority approach, was that ‘a

²⁴ Art 11 CISG.

²⁵ *ibid* Art 29(1).

²⁶ *ibid* Art 29(2).

²⁷ *ibid* Art 96.

²⁸ *Forestal Guarani S.A. v. Daros International, Inc.* (n 15).

²⁹ *ibid*.

³⁰ *ibid*.

³¹ *ibid*; see also Jeannette Sedgwick, ‘International Contract Law--Choice-of-Law Analysis Applies When Signatory Nations Adopt Opposing Oral Contract Provisions Under the CISG -- *Forestal Guarani S.A. v. Daros Intl., Inc.*, 613 F.3d 395 (3d Cir. 2010)’ (2011) 34 *Suffolk Transn'l LR* 273, 278.

³² *Forestal* (n 15).

³³ *ibid* 399–400.

court should simply require the existence of a writing without reference to either state's law, though it is unclear what form such a writing would have to take to be considered sufficient.'³⁴

The court of appeals opted for the majority approach, and stated that:

Because Argentina has opted out of Articles 11 and 29 as well as Part II of the CISG, the CISG does not 'expressly settle' the question whether a breach-of-contract claim is sustainable in the absence of a written contract. So Article 7(2) tells us to consider the CISG's 'general principles' to fill in the gap.³⁵

The court went on to say that since no general principle applied, Article 7 of the CISG required the court to use private international law in order to determine whose law applied.³⁶ Finally, the court concluded that there was insufficient evidence in the record to actually do the private international law analysis, and therefore the court remanded the case to the lower court.³⁷

This thesis proposes that this approach was incorrect. In place of the court's reliance on conflict of laws, the court should have treated this problem as an internal gap in the CISG, and should have therefore applied a rule whereby absent an effective choice of law, where either the home state of the buyer or the home state of the seller has made a reservation under Article 96, the formalities rules of that jurisdiction apply.

³⁴ *ibid* 400.

³⁵ *ibid*.

³⁶ *ibid*. Schroeter (n 3) 28 n 125 characterizes the court's approach as having assumed an internal gap, and only resorting to private international law after finding no general principles. While the court could have been clearer, the structure of its decision still used the majority approach, as it ultimately derived its answer through private international law.

³⁷ *Forestal* (n 15). There was one dissenting judge, who argued that since this issue had not been properly addressed in the court below, it was inappropriate grounds for an appeal. *ibid* 403.

Since its inception, there have been advocates and critics of the CISG. Scholars who have praised the CISG have argued that it has decreased transaction costs,³⁸ promoted uniformity in international law, and has harmonized significant portions of the law governing transactions across international borders.³⁹ It has also gained ‘broad acceptance’,⁴⁰ and ‘represents vast progress towards a uniform international sales law’,⁴¹ as well as being praised as ‘a well-balanced, carefully drafted international agreement’.⁴² Others have taken issue with the CISG, attacking both the idea that an international commercial code is necessary or desirable,⁴³ or with particular aspects of the CISG as is written or applied.⁴⁴ While the latter question is at the heart of the argument presented here,⁴⁵ this thesis does not seriously engage with the first question, for two primary reasons.⁴⁶ First, scholars are mostly

³⁸ See eg Rolf Knieper, ‘Celebrating Success by Accession to CISG’ (2005) 25 *JL & Com* 477, 478; but see generally James E Bailey, ‘Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales’ (1999) 32 *Cornell Intl LJ* 273 (although Bailey’s argument is primarily about the United States, and is in part related to the status of the CISG as a self-executing treaty within the United States, two of his three main arguments, about the CISG’s internal interpretative tools and its approach to contractual autonomy, are generally applicable).

³⁹ But see Bailey (n 38) 274:

Despite the CISG’s political and economic significance to the United States, for the past decade, U.S. courts and attorneys have overlooked, misconstrued, and misapplied the terms of the Convention. Most commentators, however, have dismissed the U.S. legal system’s recalcitrance and agree that the CISG brings general uniformity to the law of international sales.

⁴⁰ Harry M Flechtner, ‘The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)’ (1998) 17 *JL & Com* 187, 189.

⁴¹ *ibid* 216 (criticizing the notion that ‘perfect uniformity’ is possible or desirable.)

⁴² Robert S Rendell, ‘The New U.N. Convention on International Sales Contracts: An Overview’ (1989) 15 *Brooklyn J Intl L* 23.

⁴³ See eg Gilles Cuniberti, ‘Is the CISG Benefiting Anybody?’ (2006) 39 *Vanderbilt J Transnat’l L* 1511.

⁴⁴ See eg J S Hobhouse, ‘International Conventions and Commercial Law: The Pursuit of Uniformity’ (1990) 106 *LQR* 531; Robert A Hillman, ‘Article 29(2) of the United Nations Convention on Contracts for the International Sale of Goods: A New Effort at Clarifying the Legal Effect of ‘No Oral Modification’ Clauses’ (1988) 21 *Cornell Intl LJ* 449.

⁴⁵ This approach is in accord with Michael Joachim Bonell, ‘International Uniform Law in Practice -- Or Where the Real Trouble Begins’ (1990) 38 *Am J Comp L* 865 (arguing that the implementation of substantive international law is often much more difficult than its creation).

⁴⁶ Some of the more general criticisms of the CISG are examined at various points, but the broader question of whether an international sales law is beneficial is largely assumed throughout this thesis.

in agreement that some form of international sales law is beneficial to international trade.⁴⁷ In addition to this, the fact is that the CISG exists and is unlikely to go away. The CISG has now been in effect for over twenty years, and there is an extensive record of jurisprudence and scholarship surrounding it. It is simply part of the status quo of international trade law, and the arguments for a transnational substantive law have become stronger as commerce has become more globalized.⁴⁸ Given this and the realities of politics in ratifying nations and institutional inertia, the CISG is simply a fact of life. The question is no longer ‘is the CISG desirable?’ but instead is ‘what changes in how it is understood could make the CISG better?’

This thesis addresses that last question by examining a discrete issue within the CISG. There are implications to the argument in this thesis for other areas of dispute within the CISG, but insofar as possible, this thesis addresses itself merely to the question of how courts should rule on disputes over the applicability of Article 96 reservations. That states can reserve under Article 96 may be undesirable.⁴⁹ This thesis does not argue in favour of the use of Article 96 reservations by signatory states, nor does it support the proposition that the

⁴⁷ See eg 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’ (2010) 10 J Bus & Sec L 133, 138. While scholars may agree that some form of international sales law would be desirable, the practices of commercial actors do not necessarily confirm the utility of the CISG itself. One other lingering question is: ‘if the CISG is so beneficial, why have some nations failed to ratify it?’ As of this writing, the United Kingdom is the eleventh largest economy in terms of exports of merchandise, and the sixth largest in terms of imports of merchandise in the world, see World Trade Organization, ‘World Trade Profiles 2012’ 179, <http://www.wto.org/english/res_e/booksp_e/anrep_e/trade_profiles12_e.pdf> accessed 2 January 2014, yet it has not yet ratified the CISG. What explains this reluctance? One scholar has identified three possible reasons, albeit in an article that did not focus on the topic. The first reason is that commercial litigation is incredibly lucrative for the United Kingdom, and adopting the CISG could discourage cases from being brought in its courts. The second reason is that international sales law as understood by British lawyers concerned commodities trades by sea, and the subject matter of the CISG implicates different policy concerns. Lastly, the author argues that there simply has not been enough interest in the CISG from the relevant stakeholders, and this lack of interest is probably the most important reason for the failure of the United Kingdom to adopt the CISG. See Alastair Mullis, ‘Twenty-Five Years On -- The United Kingdom, Damages and the Vienna Sales Convention’ (2007) 71 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 35. This view is confirmed by at least one other scholar. See Sally Moss, ‘Why the United Kingdom Has Not Ratified the CISG’ (2005-06) 25 *JL & Com.* 483. In at least 50% of the cases before it, one party is not British and in 30% neither is. A large amount of arbitration also takes place in London. See also John Linarelli, *The Economics of Uniform Laws and Uniform Law Making*: (2003) 48 *Wayne LR* 1387.

⁴⁸ See generally Klaus Peter Berger, *Transnational Commercial Law in the Age of Globalization* (Saggi 2001).

⁴⁹ For a discussion of the problems with reservation schemes see Schroeter (n 3) and Flechtner (n 40).

CISG should allow Article 96 reservations. It also does not argue that nations should use or even care about formality requirements for contracting. The arguments that states use in justifying formality requirements may be weak, outdated, and contrary to the modern business world.⁵⁰ But the ability to enforce them was protected in the CISG, and short of a new diplomatic conference to eliminate them, ought to be respected by courts.

Therefore, what it does argue is that the majority approach to this problem ignores the text and intent of the CISG. It further argues that the resort to private international law is misguided and unnecessary. Part II describes the problem addressed in detail, with reference to the structure of the CISG. Part III criticizes the majority approach, while Part IV argues for an alternative approach, relying on both the text of the CISG and the general principles which guide interpretation of the CISG. Part V briefly concludes.

II. The Problem With Article 96

Before addressing the particular doctrinal issue at the heart of this thesis, it is necessary to understand the basic structure of the CISG. This section will briefly explain the structure of the CISG, including the distinction between internal and external gaps, before turning to a criticism of the majority approach.

A. The Structure of the CISG and the Freedom of Form Principle

The CISG is broadly divided into four parts. Part I addresses the applicability and scope of the Convention itself.⁵¹ It states that the CISG applies either when both parties are

⁵⁰ This contention is supported by fact that the language permitting reservations on the subject of formality was included largely at the insistence of the Soviet Union. Schroeter (n 3) 6.

⁵¹ Part I CISG. Whether or not the CISG applies to govern a transaction has been one of the most-discussed issues by both courts and scholars. The convention can apply in one of four ways: Article 1(1)(a); article 1(1)(b), by the parties choosing to opt-in; or as *lex mercatoria*. Louis F Del Duca and Patrick Del Duca, 'Selected Topics Under the Convention on International Sale of Goods (CISG)' (2001) 106 Dickinson LR 205, 206–07. Article 1(1)(a) applies 'when the parties have their places of business in different Contracting States'. Franco Ferrari, 'Overview of case law on the CISG's international sphere of application and its applicability requirements (articles 1(1)(A) and (B))' (2002) 8 Intl Bus LJ 961, 965. When one party is from a contracting state, while the other is not, then the CISG may apply indirectly, through Article 1(1)(b). This is complicated by

based in contracting states,⁵² or ‘when the rules of private international law lead to the application of the law of a Contracting State.’⁵³ Part I also excludes some types of sales from the scope of the CISG,⁵⁴ delineates between contracts for services and goods in the context of ‘mixed’ contracts,⁵⁵ and states that personal injury liability is not affected by the CISG.⁵⁶ Part I also permits parties to opt out of the CISG or derogate from any its provisions.⁵⁷ Chapter II of Part I of the CISG addresses ‘general provisions,’⁵⁸ such as interpretation of terms from contracts.⁵⁹ Part II of the CISG governs formation of contracts,⁶⁰ while Part III contains substantive provisions for performance of contracts for the sale of goods.⁶¹ Part IV, the ‘Final Provisions,’⁶² contains several technical provisions concerning ratification of the CISG, and

Article 95, which allows states to make a reservation stating that the CISG will not apply by virtue of Article 1(1)(b). The CISG can also apply if the parties choose to let it govern the dispute. Del Duca and Del Duca (n 45) 206. Finally, the CISG can be applied by arbitral tribunals or courts as a customary usage. Some refer to this as a version of *lex mercatoria*, see eg *ibid*, while others shy away from using the term. See eg Ferrari (n 45) 968 (referring to the ‘so-called ‘*lex mercatoria*’”). The nomenclature is unimportant here. Another issue of applicability concerns what types of contracts are governed by the CISG. See eg Katrina Winsor, ‘The Applicability of the CISG to Govern Sales of Commodity Type Goods’ (2010) 14 *Vindobona J Intl Com L & Arb* 83. For a discussion of these issues in the specific context of China, see Chen Weizuo, ‘The Conflict of Laws in the Context of the CISG: A Chinese Perspective’ (2008) 20 *Pace Intl LR* 115, 115–121.

⁵² Art 1(1)(a) CISG.

⁵³ *ibid* Art 1(1)(b).

⁵⁴ *ibid* Art 2.

⁵⁵ *ibid* Art 3. A mixed contract is one that is for both goods and services (such as a contract for the sale of manufacturing equipment and providing for maintenance of that equipment).

⁵⁶ *ibid* Art 5.

⁵⁷ *ibid* Art 6.

⁵⁸ *ibid* Part I, ch. II.

⁵⁹ *ibid* Art 7.

⁶⁰ *ibid* Part II.

⁶¹ *ibid* Part III.

⁶² *ibid* Part IV.

the articles most directly relevant to this essay, which concern the reservations and declarations.⁶³ These provisions are explored fully below.

Of crucial importance to this thesis are Articles 11 and 29. They state that: '[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses'⁶⁴ and that:

(1) A contract may be modified or terminated by the mere agreement of the parties.

(2) 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.⁶⁵

Thus the CISG, without a reservation, eliminates all formal requirements for a contract provided that it is 'sufficiently definite',⁶⁶ which requires that the offer: '... indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.'⁶⁷ The basic structure of the CISG's freedom of form provisions seems simple enough. It appears to create a global commercial code for sales contracts with uniform provisions for the formal requirements of contracts, but the possibility of a reservation complicates this.

⁶³ *ibid* Art 92–98.

⁶⁴ *ibid* Art 11.

⁶⁵ *ibid* Art 29.

⁶⁶ *ibid* Art 14(1).

⁶⁷ *ibid*, Art 14(2).

The CISG permits signatory states to declare that they will not honour some of the CISG's provisions.⁶⁸ While Article 98 limits contracting states to reservations explicitly allowed in the convention,⁶⁹ the reservations permitted are extremely broad.⁷⁰ Article 92 allows a contracting state to declare that 'it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.'⁷¹ Article 93 concerns states that have multiple administrative units with different laws for the sale of goods,⁷² while Article 94 permits contracting states 'which have the same or closely related legal rules on matters governed by this Convention' to exclude the Convention as between those two states.⁷³ Article 95 permits states to exclude Article 1(1)(b), which applies the CISG in circumstances where only one party is based in a contracting state.⁷⁴

Article 96, the primary subject of this thesis, allows nations to require that contracts be in writing, and states that:

⁶⁸ The language of the CISG uses the term 'declarations' in most places, and the term 'reservation' in Article 98. Michael Bridge, 'Uniform and Harmonized Sales Law: Choice of Law Issues' in James J Fawcett, Jonathan M Harris and Michael Bridge (eds), *International Sale of Goods in the Conflict of Laws* (OUP 2005) 972. Bridge has argued that the terms are effectively interchangeable within the context of the CISG, and that the CISG definition follows the UN Convention on the Law of Treaties, to mean 'a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State.' *ibid* 973. This thesis uses the term 'reservation' to refer to an objection made by a state, and 'declaration' to refer to specific national statements explaining their reservation, following the example of Ulrich G Schroeter, 'Backbone or Backyard of the Convention? The CISG's Final Provisions' in Camilla B Andersen and Ulrich G Schroeter (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (Wildy, Simmonds & Hill Publishing 2008). Adding to the confusion, the CISG also refers to contractual declarations, or statements made between parties. For a summary of those declarations, see Peter Schlechtriem, 'Effectiveness and Binding Nature of Declarations (Notices, Requests or Other Communications) under Part II and Part III of the CISG' in *Cornell Review of the Convention on Contracts for the International Sale of Goods* (Kluwer 1995).

⁶⁹ Art 98 CISG; see also Flechtner (n 40) 193.

⁷⁰ For a fuller summary of the reservation provisions see Bridge (n 68) 972–84.

⁷¹ Art 92 CISG.

⁷² *ibid* Art 93.

⁷³ *ibid* Art 94.

⁷⁴ *ibid* Art 95. For a brief summary of Article 95, see Malcolm Evans, 'Article 95' in C Massimo Bianca and Michael Joachim Bonell (eds), *Bianca-Bonell Commentary on the International Sales Law* (Giuffrè 1987).

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.⁷⁵

Article 96 is also referred to in Article 12, which, alone among CISG provisions, makes reservations under Article 96 non-derogable. Article 12 is discussed in some detail later in this thesis. Finally, Article 97 deals with the technical aspects of making a reservation, such as how to ratify it and how to withdraw it later.⁷⁶ Several states have made declarations under these articles. The current declarations, as of January 2014 can be found in Appendix A. This thesis addresses a particular problem that arises as a consequence of Articles 96 and Article 12.

To briefly summarize, Articles 11 and 29 establish the CISG's freedom of form principle. However, the CISG permits some limited reservations, and Article 96 permits a state to take a reservation to the freedom of form provisions. In other words, Article 96 allows a state to preserve its own formalities rules for contracts despite the state otherwise agreeing to the CISG. But there is no explicit guidance within the CISG as to what happens when one party is from a state that has accepted the CISG's freedom of form provisions and one that has reserved under Article 96. Thus, there is a gap in the CISG.

As seen with the *Forestal* case, courts, when confronted with this problem, have usually found that when the dispute turns on whether an Article 96 reservation applies, the question must be addressed as an external gap. This thesis proposes that this is the incorrect interpretation of the CISG. Rather than treat this gap as external, it should be considered

⁷⁵ Art 96 CISG.

⁷⁶ Art 97 CISG. For a fuller discussion of some of the technical aspects of reservations, see Schroeter (n 3) 10–11 and Flechtner (n 40) 192–94.

internal. Before presenting the argument as to why this should be considered an internal gap, the next section briefly explains the interpretative rule of the CISG with particular reference to the distinction between internal and external gaps.

B. Article 7: Internal and External Gaps

Article 7 provides the primary internal interpretive guide to the CISG. It 'is considered the most important provision of the Convention; in fact, some believe that the success of the CISG depends on Article 7.'⁷⁷ It states:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.⁷⁸

This article thus establishes both the CISG's interpretive philosophy and its framework for private international law.

Bruno Zeller has argued that Article 7 has three rules: '[f]irstly, a general rule as to interpretation; secondly, a rule regarding filling of gaps; and thirdly, a rule regarding the relationship between the CISG and national law.'⁷⁹ This description seems to capture much of the general scope of Article 7, and has been generally accepted in the literature

⁷⁷ Christopher Sheaffer, 'The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law' (2007) 15 *Cardozo J Intl & Comp L* 461, 469 (citing Phanesh Koneru, 'The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles' (1997) 6 *Minnesota J Global Trade* 105, 129.) See also Bruno Zeller, 'The UN Convention on Contracts for the International Sale of Goods (CISG) -- A Leap Forward Towards Unified International Sales Laws' (2000) 12 *Pace Intl LR* 79, 81. ('[A]rticle 7 is the key to fully understand the implications of new or different concepts as expressed in the CISG.').

