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The Political Economy of International Sales Law

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Abstract

The United Nations Convention on Contracts for the International Sale of Goods, or CISG, purports to harmonize the law that applies to international sales contracts. In this paper, we argue that the effort to create uniform international sales law (ISL) fails to supply contracting parties with the default terms they prefer, thus violating the normative criterion that justifies the law-making process for commercial actors in the first instance. Our argument rests on three claims. First, we contend that the process by which uniform ISL is drafted will dictate the form that many provisions take. Second, we contend that the legal form dictated by the drafting process has significant substantive consequences, particularly for the policy objectives of uniform ISL. Third, we predict that in order to achieve uniform ISL that is widely adopted, those involved in the drafting process will systematically promulgate many vague standards that contracting parties would not choose for themselves. These defaults cannot be justified as the inevitable cost of achieving an optimal level of uniformity. If the products of a uniform ISL are default terms that parties do not want, then the underlying justification for the law-making function – reduction of contracting costs – vanishes.

We find significant correspondence between our predictions about the drafting of uniform international sales law and the CISG. The CISG was drafted by parties whose objectives did not necessarily coincide with those of the commercial actors whose conduct the treaty was intended to regulate. The result is a variety of vague standards and compromises that appear inconsistent with commercial interests. We conclude by suggesting that commercial actors involved in international sales would prefer to choose governing law from among legal regimes that compete to supply parties with more desirable substantive terms.

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The dramatic growth of international trade has generated corresponding calls for an increase in uniform sales law to govern these transactions.¹ The implicit assumption underlying these efforts is that the lack of uniformity will increase the costs of writing contracts for parties to international sales transactions. They will have to bargain over the legal regime (and the default terms) that will govern their transaction, and the regime that is ultimately selected will be relatively unfamiliar to at least one of them. Uniform international sales law (ISL) purports to cure this situation by creating a legal regime with which commercial parties in different jurisdictions will be familiar and will accept without significant additional negotiation.

Our particular focus in this article is the United Nations Convention on Contracts for the International Sale of Goods (CISG), the primary treaty that governs the international exchange of goods by contract. To the extent that adoption is a measure of success, the CISG has become the most successful of efforts to create uniform commercial law. As of this writing, the CISG has been adopted by 65 states. They include most of the major trading nations, although the United Kingdom and Japan are not parties.

In theory, a uniform sales law confers significant benefits on parties, at least to the extent that it embodies in its default rules the solutions to contracting problems that parties would otherwise choose. This claim follows from the fact that all sales contracts are inevitably incomplete. Contracting costs are finite while states of the world (and possibly partners) are infinite. As a consequence, sales contracts contain gaps. Either they fail to address a particular contingency or they provide the same obligations for contingencies that the parties would prefer to treat differently. Sales law rules are intended to fill many of those gaps; each rule becomes a default term in the contracts that the rule regulates. Sales law default rules thus are public goods.² To serve this function appropriately, however, the default must specify the contract term that the broadest number of affected parties would choose for themselves. Otherwise, the process of creating sales law defaults would generate unnecessary costs. The public would bear the law creation costs of drafting defaults that few parties would choose, and the individual parties to sales transactions would incur the additional costs of opting out of the disfavored defaults. This suggests a normative criterion by which to evaluate the substantive terms of any uniform ISL: The default terms in an ISL will be socially optimal precisely and only because they do for the parties what the parties cannot as easily do for themselves.

In this article, we argue that the effort to create uniform ISL has predictably failed to supply contracting parties with the default terms they prefer, thus violating the normative criterion that justifies the law-making process in the first instance. Our argument rests on three claims. First, we contend that the process by which uniform law is drafted will dictate the form that many provisions take. Second, we contend that the legal form dictated by the drafting process has significant substantive consequences, particularly for the policy

¹ See, e.g. Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 Ohio St. L. J. 265, 266–67 (1984).

² For an explanation and justification of the public goods justification for contract law, see Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 Cal. L. Rev. 261, 276, 278 (1985).

objectives of uniform ISL.³ That leads to our third claim. We predict that in order to achieve ISL that is widely adopted, those involved in the drafting process will systematically promulgate many vague standards that contracting parties would not choose for themselves. These defaults cannot be justified as the inevitable cost of achieving an optimal level of uniformity. A uniform ISL is justified only to the extent that it reduces parties' contracting costs. If the products of a uniform ISL are default terms that parties do not want, then the underlying justification for the law-making function vanishes. In that case, parties governed by ISL will be motivated to abandon the uniform law and instead choose among legal regimes that compete to supply parties with more desirable substantive terms.

We focus on the incentives of those who draft ISL in order to make predictions about the form of the default rules that will emerge from the law-making process. Our objective is to determine the extent to which ISL as it is actually promulgated coincides with the provisions that would apply if drafters acted in a manner consistent with the normative goal of drafting legislation that optimally reduces contracting costs. Initially, one might think that ISL goals and practice would largely coincide. The political economy literature typically attributes any deviation from normative goals in the legislative process to the presence of interest groups that are able to gain disproportionate influence. That seems less of a concern, however, in the case of ISL. That body of law regulates the conduct of buyers and sellers of goods in transnational markets. These groups are generally not at loggerheads about ideal law. Buyers in one transaction, after all, are likely to be sellers in the next. Thus, the asymmetrical interests that lead interest groups to divert legislative behavior away from the social interest appear to have little application in this context.

Even if buyers and sellers have common interests, however, concerns may arise if those interests are not reflected in the unique processes by which uniform ISL is promulgated. Drafters of ISL must deal with political as well as commercial issues because they must meld different legal, governmental, and economic interests. The theory of uniform law that we elaborate predicts that efforts to accommodate these diverse political considerations will cause the law to be drafted at a high level of abstraction, explicitly to authorize numerous exceptions to the law's uniform application, and implicitly to tolerate significant variation in the interpretation of the (formally) uniform law. Commercial interests, however, require legal certainty and predictability so that parties involved in international trade are able to price the risks, including legal risks, that their contracts entail. Drafting good commercial law thus requires both extensive staffs and expertise to write the complex rules needed to govern heterogeneous economic environments. Our analysis reveals, however, that the process of drafting ISL has been dominated by individuals concerned with political, rather than commercial interests. As a result, where commercial and political interests conflict, the ISL-creation process has subordinated the former to political concerns.

The article proceeds as follows. We begin in Part I with a description of the process by which the CISG was created. In Part II, we develop the normative criterion for a good ISL: A successful ISL provides standardized default terms that minimize the contracting costs of achieving a given gain in contractual incentives and that the parties in consequence prefer. In Part III, we develop a framework for analyzing the ISL drafting process that focuses on

³ See Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. Penn. L. Rev. 595, 597 (1995) ("the form and substance of a law are significantly endogenous to the law-creating institution.").

the identity and motivations of the drafters. That Part explains how such a drafting process predictably generates many ambiguous terms and vague standards that deviate from the substantive goals of a successful ISL. In Part IV, we examine the provisions of the CISG in some detail and show that the substantive characteristics we predict will result from the drafting process do, in fact, appear in that treaty. Part V considers the alternatives to a uniform ISL. We conclude that if the criterion is to provide the contract rules that commercial parties want, then a regime in which jurisdictions compete for firms that choose which international sales law governs their contracts will dominate attempts to draft uniform ISL.

1. The creation of the CISG—a brief political history

1.1. The drafting history

The United Nations Commission on International Trade Law (UNCITRAL) organized the effort to create the CISG in response to the failure of prior efforts to create widely acceptable uniform sales law.⁴ The International Institute for the Unification of Private Law, or UNIDROIT, had previously undertaken a three-decade effort that resulted in the 1964 promulgation of two treaties, the Uniform Law for International Sales (ULIS) and the Uniform Law on the Formation of Contracts for International Sales (ULF). Neither attracted adoption in more than nine states, in part because the result was considered to have been dominated by European legal concepts that were not recognized elsewhere.⁵ UNCITRAL believed that it could increase adoptions by revising the prior treaties to reflect a more international flavor. UNCITRAL's membership was organized to ensure broad representation in drafting projects. Membership is limited to delegations from 36 states selected by the United Nations General Assembly, and is allocated along geographic lines. States from Africa, Asia, Eastern Europe, Latin America, and "Western Europe and Others" all have membership assured under the UNCITRAL charter.⁶ Thus, the project of reforming the ULIS and ULF necessarily involved representation from affluent and developing countries, common law and civil law systems, and (recall that the project pre-dated democratic movements in Eastern Europe) market-based and Socialist economies.⁷