⁷⁸ Art 7 CISG.

⁷⁹ Zeller (n 77) 85.

surrounding Article 7.⁸⁰ The first provision directs courts on how to read and understand the provisions of the CISG itself. The second provision, through its phrase ‘concerning matters governed by this Convention which are not expressly settled in it’, then creates a distinction between internal and external gaps,⁸¹ where the former are interpreted through the ‘general principles’ of the CISG while the latter are decided according the rules of private international law.⁸² If this framework is accepted, how should a court approach the question of the applicability of a reservation under Article 7? Article 7 itself is not entirely clear,⁸³ and scholars have argued that it has been frequently misinterpreted.⁸⁴ While this thesis will argue that the general rule for interpretation should inform a court’s understanding of the formalities rules,⁸⁵ the first thing that must be understood is the distinction between an internal and external gap.

The CISG (or perhaps more precisely, the scholarship on the CISG) makes a distinction between ‘internal’ and ‘external’ gaps. Per Article 7(2) of the CISG, there are

⁸⁰ At least one scholar has described Article 7 as having four rules. See Bailey (n 37) 285–86. Bailey describes Article 7’s rules as ‘consideration of the Convention’s international character’; promotion of uniformity; good faith, and use of ‘implicit general principles.’ *ibid.* While the two approaches are similar, Zeller’s description is preferable for a number of reasons. Bailey’s approach conflates the two separate provisions of the article, which, if not exactly the logic of the decisions criticized in this thesis, leads to the same kinds of decisions. It also ignores the differences in methodologies that would logically govern the two types of inquiries, one of which asks ‘how does one interpret a term within the CISG or within a contract?’ while the other asks ‘is this issue within the CISG?’ before interpreting it. Notwithstanding this minor conceptual disagreement, Bailey’s criticisms of the language of Article 7 are well taken, and used throughout this section.

⁸¹ Franco Ferrari, ‘CISG and Private International Law’ in Franco Ferrari (ed), *The 1980 Uniform Sales Law: Old issues Revisted in the Light of Recent Experiences* (Giuffrè / München: Sellier European Publishers 2003) 39.

⁸² *ibid.*

⁸³ See eg Bailey (n 37) 286 (arguing that ‘the principles of interpretation in Article 7 are vague and difficult to apply.’).

⁸⁴ Sheaffer (n 77) 469. For a summary of some of the scholarly approaches to Article 7, see Sunil R Harjani, ‘The Convention on Contracts for the International Sales of Goods in United States Courts’ (2000) 23 *Houston J Intl L* 49, 56–59.

⁸⁵ This is discussed later in the thesis at 44.

‘matters governed by this Convention which are not expressly settled in it.’⁸⁶ These are the so-called ‘internal gaps,’⁸⁷ and include examples such as the rate of interest to be applied in a remedial procedural phase.⁸⁸ The CISG tells courts these gaps: ‘are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.’⁸⁹ These are to be contrasted with the ‘external gaps,’ which are issues not even covered by the CISG, and which thus must be settled through Private International Law.⁹⁰

In describing this conceptual framework, one scholar has summarized the division between internal and external gaps as one between rules that are not excluded from the CISG as opposed to ones that are:

Some types of issues are expressly excluded from the scope of the CISG. But if an issue is not so excluded, it is ‘governed’ by the CISG. An issue that is governed by the CISG but not resolved by any express rule of the CISG is said to fall in a gap. For example, article 78 provides that if a party fails to pay a sum of money that is due, the other party is entitled to interest on that sum. Interest at what rate? No article of the CISG excludes the interest rate issue from the scope of the CISG, but neither article 78 nor any other article specifies how the interest rate is to be determined. The issue is governed by the CISG but not resolved by any express rule of the CISG. It falls into a gap, a gap that lies within the scope of the CISG regime. Such interstitial gaps are to be filled pursuant to article 7(2).⁹¹

Thus, Article 7 provides that if the issue is not directly covered by the CISG, then courts have two potential avenues for resolving the matter. If the issue is an internal gap, then they are

⁸⁶ Art 7(2) CISG; see also Ferrari (n 81) 39.

⁸⁷ Ferrari (n 81).

⁸⁸ For a discussion of a few other examples, see *ibid*.

⁸⁹ Art 7(2) CISG.

⁹⁰ Ferrari (n 81).

⁹¹ Henry Mather, ‘Choice of Law for International Sales Issues not Resolved by the CISG’ (2001) 20 *JL & Com* 155, 155 (internal citations omitted).

meant to decide it on the basis of general principles. If the issue is an external gap, then courts are meant to use the rules of private international law in order to decide it.

In the context of disputes over reservations, this latter method has been the dominant approach. Courts have tended to find that the applicability of an Article 96 reservation is an external gap, and then used conflicts analysis to determine what law applied.⁹² As a consequence, parties from reserving states can be subject to the CISG's freedom of form principle, despite their state's explicit exclusion of that rule. It is the argument of this thesis that this approach is incorrect, and that these disputes should be treated as internal gaps and resolved through the application of the reserving state's formalities rules.

The next section of this thesis will address the problems with treating the applicability of Article 96 as an external gap, as courts using the majority approach have done. It will then argue that these gaps should be treated as internal gaps, before turning to its interpretation of the CISG.

III. The Majority Approach: Treat Disputes Over the Applicability of Article 96 as External Gaps

In addressing disputes over the applicability of Article 96 reservations, most courts have found that the issue was an external gap, and proceeded to use the principles of private international law to decide which state's law to apply. They have almost invariably ruled in favour of enforcing the contract. This section will examine these cases and criticize this approach, before arguing in favour of an alternative.

A. The Majority Approach

As discussed above, the *Forestal* decision provides a basic roadmap of how these decisions are reached. The court explains the problem, declares that it is an external gap in

⁹² See Peter Schlechtriem and Petra Butler, *UN Law on International Sales: The UN Convention on the International Sale of Goods* (Springer 2009) 62.

the CISG, then uses the forum's conflicts approach to determine which law should apply. An examination of similar cases reveals largely the same set of interpretive techniques.⁹³ In a similar 1992 Hungarian case, two parties concluded a deal by telephone. The Hungarian buyer later refused to pay the German seller. Hungary had taken an Article 96 Reservation, but Germany had not. After pursuing conflicts analysis, the court ruled that German law governed.

In *J.T. Schuermans v. Boomsma Distilleerderij / Wijnkoperij BV*,⁹⁴ a Belgian, based in Russia, sued a Dutch vodka producer. There was some dispute as to whether Russian or Belgian law would be the home state of the plaintiff, but ultimately, private international law rules were found to point to Dutch law, which had no reservation. In another Russian case, a court enforced a written choice-of-law provision in a contract, which required the application of Russian law, in order to dismiss the (Russian) buyer's claim that there had been an oral modification to a contract. Finally, in *Quilmes Combustibles v. Vigan S.A.*,⁹⁵ an Argentine court ruled that pre-printed forms with handwritten notes met the Argentine writing requirements, so that the choice-of-law provision within the contract was enforceable, and declined jurisdiction.

Thus the majority approach to this problem uses an interpretative pattern⁹⁶ that can be summarized as follows: the court sees that there are two potential texts of the CISG that could

⁹³ Some of the cases cited here are available not available in full translation, and so cannot be discussed in detail. To the extent that they are available, they are illustrative of a certain series of arguments, and it is not necessary to address the cases through a closer reading. In addition, some of these cases are discussed further in Schroeter (n 3) 17 n 76.

⁹⁴ *J.T. Schuermans v. Boomsma Distilleerderij/Wijnkoperij* Supreme Court Hoge Raad (Netherlands) 7 November 1997 (available at < <http://cisgw3.law.pace.edu/cases/971107n1.html> > accessed 3 January 2014).

⁹⁵ *Quilmes Combustibles v Vigan SA* (n 14).

⁹⁶ Depending on the local customs, this pattern can be more or less explicit on the face of the decision. For one or two more cases following this pattern, see Louis F Del Duca, 'Implementation of Contract Formation Statute of Frauds, Parol Evidence, and Battle of Forms CISG Provisions in Civil and Common Law Countries' (2005) 25 JL & Com 133, 137–38.

govern the case, that of the reserving country and that of the non-reserving country.⁹⁷ Next, the court states that the interpretative technique of Article 7(1) is not applicable, thus the case must be decided under Article 7(2). Then, the court acknowledges the distinction between internal and external gaps under Article 7(2), declares this issue an external gap, and uses Private International Law to determine the applicable law. There is then either a contract, under the applicable law, which is then subject to the rest of the CISG as understood by the forum,⁹⁸ or there is no contract, in which case conflicts laws must be applied to determine if there is an additional restitutionary claim. This approach has also been largely approved of in the scholarship surrounding the CISG, albeit with some disagreements about the precise contours. Peter Winship describes the disagreement between Professors John Honnold and Peter Schlechtriem.⁹⁹ He summarizes Schlechtriem's view as a basic statement of the majority approach. The reservation only applies when the rules of private international law points to the law of the reserving state, whereupon it is up to the forum to determine what formalities rules apply.¹⁰⁰ This is contrasted with Professor Honnold's view, that if conflicts rules point to the rules of the reserving state, then the suit ought to be dismissed.¹⁰¹

This general approach, as adopted by the court in *Forestal*, looks appealing, especially from the perspective of an appellate court. It allowed the judges to remand the issue back to the lower court without engaging in a lengthy inquiry into the CISG itself, and it appears to solve the problem of an 'external gap' within the CISG by reference to established

⁹⁷ There is also the possibility that a third text, that of the forum, could govern.

⁹⁸ That is, either the CISG as the forum interprets it or the CISG as the forum understands the CISG as interpreted in the state whose law applies.

⁹⁹ Winship (n 11) 6. Winship cites Peter Schlechtreim and Ingeborg Schwenzer, (eds), *Commentary on the UN Convention on the International Sale of Goods* (2nd edn, OUP 2006) and John Honnold, *Uniform Law for International Sales Under the 1980 Convention* (4th edn, Kluwer 2009); Winship's work is cited as a cogent summary of the relevant arguments.

¹⁰⁰ Winship (n 11) 6.

¹⁰¹ *ibid* 7.

national law, rather than by judicial rule-making. But this approach is flawed for several reasons.¹⁰² This section will examine these reasons before proposing an alternative reading.

B. Private International Law Produces Arbitrary Results

While this thesis argues that the interpretation of the CISG preferred by the majority approach is wrong as a matter of textual interpretation, there is an extra-textual reason to dislike the majority approach: its resort to settling these disputes using conflict of laws analysis is deeply unattractive. Assuming, for the time being, that the majority approach is the correct reading of the CISG,¹⁰³ and an issue involving the applicability of an Article 96 reservation should be resolved through conflict of laws analysis, another problem emerges: what conflict of laws approach should be used? The CISG itself does not provide a rule for conflicts.¹⁰⁴ Therefore every forum in which these types of cases could be litigated is free to use its own rule for conflicts. So perhaps the majority approach is generally sound, but only if a particular conflicts rule is used, and therefore the failing of the CISG in this area is that it does not supply its own conflicts rules.

A closer look at conflicts approaches, however, suggests that this is not the case. The contention of this thesis is the same conclusion found in Henry Mather's article *Choice of*

¹⁰² As the *Forestal* case is relatively recent, there is very little scholarship on it. One exception is a brief student comment, Sedgwick (n 31), which covers some of the issues discussed here. Another is Schroeter (n 3) 19 n 81.

¹⁰³ In other words, disputes over reservations are external gaps.

¹⁰⁴ The CISG itself is part of a broader debate between two ways in which law makers have attempted to harmonize international law. While some attempts, like the Hague Convention, attempted to harmonize conflicts rules, others, including the CISG, have focused on harmonization of substantive rules of law. Peter Winship, 'Private International Law and the U.N. Sales Convention' (1988) 21 Cornell Intl L J 487. As Winship has noted, '[t]he two techniques are not incompatible', *ibid* 487, but they do have different emphases, and this thesis accepts the view that substantive unification of law is preferable. See generally Ferrari (n 81). A related issue to consider is the extent to which the CISG even acts as a harmonizing vehicle: even from almost immediately after its creation, scholars pointed out that it did not so much harmonize international law for commercial transactions, but created a separate kind of international transaction which it would be governed by a new international code. See eg Arthur Rosett, 'Critical Reflections on the United Nations Convention on Contracts for the Sale of Goods' (1984) 45 Ohio State LJ 265. The decision to carve out as special an international sale, rather than harmonizing the law of sales in various countries, has itself been controversial. See eg Ferrari, 'Uniform Interpretation of The 1980 Uniform Sales Law' (1994–95) 24 Georgia J Intl Comp L 183; Rosett (n 102) ('[t]his creates harmony at one level but new problems at another.').

Law for International Sales Issues not Resolved by the CISG,¹⁰⁵ ‘that none of these rules or approaches provide sound or helpful guidance for choice of law in the international sales context’.¹⁰⁶ None of the major conflicts approaches provides a satisfactory answer to the problem, and that conflicts approaches themselves will typically add a dimension of non-uniformity into CISG jurisprudence. Perhaps more importantly, the resort to conflicts approaches is deeply problematic for a more practical reason: no major approach to conflicts of law provides any principled solution to the issue at hand and therefore, a unification of substantive law is a better solution to the problem.

The problem with using conflicts rules to determine which law applies is that they undermine the central project of the CISG itself. Because they are not results driven, and vary both in content and in their ultimate application, they tend to undermine uniformity and encourage forum shopping. Regardless of whether one uses more bright-line rules, such as the rule found in the Rome Regulation,¹⁰⁷ or a form of interest analysis, the end result will tend to be either arbitrary (under a more traditional approach) or unpredictable (under a flexible approach). Neither of these situations promotes the values of the CISG.

This is true regardless of which of the major conflicts approaches is used.¹⁰⁸ To demonstrate this, consider the following hypothetical: Party A is a seller of widgets. Their entire business is in Ruritania, a state that is a signatory to the CISG which has not taken any reservations. Party B is a buyer, based entirely in Utopia, a state which is a signatory to the CISG but has made a declaration under Article 96, stating that contracts for the sale of goods must be made in writing. B calls A and orders a substantial quantity of widgets. The order

¹⁰⁵ Mather (n 91) 166–85 also contains commentary on many of these methods.

¹⁰⁶ *ibid* 166. While Mather extends his criticism to all choice of law issues within the CISG, and further suggests that it applies to domestic sales law as well, this thesis limits its argument to Article 96 reservations.

¹⁰⁷ Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6 (‘Rome Regulation’ or ‘Rome I’)

¹⁰⁸ See also Mather (n 91).

meets the ordinary standards of a contract under the CISG, but is never reduced to writing. A sends the widgets to B. The goods are perfectly conforming, and B accepts them. B then simply refuses to pay the contract price. In the interim, the price of widgets has fallen significantly. A sues B. Both parties agree that the CISG applies.¹⁰⁹

Consider the traditional, American rule, found in the First Restatement,¹¹⁰ which was the ‘law of the place where the contract was made.’¹¹¹ The problems with applying this situation to the hypothetical should be immediately apparent. First, where was the contract ‘made?’ This issue of place of contracting was considered problematic in 1878, when *Milliken* was decided. In a modern world, where most international contracts are concluded by phone or other forms of remote communication, this becomes totally and completely arbitrary.

Alternatively, consider the current approach used for private international law in the European Union.¹¹² The current European Union rule is found in Regulation 593/2008 (the Rome I Regulation).¹¹³ This Regulation replaced the earlier Rome Convention.¹¹⁴ This

¹⁰⁹ This has been stipulated in this hypothetical for the sake of simplicity, but the problem arises as long as the court applies the CISG. The applicability of the CISG generally is a separate issue, and one on which there have been many cases and articles. For a general discussion of these issues see Michael Joachim Bonell and Fabio Liguori, ‘The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law -- 1997 (Part 1)’ [1997] Uniform LR 385.

¹¹⁰ *Restatement, Conflict of Laws* (ALI 1934) § 332, cited in Russel J Weintraub, *Commentary on the Conflict of Laws* (4th edn, Foundation Press 2001) 439.

¹¹¹ Weintraub (n 110) § 7.3A (internal citations omitted). The case Weintraub refers to, *Milliken v. Pratt*, 125 Mass. 374 (1878), is one of the classic cases used to demonstrate the deficiencies in the first Restatement approach. While Weintraub gives the case a somewhat lengthy treatment, the basic facts are these: Daniel Pratt and his wife lived in Massachusetts. The husband wanted to buy goods on credit from a partnership in Maine, but the creditors required him to get his wife’s signature as a guarantor. He did so, and mailed the guarantee to Maine. When he didn’t pay for the goods, the Maine partnership sued. Under Massachusetts law, the wife was not allowed to act as a guarantor, while she was under Maine law. The Massachusetts court ultimately found the contract to have been made under Maine law, and ruled against Pratt.

¹¹² For a comprehensive survey of private international law under the EU, see Geert Van Calster, *European Private International Law* (Hart 2013).

¹¹³ Rome I OJ L177/6.

¹¹⁴ The Rome Regulation came into effect in 2009. It replaced the Rome Convention, which used the ‘closest connection test’ for conflicts of law involving contracts. Van Calster (n 112) 125. But this approach does not

approach is facially simple: when the dispute is over the sale of goods, and no stipulation has been made for choice of law, then a court should apply the law of the ‘habitual residence’ of the seller.¹¹⁵ With the exception of certain types of transactions, where the subject-matter of the contract has been excluded through Article 1 of the Regulation,¹¹⁶ the Regulation applies to all civil and commercial contracts disputed in the courts of European Member States, regardless of whether jurisdiction to hear the case is predicated on the jurisdictional rules of the European Union or the Member State’s internal rules for private international law.¹¹⁷

Under the Regulation, where the countries have not made an effective choice of law, ‘a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence’.¹¹⁸ This ‘bright-line approach’¹¹⁹ is facially simple, but as will be discussed below, the Rome Regulation’s simplicity is somewhat deceptive.

First, assume that the parties in the hypothetical given above are both from countries subject to the Rome Regulation. Under this hypothetical, Party A, the seller, is based in a state (Ruritania) without a reservation, while Party B is from a state (Utopia) that has. Under the majority approach a court based in a member state will use the rule found in the Rome Regulation, and presumably find that the law of Ruritania applies, and would enforce the

adequately deal with the hypothetical either. Why would either party’s country be more closely connected with the sale of goods than the other country? Even in cases where that it is true that one country is far more connected with the contract, it would be very difficult to predict that result *ex ante*. Accordingly, there is the possibility of inconsistent results between two countries; where a party in a non-reserving country would be unable to predict the result of dealings with a reserving one with any certainty unless a nearly identical transaction had been litigated in the forum previously. There is also the possibility of inconsistencies in types of transactions, where two fora disagree on how to characterize the closest connection.

¹¹⁵ Rome I, OJ L177/11, art 4(1)(a). See also Nils Willem Vernooij, ‘Rome I: An Update on the Law Applicable to Contractual Obligations in Europe’ (2009) 15 Columbia J Eur L Online 71 <http://www.cjel.net/online/15_2-vernooij/> accessed 27 December 2013.

¹¹⁶ Rome I, OJ L177/10, art 1 excludes certain questions from the scope of the regulation, including some obligations involving negotiable instruments and questions emerging from family relationships.

¹¹⁷ Van Calster (n 112) 125.

¹¹⁸ Rome I, OJ L177/11, art. 4(1)(a).

¹¹⁹ Vernooij (n 115) 74.

contract under the CISG's freedom of form principle. While this appears simple, there are several problems. The first two are perhaps a bit obscure, but should be mentioned. The court might find that under the local law of Ruritania, the CISG applied, and its understanding of the CISG required a resort to Utopian law.¹²⁰ In addition there could be issues with the definition of how one defines 'habitual residence.' The habitual residence language used in Article 19 is not entirely new language, but it is not thoroughly defined in any of its prior iterations.¹²¹ And while unlike 'domicile,' as defined in other agreements, which could create multiple places where jurisdiction was proper,¹²² the habitual residence language should produce a correct answer.¹²³ But what that answer is may be difficult in real-world problems, even if simple within the hypothetical.

More importantly, there is a bigger structural problem with this approach. It produces diametrically opposing results merely upon flipping the identity of the parties or of their home state's contract regime. That is to say that if either Party A were the buyer, rather than the seller, or it was Ruritania with the reservation, rather than Utopia, then the court would reach the totally opposite result. This is anathema to the project of the CISG, as it provides non-uniform results, without any clear or principled basis for the application of a bright-line rule.

¹²⁰ There is some dispute over the possibility of *depeçage* under the Rome Regulation. The earlier Rome Convention used the 'closest connection' test, see Van Calster (n 112) 136 and Zheng Sophia Tang, 'Law Applicable in the Absence of Choice the New Article 4 of the Rome I Regulation' (2008) 71 Modern LR 785, it also had an escape clause that allowed courts to apply a different country's law when appropriate. Van Calster (n 112). It further discussed *depeçage*. Accordingly, at least two authors have stated that there is a good argument that *depeçage* is not permitted under the Regulation. Van Calster (n 112)136 and 136 n 474 (citing Ulrich Magnus, 'Article 4 Rome I Regulation: The applicable in the Absence of Choice' in Franco Ferrari and Stefan Leible (eds), *Rome I Regulation – The Law Applicable to Contractual Obligations in Europe* (Sellier 2009)). However, if the Rome Regulation includes the CISG, and the CISG re-routes the applicable law to another country, then it may still be possible.

¹²¹ Van Calster (n 112) 138.

¹²² *ibid.*

¹²³ *ibid.*

In cases such as the above hypothetical, rules such as these are essentially coin-flips. While there are benefits to a bright-line rule, here they would simply provide a windfall to one party or the other. And while the nations of the European Union have largely harmonized their conflicts approaches, far more nations are signatories to the CISG than are in the E.U. This necessarily adds a dimension of non-uniformity to CISG jurisprudence. Anytime a court uses conflicts analysis, the world of CISG jurisprudence becomes slightly less predictable.

If the nominally simpler, bright-line approaches are problematic because they render decisions based on seemingly irrelevant factors, then perhaps a more standards-driven approach would work. However, these will tend to produce greater uncertainty and unpredictability. Consider, for example, another type of conflicts approach: ‘Interest Analysis,’ sometimes called ‘governmental interest analysis’, first developed by Brainerd Currie.¹²⁴ This form of conflicts analysis has been influential, and has been adopted in one form or another by a variety of US states, as well as being part of the second restatement approach.¹²⁵ The basic method of analysis would be to identify the two relevant laws in conflict, and determine which policies undergird their enactment. If the policies are not in conflict with one another when applied to the case, then the court can apply the interested state’s law. If the policies are in conflict, then it is said to be a true conflict, in which case some courts and scholars use forum law, under ‘pure interest analysis,’ while others use the ‘comparative impairment test.’¹²⁶ But this is a problematic approach in this scenario.

¹²⁴ See eg Brainerd Currie, ‘Comments on *Babcock v. Jackson*, a Recent Development in Conflict of Laws’ (1963) 63 Columbia LR 1233. See also David McClean and Kisch Beevers, *Morris: The Conflict of Laws* (Seventh edn, Sweet & Maxwell 2009) § 21-017.

¹²⁵ *Restatement (second) Conflict of Laws* (ALI 1971) § 6; see also Friedrich K Juenger, ‘Conflict of Laws: A Critique of Interest Analysis’ (1984) 32 American J Comp L 1.

¹²⁶ McClean and Beevers (n 124) §§ 21-017 and 018.

Even within the United States, courts have sometimes been reluctant to use methods such as legislative intent to interpret statutes,¹²⁷ and scholars have frequently pointed out that courts are not well-situated to assert what specific policies a law is meant to protect, especially in the context of private law, where individual interest may be more important than purported government policies.¹²⁸ The problems will tend to multiply when comparing foreign jurisdictions.¹²⁹ Article 96 presents several additional difficulties in the context of interest analysis. As Michael Bridge has written, there are at least two possible competing justifications for the reservation, one for countries with long traditions of written contracts, and another for courts that might have trouble enforcing oral contracts.¹³⁰ If it is the latter, how should a forum in a declaring state address a dispute between two parties from non-declaring states?¹³¹ Similarly, if it an evidentiary issue, then why should a non-declaring forum care about the place of business of a party from a declaring state?¹³² Ultimately, Bridge argues that Article 96 was simply a ‘compromise’ in order to get the CISG adopted,¹³³ and that it simply allows private international law to supply the answer to the question of form.¹³⁴ But that does not adequately address the problem of how courts should rule when

¹²⁷ See generally Lea Brilmayer, ‘Interest Analysis and the Myth of Legislative Intent’ (1980) Yale Law School Faculty Scholarship Series Paper 2509 available at <http://digitalcommons.law.yale.edu/fss_papers/2509/> accessed 4 January 2014.

¹²⁸ McClean and Beevers (n 124) § 21-018.

¹²⁹ For example, Flechtner describes the likely differences in how the fact that a contract has been reduced to writing would be interpreted under two different legal traditions, one of which sees contracts as ‘the product of an adversarial relationship where each party seeks to gain the most while giving up as little as possible ...’ and a system where ‘contracts are conceived of as cooperative ventures where the parties are engaged in a mutually beneficial relationship based on trust and joint action.’ Flechtner (n 40) 202.

¹³⁰ Bridge (n 68) 982.

¹³¹ *ibid.*

¹³² *ibid.*

¹³³ *ibid.* 983.

¹³⁴ *ibid.*

confronted with a dispute over the applicability of an Article 96 reservation, as will be demonstrated below.

Frederick Juenger's criticism of interest analysis is also relevant here.¹³⁵ Juenger argues that the concern for the state's relationship with the parties in Currie's interest analysis typically leads to a focus on the domicile of the parties. In the hypothetical outlined above, this is not a very helpful factor. Perhaps this is unfair, as Currie's interest analysis was primarily designed for United States multi-state tort and contracts cases, where the place of injury or the place of the making of the contract was often not the domicile of either party, but it still demonstrates the inadequacy of using this approach for CISG conflicts issues.¹³⁶

Accordingly, there is no system of conflicts analysis that will produce results that support the general project of the CISG. Either one uses a fixed rule, such as the place of performance, or the habitual residence of seller, which will tend to create arbitrary results based on irrelevant factors, or one uses a standard-based approach, such as interest analysis,¹³⁷ which can introduce a level of unpredictability and instability into this analysis. The next section will address a reason why this is particularly problematic: it will lead to more forum shopping and will thus decrease the uniform interpretation of the CISG, as well as possibly creating perverse incentives to litigate rather than to settle.

C. The Majority Approach's Resort to Conflicts Leads to Forum Shopping

The problem of conflicts approaches is further complicated by the issue of forum selection. Consider five possible forums for the litigation given the hypothetical: Ruritania,

¹³⁵ Friedrich K Juenger, 'Conflict of Laws: A Critique of Interest Analysis' (1984) 32 American J Comp L 1. See also generally Friedrich K Juenger, *Selected Essays on the Conflict of Laws* (Transnational Publishers 2001).

¹³⁶ *ibid.*

¹³⁷ See also Robert A. Leflar, 'Choice-Influencing Considerations in Conflicts Law' (1966) 41 NYU LR 267 for an alternative standard-based approach.

Utopia, Catarina, a signatory state without reservations, Frisia, a signatory state with a reservation under Article 96,¹³⁸ and Lonsdale, a non-signatory state. Further assume each of these would take jurisdiction.¹³⁹ Depending on where Party A files their complaint, and that forum's approach to conflicts of law, and the nature of that forum's legal system generally,¹⁴⁰ several different results are possible, including the wholesale exclusion of the CISG (if litigated in Lonsdale). For example, if Frisia adopts the rule found in the Rome Regulation, it would apply the law of the habitual residence of the seller, which in this case precludes application of its own formalities rules. However, had it adopted a form of interest analysis, it would likely reach the opposite result, as there would be a forum interest in the application of its rules for formalities. The same problem affects each of the possible choices of forum. This is a direct affront to at least two of the major goals of the CISG: uniformity and the reduction in forum shopping. Furthermore, many conflicts approaches make procedural rules a matter of forum law, and a forum could hypothetically find that proving a contract is evidentiary, and therefore procedural.¹⁴¹

Resort to private international law, and many particular rules of private international law will generally encourage forum-shopping.¹⁴² At least one court and a scholar praising

¹³⁸ Further assume that Frisia has the same formality requirements as Utopia (ie, a contract for the sale of goods must be in writing).

¹³⁹ While it seems unlikely that five nations could take jurisdiction in any given case, it is not as improbable as it seems. Some jurisdictions make it relatively easy to obtain a forum within their courts. See eg New York General Obligations Law § 5-1401 and 1402. And there are several cases that demonstrate that two parties from two different states can stipulate and obtain jurisdiction in a third state. See eg *Tzortzis v. Monark Line A/B* 1 WLR 406.

¹⁴⁰ For example, is the jurisdiction a civil law or common law or mixed jurisdiction?

¹⁴¹ McClean and Beevers (n 124).

¹⁴² See Franco Ferrari, 'International Sales Law and the Inevitability of Forum Shopping: A Comment on Tribunale di Rimini 26 November 2002' (2004) 23 JL & Com 169. 'After stating that uniform substantive law rules prevail over private international law rules due to their being more specific -- in the sense that they solve the substantive problem 'directly,' without the need for a two-step approach which resort to private international law necessarily entails -- the Tribunale di Rimini states that 'it has also been pointed out by some scholars that the application of substantive uniform law has an additional advantage compared to the application of the rules of private international law: the avoidance of forum shopping.'" (citing *Al Palazzo S.r.l.v. v. Bernardaud de*

that court have asserted that some degree of forum-shopping is inevitable,¹⁴³ but that does not mean that it is desirable or should be encouraged. This problem of forum-shopping is compounded in the context of this hypothetical because of the structure of the CISG. Consider a similar hypothetical case given by Harry Flechtner, where an Argentine party orally contracts with a party in the United States.¹⁴⁴ In that case, if the choice of laws analysis leads to Argentina's law, then there is no contract, yet if it points to US domestic law, then the contract may be subject to a state statute of frauds.¹⁴⁵ This means that a party seeking to prevent an oral contract from being enforced has a strong incentive to litigate the case in a forum that itself has a writing requirement, even if that country has not taken a reservation from the CISG. This is precisely the situation the CISG seeks to eliminate. Even without knowing which side would eventually win in the district court (when they applied conflicts analysis,) one can state with some confidence that a future party on the same side of the issue as the prevailing party in *Forestal*, for example, would be likely to seek the same forum if at all possible.

The efficiency promised by the CISG would be largely impeded if forum-shopping could affect results. This is because if the law applied were likely to be different under the rules of different fora, then parties would incur costs in both going to different courts to seek relief, and in forcing parties to deal with legal knowledge costs that uniform law is supposed to reduce or eliminate. In addition, it could create a rush to litigate; if one party thinks it can

Limoges S.A. Tribunale di Rimini 26 November 2002). cf Gary F Bell, 'Why Singapore Should Withdraw its Article 95 Reservation to the United Nations Convention on Contracts for the International Sale of Goods (CISG)' (2005) 9 Singapore Year Book of Intl L 55, 62.

¹⁴³ Ferrari (n 142). Ferrari lists among the reasons for this inevitability differences in procedural rules, such as pretrial discovery and the burden of proof, as well as the quality and enforceability of a particular court's judgments.

¹⁴⁴ Flechtner (n 40).

¹⁴⁵ *ibid.*

gain a substantive advantage by the application of a particular forum's conflict approach, it may be inclined to file sooner rather than later.

D. The Majority Approach Fails to Preserve Uniformity

The question of how to interpret the CISG, both as a general matter and in the context of particular disputes, has been a consistently vexing problem for both scholars and courts. However, it is without question that uniformity is one of the values meant to be preserved under the CISG. While the issues raised in this section are not necessarily unique to the problem addressed in this thesis, they do surround it, and are particularly problematic given the nature of conflicts analysis, which will necessarily require both a determination of the applicable law and then an application of that law.

It is widely recognized that the CISG would not accomplish its primary purpose unless courts interpreted its provisions uniformly. But the history of the CISG has demonstrated that uniformity is very difficult to accomplish in practice. This section will outline some of the theoretical and practical difficulties in accomplishing a truly uniform international commercial code, and argue that the majority approach to Article 96 reservations frustrates that goal.

The first of the difficulties in creating uniformity is simple: The CISG does not have one authoritative text, but instead, six different versions of the text in different languages,¹⁴⁶ in addition to a body of case law from different countries and courts, and reservations and interpretations made in different countries.¹⁴⁷ The text of the convention itself, in the various official translations, appears to diverge in force and meaning on several key points.¹⁴⁸ Even

¹⁴⁶ The languages are Arabic, Chinese English, French, Russian, and Spanish. This information was taken from the Pace Electronic Library < <http://www.cisg.law.pace.edu/> > accessed 5 January 2014. Further references to this database will cite to 'Pace Electronic Library'. See also Flechtner (n 40); Sheaffer (n 37).

¹⁴⁷ Flechtner (n 40) 189.

¹⁴⁸ *ibid* 191–92 (discussing the difference between Article 7(1) and (2) in English, where the text uses the phrases 'fundamental breach' and 'a substantial part of his obligations,' and the same text in French, which uses the word '*essentielle*' in both provisions).

authors who are generally supportive of the CISG have noted the difficulties arising both from the multiple translations of the text and the possible issues arising from differences in the regional dialects of each of the signatory states even where there is a common language.¹⁴⁹

Related to the issue of uniformity is the problem of ‘Homeward Trend’.¹⁵⁰ This is typically defined as the importation of domestic law concepts into CISG jurisprudence by reading terms in the CISG in light of domestic law definitions.¹⁵¹ Franco Ferrari has argued that this represents a serious attack on the values of the CISG:

This trend is deplorable because it promotes parochialism and thus defeats the very purpose of the CISG, namely the creation of a *uniform* sales law aimed at the creation of legal certainty and 'the removal of legal barriers in international trade'. In effect, the homeward trend 'deprives the collective signatories of the predictability and reliability of law which the CISG was meant to create.'¹⁵²

The homeward trend does not only manifest itself in examining terms within the CISG, but also in analysing terms used within contracts.¹⁵³ This adds another layer of importance to forum selection, and another layer of unpredictability during the contract drafting phase.¹⁵⁴

¹⁴⁹ See eg Bruno Zeller, ‘International Trade Law -- Problems of Language and Concepts?’ (2003) 23 JL & Com 39. Despite this, some scholars, such as Ingeborg Schwenzer and Pascal Hachem, have argued that:

The rich body of court decisions in German speaking countries, which was mainly developed using the non-authoritative German translation of the CISG, so far has not revealed any serious problems in court practice. Where inconsistencies were detected, these were easily resolved by interpretation of the relevant provision in light of the authoritative versions as well as the drafting history and the purpose of the provision.

Ingeborg Schwenzer and Pascal Hachem, ‘The CISG--Successes & Pitfalls’ (2009) 57 American J Comp L 457, 465–66.

¹⁵⁰ The phrase ‘homeward trend’ is credited to John Honnold. Karen Halverson Cross, ‘Parol Evidence Under the CISG: The ‘Homeward Trend’ Reconsidered’ (2007) 68 Ohio St LJ 133, 136.

¹⁵¹ Franco Ferrari, ‘Homeward Trend and Lex Forism Despite International Sales Law’ (2009) 13 Vindobona J Intl Com L & Arb 15, 22. Others have suggested that the homeward trend may help the CISG gain broader acceptance. See eg Cross (n 150).

¹⁵² Ferrari (n 151) (internal citations omitted, emphasis in original).

¹⁵³ Flechtner (n 40) 201–02.

While the issue of homeward trend is a general problem under the CISG, this thesis proposes that it is exacerbated by the majority approach. Facially, this is counterintuitive: the proposed solution requires courts to use domestic law, while the majority approach may allow courts to create some sort of international common law. But in actuality, the majority approach, because it requires courts to construe the issue as outside of the scope of the CISG, necessarily requires the use of domestic laws to address the problem and is therefore far more susceptible to the homeward trend. This is especially true because conflicts approaches will inevitably require the importation of domestic law terms. For example, use of the Rome Regulation requires a court to determine what the habitual residence of the seller means in a particular context. And even to the extent that courts from different states may be able to engage in a common-law style dialogue about the law, there is no programmatic or systemic way to reconcile those decisions in the likely event of disagreement.

A further point on uniformity is that judicial decisions cannot be reconciled with one another by an apex court or higher interpretative body.¹⁵⁵ Unlike the American Uniform Commercial Code, which is periodically revised and updated, or the Brussels Convention on Recognition and Enforcement of Judgments, which, as an instrument of the European Union is interpreted by the European Court of Justice, there is no single body or editorial board for the CISG.¹⁵⁶ In 2001, a private organization, called the Advisory Council of the United Nations Conventions on Contracts for the International Sale of Goods was founded,¹⁵⁷ but its

¹⁵⁴ Some have questioned the notion that we should be concerned about homeward trend. See eg Cross (n 150). Cross does not deny that there is a homeward trend, but suggests that it is not particularly worrisome, and may have some benefits.

¹⁵⁵ See eg Joseph Lookofsky, 'Not Running Wild With the CISG' (2011) 29 JL & Com 141, 142.

¹⁵⁶ Zeller (n 149).