UNCITRAL traditionally employs Working Groups to create initial drafts before submitting a proposed treaty to a Conference of delegates from a broader range of states. The Working Group consists of representatives from a diverse set of political and economic systems. Working Groups meet for 2–3 weeks annually and work primarily from preparatory materials provided by the Secretariat of UNCITRAL, a full-time body composed largely

⁴ The following history is extracted from C.M. Bianca and M.J. Bonell, *Commentary on the International Sales Law* 2–16 (1987) and John O. Honnold, *Uniform Law for International Sales* 7–12 (3rd ed., 1999) (hereinafter, Honnold, *Uniform Law*).

⁵ See Honnold, *Uniform Law*, supra note 4 at 9; Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. Penn. L. Rev. 687, 725–26 (1998); Gyula Eörsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 Am. J. Comp. L. 333, 335 (1983).

⁶ See John O. Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, 27 Am. J. Comp. L. 201, 207 (1979) (hereinafter Honnold, *Mission and Methods*).

⁷ Id. at 207–08.

of international lawyers.⁸ The materials prepared by the Secretariat include draft statutory texts with alternatives that are intended “to facilitate debate and decision with a minimum of confusion or misunderstanding.”⁹ UNCITRAL and its Working Groups apparently work by consensus and rarely take formal votes on their proposals. Indeed, proceeding outside of formal majority rule appears to be a matter of pride for some involved in the process.¹⁰

In the case of the CISG effort, UNCITRAL created an initial Working Group comprising representatives from a broad geographic, political, and cultural range of states.¹¹ UNCITRAL charged the Working Group with the development of legislation that would be acceptable “by countries of different legal, social, and economic systems.”¹² The Working Group met in nine sessions from 1970 to 1977. While the Working Group initially proposed revisions to the ULIS and the ULF, UNCITRAL ultimately decided to consolidate the two treaties into a single document. UNCITRAL thus established a Drafting Committee for this purpose composed of representatives from Chile, Egypt, France, Hungary, India, Japan, Mexico, Nigeria, the USSR, and the United Kingdom.¹³ That Committee completed its work in 1978. UNCITRAL approved the draft that resulted and requested the United Nations to convene a Diplomatic Conference to consider it. That Conference was held at Vienna during a 5-week period in 1980. Representatives of 62 states attended.¹⁴ Representatives from a variety of non-governmental and intergovernmental agencies interested in international trade attended as observers.¹⁵ Two committees performed most of the work for what became

⁸ Id. at 209; Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 Int. Law. 443, n. 25 (1989).

⁹ Honnold, *Mission and Methods*, supra note 6, at 209.

¹⁰ Honnold, *Uniform Law*, supra note 4, at 8.

¹¹ The original representatives were from Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, USSR, the United Kingdom, and the United States. Representatives from Austria, Czechoslovakia, the Philippines, and Sierra Leone were added later. See Bianca and Bonell, supra note 4, at 6.

¹² See John Honnold, *Documentary History of the Uniform Law of Sales* 3 (1989) (hereinafter, Honnold, *Documentary History*).

¹³ Bianca and Bonell, supra note 4, at 6.

¹⁴ Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cyprus, Czechoslovakia, Denmark, Ecuador, Egypt, Finland, France, German Democratic Republic, Germany, Federal Republic of, Ghana, Greece, Hungary, India, Iran, Iraq, Ireland, Israel, Italy, Japan, Kenya, Libyan Arab Jamahiriya, Luxembourg, Mexico, Netherlands, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Singapore, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Yugoslavia and Zaire. Venezuela sent an observer. See 19 I.L.M. 668 (1980).