¹⁵⁷ Franco Ferrari, 'Have the Dragons of Uniform Sales Law Been Tamed? Ruminations on the CISG's Autonomous Interpretation by Courts' in in Camilla B. Andersen and Ulrich G. Schroeter (n 68) available at <<http://www.cisg.law.pace.edu/cisg/biblio/ferrari18.html>> accessed 30 December 2013.

opinions are not binding law in any court.¹⁵⁸ While the opinions of the Advisory Council have had a significant impact on global jurisprudence on the CISG,¹⁵⁹ they are not positive law, nor is it representative of the nations that have signed the CISG.¹⁶⁰

Since there is no single court responsible for the administration of the CISG, and therefore no binding precedent for common law courts, the familiar principle of stare decisis ‘cannot function properly.’¹⁶¹ It still may be the case that courts, even if not bound by a higher court’s precedent, will still accept foreign courts’ decisions as persuasive authority.¹⁶² But courts may be reluctant to give precedential credit to decisions from other countries, and more powerful or richer countries might simply ignore decisions from smaller, less powerful, or poorer countries. As Clayton Gillette and Steven Walt have suggested, courts in one state are probably not going to accord much weight to prior decisions of another state:

Respect for uniformity requires that courts construing these provisions pay substantial attention to precedents of courts in other jurisdictions that have adopted the CISG. This could cause courts to be relatively proactive in their interpretations of the CISG in order to articulate precedents that will then become authoritative, if not binding, for subsequent courts. More realistically, however, it is difficult to imagine a court deferring to the decisions of foreign legal systems to interpret a convention of which that court’s country is a signatory. A United States court, we suspect, unlikely to adopt an interpretation of a CISG provision favored by a Lithuanian court or a Ugandan court simply because that decision was promulgated first.¹⁶³

¹⁵⁸ Joshua D H Karton and Lorraine de Germiny, ‘Can the CISG Advisory Council Affect the Homeward Trend?’ (2009) 13 *Vindobona J Intl Com L & Arb* 71. For a full description of the composition, history, and legal authority of the CISG Advisory Council, see *ibid*.

¹⁵⁹ *ibid*.

¹⁶⁰ *ibid*.

¹⁶¹ Gary F Bell, ‘Uniformity through Persuasive International Authorities: Does Stare Decisis really Hinder Uniform Interpretation of the CISG?’ in Camilla B. Andersen and Ulrich G. Schroeter (n 68) available at <<http://cisgw3.law.pace.edu/cisg/biblio/bell4.html>> accessed 30 December 2013.

¹⁶² *ibid*. See also Franco Ferrari, ‘Applying the CISG in a Truly Uniform Manner: *Tribunale di Vigevano* (Italy), 12 July 2000’ [2001] *Uniform LR* 203.

¹⁶³ Clayton P. Gillette and Steven D. Walt, *Sales Law: Domestic and International* (Revised edn, Foundation Press 2002) 6.

Other scholars have been more optimistic about the reach of foreign decisions,¹⁶⁴ and some courts have been able to effectively apply foreign precedents.¹⁶⁵ Even still, Gillette and Walt's point, notwithstanding its optimism regarding the possibility of courts actively seeking to impose their own precedents, remains valid because of the lack of any higher court or enforcement mechanism in order to make sure they continue to do so.¹⁶⁶ In addition, the empirical evidence suggests that Gillette and Walt were correct: US courts continue to rely on the UCC, not the CISG.¹⁶⁷ In the context of Article 96 disputes, this is particularly troubling, because private international law is an intensely complicated area of law. That is to say, it is perfectly suited to the process of refinement through common law jurisprudence or legislative reform, as courts may get the cases correct as reliably as in other areas. In addition, because these disputes are relatively rare, there is less chance for error correction by courts and less incentive for legislators to visit the issue.

While the particular problems of *stare decisis* are unique to common law countries, the general problems of creating a global jurisprudence are not. Since most civil law countries do not use precedent as a powerful source of law,¹⁶⁸ even when decisions are made

¹⁶⁴ Zeller (n 77).

¹⁶⁵ See eg *Rheinland Versicherungen v. Altarex*, *Tribunale de Vigevano* 12 July 2000 (District Court Italy), available in translation at < <http://cisgw3.law.pace.edu/cases/000712i3.html> > accessed 3 January 2014. For a discussion of this case, see Ferrari (n 162).

¹⁶⁶ UNCITRAL itself publishes a digest of cases, called the 'Case Law on UNCITRAL Texts' ('CLOUT'), but this is merely a collection of cases, not binding authority. Spiro V. Bazinas, 'Uniformity in the Interpretation and the Application of the CISG: The Role of CLOUT and the DIGEST' in *Celebrating Success: 25 Years United Nations Convention on Contracts For the International Sale of Goods* (Singapore International Arbitration Centre 2005)

¹⁶⁷ Marcia J Staff, 'United Nations Convention on Contracts for the International Sale of Goods: Lessons Learned From Five Years of Cases' (2009) 6 South Carolina J Intl L & Bus 1. See also Marlyse McQuillen, 'The Development of a Federal CISG Common Law in the U.S. Courts: Patterns of Interpretation and Citation' (2006–07) 61 U Miami LR 509, 511 (arguing that US courts look at other US courts, even across jurisdictions, but rarely look at international courts).

¹⁶⁸ See, eg Keith S Rosenn, 'Procedural Protection of Constitutional Rights in Brazil' (2011) 59 Am J Comp L 1009, 1034, for an example of how precedents work in one civil law country. See also Mark R Shulman and Lachmi Singh, 'China's Implementation of the UN Sales Convention Through Arbitral Tribunals' (2010) 48 Columbia J Transnatl L 242, 255 ('Precedent does not play a significant role in the PRC, in great part because

that take into account foreign law, it is not clear how much impact they have on future decisions within the same jurisdiction. And beyond the lack of an apex court, the simple fact is that decisions from one country are not binding on courts of another, which creates a perpetual sense of uncertainty about CISG jurisprudence.¹⁶⁹ This is not to say that decisions will have no influence. Both the French and German systems, for example, have concepts that address the weight of multiple court decisions in a particular direction.¹⁷⁰ And there are other ways in which foreign decisions are used by courts, even if it only because the court finds the argument persuasive.¹⁷¹ But the fact remains that there can be accumulations of inconsistent precedent, and the lack of an apex court prevents the kind of jurisprudential ‘house-keeping’ that could mitigate this problem.

The relevance of this to the problem at hand is that under the majority approach, similar fact patterns will be analyzed in different ways, first as a matter of conflicts analysis, and then, quite possibly, as a matter of substantive interpretation of the CISG, with no mechanism in place to resolve disagreements between courts. Under the rule proposed by this thesis, similar patterns should lead to similar results, at least in the first instance of deciding which law applies.

Because the majority approach implicates conflict of laws rules that do not produce consistent or fair results, and because that in turn encourages forum shopping and

most decisions are not reported. Because the Ministry of Propaganda's consent is required before a court can release the text of a decision, the few decisions that are made public are released in order to satisfy a political rather than a legal agenda.’) (internal citations omitted).

¹⁶⁹ Lookofsky, ‘Walking the Article 7(2) Tightrope between CISG and Domestic Law’ (2005–06) 25 JL & Com 87, 89. See also United Nations Commission on International Trade Law (‘UNCITRAL’) *Digest of Case Law on the United Nations Convention on the International Sale of Goods* [2008] ¶ 4 (‘[t]wo courts have stated that foreign court decisions have merely persuasive, non-binding authority.’) .

¹⁷⁰ John Bell, ‘The Relevance of Foreign Examples to Legal Development’ (2011) 21 Duke J Comp & Intl L 431, 450: ‘The German expression *ständige Rechtsprechung* [sic] and the French idea of *la jurisprudence constante* both contain the idea that, while a single decision may not have a lot of force, a group of decisions in the same direction have a gravitational effect.’

¹⁷¹ *ibid* 433 (describing ways in which courts use foreign precedent).

inconsistency in the CISG, it should be rejected. But if the majority approach is inadequate, what other approach exists? The next section will outline an alternative approach, and argue that it is the superior reading of the CISG.

IV. The Minority Approach: Treat These Disputes as Internal Gaps

As has been noted, the majority of courts decide the applicability of an Article 96 reservation on the basis of Article 7(2)'s private international law clause. In doing so, they typically brush aside the applicability of Article 7(1) and Article 7(2)'s interpretive rules. This section will argue that a more appropriate reading of Article 7 would resolve the issue under Article 7(1). This argument is based on the interpretative approaches found in the Article itself, the primacy and importance of uniformity in CISG jurisprudence, and an interstitial reading of the CISG, especially Article 12.

Unlike the approach in *Forestal*, in some circumstances, courts and arbitral bodies have done something different:¹⁷² instead of resolving the case under Article 7(2), they chose instead to apply the reservation. This section will first address those cases, before giving some hypothetical examples of how the proposed rule would work in practice, before arguing that the gap created by Articles 12 and 96 is internal to the CISG, and that the better interpretation of the CISG supports the proposed rule.

A. Existing Case Law and Examples in Practice

In a case from the Russian Federation, a Russian seller sued a Cypriot buyer.¹⁷³ There, the tribunal found that when a state has taken a reservation under Article 96, the

¹⁷² Winship (n 11) 8 provides a brief summary of some of these cases as reported in the UNCITRAL *Digest of Case Law on the United Nations Convention on Contract for the International Sale of Goods* [2012] available at <<http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf>> accessed 5 January 2014. He also adds a reference to a recent French decision, Winship (n 11) 8 n 47, discussed below.

¹⁷³ *Tribunal of International Commercial Arbitration of the Russian Federation*, 10 June 1999, available in translation at <<http://cisgw3.law.pace.edu/cases/990610r1.html>> accessed 3 January 2014. The parties' names are not published.

domestic law of the state taking the reservation should govern with respect to the formal rules of contract formation.¹⁷⁴ In *Conservas la Costena S.A. de C.V. v. Lanis San Luis S.A. & Agro-industrial Santa Adela S.A.*,¹⁷⁵ a Mexican buyer and Argentine seller contested the same issue. Goods, from Chile, were meant to be delivered to the Mexican buyer.¹⁷⁶ Among the various defenses raised by the Argentine party, one was that the contract had not been in writing, a requirement that they asserted because of Argentina's reservations to the CISG. The arbitral tribunal found that while the reservation applied, the contract was sufficiently definite to meet the writing requirements because the CISG requirements of quantity, quality and price had all been reduced to writing.¹⁷⁷ More recently, the French Court of Cassation ruled that an Argentine company could not recover against a French seller even where subsequent writing confirmed an oral agreement, because Argentina had taken a reservation pursuant to Article 96.¹⁷⁸

Finally, in *Vital Berry Marketing v. Dira-Frost*,¹⁷⁹ an unpublished Belgian case, the court addressed the issue of an oral modification of a contract term.¹⁸⁰ The plaintiff, a Chilean raspberry merchant, claimed that the buyer, based in Belgium, owed the full price of a contract when there had been a change in the market price for raspberries.¹⁸¹ While the

¹⁷⁴ *ibid.*

¹⁷⁵ *Conservas la Costena SA de CV v Lanis San Luis SA & Agro- industrial Santa Adela SA* 29 April 1996 Compromex Arbitration proceeding (Mexico) available in translation at <<http://cisgw3.law.pace.edu/cases/960429m1.html>> accessed 3 January 2014.

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid.*

¹⁷⁸ *Ecofrut c Dole France*, *Cour de Cassation* no. 10-30912 (7 February 2012). This case is available through <<http://www.cisg.fr/decision.html??lang-fr>> accessed 5 January 2014, however the link to a stable format of the decision is not presently available.

¹⁷⁹ 2 May 1995 *Rechtbank van Koophandel, Hasselt* (District Court Belgium) 1849/94, available at <<http://cisgw3.law.pace.edu/cases/950502b1.html>> accessed 25 December 2013.

¹⁸⁰ *ibid.*

¹⁸¹ *ibid.*

initial contract was in writing, the proposed modification had not been. The Chilean seller claimed they were due the initial price under the written contract. Chile, but not Belgium, had a reservation under Article 96. The court agreed with the Chilean plaintiff, stating that because Chile had taken a reservation, their formal requirements applied, and the written modification had to be in writing.¹⁸² The court also engaged in a discussion of Article 79, asserting that a market price change was not within the meaning of an impediment to performance.¹⁸³ Whether explicitly or not, these tribunals have applied the rule proposed by this thesis.¹⁸⁴ Before turning to reasons to prefer this approach, a few illustrations of how it would work in practice should clarify the issue.

Turning back to the hypothetical given earlier, how would this work in practice? Starting with a simple example, assume that Party A, the seller, is from Ruritania, a signatory state without any reservations. Party B, the buyer, is from Utopia, a signatory state that has a validly enacted reservation under Article 96, and in addition, has a law that states that all contracts for the sale of goods worth more than £500 must be in writing. Party B refuses to pay, and Party A sues. Under the rule proposed by this thesis, Party A will lose in any forum,¹⁸⁵ at least with respect to their claim under the CISG. A court, when confronted with the case, will resolve the issue as an internal gap, find that the dispute is governed by the CISG, and that the fact of the reservation by Utopia requires the court to apply Utopia's writing requirement to the dispute. While this result seems unfair, a problem discussed below, compare it to the multiple different results that could emerge if the majority approach is used.

¹⁸² *ibid.*

¹⁸³ *ibid.*

¹⁸⁴ In another unpublished case from the United States, *Zhejiang Shaoxing Yongli Printing and Dyeing Co Ltd v Microflock Textile Group Corporation* (District Court of Florida 19 May 2008) the court applied formalities rules because of China's Article 96 declaration, but did so without explaining its reasoning. Furthermore it did require Chinese formality rules in particular, merely some writing. The decision is available at <<http://cisgw3.law.pace.edu/cases/080519u2.html>> accessed 4 January 2014.

¹⁸⁵ Assuming that even forums in states without the CISG would properly apply it.

Depending on the forum's conflict approach, there are various different outcomes that could emerge, and the result would be inherently unpredictable. Note in particular that the result remains the same even if the identities of the parties or the reserving states are reversed. If Party A were the buyer, they would still lose; and if they remained the seller, but Ruritania, not Utopia, had the reservation and formalities rule, they would also lose. In addition, Party A would, under the original terms of the hypothetical, be free to advance alternative legal theories for recovery. But they could not prevail on a contractual claim made under the CISG.

Now consider an alternative hypothetical. Party A, the seller, is from Ruritania, a signatory state without any reservations. Party B, the buyer, is from Utopia, a signatory state that has a validly enacted reservation under Article 96. Utopia's law requires that while contracts for the sale of goods do not need to be in writing, once a contract has been concluded, any modifications regarding price or quantity must be in writing signed by both parties. After concluding the contract for the sale of 2000 widgets, the price of widgets drops dramatically. B demands a price reduction. A agrees to lower the price, but neither party confirms this modification in writing. A sends the widgets. B pays the modified contract price, and A sues for the difference between the original and modified price terms. Under the rule proposed in this thesis, the original contract price is binding, but the modification is not. B is liable for the original contract price.

Finally consider one more example using the same parties, however, in this case there has been an effective choice of law. This situation, where the parties have made an effective choice of law, but there is still an issue regarding the applicability of an Article 96 reservation, will be exceedingly rare, but it is not impossible. Consider, for example, a valid agreement for the sale of widgets, with a choice of law clause included that also includes a term making Party A the exclusive supplier of widgets to Party B for the next 3 years, and which does not include a price or quantity term. Assuming a contractual clause such as that is

otherwise valid, there would still be the possibility of a dispute over the applicability of the reservation in the event of a disagreement over a subsequent contract. Under the rule proposed by this thesis, the formalities rules are no longer applicable. Despite the non-derogability of Article 12, parties are still permitted to make a choice of law; in a technical sense this would not be a derogation of Article 12 (as their choice would not affect Utopia's reservation where Utopian law supplied the rule of decision), and assuming that the initial contract was an effective choice of law, then the rule proposed by this thesis does not apply.

These results, particularly with respect to the first two hypotheticals, may seem harsh. But it is the contention of this thesis that they are the better outcomes for several reasons. First, they largely eliminate actual conflicts analysis. Even in the last example, the only conflicts analysis required would be whether the choice of law was effective, which is generally a simpler question than the actual application of most conflicts laws. This has the benefit of making litigation less expensive and more predictive.

In addition, the proposed rule protects the interest of a reserving state in protecting parties from that state. While some have dismissed this approach because it ignores factors such as the home state of the buyer or seller or the place of performance,¹⁸⁶ this thesis contends that this is part of the proposed rule's virtue. Formalities rules cover both the buyer and seller. If a state wishes to preserve those rules, then it does not matter which side of the transaction the party from that state is from—and if a state felt that it were important, then presumably it could tailor its formalities rules to reflect that.¹⁸⁷ In addition, some of the harshness of this rule's application is non-unique; if the forum uses a bright-line rule such as the habitual residence of the seller (especially if it is truly a bright-line approach with very little room to argue about the residence), then similar results could emerge. The crucial

¹⁸⁶ Schroeter (n 3) 24.

¹⁸⁷ For example, a state could write a law requiring sellers, but not buyers, to use written evidence of a contract to prove its existence in court.

difference is that under the majority approach, results will vary with the forum's conflicts rules, which may be contradictory in different fora. In addition, various doctrines such as unjust enrichment can help soften the application of this rule, a possibility discussed later. Finally, as this section will argue, this is a better reading of the CISG.

One final potential complication exists with the rule proposed in this thesis. What should a court do when both parties are from countries that have taken reservations under Article 96, and further, what should they do when those formal requirements contradict one another? At the outset, it should be noted that this is a largely theoretical question; there are relatively few countries that have taken such a reservation, and there is very little trade between them, let alone sales of goods contracts that end in litigation.¹⁸⁸ However, taking the two possibilities in turn, this thesis suggests that while it holds for the first situation, where both countries have taken reservations, but those reservations are not contradictory, the court should apply both states formalities rules. In the latter situation, this thesis proposes that the more onerous formalities rules should apply. For example, if one state requires writing when the contract is for the sale of goods in excess of £500, while the other requires it only when the value exceeds £1000, the former rule (£500) would apply. This should be preferred because general rule, more onerous formalities will encompass less onerous ones (eg, if a state requires notarial seal, it will usually have also required writing, as the seal would have to be affixed to something. In the extremely far-fetched event¹⁸⁹ that the rules are simply contradictory, (eg, one state requires all contracts be written on pink paper, while the other requires yellow paper,) resort to conflict of laws analysis may be required.

¹⁸⁸ See Appendix A..

¹⁸⁹ To the extent that a review of the relevant law was practical, and drawing on the Pace Electronic Library, the author has not found any examples of actual contradictions with respect to formalities in the laws of the relevant states.

Thus, if each country has formality rules, but those rules are not contradictory, then each should be enforced. This is because the same principles of party autonomy and international comity that are relevant in the more common situation of one country's formality rules still apply. However, if the two regimes have contradictory formal requirements, then applying what has been termed 'the majority approach' in this thesis is inevitable. That said, these situations are extremely rare, and so any impact on the efficiency and clarity gains that the approach of this thesis would produce are likely de minimis.

While the *Forestal* court made some persuasive criticisms of the minority approach,¹⁹⁰ this thesis argues that the minority approach is superior in 4 primary ways. First, these gaps should be considered as internal, rather than external. Next, if understood as an internal gap, then the best reading of Article 96 is that it has a positive effect on the CISG.¹⁹¹ It will then argue that the minority approach is more closely aligned with the general principles that should be used to interpret an internal gap under Article 7, and that the approach favoured by courts the approach promotes non-uniformity in contradiction of the Article 7 interpretive imperative. Finally, It will argue that there are extra-textual policy reasons to prefer this solution to the majority approach, before turning to some possible objections.

B. Disputes Over the Applicability of Article 96 as Internal Gaps

Disputes over the applicability of reservations made under Article 96, even if one would not characterize them as 'expressly settled' by the CISG, should be characterized as within the scope of the CISG, and thus as internal gaps.¹⁹² There are several reasons for this.

¹⁹⁰ *Forestal Guarani S.A. v. Daros International, Inc.* (n 15) 399–401.

¹⁹¹ It should be noted that the question of whether this gap is internal or external is closely related to the question of whether Article 96 has a positive or negative effect. That is to say, if Article 96 is entirely negative, then there is a stronger argument for conceiving of the gap as external.

¹⁹² While this argument could be extended to all disputes over the applicability of reservations, this question is beyond the scope of this thesis.

This section will argue that the text of the CISG, as well as the conventional constructions of treaties support treating these disputes as internal gaps. The relevance of whether a dispute over the applicability of a reservation is an internal or external gap is that if the dispute is an external gap, then the CISG has no more to say about the issue. The only relevant factor is what the conflicts rules of the forum say. If however, the issue is internal, then there is a second order question as to what is the correct interpretation of the CISG.

Distinguishing between the *lacunae intra legem*, or internal gaps, and *lacunae prater legem*, or external gaps, may not be easy as a general matter, because even defining what constitutes a gap is not simple.¹⁹³ But even authors who are sceptical about the possibility of a universal and completely consistent system of defining gaps have conceded that there are some criteria that could be useful in determining whether the gap is internal or external.¹⁹⁴ Andersen gives five separate factors that could be evaluated: 1) '[t]he issue must arise from a contract for the international sale of goods as defined by the CISG,¹⁹⁵ 2) whether or not the subject matter is specifically excluded from the CISG, 3) if there a CISG provision that deals with the issue in part, 4) if there is a *lex fori* rule treating the issue, dispositively, as substantive or procedural, and if yes, is there an 'established body of international CISG precedents/scholarship' which accepts this classification, and 5) is there a corpus of precedents or academic work that has already determined if it is an internal gap?¹⁹⁶

These factors line up to on the side that states that Article 96 disputes should be treated as internal gaps. By definition, the disputed contracts within this thesis are about the

¹⁹³ Camilla Baasch Andersen, 'General Principles of the CISG -- Generally Impenetrable?' in Camilla B. Andersen and Ulrich G. Schroeter (n 68) 17–18 .

¹⁹⁴ *ibid* 19–22.

¹⁹⁵ This would seem to be obvious, and it is presumed that Andersen means: is this issue directly related to the sale of goods, and not about other issues that may be litigated in the same case.

¹⁹⁶ Andersen (n 193) 22.

international sale of goods,¹⁹⁷ They are about contracts for the sale of goods under the CISG. Moreover, the question of formality is not only included in the CISG, but four different articles must be considered when addressing the issue. While the cases that have addressed this issue have tended to treat it as an external gap there are relatively few precedents; consequently, there is little benefit to considering it ‘established’. And there is little scholarly work that bears on the problem in either direction.

Consider, for example, Article 12. Even if one does not accept the idea that Article 12, by its own terms, provides an express resolution of these disputes, it is nevertheless true that, at the very least, the existence of Article 12 places these disputes within the ambit of the CISG. While one might argue, even if this thesis disagrees, that the text of Article 12 is somewhat opaque, it is hard to imagine a way to read the article that does not demonstrate that Article 96 reservations are within the scope of the CISG. And even if one says that this article is too vague to provide an express resolution to the controversy that does not lead to the inexorable conclusion that there is no implied resolution to the problem.

This is connected to a second point: reservations are obviously contemplated by the CISG. In authorizing these reservations in the first place, the framers of the document clearly contemplated litigation over both the issues covered by the reservations and the reservations themselves.¹⁹⁸ It is hard to think of something that would more squarely be ‘governed by ...’ but ‘not expressly settled’ by the CISG.¹⁹⁹ It would be fairly asinine if there was an entire structural feature contemplated by the CISG that was not subject to interpretation under the CISG.

¹⁹⁷ There is the possibility that the sale of goods would be tangential to a services contract that is excluded from the CISG, but this is remote and would remove the CISG from consideration entirely.

¹⁹⁸ Further, academics have assumed that the intentions of the drafters of the CISG are relevant to its interpretation. See eg Paolo Torzilli, ‘The Aftermath of *MCC-Marble*: Is This the Death Knell for the Parol Evidence Rule?’ (2000) 74 St John’s LR 843, 854.

¹⁹⁹ Art 7 CISG.

In addition to the reasons for reading the CISG itself this way, the interpretative canons of treaties generally must be considered. It is a standard interpretative technique in international law to read treaties as comprehensively as permitted by assuming that states will not act to defeat the purpose of the treaty and by assuming that treaties are entered into in good faith.²⁰⁰ In other words, interpreters should start from the presumption that issues are covered, because to do otherwise would not accord respect to the deal struck by the parties.²⁰¹ And the same interpretative system gives two situations in which good faith interpretation by standard meaning does not apply: ambiguity or manifest absurdity.²⁰² Given Article 12 of the CISG, neither of those provisions are applicable.

Moreover, reservations are assumed to have reciprocal force.²⁰³ While the formal application of this rule is a bit muddled, because the CISG is by nature a multi-lateral arrangement, and the draft article addressing reservations appears to be designed for bi-lateral treaties, the basic thrust is clear: reservations are to be respected, because they represent the treaty as agreed to by a state.²⁰⁴ And while there appears to be some tension between reading a treaty comprehensively and respecting the reservations, this is superficial. In this context, reading the treaty comprehensively means assuming the issue itself is covered, while respecting the reservation refers to the rule of decision for the issue.

²⁰⁰ Art 28 United Nations Draft Articles on the Law of Treaties with Commentaries [1966] Yearbook of the International Law Commission Volume II. See generally United Nations Draft Articles on the Law of Treaties with Commentaries (adopted 23 May 1969, entered into force on 27 January 1980 1155 UNTS 331).

²⁰¹ Art 23 United Nations Draft Articles on the Law of Treaties with Commentaries [1966] Yearbook of the International Law Commission Volume II. See also *ibid* Art 27 (discussing good faith in interpretation). It is also clear that compromises, such as the inclusion of a reservation scheme, were key to with widespread adoption of the CISG, and were intended as such. Cross (n 150) 144.

²⁰² Art 28 United Nations Draft Articles on the Law of Treaties with Commentaries [1966] Yearbook of the International Law Commission Volume II.

²⁰³ *ibid* Art 19.

²⁰⁴ *ibid*.

Finally, the structure and text of Article 7(2) supports this interpretation. As Camilla Baasch Andersen wrote: ‘The clear wording ‘in the absence of such principles’ makes it abundantly clear that general principles must be consulted first in any gap-filling situation.’²⁰⁵ Thus, if there is a way to determine the answer to the question without resort to private international law, it should be preferred. While the reasons why these general principles independently support the proposed rule in this thesis will be addressed the later, the majority approach simply skips over any attempt to address these principles at all. Given this textual imperative, and using those general principles, the better reading of the CISG is that these disputes are internal gaps.

Accordingly, before the question of the applicability of reservations is characterized as an external gap, a court should first consider Article 7(2), and examine ‘the general principles on which [the CISG] is based’ before resorting to Private International Law.²⁰⁶ Moreover, there is a strong argument that even where the question of the applicability of a rule is not explicitly covered by the convention, then it should be resolved as an internal gap. As Phanesh Koneru, arguing for an expansive definition of internal gaps, wrote:

It has been suggested that one should exercise restraint in extracting the general principles. Professor Honnold recommends that such findings of general principles should be limited to situations where the general principles are ‘moored to premises that underlie specific provisions of the Convention.’ He further suggests that finding general principles to solve a specific problem is valid only when the lack of a specific provision to govern the issue is due to deliberate rejection by the delegates to the Convention or due to the Convention’s ‘failure to anticipate and resolve [the] issue.’ If the Convention failed to anticipate and thus provide for a specific solution to an issue, an analogical extension from the existing provisions to the new situation is then appropriate.

²⁰⁵ Andersen (n 193) 15. Andersen, however, is skeptical of about the applicability of general principles. *ibid* 16–17; 22–23.

²⁰⁶ Art 7(2) CISG.

Thus, any *issue* that has not been expressly *excluded* by the Convention, and which can be resolved by applying the general principles of the Convention, should be solved accordingly.²⁰⁷

Finally, one might argue that because courts have generally treated this problem as an external gap, fidelity to the project of a global jurisprudence requires courts to continue to do so. But courts have been inconsistent in their application and interpretation of Article 7(2),²⁰⁸ and so the argument for consistency and predictability is somewhat weakened.

In addition, because of the interstitial connections that apply to Article 96 reservations, and which do not exist in the context of any other permitted reservations, one can conclude that Article 96 is meant to be read as covered by the convention. The fact that Article 96 implicates at least two other articles indicates that it is meant to be read within the internal gaps provision.

There has also been a tension throughout the history of the CISG: while courts prefer to cabin in the application of the CISG, academics have tended to want to place more disputes within its reach.²⁰⁹ While the broader argument may be beyond the scope of this thesis, the issue-by-issue approach favoured by Lookofsky²¹⁰ provides some help here. Lookofsky argues that ‘those who run wild with the CISG—stretching its borders to solve controversial problems it was not designed to solve—might unwittingly provide commercial certainty-seekers with an excuse to opt out of the Convention regime altogether.’²¹¹ An argument can be made here that the approach used by the majority gets this imperative wrong in both directions: it expands the CISG to cover unwritten contracts, despite the fact that nations have chosen to take reservations, and it introduces uncertainty.

²⁰⁷ Koneru (n 77) 120–21 (internal citations omitted, emphasis in original).

²⁰⁸ Lookofsky (n 169) 89. See also Lookofsky (n 155) 142.

²⁰⁹ Lookofsky (n 155) 143.

²¹⁰ *ibid.*

²¹¹ *ibid.*

That these disputes should be discussed as internal gaps is only half of the battle. It still needs to be demonstrated that as an internal gap, the correct interpretation of the CISG would be to use the reserving state's formalities rules. The argument for this interpretation follows in three parts, first with reference to the text of the CISG itself.

C. Article 96 Has Both a Negative and Positive Effect

As discussed above, there is a strong argument for treating disputes over the applicability of reservations as internal gaps. Reservations are contemplated by the CISG, and the principles underlying the CISG are supported by approaching this problem as an internal gap. But if this is an internal gap, how should it be interpreted under the CISG? The contention of this thesis is that the best reading of Article 96, and in particular its interaction with Article 12, supports the idea that the CISG, in the absence of an effective choice, should be understood as requiring the formalities approach of the reserving state.

Ulrich Schroeter has described two possible effects of Article 96, a 'negative effect' and a 'positive effect.'²¹² While this thesis disagrees with his views on some issues, his description of these effects is significant. He describes the negative effect of Article 96 as not only excluding reserving states from being forced to adopt freedom of form provisions,²¹³ but also permitting all contracting states to ignore the CISG's freedom of form provisions.²¹⁴ He goes on to state that the scope of Article 96's negative effect is unclear, at least with respect to Article 12's scope.²¹⁵ At the very least, however, the negative effect of the provision

²¹² Schroeter (n 3). As will be clear, Schroeter takes an opposing view on the issue in this thesis.

²¹³ *ibid* 14. Schroeter does not provide very much in the way of citations for his claim that the reservations on form were included primarily with respect to public international law, rather than as a substantive rule of private international law.

²¹⁴ *ibid* 17.

²¹⁵ *ibid* 16. In particular, there is a question as to whether the negative effect of Article 96 refers to only writing requirements, as opposed to other formal requirements such as authentication. While writing is the primary issue for this thesis, it should be noted that Schroeter takes the position that other formalities requirements are not maintained by a declaration under Article 96. However, he does make any substantive arguments as to why

means that no state that is party to the CISG must apply the freedom of form provisions when the place of business of at least one party is in a reserving state.²¹⁶ Schroeter's view is that the language of Article 12 and Article 96 refers to 'the place of business of at least one of the parties' as opposed to the location of the forum, and therefore must apply regardless of the location of the court.²¹⁷

First, it seems clear that Schroeter is correct as to the existence of a negative effect of Article 12. Article 12 states that:

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.²¹⁸

Thus the plain text of this article supports at least the idea that where one party is from a reserving state, there is the possibility of using the formalities rules of the reserving state.²¹⁹

formalities requirements such as a notarial seal, which are part of the written instrument, are excluded by the language 'in any form other than in writing.' Furthermore, every one of the formalities which Schroeter mentions would require some form of writing. In addition, given that the CISG exists in multiple languages, and the process by which it was drafted, the level of precision which Schroeter appears to attach to the phrase 'writing' seems a bit out of place. Regardless, none of the cases that have arisen under these provisions have, to the best of the author's knowledge, addressed the question of what formalities constitute writing and which do not. In addition, there appears to be very little scholarship on this question. Accordingly, this thesis assumes that formal requirements includes both the writing and any related formalities such as seal or registration.

²¹⁶ *ibid* 17. Schroeter also provides evidence for this interpretation with reference to the diplomatic conference drafting the CISG.

²¹⁷ *ibid*.

²¹⁸ Art 12 CISG.

²¹⁹ See also Mather (n 91) 166: 'And CISG article 12 provides that if *either party* has his place of business in a state that has made an article 96 declaration, the 'no writing required' rules of article 11, article 29, and Part II do not apply.' (emphasis in original).

However, the mere fact that any court, when confronted with the question of the applicability of an Article 96 reservation, can apply it regardless of forum law does not completely answer the question. As Schroeter points out, the negative effect alone does not allow the court to determine if a contract has been concluded, and determining whether or not there is a positive effect to the articles become relevant.²²⁰ In other words, the negative effect of Article 12 removes the CISG's freedom of form principles. But it does not explicitly substitute in the form requirements of a reserving state.

Schroeter also discusses the possible interpretations of a positive effect of Article 96.²²¹ He characterizes the view that there is positive effect to the Article as a minority approach,²²² and dismisses the cases that apply it out of hand.²²³ Instead, he favours the majority approach, that determinations of whether the applicable law is that of the reserving or non-reserving state, should be determined by applying conflicts approaches.²²⁴

There are at least two immediate reasons to question this conclusion however. First, it does not answer the question of what law applies once the freedom of form provisions have been excluded. Clearly, some law has to be applied to the disputes, and the most obvious source of that law would be the law that the Article 96 reservations are designed to protect, rather than by relying on conflicts approaches, because relying on 'the private international rules implicitly ignores the policies of declaring and non-declaring States implicitly adopt

²²⁰ Schroeter (n 3) 19.

²²¹ Schroeter also argues that the discussion of whether there is a positive affect should be limited to the 'rules governing such interpretation,' rather than issues of adopting states' policies or comity. *ibid* 22. However, as will be discussed, the interpretative rules of the CISG include discussions of topics such as states' policies and comity.

²²² *ibid* 19–20.

²²³ *ibid*.

²²⁴ *ibid*.

when they become parties to the Convention.’²²⁵ Second, and connected to the first reason, is that Schroeter’s approach effectively collapses the question of how one interprets the CISG with the question of whether these disputes are an internal or external gap.²²⁶ Schroeter argues that the negative phrasing of the relevant articles indicates that it is not an internal gap, because a positive reading would allow a court to avoid one of those general principles (the freedom of form principle).²²⁷ It is proposed that this argument is circular and misguided. While it is true that freedom of form is a principle of the CISG, the phrase used makes references to ‘general principles’.²²⁸ Freedom of form is not the only principle at stake in this discussion. Furthermore, the question of whether the gap is internal or external is largely concerned, in the first instance, with whether the question can be resolved by the general principles. To determine that because one principle disfavors an approach the others need not be consulted before recourse to private international law does not comply with the interpretative rule of Article 7.

But this thesis argues that the text does more than merely establish a negative effect. In a document that tends to use somewhat unclear language, this passage unambiguously states that if any party is from a reserving state (or at least, has its place of business there), then the provisions of the CISG that eliminate formal requirements do not apply to the transaction.²²⁹ While that might even be enough for one to say that the plain text of Article 12

²²⁵ Winship (n 11) 10–11.

²²⁶ See Schroeter (n 3) 28.

²²⁷ *ibid* 28–29.

²²⁸ Art 7 CISG.

²²⁹ The French language version of the text is in accord, as are the Spanish and Arabic versions. The Arabic text states that:

All provisions of article 11 and article 29 or part two of this treaty which allow any form other than writing for establishing the selling contract or amending it or terminating it by agreement, or by occurrence of agreement or acceptance, or by announcing the intention of one of the parties, do not apply when the business of one of the parties is located in one of the contracting states which joined

supports necessarily applying the reservation, the text goes even further than that. Not only do the various articles not apply, but writing itself is a requirement for a contract to be concluded. Thus, contractual regimes with limited formal requirements still might not be sufficient. In other words, the only meaningful way to make sense of the provision is to conclude that a reservation permits a state to substitute its own writing requirements for those of the CISG.²³⁰

Beyond the plain text of this passage, one must consider the article in the context of the CISG as a whole. Article 12 is the only non-derogable provision in the entirety of the CISG. A party in a signatory state contracting with a party from another signatory state, even where neither state has made a reservation can contract out of the CISG entirely, but if they use the CISG, then Article 12 applies, though it may not have any application in that context. This is somewhat remarkable. The CISG is meant as a system of default rules.²³¹ That is to say, the CISG stands in for contractual clauses that the parties could not be bothered to negotiate themselves, either because it was too costly to do so or because they simply neglected to do so.²³² By definition, it can only work as a system of default rules, rather than a system of mandatory rules, to the extent that parties can opt-out of the default. Furthermore, there is no doubt that the CISG is intended to promote party autonomy.²³³ Given this

this treaty and announced its reservation according to article 96 of this treaty. Both parties are not allowed to violate this article or amend its effects.