Some commentators characterize the participants by reference to their political cultures. Thus, Alejandro M. Garro notes that “Sixty-two nations were represented at the Vienna Conference. Roughly speaking, twenty-two from the ‘Western developed’ part of the world, eleven from ‘socialist regimes,’ and twenty-nine from ‘Third World’ countries.” Garro, supra note 8, at 443 (1989).

¹⁵ These included the World Bank, the Bank for International Settlements, the Central Office for International Railway Transport, the Council of Europe, the European Economic Community, the Hague Conference on Private International Law, the International Institute for the Unification of Private Law, and the International Chamber of Commerce. Pre-Conference proposals for the convention were circulated to these observers, and they made comments on various provisions. See Honnold, *Documentary History*, supra note 12, at 392. For instance, the ICC recommended the deletion of an article, similar to present Article 8, concerning a general rule on interpretation. See id. at 394.

known as the Vienna Conference. One committee prepared the substantive provisions of the CISG, while the other prepared the “final clauses,” which dealt with such issues as reservations, declarations, and ratification by Contracting States.¹⁶ Members of the Conference debated the text of each article, but ultimately approved the CISG unanimously. The CISG was then submitted to states for their approval according to domestic processes for adopting international treaties. According to its terms, the CISG was to become effective among signatories, denominated “Contracting States,” approximately 1 year after the 10th state deposited with the United Nations an instrument indicating its acceptance of the treaty.¹⁷ China, Italy, and the United States became the 9th, 10th, and 11th Contracting States in December 1986. As a result, the CISG became effective among then-Contracting States as of 1 January 1988. As we noted above, as of this writing, 65 nations have become Contracting States.

The actual participants in UNCITRAL projects, including the CISG, tend to come from either universities or ministries in their home state.¹⁸ They are appointed by the governments of their various states, rather than by the United Nations. Appointing authority varies among the states. In some instances (for instance, Italy), the office of the Secretary of State makes the appointment; in other instances (for instance, Germany and Switzerland), the appointment is made by the Ministry of Justice.¹⁹ There is apparently no minimum credentialing required for appointment. Some commentators suggest that the representatives are experts in their field. Honnold reports that representatives to UNCITRAL projects tend to be academics who work in commercial or comparative law, practicing attorneys, and members of government ministries with significant experience in international lawmaking.²⁰ This may be a bit of an overstatement. While most states do send experts, much of the expertise has been gained from academic study rather than participation in international business, and some states simply appoint members of the state’s Permanent Mission to the United Nations. Of the 13 representatives from nations involved in the first Working Group that led to the CISG, nine were legal academics, three were bureaucrats, and one was a member of the country’s Permanent Mission to the United Nations.²¹ Participants receive no remuneration from UNCITRAL. They do, however, typically receive reimbursement for expenses and a per diem allowance from their home states. Participation, therefore, is not a full-time occupation. Participants continue to hold their academic or ministerial positions while serving in the process of drafting the uniform law.

1.2. *The structure of the CISG*

Given the objective of creating uniform ISL, the CISG is notable both for what it contains and for what it omits. The first Part, containing 13 Articles, deals with the statute’s sphere of application. Article 1(1) recites that the CISG applies to “contracts of sale of goods

¹⁶ Bianca and Bonell, *supra* note 4, at 6.

¹⁷ CISG Article 99.

¹⁸ Honnold, *Mission and Methods*, *supra* note 6, at 209.

¹⁹ We are grateful to Professor Franco Ferrari, former Legal Officer at the United Nations Office of Legal Affairs, International Trade Law Branch, for this information.

²⁰ Honnold, *Mission and Methods*, *supra* note 6, at 209. Honnold’s assertion is borne out by a review of the institutional affiliations of the participants we have been able to trace.

²¹ Honnold, *Documentary History*, *supra* note 12, at 187–88.

between parties whose places of business are in different States.” Nevertheless, neither the term “sale” nor the term “goods” is defined within the CISG, except for exclusions of particular transactions,²² and the definition of “place of business” leaves significant ambiguity about what law governs where a party has multiple places of business. Part II concerns the formation of contracts. Part III contains numerous articles that cover substantive provisions of a contract, such as the obligations of buyers and sellers, remedies for breach, passage of risk, anticipatory breach, and damages. The final Part concerns procedural issues for the CISG, such as the ability of those who wish to become Contracting States to declare their unwillingness to be bound by certain provisions, and the terms under which the CISG becomes effective among Contracting States.

The CISG explicitly excludes certain aspects of sales law, however. Article 4 recites that matters of contract validity and the effect of a contract on property rights in the goods sold are beyond the CISG’s jurisdiction. Thus, nothing in the CISG addresses issues such as unconscionability, capacity defenses, or the rights of a bona fide purchaser to goods that turn out to have been stolen. Of perhaps greater importance, the CISG does not provide any mechanism for resolving disputes that might arise with respect to its own meaning. Article 7(b) requires that matters governed by the CISG that are not expressly settled in it are to be resolved in accordance with the “general principles” on which it is based.²³ One searches in vain, however, for a recitation of such principles, with the possible exception of Article 7(a). That provision admonishes those interpreting CISG provisions to promote “the observance of good faith in international trade.” The quoted phrase, however, is not even accompanied by a definition as indefinite as the “observance of reasonable commercial standards of fair dealing,” the definition of good faith within the Uniform Commercial Code.²⁴ Tribunals that apply the CISG, moreover, are directed to consider the treaty’s “international character and the need to promote uniformity in its application,” a phrase that is typically understood to encourage uniform interpretation and to induce national courts and arbitrators to avoid injecting domestic law concepts into their interpretations of the CISG. The underlying assumption appears to be that courts of one nation will treat opinions on the provisions of CISG from courts of other nations as at least evidentiary of the correct interpretation of that provision, even if the foreign opinion is neither authoritative nor binding precedent. Perhaps the ideal way to achieve uniformity would be to have an international commercial court hear cases under the CISG, or at least serve as a court of last resort to resolve conflicts among domestic courts. But the CISG creates no such apparatus. The reason, apparently, has less to do with the merits of uniform interpretation than with practical politics. As Bonell concludes, “[t]o expect that all adhering States, notwithstanding their different social, political, and legal structure, could even agree on conferring to an international tribunal the exclusive competence to resolve divergencies between the national jurisdictions in the interpretation of the uniform rules, would be entirely unrealistic.”²⁵

²² See CISG Article 2 (excluding certain transactions from the scope of “sale”), Article 3 (excluding certain transactions in which the buyer supplies materials for goods or in which the “seller” primarily provides labor or services).

²³ In the absence of such principles, Article 7(b) directs that matters are to be resolved “in conformity with the law applicable by virtue of the rules of private international law.”

²⁴ See UCC § 2-103(1)(b).

²⁵ Bianca and Bonnell, *supra* note 4, at 89.

This summary suggests that while the CISG creates law that is formally uniform at the time of adoption (that is, statutory law that is identical in linguistic form in all jurisdictions that have adopted it²⁶), subsequent litigation will create many opportunities for non-uniform interpretations of the treaty's provisions. As a result, the CISG will, over time, fail to supply a standard language in which solutions to common contracting problems can be cast. But this erosion of the treaty's linguistic and interpretive uniformity is not the only or even our principal concern. Evolving non-uniformity is perhaps inevitable in any legislation that is intended to apply to heterogeneous situations. Our claim, however, is stronger. Recall that we began with the assumption that the normative goals of a uniform ISL are to provide the substantive solution to particular contracting problems that most contracting parties want. In the next Part, we suggest that most parties would want a commercial law statute to minimize the sum of a) the costs to the parties of embodying contracting solutions in written agreements (legal knowledge costs) and b) the costs to the parties of solving contracting problems (problem-solving costs). We claim in subsequent Parts that the CISG systematically fails to accomplish this objective, and fails because of structural defects inherent in the processes by which ISL is drafted.