My thanks to Ahmed Kessem for the translation from the Arabic text, and to Daniel Rosenheck, for his help with the Spanish text.

²³⁰ The dilemma that might occur were both parties to be from reserving states is thankfully, even rarer, and not always perfectly resolvable along the lines proposed in this thesis. This may itself be some indication that reservation schemes should be disfavoured, but does not significantly impact the rest of this thesis. Regardless, this possibility was considered earlier in this thesis.

²³¹ Clayton P. Gillette, 'Harmony and Stasis in Trade Usage for International Sales' (1999) 39 *Virginia J Intl L* 706.

²³² *ibid.*

²³³ See eg, Yongping Xiao and Weidi Long, 'Selected Topics on the Application of the CISG in China' (2008) 20 *Pace Intl LR* 61, 75–76.

preference for party autonomy, the fact that there is one non-derogable rule is *prima facie* evidence that the drafters of the CISG intended for that rule to always apply. Even without getting into the quandary of divining the intent of a large, polyglot group of diplomats and lawyers, fidelity to the text requires a court to take the fact of this rule's anomalous status seriously. Only the reading proposed in this thesis gives the non-derogability of the rule any legal force.

There is one potential counter-argument to this reading. One could read Article 6 to state that since the entirety of the CISG may be excluded, an oral contract made under the CISG is an implicit choice to opt into the CISG, excluding Article 12. But there are a number of problems with this reading. First, it makes the language of Article 12, which does not permit derogation, a near nullity. If simply concluding an oral contract is enough to implicitly exclude the CISG's provisions governing oral contracts, then why include them in the first place? This is at odds with the idea that the CISG acts as a series of default rules. Second, implicit exclusions are generally disfavoured within the CISG: courts have generally found that absent a clear intent to avoid the CISG or a particular provision, the CISG applies.²³⁴ If the general applicability of the CISG can only rarely be excluded by silence, then it would be somewhat odd to allow individual provisions, which are less likely to be specifically negotiated over, to be excluded, as that would significantly limit the ability of the CISG to act as a series of default rules.

Schroeter makes several additional arguments as to why one should favour the majority approach. His first is that the text of the CISG says that the freedom of form provisions, Articles 12 and 96 'do 'not apply', ' rather than establishing some independent reason to think that the reserving state's formal requirements 'do apply'.²³⁵ This argument is

²³⁴ See eg *Delchi Carrier SpA v. Rotorex Corp.*, 71 F 3d 1024, 1027 n 1 (2d Cir 1995); see also Honnold (n 277).

²³⁵ Schroeter (n 3) 23.

flawed in part because, as has been noted, the text of the CISG in a particular language is not singular and authoritative; there are several different versions in different languages, each of which is equally valid. Schroeter's best argument here is that in one other instance, the CISG directs a state to look at its 'own law'.²³⁶ But given the criticisms of the drafting process of the CISG,²³⁷ it seems dangerous to make serious assumptions about the meaning of the CISG merely through this comparison.

Schroeter also notes that the lack of a positive rule was mentioned in the diplomatic conference over the CISG, and left intact.²³⁸ But again, this attempt to read the rule based on lack of quasi-legislative action is inherently unstable. It is true that various other iterations of the rule were proposed, but inferring from the records of a diplomatic conference tells us very little about the actual meaning of the text as it was written. Winship, for example, cites an Austrian delegate to the diplomatic conference as understanding the rule as written to support the minority view.²³⁹ He also notes an English delegate who disagreed and a Swiss delegate

²³⁶ *ibid* citing Art 28 CISG.

²³⁷ Rosett (n 104) summarizes this issue:

The process by which agreement was reached at Vienna testifies to the complexity of the task and suggests the salient characteristics of the product. The delegates of the sixty-two participating nations did not reach consensus by a magical process. The majority, representing nations that follow the civil-law tradition, did not suddenly realize the virtues of the common-law approach to contract and commercial transactions. Nor did the representatives of states with planned socialist economies suddenly recognize the virtues of free enterprise and the private allocation of risks by contract. And the many representatives of poorer and underdeveloped nations did not come to a new appreciation of the plight of the wealthy creditors of this world. After thirty years of hard technical negotiation by experts, worldwide agreement was reached by diplomatic compromise. This is hardly surprising, nor is it a vice. Nonetheless, the diplomat's drive to be inclusive and reach an agreement on the text of a treaty is at odds with the needs of the primary user of this particular Convention, the businessperson who has to make transactional decisions. Businesspersons do not place a high value on doctrinal purity nor do they especially value the political capacity to accommodate persistently conflicting views in an acceptable diplomatic text. They do need to set prices and undertake risks; hence, they need legal guidance in responding to particular situations.

²³⁸ Schroeter (n 3) 23–24.

²³⁹ Winship (n 11) 4.

who was sure that the intention was to create the minority approach, but who thought it was not done clearly enough.²⁴⁰ What we do know is that the text of the articles establishing this reservation was acceptable to states with strong policies in favour of formalities rules, and presumably they felt that the rule would preserve their formalities approaches. Schroeter's approach would significantly weaken that, as it would encourage parties to shop for a forum that would not apply the rule.

Additionally, Schroeter's argument is that a positive rule would have made the use of reserving state's laws too frequent.²⁴¹ But that reads too much into the rule. Perhaps if there were clearer positive language in the Articles 12 and 96, then this doctrinal puzzle might not have arisen. That does not mean that the lack of a positive phrasing of the rule indicates that this particular problem has no positive effect. The more obvious reading is that it indicates that the provision is not intended to cover all contracts between parties where one is from a non-reserving state. In other words, a dispute over the meaning of a particular term may not be impacted by the fact of a reservation. For example, a dispute between a party from a reserving state and one from a non-reserving state where the issue was over the rules governing delivery obligations pursuant to Article 31 would not be governed by the reserving state's law.²⁴² Instead, only situations that directly implicate the lack of formalities, such as oral contracts, or others where it is unclear that there was ever an effective choice of law are covered by Article 96.

In other words, Schroeter is correct that the inclusion of a positive rule might have led to the use of the reserving state's laws whenever a reserving state was involved in a contract of sales. He is not correct, however, to suggest that this undesirable result prevents

²⁴⁰ *ibid.*

²⁴¹ Schroeter (n 3) 23–24.

²⁴² Art 31 CISG.

courts from reading Article 96 as covering the specific instance that formalities rules are meant to cover. Therefore if there was an effective choice of law that pointed to a non-reserving states laws, then one could ignore the formalities requirements. But where there has not been one, and a state has reserved on formalities, it would largely render the reservation null to resort to private international law. And the fact that a state has reserved with respect to writing would not mean that any contract formed with a party from that state requires the wholesale adoption of that state's laws for the CISG. But formalities rules exist as policy matter for cases in which there is no evidentiary basis for a contract or where there are fears regarding interpretation of contracts. The same issues are present in Schroeter's analysis of the purpose of the reservation.²⁴³ His argument only applies if the use of the reservations is extended to all contracts between reserving and non-reserving state parties. It does not apply in the narrow circumstance where the interest of the reserving state in protecting parties is implicated.

In addition, one should consider the implications of Schroeter's argument. If Article 12 has a negative effect, and thus can eliminate the freedom of form provisions of the CISG, then some rule has to step in to fill the gap left by the elimination of those provisions. Schroeter argues that this negative effect only eliminates the freedom of form provisions, and cannot bind states to any particular formalities rule.²⁴⁴ But what would be the point of making an Article 96 reservation unless a state wished to protect its own formalities rules? The text of Article 96 explicitly permits states to reject the freedom of form principle, and would become

²⁴³ Schroeter (n 3) 24.

²⁴⁴ *ibid* 17.

a virtual nullity if the freedom of form principle were still applicable despite the reservation. And the scheme of the treaty itself would be undermined if this were not the case.²⁴⁵

Schroeter's best argument regarding the text of Articles 12 and 96 is interstitial. He argues that in other instances, the CISG authorizes the use of a state's local law, and therefore the lack of such explicit language in Articles 12 and 96 should prevent recourse to local law.²⁴⁶ But there are problems with this argument as well. Primarily, the interstitial reading is somewhat weak, because of the issue of different languages for the CISG. In addition, the reference to a state's own law in Article 28 is narrow, and serves to prevent an imposition of a particular remedy in other courts.²⁴⁷ It has no interaction with the reservation scheme, and could only conceivably work if explicit. Lastly, the particular explanation given by Schroeter, that a state is 'authorize[d]'²⁴⁸ to look to its own law by Article 28 does not make logical sense given his reading of the negative effect of Articles 96 and Article 12. If there is a negative effect, then a state is 'authorized' to examine its own or another state's formalities rules as well, because it still must pick the applicable law in the absence of the CISG's freedom of form principle. Accordingly, the stronger reading of the CISG's text favours the minority approach. However, there is an additional reason to prefer the minority approach, which is that the general principles, which per Article 7 must be considered before resort to private international law, also support application of a reserving state's formalities rules.

D. Article 7 and General Principles

²⁴⁵ While Winship (n 11) 9-11 refrains from answering this question directly, he does argue that if one accepts the premise that states have a right to protect their own fundamental policies, then the logical conclusion is that under the types of disputes described in this thesis, then the formalities rules of the governing state should apply.

²⁴⁶ *ibid* 23, citing Art 28 CISG, which states '[i]f, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.'

²⁴⁷ Art 28 CISG.

²⁴⁸ Schroeter (n 3) 23.

Even if the plain text of Article 96 does not completely answer the question, then does the interpretative guide of Article 7 help a court understand the issue? While the text of Article 7 is not always clear, one thing is readily apparent: resort to the general principles of the CISG is preferable to resort to the principles of public international law. Even the courts that apply the majority approach concede as much.²⁴⁹ The interpretive technique of the CISG given in Article 7(1) are ‘regard [for] its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.’²⁵⁰ In addition, Article 7(2)’s first clause refers to other ‘general principles.’²⁵¹ One²⁵² of these principles is ‘freedom of contract’; parties are entitled to the benefits of the bargain they have struck,²⁵³ in part by enforcing the subjective intent of the parties.²⁵⁴ Others include the facilitation of international trade. Using these principles, the better approach to this gap is to apply the reservation.

First, using the textual imperative of Article 7(1), and thus privileging international character, uniformity, and good faith, what is the best reading of Article 96? Unless the reservation is somehow invalid, for either failing to meet the technical requirements of the CISG, or because the state taking the reservation does not in fact have a writing requirement for sales contracts not governed by the CISG, then the two versions of the CISG—that of the reserving state and that of the non-reserving state—are simply in conflict, and a court must do something to resolve the discrepancy. While the majority approach resolves this with private

²⁴⁹ See eg *Forestal Guarani S.A. v. Daros International, Inc.* (n 15).

²⁵⁰ Art 7(1) CISG.

²⁵¹ Art 7(2) CISG; for methodology see Ulrich Magnus, ‘General Principles of UN-Sales Law’ (1995) 59 *Rechts Zeitschrift für ausländisches und internationales Privatrecht*.

²⁵² Not all of the general principles in the CISG are relevant to this discussion. For a detailed list of most of the general principles, see *ibid*.

²⁵³ Koneru (n 77) 116.

²⁵⁴ Art 8 CISG.

international law, a court can and should resolve the issue by examining these principles. This thesis proposes that while good faith is not much help, uniformity and international character both support the minority approach, as do party autonomy and the facilitation of international trade.

First, however, consider the idea of good faith, as the notion of ‘good faith’ is itself problematic. For example, one writer has identified four possible meanings of the term:

Various commentators have suggested that there are four possible approaches to the role of good faith. Firstly, it is used to only interpret the CISG; secondly, that the conduct of the contracting parties is governed by good faith; thirdly, that good faith is a general principle of the CISG; and fourthly, that good faith is a general principle of *lex mercatoria* and of the UNIDROIT Principles of International Commercial Contracts.²⁵⁵

Bruno Zeller argued that good faith is applied to the courts, because the drafters could have used the language of the Uniform Commercial Code section 1-203²⁵⁶ or of the Restatement (second) of Contracts section 205,²⁵⁷ either of which would have clearly made the principle of ‘good faith’ applicable against the parties themselves.²⁵⁸ Zeller also concedes that the conventional view is that good faith covers both the courts and the parties,²⁵⁹ and ultimately concludes that it should be used for both.²⁶⁰ Peter Schlechtriem argues that the

²⁵⁵ Bruno Zeller, ‘Good Faith - The Scarlet Pimpernel of the CISG’ in Gabriel Moens (ed), *International Trade and Business Law Annual* (Taylor & Francis 2001) n 42 surrounding text, available at <<http://www.cisg.law.pace.edu/cisg/biblio/zeller2.html>> accessed 4 January 2014.

²⁵⁶ Uniform Commercial Code § 1-203: ‘Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.’

²⁵⁷ Restatement (second) of Contracts (ALI 1981) § 205: ‘Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.’

²⁵⁸ Zeller (n 77).

²⁵⁹ *ibid* (citing J S Ziegel, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods* available at <<http://www.cisg.law.pace.edu/cisg/wais/db/articles/english2.html>> accessed 4 January 2014).

²⁶⁰ Zeller (n 77). Koneru also reaches this conclusion, arguing that the text of the convention supports reading the requirement as directed at parties, while the legislative history supports reading it as a requirement for judges. Koneru (n 77) 139.

language was intentionally written to exclude application of the principle to parties themselves, as a compromise between common law and civil law nations, but that courts and legal writers have gradually applied the principle to the parties.²⁶¹ Franco Ferrari has argued that:

The aforementioned possibility of imposing on the parties additional obligations must not be admitted. However, this does not mean that one should adopt the view according to which good faith represents merely an instrument of interpretation. On the contrary, the parties' behavior must be measured on a good faith standard, limited by the Convention's scope of application *ratione materiae*.²⁶²

But what does it mean to say that courts should evaluate parties against a good faith standard, without implying another duty to the parties? It appears to mean that for matters within the CISG (the *ratione materiae*) parties are expected to deal with one another in good faith, but that no such obligation applies to their dealings with one another generally.

‘Good faith’ itself, even apart from the question of to whom it should be applied, could be interpreted in different ways. While some tribunals have applied it without reference to domestic law,²⁶³ others have read the provision in light of their own precedents.²⁶⁴ This is somewhat troubling under the CISG, because different legal traditions have different definitions and uses for the good faith principle.²⁶⁵ In summarizing the Australian jurisprudence on the definition of good faith, Bruno Zeller notes that good faith can be seen

²⁶¹ Peter Schlechtriem, ‘Good Faith in German Law and in International Uniform Laws’ (1997) available at <<http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem16.html>> accessed 3 January 2014.

²⁶² Ferrari (n 104).

²⁶³ See eg *Dulces Luisi v. Seoul International*, 30 November 1998 Compromex (Mexico) available at <<http://cisgw3.law.pace.edu/cases/981130m1.html>> accessed 4 January 2014; cited in Zeller (n 255) n 4.

²⁶⁴ Alexander S Komarov, ‘Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: Some Remarks on Article 7(1)’ (2005-06) 25 JL & Com 75, 77–78 (discussing, though not necessarily criticizing courts for their use of domestic rules in interpretation of the CISG).

²⁶⁵ For a summary of some of these different definitions, see Larry A DiMatteo, ‘An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contract Liability’ (1997) 23 Syracuse J Intl L & Com 67 at 82–86.

as a subjective, objective, or conceptual inquiry.²⁶⁶ The point here is not to adopt one or more of these readings, but instead to demonstrate that the language provided by the CISG has muddied the waters on this question. Regardless of which interpretation is right, what is clear is that the majority approach to the question of reservations does not apply any of these readings, while the minority approach, at the very least, respects the rules of other courts.

As good faith does not appear to provide a satisfactory answer, one could turn to the idea of regard for the CISG's international character. Using Article 7(1), a court could theoretically decide that 'regard ... [for] its international character'²⁶⁷ suggests refusing to enforce the reservation, however this would require further doctrinal justification than the text of the CISG's Article 7(1), such as the fact that most nations have not reserved, or that the CISG generally disfavors writing and formality. But this would necessarily create a series of ad hoc decisions that would be anathema to the uniformity of the CISG, which is how the majority approach appears to have developed. Does 'international character' imply that imposing uniform rules even when nations disagree is proper? It could just as easily imply that courts ought to always enforce reservations, knowing that they allow certain nations to join the CISG at least in part, even when there are 'deal-breaker' provisions in the convention. And that is a stronger reading, because the fact that reservations are included in the CISG indicates that it was contemplated that states would want to use them.

The preamble to the CISG states: 'the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States'.²⁶⁸ Equality and mutual benefit can only exist where all states have the ability to have their pronouncements of law respected. When a nation is permitted to take a reservation, but

²⁶⁶ Zeller (n 255).

²⁶⁷ Art 7(1) CISG.

²⁶⁸ Preamble CISG.

must suffer the consequences of foreign approaches to conflicts of law if they do so, does not suggest an equal system. While one could argue that this is formally equal, and that all nations can choose to reserve or not, that ignores the fact that courts will almost certainly be inclined to apply the version of the CISG that most closely resembles their own. But if it is somewhat unclear whether international character supports the majority or minority approach, this thesis contends that the goals of facilitating international trade and uniformity strongly support the minority view.

The preamble goes on to state that ‘the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade’.²⁶⁹ A few things in this provision suggest the reading favored in this thesis. ‘Taking into account’ varied systems suggests using readings that can be easily understood and ported across systems. While an alternative reading, that the CISG would do a better job of accounting for these systems if it were flexible, is certainly plausible, it is a weaker reading because that would tend to increase, rather than decrease, the boundaries to trade. This is because it tends to increase the costs required to gain legal knowledge, and introduces uncertainty and risk costs into the equation.

But the majority approach adds costs that go beyond these basic costs. They add enforcement costs in the form of extended litigation over the conflicts approach, and interpretation costs that include proof of contractual meaning in fora that are not prepared to do so. Private International Law often produces protracted, costly litigation itself. In addition, lawyers have to learn various conflicts approaches, and the unpredictability of conflicts litigation may act as a disincentive to settle cases.²⁷⁰ In many cases, they will have to hire

²⁶⁹ *ibid.*

²⁷⁰ See also Harry M Fletcher, ‘Changing the Opt-Out Tradition in the United States’ (2007) University of Pittsburgh Legal Studies Research Paper Series No. 2010-10,

local counsel.²⁷¹ These costs make contracting with parties in reserving countries more expensive, and might, therefore, be expected to undercut the CISG's purpose in encouraging international trade. More importantly, the value of uniformity also supports this reading.