2. The normative goals of ISL

In order to evaluate the CISG's success, we must first identify more precisely just what goals uniform ISL should pursue. As we suggested above, there is a broad consensus that a lack of uniformity in international sales will increase costs of embodying contracting solutions in written agreements. Parties will have to bargain generally about the legal regime that will govern their transaction, and, in particular, about the array of default rules that will be incorporated as implied terms into their sales contracts. Uniform ISL purports to cure this situation by supplying a standard language in which solutions to common contracting problems are cast. The standard language reduces drafting costs and also reduces uncertainty if courts will interpret the words parties use in various contracts in the same way. Over time, commercial parties in different jurisdictions will become familiar with the standard language and will accept the contracting solutions it embodies without significant additional negotiation. Implicit in this broad statement of purpose, however, are two distinct (and potentially conflicting) objectives.

2.1. *Minimizing contract drafting costs: Legal knowledge costs and problem-solving costs*

The first objective of a successful uniform sales law is to reduce the costs to particular parties of learning about the legal consequences of any particular set of sales law rules. A standard legal language and method of categorizing and interpreting legal rules results in

²⁶ Given the international nature of the CISG, the statement in the text is a bit of an overstatement. The CISG has been adopted in six equally authoritative versions, Arabic, Chinese, English, French, Russian and Spanish. Moreover, it must be translated into other languages in states that do not primarily use one of the "authoritative" languages. Thus, the text is not literally identical in all states.

a pro tanto reduction in these “legal knowledge costs” (the cost involved in learning about the meaning and legal consequences of express and implied contract terms).²⁷ Indeed, this notion of a uniform legal language and a “filing system” that permits the storage and retrieval of key information (such as judicial interpretations of particular provisions) was one of the strongest justifications advanced by Karl Llewellyn in the 1950’s for the adoption of a uniform sales law in the United States.²⁸

But the benefits of a uniform law in reducing legal knowledge costs depend on a second objective: In a large global economy, some sets of parties will dislike particular default terms. A default rule typically is justified as doing for parties at less cost what they would have done for themselves. It follows that parties should supplant the uniform statutory rule when the cost of creating their own term to govern a particular situation is less than the gain from adopting the default. If parties are free to reject the uniform terms, it follows that the law maker should attempt to maximize the set of parties that will find any statutory term acceptable. Put another way, the law maker should seek to minimize the parties’ costs of solving any given contracting problem. From this point of view, law makers should avoid default rules that numerous parties will reject, incurring significant contracting costs in the process.

From this analysis, we derive the normative criterion we suggested above: The default terms in an optimally precise ISL will reflect the solution to contracting problems that most parties would prefer. Any other default rules will induce exit that both fails to reduce “problem-solving costs” (because parties will draft their own provisions) and exacerbates the problem of legal knowledge costs (because party-specific terms increase interpretive uncertainty). If the problem-solving objective of a uniform ISL is not met, therefore, the product will be linguistically uniform upon enactment, but parties subsequently will either abandon the law entirely or opt-out of disfavored provisions thus undermining even the initial benefits of the standard terms.

2.2. *Why parties write incomplete contracts*

Determining the solutions to common contracting problems that most contracting parties would prefer requires that we answer yet another question: Why do parties write incomplete contracts? Most commercial contracts negotiated between sophisticated parties are drafted with the assistance of legal counsel. Unsurprisingly, therefore, most of these contracts are in writing with detailed terms and specifications. Yet, whenever a dispute subsequently arises, it turns out either that the parties have failed to reach an express understanding about who should bear a particular risk that has materialized in the interim, or the contract term that purports to allocate the risk in question is framed in terms of a broad standard that requires subsequent interpretation by a court. Why would commercial parties ever leave such important questions unresolved in their contract?

²⁷ See Steven Walt, *Novelty and the Risks of Uniform Sales Law*, 39 Va. J. Int’l L. 671 (1999); Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or “the Economics of Boilerplate”)*, 83 Va. L. Rev. 713 (1997).

²⁸ Karl Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. Fla. L. Rev. 367, 369 (1957). For discussion, see Robert E. Scott, *The Rise and Fall of Article 2*, 62 La. L. Rev. 1009 (2002).