The CISG was designed to facilitate the international sale of goods. The primary purposes of the CISG are uniformity and efficiency. The adoption of the CISG was meant to promote uniformity in the substantive international law governing the sale of goods, and in doing so, create a more efficient and manageable legal order for international sales transactions.²⁷² Its preamble notes that countries have 'different social, economic and legal systems,'²⁷³ and that uniform rules can 'promote the development of international trade.'²⁷⁴ It was recognized from the outset that uniformity of interpretation was 'essential to the unification of trade law.'²⁷⁵ Moreover, courts have frequently relied on the legislative history of and scholarly opinions about the CISG,²⁷⁶ and both of these stress the importance of uniformity of interpretation.

Professor John O. Honnold, who was instrumental in the drafting of the CISG, also published numerous books and articles on the convention. In one, he defended the CISG from charges that its application would not be perfectly uniform:

<<http://www.uncitral.org/pdf/english/congress/Flechtner.pdf>> accessed 6 January 2014, (discussing why US parties may opt-out of the CISG: 'The reasons behind the opt-out advice in the United States often made sense in the short term. For any particular transaction, the uncertainty and start-up costs associated with the Convention might well make it worthwhile to pay the price . . . to opt out of the CISG.').

²⁷¹ Even if parties already have to do this, they may be able to settle more cases, and thus save on these fees, when the result is clear ex ante.

²⁷² Preamble CISG; see also Flechtner (n 40) 187 ('Uniformity is a fundamental theme and a central value in the United Nations Convention on Contracts for the International Sale of Goods.')

²⁷³ Preamble CISG.

²⁷⁴ *ibid.*

²⁷⁵ Maureen T. Murphy, 'United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law' (1989) 12 Fordham Intl LJ 727, 748.

²⁷⁶ United Nations Commission on International Trade Law ('UNCITRAL') *Digest of Case Law on the United Nations Convention on the International Sale of Goods* [2008] ¶ 2.

Throughout the work on uniform laws realists have told us:
Even if you get uniform laws you won't get uniform results.
Those sad-faced realists were dead right -- as right as
confirmed bachelors and spinsters who build their lives on the
realistic view that there is no perfect spouse.²⁷⁷

He went on to argue that while there may be some complications, through use of an increasingly large body of academic work and published materials from abroad, eventually these problems would become less important.²⁷⁸ He also suggested that the 'gap-filling' split between civil and common law countries would be more problematic than simple divergent interpretations of terms, and suggested some ways in which that could be mitigated.²⁷⁹ Whether courts have followed his counsel is still an open question.²⁸⁰ Honnold concluded this article by stating that even a somewhat non-uniform code was preferable to the 'Babel of competing systems that preceded it'.²⁸¹ Other scholars have agreed with this assessment.²⁸² Furthermore, some have seen the growth of the CISG, even while acknowledging its faults, as a simple consequence and necessity of globalization.²⁸³ It is the position of this thesis that Honnold was largely correct; some greater amount of uniformity is preferable to less uniformity, even if it is not perfectly uniform. And the proposed approach of this thesis creates greater uniformity with respect to results between two parties, because it is largely based on a known condition, whether or not a party is from a reserving state, rather than the

²⁷⁷ John O Honnold, 'The Sales Convention in Action - Uniform International Words: Uniform Application?' (1988) 8 JL & Com 207; but see Hobhouse (n 44) 533 ('[U]niformity is a utopian not a practical concept in a world composed of independent states with widely differing legal traditions and institutions.').

²⁷⁸ Honnold (n 277).

²⁷⁹ *ibid.*

²⁸⁰ *ibid.*

²⁸¹ *ibid.*

²⁸² Philip Hackney, 'Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?' (2001) 61 Louisiana LR 473 ('[t]he Convention has not brought perfect uniformity to the international law of sales. This is an impossible goal. Its goal of bringing more predictability to international sales law, however, is a useful and possible goal.')

²⁸³ Zeller, 'The CISG - Getting off the Fence' (2000) 79 L Institute J 73.

unpredictable nature of conflicts of laws litigation. It may seem somewhat counterintuitive that applying the reservation and thus using different versions of the CISG would preserve the value of uniformity. But because the rules would be clearer before disputes arose, and because the application of the proposed rule would be predictable in any forum, it would produce more uniform results.

Finally, the value of party autonomy supports this reading. That the CISG is meant to support party autonomy is beyond question.²⁸⁴ One of the antecedents for party autonomy is the ability of parties to understand what legal regime they are contracting under. Clarity is an important value for this, and clarity is increased by a system that relies on simple, bright-line rules. Certainly, there are areas in which the CISG must be flexible, in order to accommodate the diverse perspectives and interests that need to assent to a global treaty for it to have any meaning. But in areas that deal with the most basic questions of whether or not the treaty even applies, clarity ought to be a highly regarded objective.

Articles 8 and 9 both bind parties to agreements based on this principle.²⁸⁵ In the types of disputes that emerge under this rubric, one can presume that the reserving countries have taken a somewhat skeptical approach to demonstrating subjective intent, so much so that they will not burden courts with measuring it without written evidence. And they may have good reason for this; under the CISG, the question of how to evaluate the intent of contracting parties has proven to be particularly tricky. The CISG states that:

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

²⁸⁴ *ibid* ¶ 7.

²⁸⁵ Robert A Hillman, 'Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity' [1995] *Cornell Review of the Convention on Contracts for the International Sale of Goods* 21.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.²⁸⁶

Bruno Zeller has argued that this provision allows a court to examine both objective and subjective intent, and it is therefore superior to traditional common law evidentiary rules.²⁸⁷ That may be true, (and this thesis expresses no view on the evidentiary rules of different courts), but in specific areas where countries have decided not to adopt the CISG on the issue of writing, there has been a clear statement that in order to implement the intent of the parties, a specific form of evidence is required, and thus support for party autonomy requires that this choice be respected.

E. A General Theory of Reservations

Beyond the text of the CISG and the general principles informing interpretation of the CISG, there is a further reason to support the solution proposed by this thesis. It preserves the choices of a given signatory state. As Peter Winship has written: ‘... application of the private international law rules implicitly ignores the policies declaring and non-declaring States implicitly adopt when they become parties to the Convention.’²⁸⁸ States that have made a reservation to the freedom of form principle joined the CISG knowing that they could

²⁸⁶ Art 8 CISG.

²⁸⁷ Bruno Zeller, ‘Determining the Contractual Intent of Parties under the CISG and Common Law -- A Comparative Analysis’ (2002) 4 Eur JL Reform 629.

²⁸⁸ Winship (n 11) 9–10.

do so, and may have had a strong policy preference for maintaining their own formal requirements.²⁸⁹ By resort to private international law, courts effectively ignore this decision.

Given that the stated goal of the CISG is to establish a uniform international sales law, the fact that the CISG even allows reservations seems somewhat odd. It is therefore necessary to develop a theory as to why the reservations exist in the first place.²⁹⁰ One possibility is that the possibility of reservations exists in order to entice states that have a strong aversion to particular parts of the CISG to join the convention generally. This is a somewhat weak justification, because it undermines the crucial purposes of the CISG in having a uniform sales law. Obviously uniformity is weakened by allowing them, but there is still a plausible argument that a state with a reservation is more uniform relative to a state without the reservation than it would be if it simply did not have the CISG. And some of the non-uniformity implicit in allowing reservations can be ameliorated through interpretative techniques like the one proposed here.

As previously noted, the preamble of the CISG stresses that ‘the basis of equality and mutual benefit’.²⁹¹ But as argued before, these values can only exist where the choices that states have made are respected by courts. The CISG has always, like all international treaties, been deeply entwined with and affected by political considerations. This was unavoidable, and therefore not sufficient justification to dismiss the entirety of the project, but it has had consequences. One of these consequences is the presence of these reservations. The reservations allow countries that have strong objections to parts of the CISG to join notwithstanding those objections.

²⁸⁹ This is true regardless of whether or not such a preference is rational or well-justified.

²⁹⁰ While this thesis is confined to Article 96, many of these arguments may apply to other reservations.

²⁹¹ Preamble CISG. The Preamble also states, somewhat obliquely, that the framers acted ‘bearing in mind the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order’. Those objectives include respect for state sovereignty, as well as international comity and strengthening of economic ties. See Declaration on the Establishment of a New International Economic Order (A/Res/S-6)/3201

The model of diplomacy used for the CISG was bound to create vagueness and legal uncertainty, which undermine the two primary purposes of having substantive international law for sales, uniformity and efficiency. But consider the consequences of an alternative approach to treaty drafting. Pretend that Article 96 simply does not exist, and that the states that have used Article 96 reservations would simply have never joined the CISG. A legal order with the CISG minus those countries still seems preferable to one without the CISG, because there is no significant increase in the costs of legal knowledge. The converse, however, is not true. In other words, a world in which all states took some reservation,²⁹² but still signed the CISG, would likely be less preferable to one without the CISG itself, because it would have neither the benefit of uniform law nor the advantages of maintaining the status quo.

Furthermore, the CISG was borne out of significant compromises between many different legal traditions. For example, socialist nations were reluctant to accept the primacy of trade usage often found in the Anglo-American contracts tradition.²⁹³ It seems unreasonable to expect that every nation would be perfectly content with every provision of the CISG, and if international substantive law is to provide its promised benefits, than occasionally countries will have to accept provisions that are not ideal for them, knowing that the overall package offered is better for everyone. As Cross argues:

To use uniformity as the sole interpretive guide would disregard the context within which the Convention was negotiated. Therefore, when CISG Article 7(1) instructs courts and tribunals to interpret the convention in light of its 'international character,' arguably it means more than a strictly autonomous interpretation; it also means that the interpreter

²⁹² Clearly, states would have to be able to take different reservations, but of course, if they all had the same reservation, it is unlikely that the CISG would have included the provision that the states were attempting to avoid.

²⁹³ Alejandro M Garro, 'Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods' (1989) 25 Intl Lawyer 443.

should be sensitive to the compromises that made adoption of the Convention possible.²⁹⁴

While this thesis proposes that applying the reservations would create more uniformity, at least on one level of generality, Cross's point has a broader implication, that states ought to respect the imperatives of other states who signed onto the treaty.

And if mere aversion to certain provisions is insufficient justification for reservations, what can justify them? The ability of courts to administer the different provisions might be a better reason. But given the way in which private international law interacts with the CISG, it is unrealistic to assume that a forum will never have to deal with evidence that would ordinarily be insufficient in its own courts, or rules of law with which it is unfamiliar.

Ultimately, it seems as if the reservations are not really justifiable except as a mechanism by which more countries can feel comfortable joining the CISG. While there is strong argument that this is a wrong-headed approach to the development of international law, to the extent that it is desirable, then it is desirable to actually respect those reservations when they are utilized, and to eliminate the costs associated with private international law.

In the first instance, if a court has a strong evidentiary or procedural preference for written contracts, and parties wish to trade with businesses from that court's nation, then they simply have to write out their contracts. It is hard to imagine that a party who thinks it is economically viable to trade with someone in a foreign nation would find that the transaction costs associated with writing out a contract are worse than the potential risks of dealing with conflicts litigation, especially given the already-higher-than-normal enforcement costs and monitoring costs. Finally, to the extent that parties from reserving states now will have to write out their contracts, they are better positioned to lobby their state to withdraw the

²⁹⁴ Cross (n 150) 139–40.

reservation. If it is truly the case that a world that allows for oral contracts is economically efficient, then this should progressively lead to more states withdrawing those reservations.

Article 95 presents an interesting point of comparison to Article 96. Article 95 permits countries to take a reservation to Article 1(1)(b) of the convention.²⁹⁵ That Article applies the CISG ‘when the rules of private international law lead to the application of the law of a contracting state.’²⁹⁶ This broadens the applicability of the CISG beyond its reach under Article 1(1)(a), which makes the CISG applicable when both parties are from signatory states.²⁹⁷ Article 95 states that ‘[a]ny State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.’²⁹⁸ The effect of taking a reservation is that the CISG only applies when both parties are from contracting states.²⁹⁹ While one US court went through conflicts analysis and applied the CISG regardless of the US reservation,³⁰⁰ that decision has not been followed elsewhere.³⁰¹

The comparison should be immediately clear: how should a court rule when a nation has taken an Article 95 reservation, but the forum’s conflict of laws rules point to the law of a state that has signed the CISG?³⁰² In these circumstances, it seems patently unfair for courts

²⁹⁵ Art 95 CISG.

²⁹⁶ *ibid* Art 1(1)(b).

²⁹⁷ *ibid* Art 1(1)(a).

²⁹⁸ *ibid* Art 95.

²⁹⁹ Jacob Ziegel, ‘The Scope of the Convention: Reaching Out to Article One and Beyond’ (2005–06) 25 *JL & Com* 59, 64–65.

³⁰⁰ *Asante Technologies Inc v PMC-Sierra Inc* 164 F Supp 2d 1142 (ND Cal 2001) (cited in Ziegel (n 282).)

³⁰¹ See eg *Impuls ID International SL v. Psion-Teklogix Inc* 234 F Supp 2d 1267 (SD Fla 2002) (cited in Ziegel (n 282).)

³⁰² This mirrors the traditional conflicts problem of *depeçage*. Also note that this could lead to the application of the CISG where neither party is from a signatory state, but the conflicts approach of the forum pointed to the law of a signatory state. See Bridge (n 68).

to apply the CISG in the face of unambivalent evidence that a state has not agreed to the treaty given the circumstances. The scholarly criticisms of this article are well-taken: an Article 95 reservation creates confusion,³⁰³ leads to forum shopping,³⁰⁴ and impedes the development of uniform international law.³⁰⁵ But the reasons for respecting such a reservation are largely the same as the ones for respecting an Article 96 reservation.

A court, confronted with a dispute about the applicability of the CISG because of an Article 95 reservation, can logically either refuse to apply the convention, or it can conduct a conflict of laws analysis and determine whether the CISG applies by virtue of the fact that conflicts analysis points to the law of a state that has signed the CISG. But that would eliminate the entire purpose of the reservation itself. Further, while the existence of these reservations may not be desirable, they have the benefit of some predictability, at least insofar as courts should not apply the CISG in these circumstances.

While the language of Article 95 may be a bit clearer than that of Article 96, and the disputes that can arise under it are somewhat more discrete, the basic principle is the same. Given that one nation has disclaimed the applicability of the CISG, parties can negotiate around a series of possible conflicts results. The alternative, to conduct conflicts analysis, provides neither the promised uniformity or efficiency of the CISG, and actually presents a serious impediment to those goals, because it increases either the cost of entering into a contract, or the risks involved in that contract. Just as courts typically do not conduct conflict analysis to decide if Article 95 applies or not, courts should not do so when Article 96 has been invoked.

F. The Possibility of Fraud

³⁰³ Bell (n 142).

³⁰⁴ *ibid* 62.

³⁰⁵ Asa Markel, 'American, English and Japanese Warranty Law Compared: Should the U.S. Reconsider Her Article 95 Declaration to the CISG?' (2009) 21 Pace Intl LR 163, 172–73.

One obvious problem with applying Article 96 Reservations without regard for Private International Law is that it opens up the possibility of outright fraud. Simply, one party can agree to a sale orally, knowing full well that their home state has made a reservation under Article 96, and then fail to deliver goods or make payment.

Fear of this possibility is a theme in the cases that arise under Article 96. The facts suggest that one party is trying to avoid the contract, often in ways that look less than honest. And since it is easier for the party from a reserving state to monitor its own laws, and given what we know about lawyers less-than-perfect understanding of the CISG,³⁰⁶ courts might be sceptical of claims from parties from reserving states. Indeed, two tribunals applying the solution favoured in this thesis—deciding these disputes as internal gaps and applying the formalities rules of the reserving state—eventually found that the writing used was sufficient for a contract.³⁰⁷ While this suggests that these disputes can be resolved equitably under either approach, there is an alternative protection already in place, and it is better to use that than to further a mistaken reading of the CISG.

Virtually every legal culture has a doctrine of restitution as distinct from either contract or tort theories of recovery.³⁰⁸ While '[t]he relation between restitution and contract is notoriously confused',³⁰⁹ the fact remains that even absent a contract, in a common law

³⁰⁶ See Martin F Koehler, 'Survey Regarding the Relevance of the United Nations Convention for the International Sale of Goods (CISG) in Legal Practice and the Exclusion of its Application' (2006) in Pace Electronic Library available at < <http://www.cisg.law.pace.edu/cisg/biblio/koehler.html> > accessed 5 January 2014.

³⁰⁷ Del Duca (n 96) citing *Conservas la Costena SA de CV v Lanis San Luis SA & Agro- industrial Santa Adela SA* (n 175) and *Tribunal of International Commercial Arbitration of the Russian Federation*, 10 June 1999 (n 173).

³⁰⁸ Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 3, citing *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 61.

³⁰⁹ Andrew Kull, 'Rescission and Restitution' (2006) 61 *Business Lawyer* 569, 569. The term 'restitution' is sometimes used in different ways in United States contract law, sometimes designating a form of equitable disgorgement in cases of unjust enrichment, and sometimes designating a 'remedy for breach of contract'. Andrew Kull, 'Disgorgement for Breach, the 'Restitution of Interest,' and the Restatement of Contracts' (2001) 79 *Tex LR* 2021, 2029. This thesis concerns the former use of the phrase, through because of the context, the latter might also be applicable.

jurisdiction the party who has performed will have a claim based on the failure of the other party to perform,³¹⁰ while in a civil law country, the party can claim that there was no contract, and thus no duty to perform, and thus is entitled to get any payments they made under the mistaken belief that there was a contract.³¹¹ The practical importance of this is that even were courts to find that oral contracts³¹² made by parties were not enforceable under the CISG because of a reservation, they could still avoid the problem of one party enriching themselves without performing on the contract. For example, using the English approach to restitution,³¹³ there are four elements to a claim: one party has received a benefit; that benefit was from the other party; the benefit was unjust,³¹⁴ and there are no defences.³¹⁵ In the cases described above, the elements would be met, and in fact, the elements of proof would likely be easier and cheaper to address than conflicts litigation. Similarly, under the French Civil Code there is an obligation in ‘quasi-contract,’ for restitution for mistaken payments.³¹⁶

The existence of these policies provides a good reason not to worry too much about the possibility of fraud under this thesis; parties will at the very least be able to recover any sums paid out unjustly. The more important point is that it may limit the scope of application of this thesis. First, this is not a bad thing. Hopefully, relatively few parties do attempt to use

³¹⁰ See also Lookofsky (n 155) 148 (discussing alternative theories of recovery in the English legal system).

³¹¹ Daniel Friedmann, ‘Unjust Enrichment, Pursuance of Self-Interest, and the Limits of Free Riding’ (2003) 36 Loyola Los Angeles LR 831, 834–35 (discussing the French Civil Code).

³¹² Here, ‘oral contracts’ should be read to include modifications, and written contracts that do not meet the writing standard ultimately applied.

³¹³ While the United Kingdom is not a signatory to the CISG, their approach is used here as an exemplar of common law unjust enrichment doctrine. Chaim Saiman, ‘Restitution in America: Why the US Refuses to Join the Global Restitution Party’ (2008) 28 OJLS 99, 99–100 (discussing how the US is something of an outlier with regard to the doctrine).

³¹⁴ ‘Unjust’ in this context is a term of art, and does not imply a moral wrong. Burrows (n 308) 26.

³¹⁵ *ibid* 27.

³¹⁶ Friedmann (n 311) 834–36 (discussing *Code Civile des Français* art. 1371-77, and comparing the provisions and their judicial history to the history of restitution in the United Kingdom).

this solution as an invitation to outright fraud. Second, there is a question of judicial economy. Using this approach, in addition to relieving courts of the burden of conflicts analysis, and the burden of what this thesis proposes is an incorrect reading of the CISG, has one further benefit: it does not require a court to make any findings of fraud or other misbehaviour. In the context of unjust enrichment, the fact that one part has been wrongly enriched does not necessarily mean that that party has committed any moral or unlawful wrong.³¹⁷ Proving a contract, and the concurrent problems of fixing party intent, is often more difficult than proving unjust enrichment. In cases where there is a dispute, and the purported fraud is not clear, but one party has definitely been unjustly enriched, this solution provides a much clearer example.³¹⁸

V. Conclusion

That the CISG allows for reservations under Article 96 is perhaps regrettable. The ability of a nation to reserve under the Article was the result of compromise and negotiation, and the effort to maintain this ability was spearheaded by a state that no longer exists.³¹⁹ Yet the ability was preserved, and several signatory states to the CISG have availed themselves of it. And the fact that this ability exists has not prevented the CISG from becoming one of the more expansive, versatile, and successful international conventions in history. But it has created the doctrinal puzzle at the heart of this thesis. While courts and scholars have typically preferred to resolve the issue through resort to conflicts of laws, that solution is imperfect. It creates uncertainty and promotes non-uniformity. In other words, it is anathema to the project of the CISG. Although occasional resort to conflict of laws was anticipated by

³¹⁷ Burrows (n 308) 26.

³¹⁸ Various types of estoppel may also cover some of this ground, though the extent to which estoppel is a principle of the CISG is controversial. *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods* [2008] ¶ 10.

³¹⁹ Schroeter (n 3).

the CISG,³²⁰ it is meant to be the last option. Moreover, it is inappropriate for this particular problem, because the results it produces are arbitrary.

This issue is thankfully rare. But in the instances when these disputes do arrive, the majority approach fails to respect the stated preferences of reserving states, produces costly and unpredictable litigation, and ignores the fundamental values of the CISG. Applying the reservation under what this thesis terms the minority approach is a better reading of the CISG, and promotes uniformity in analysis. Accordingly, the rule proposed in this thesis, that absent an effective choice of law, where either the home state of the buyer or the home state of the seller has made a reservation under Article 96, or when the law governing the contract was that of a state that has made a reservation under Article 96, the formalities rules of that jurisdiction would apply, is a stronger reading of the CISG, both as a matter of textual interpretation and as an understanding of the general principles.

³²⁰ Art 7(2) CISG does, after all, include the possibility of using private international law.

Appendix A
Summary of Declarations Made by Signatory States³²¹

CISG Article	States that have a current declaration under the article in place
Articles 92 & 94	Australia, Denmark, Finland, Iceland, Norway, Sweden
Article 93	Canada, Denmark
Article 95	Armenia, China, The Czech Republic, Saint Vincent and the Grenadines, Singapore, Slovakia, The United States
Article 96	Argentina, Armenia, Belarus, Chile, China, Hungary, Latvia, Lithuania, Paraguay, Russia, Ukraine

³²¹ This information was compiled from the Pace Electronic Library, which keeps a list of current reservations and declarations <<http://www.cisg.law.pace.edu/cisg/countries/cntries.html>> accessed 5 January 2014, and confirmed by Winship (n 11) 2 n 7.

Bibliography

- — Pace Electronic Library < <http://www.cisg.law.pace.edu/>> accessed 5 January 2014
- — Restatement, Conflict of Laws (ALI 1934)
- — Restatement (second) Conflict of Laws (ALI 1971)
- — Restatement (second) of Contracts (ALI 1981)
- — United Nations Commission on International Trade Law ('UNCITRAL') Digest of Case Law on the United Nations Convention on the International Sale of Goods [2008]
- — United Nations Commission on International Trade Law ('UNCITRAL') Digest of Case Law on the United Nations Convention on the International Sale of Goods [2012]
- — United Nations Draft Articles on the Law of Treaties with Commentaries [1966] Yearbook of the International Law Commission Volume II.
- — World Trade Organization, 'World Trade Profiles 2012'

Andersen C B, 'General Principles of the CISG -- Generally Impenetrable?' in Andersen C B and Schroeter U G (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (Wildy, Simmonds & Hill 2008)

Bailey J E, 'Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales' (1999) 32 Cornell Intl LJ 273

Bazinas S V, 'Uniformity in the Interpretation and the Application of the CISG: The Role of CLOUT and the DIGEST' in *Celebrating Success: 25 Years United Nations Convention on Contracts For the International Sale of Goods* (Singapore International Arbitration Centre 2005)

Bell G F, 'Why Singapore Should Withdraw its Article 95 Reservation to the United Nations Convention on Contracts for the International Sale of Goods (CISG)' (2005) 9 Singapore Year Book of Intl L 55

— — Bell G F, 'Uniformity through Persuasive International Authorities: Does Stare Decisis really Hinder Uniform Interpretation of the CISG?' in Andersen C B and Schroeter U G (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (Wildy, Simmonds & Hill 2008)

Bell J, 'The Relevance of Foreign Examples to Legal Development' (2011) 21 Duke J Comp & Intl L 431

Berger K P, *Transnational Commercial Law in the Age of Globalization* (Saggi 2001)

Bonell M J, 'International Uniform Law in Practice -- Or Where the Real Trouble Begins' (1990) 38 Am J Comp L 865

— — and Liguori F, 'The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law -- 1997 (Part 1)' [1997] Uniform LR 385

Bridge M, 'Uniform and Harmonized Sales Law: Choice of Law Issues' in Fawcett J J, Harris J M and Bridge M, (eds), *International Sale of Goods in the Conflict of Laws* (OUP 2005) 972

Brilmayer L, 'Interest Analysis and the Myth of Legislative Intent' (1980) Yale Law School Faculty Scholarship Series Paper 2509 available at <http://digitalcommons.law.yale.edu/fss_papers/2509/> accessed 4 January 2014

Burrows A, *The Law of Restitution* (3rd edn, OUP 2011)

Chen W, 'The Conflict of Laws in the Context of the CISG: A Chinese Perspective' (2008) 20 Pace Intl LR 115

Cross K H, 'Parol Evidence Under the CISG: The 'Homeward Trend' Reconsidered' (2007) 68 Ohio St LJ 133

Cuniberti G, 'Is the CISG Benefiting Anybody?' (2006) 39 Vanderbilt J Transnat'l L 1511

Currie B, 'Comments on *Babcock v. Jackson*, a Recent Development in Conflict of Laws' (1963) 63 Columbia LR 1233

Del Duca L F, 'Implementation of Contract Formation Statute of Frauds, Parol Evidence, and Battle of Forms CISG Provisions in Civil and Common Law Countries' (2005) 25 JL & Com 133

— —and Del Duca P, 'Selected Topics Under the Convention on International Sale of Goods (CISG)' (2001) 106 Dickinson LR 205

DiMatteo L A, 'An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contract Liability' (1997) 23 Syracuse J Intl L & Com 67

Evans M, 'Article 95' in Bianca C M and Bonell M J, (eds), *Bianca-Bonell Commentary on the International Sales Law* (Giuffrè 1987)

Ferrari F, 'Uniform Interpretation of The 1980 Uniform Sales Law' (1994–95) 24 Georgia J Intl Comp L 183;

— — 'Applying the CISG in a Truly Uniform Manner: Tribunale di Vigevano (Italy), 12 July 2000' [2001] Uniform LR 203.

— — 'Overview of case law on the CISG's international sphere of application and its applicability requirements (articles 1(1)(A) and (B))' (2002) 8 Intl Bus LJ 961

— — 'CISG and Private International Law' in Ferrari F, (ed), *The 1980 Uniform Sales Law: Old issues Revisted in the Light of Recent Experiences* (Giuffrè / München: Sellier European Publishers 2003) 39

— — 'International Sales Law and the Inevitability of Forum Shopping: A Comment on Tribunale di Rimini 26 November 2002' (2004) 23 JL & Com 169

— — 'Have the Dragons of Uniform Sales Law Been Tamed? Ruminations on the CISG's Autonomous Interpretation by Courts' in Andersen C B and Schroeter U G (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for*

Albert H. Kritzer *on the Occasion of his Eightieth Birthday* (Wildy, Simmonds & Hill 2008)

— — ‘Homeward Trend and Lex Forism Despite International Sales Law’ (2009) 13 *Vindobona J Intl Com L & Arb* 15

Flechtner H M, ‘The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)’ (1998) 17 *JL & Com* 187

— — ‘Changing the Opt-Out Tradition in the United States’ (2007) University of Pittsburgh Legal Studies Research Paper Series No. 2010-10,
<<http://www.uncitral.org/pdf/english/congress/Flechtner.pdf>> accessed 6 January 2014,

Friedmann D, ‘Unjust Enrichment, Pursuance of Self-Interest, and the Limits of Free Riding’ (2003) 36 *Loyola Los Angeles LR* 831

Garro A M, ‘Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods’ (1989) 25 *Intl Lawyer* 443.

Gillette C P, ‘Harmony and Stasis in Trade Usage for International Sales’ (1999) 39 *Virginia J Intl L* 706.

— — and Walt S D, *Sales Law: Domestic and International* (Revised edn, Foundation Press 2002)

Hackney P, ‘Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?’ (2001) 61 *Louisiana LR* 473

Harjani S R, ‘The Convention on Contracts for the International Sales of Goods in United States Courts’ (2000) 23 *Houston J Intl L* 49

Hayward B, ‘The CISG in Australia: The Jigsaw Puzzle Missing a Piece’ (2010) 14 *Vindobona J Intl Com L & Arb* 193

Hillman R A, ‘Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity’ [1995] *Cornell Review of the Convention on Contracts for the International Sale of Goods* 21.

Hobhouse J S, ‘International Conventions and Commercial Law: The Pursuit of Uniformity’ (1990) 106 *LQR* 531

Honnold J O, ‘The Sales Convention in Action - Uniform International Words: Uniform Application?’ (1988) 8 *JL & Com* 207

— — *Uniform Law for International Sales Under the 1980 Convention* (4th edn, Kluwer 2009)

Hillman R A, ‘Article 29(2) of the United Nations Convention on Contracts for the International Sale of Goods: A New Effort at Clarifying the Legal Effect of ‘No Oral Modification’ Clauses’ (1988) 21 *Cornell Intl LJ* 449

Juenger F K, ‘Conflict of Laws: A Critique of Interest Analysis’ (1984) 32 *American J Comp L* 1

— — *Selected Essays on the Conflict of Laws* (Transnational Publishers 2001)

Karton J D H and de Germigny L, 'Can the CISG Advisory Council Affect the Homeward Trend?' (2009) 13 *Vindobona J Intl Com L & Arb* 71

Knieper R, 'Celebrating Success by Accession to CISG' (2005) 25 *JL & Com* 477

Koehler M F, 'Survey Regarding the Relevance of the United Nations Convention for the International Sale of Goods (CISG) in Legal Practice and the Exclusion of its Application' (2006) in *Pace Electronic Library* available at
<<http://www.cisg.law.pace.edu/cisg/biblio/koehler.html>> accessed 5 January 2014

Komarov A S, 'Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: Some Remarks on Article 7(1)' (2005-06) 25 *JL & Com* 75

Koneru P, 'The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles' (1997) 6 *Minnesota J Global Trade* 105

Kull A, 'Disgorgement for Breach, the 'Restitution of Interest,' and the Restatement of Contracts' (2001) 79 *Tex LR* 2021
— — 'Rescission and Restitution' (2006) 61 *Business Lawyer* 569

Leflar R A, 'Choice-Influencing Considerations in Conflicts Law' (1966) 41 *NYU LR* 267

Linarelli J, *The Economics of Uniform Laws and Uniform Law Making*: (2003) 48 *Wayne LR* 1387

Lopez M B, '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' (2010) 10 *J Bus & Sec L* 133

Lookofsky J, 'Walking the Article 7(2) Tightrope between CISG and Domestic Law' (2005–06) 25 *JL & Com* 87
— — 'Not Running Wild With the CISG' (2011) 29 *JL & Com* 141

Magnus U, 'General Principles of UN-Sales Law' (1995) 59 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*
— — 'Article 4 Rome I Regulation: The applicable in the Absence of Choice' in Ferrari F and Leible S (eds), *Rome I Regulation –The Law Applicable to Contractual Obligations in Europe* (Sellier 2009)

Markel A, 'American, English and Japanese Warranty Law Compared: Should the U.S. Reconsider Her Article 95 Declaration to the CISG?' (2009) 21 *Pace Intl LR* 163

Mather H, 'Choice of Law for International Sales Issues not Resolved by the CISG' (2001) 20 *JL & Com* 155

McClearn D and Beevers K, Morris, *The Conflict of Laws* (Seventh edn, Sweet & Maxwell 2009)

McQuillen M, 'The Development of a Federal CISG Common Law in the U.S. Courts: Patterns of Interpretation and Citation' (2006–07) 61 U Miami LR 509

Mendes E P, 'The U.N. Sales Convention & U.S.-Canada Transactions; Enticing the World's Largest Trading Bloc to Do Business Under a Global Sales Law' (1988) 8 JL & Com 109

Moss S, 'Why the United Kingdom Has Not Ratified the CISG' (2005-06) 25 JL & Com. 483

Mullis A, 'Twenty-Five Years On -- The United Kingdom, Damages and the Vienna Sales Convention' (2007) 71 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 35

Murphy M T, 'United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law' (1989) 12 *Fordham Intl LJ* 727.

Rendell R S, 'The New U.N. Convention on International Sales Contracts: An Overview' (1989) 15 *Brooklyn J Intl L* 23

Rosenn K S, 'Procedural Protection of Constitutional Rights in Brazil' (2011) 59 *Am J Comp L* 1009

Rosett A, 'Critical Reflections on the United Nations Convention on Contracts for the Sale of Goods' (1984) 45 *Ohio State LJ* 265

Saiman C, 'Restitution in America: Why the US Refuses to Join the Global Restitution Party' (2008) 28 *OJLS* 99

Schlectriem P, 'Effectiveness and Binding Nature of Declarations (Notices, Requests or Other Communications) under Part II and Part III of the CISG' in *Cornell Review of the Convention on Contracts for the International Sale of Goods* (Kluwer 1995)

— — 'Good Faith in German Law and in International Uniform Laws' (1997) available at <<http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem16.html>> accessed 3 January 2014.

— — and Butler P, *UN Law on International Sales: The UN Convention on the International Sale of Goods* (Springer 2009)

— — and Schwenzer I, (eds), *Commentary on the UN Convention on the International Sale of Goods* (2nd edn, OUP 2006)

Schroeter U G, 'Backbone or Backyard of the Convention? The CISG's Final Provisions' in Andersen C B and Schroeter U G (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (Wildy, Simmonds & Hill Publishing 2008).

— — 'The Cross-Border Freedom of Form Principle Under Reservation: The Role of Articles 12 and 96 CISG in Theory and Practice' *JL & Com* (forthcoming)
<<http://ssrn.com/abstract=2169834>> accessed 26 December 2013

Schwenzer I and Pascal Hachem P, 'The CISG--Successes & Pitfalls' (2009) 57 *American J Comp L* 457

Sedgwick J, 'International Contract Law--Choice-of-Law Analysis Applies When Signatory Nations Adopt Opposing Oral Contract Provisions Under the CISG -- Forestal Guarani S.A. v. Daros Intl., Inc., 613 F.3d 395 (3d Cir. 2010)' (2011) 34 Suffolk Transn'l LR 273

Sheaffer C, 'The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law' (2007) 15 Cardozo J Intl & Comp L 461

Shulman M R and Singh L, 'China's Implementation of the UN Sales Convention Through Arbitral Tribunals' (2010) 48 Columbia J Transnatl L 242

Staff M J, 'United Nations Convention on Contracts for the International Sale of Goods: Lessons Learned From Five Years of Cases' (2009) 6 South Carolina J Intl L & Bus 1

Torzilli P, 'The Aftermath of *MCC-Marble*: Is This the Death Knell for the Parol Evidence Rule?' (2000) 74 St John's LR 843

Van Calster G, *European Private International Law* (Hart 2013)

Vernooij N W, 'Rome I: An Update on the Law Applicable to Contractual Obligations in Europe' (2009) 15 Columbia J Eur L Online 71 <http://www.cjel.net/online/15_2-vernooij/> accessed 27 December 2013

Weintraub R J, *Commentary on the Conflict of Laws* (4th edn, Foundation Press 2001)

Winship P, 'Private International Law and the U.N. Sales Convention' (1988) 21 Cornell Intl L J 487.

— — 'Harmonizing Formal Requirements for Cross-Border Sales Contracts' Intl RL (2012) available at < <http://www.qscience.com/doi/abs/10.5339/irl.2012.6> > accessed 5 January 2014

Winsor K, 'The Applicability of the CISG to Govern Sales of Commodity Type Goods' (2010) 14 Vindobona J Intl Com L & Arb 83

Xiao Y and Long W, 'Selected Topics on the Application of the CISG in China' (2008) 20 Pace Intl LR 61

Zeller B, 'The CISG - Getting off the Fence' (2000) 79 L Institute J 73.

— — 'The UN Convention on Contracts for the International Sale of Goods (CISG) -- A Leap Forward Towards Unified International Sales Laws' (2000) 12 Pace Intl LR 79

— — 'Determining the Contractual Intent of Parties under the CISG and Common Law -- A Comparative Analysis' (2002) 4 Eur JL Reform 629.

— — 'International Trade Law -- Problems of Language and Concepts?' (2003) 23 JL & Com 39

— — 'Good Faith - The Scarlet Pimpernel of the CISG' in Moens G (ed), *International Trade and Business Law Annual* (Taylor & Francis 2001)

Zheng S T, 'Law Applicable in the Absence of Choice the New Article 4 of the Rome I Regulation' (2008) 71 Modern LR 785

Ziegel J S, 'The Scope of the Convention: Reaching Out to Article One and Beyond' (2005–06) 25 JL & Com 59.

— — Ziegel J S, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods* available at

<<http://www.cisg.law.pace.edu/cisg/wais/db/articles/english2.html>> accessed 4 January 2014.