One possible answer is that contracting parties systematically fail to write complete contracts (that is, to specify the consequences of possible contingencies that may affect their performance) because the transactions costs of writing complete contracts are too high. These costs include the task of adequately identifying all the possible contingencies that might occur and then specifying an appropriate outcome for each one. Given the limits of human cognition, parties may be unable to identify and foresee all future conditions or may be incapable of characterizing adequately the complex adaptations required to accommodate all the possibilities that *might* materialize. Some identified contingencies may be of such low probability that they are not worth further consideration. For those worth addressing in the contract, relevant transactions costs also include both resources invested in negotiating and drafting clauses that allocate risks, and the cost of “formulation error”—the risk that such clauses may be drafted with ambiguity or vagueness that leads to costly litigation.

There is a second reason why commercial parties may choose to write incomplete contracts. The information relevant to the clause may be private or hidden from one of the parties, even though it is available to the other. Where such problems of asymmetric information exist, a rational actor would not expend efforts to draft clauses that condition on the information because compliance can neither be observed by that party nor verified to a third party, such as a court. Assume, for example, that a buyer is unable to monitor and observe the amount of effort her seller exerts in fabricating the contract goods. Under those conditions, it would be foolish for the buyer to require a particular effort level. Rather, she might write an incomplete contract even where the transactions costs were quite low. To do otherwise would require parties either to disclose information that they wish to keep private or to have enforcement turn on facts that one or both could not observe or establish in court.²⁹

2.3. *Default rules and default standards*

The realization that parties may have good reasons to leave contracts incomplete leads to the next logical question: How should the drafters of an ISL assist the parties to incomplete contracts by providing standardized solutions to common contracting problems? If high transactions costs explain why commercial parties write incomplete contracts, then the law properly should fill the gaps with default terms that solve those problems, assuming that the law drafters’ costs are lower than the sum of the costs to contracting parties. But this argument rests on the crucial assumption that the drafting bodies that create ISL are capable of devising cost-effective default rules that would be suitable for many parties. Any rule-maker, whether a statutory drafter or court adjudicating a disputed contract, has finite resources, and so faces many of the constraints that private parties face. Thus, creating good default rules may not be cost-justified. Indeed, the project of providing default rules for parties who have not created their own terms often founders either because (1) the costs of creating complex rules for modern, heterogenous economies exceed the social gains, or (2) simple rules, which may be cost-effective, seldom can solve complex commercial problems.

The challenge rule-makers face in creating cost-effective default rules is illustrated by the (relatively small) set of default *rules* governing sales law that have evolved under the Anglo-American common law and the few bright-line default rules that are found in Article 2 of

²⁹ See Alan Schwartz, *Incomplete Contracts*, 2 New Palgrave Dictionary of Economics and Law 277 (1997).

the Uniform Commercial Code. For example, consider the difference between two possible contractual gaps.³⁰ In the first case, a fire destroys the seller's plant prior to manufacture of the contract goods. Here there are only two relevant future states: A fire could occur or not. A legal rule-maker with limited resources can attack problems such as the risk of a fire because they often can be solved with a simple rule; The seller is (or is not) excused when the goods are destroyed without fault while in her possession. Now assume in the second case that the parties agree to agree subsequently upon a price in a volatile market, but fail to do so. In the case of price uncertainty, there are numerous future states, many of which are likely. The rule-maker, therefore, cannot easily create an optimal contract term to solve price volatility problems because it would be too costly to regulate all of the states that could arise in all of the existing markets. Instead of creating a rule, therefore, law makers faced with such a challenge create a standard: "The price is a reasonable price at the time of delivery."

As we suggested above, creating a default rule may not even be possible where there is asymmetric information. Defaults must condition on information that the enforcing authority is able to observe. A default rule that conditions on unverifiable information would create moral hazard. The possibility that contracts are incomplete because of hidden information or other related factors further complicates the task for drafters of ISL seeking to create useful default rules for contracting parties. If the parties themselves would not choose to base contractual contingencies on information that is unobservable or unverifiable, they will elect to opt-out of a legally-supplied default rule that is similarly conditioned on that information.

Nevertheless, law drafters often provide broad standards when the conditions for creating good default rules are not met. Standards are common because the conditions for creating good default rules are quite difficult to satisfy. Parties are heterogenous in modern economies, good rules would sometimes have to be complex, and parties often must take into account many relevant future states of the world. The greater the heterogeneity of the parties and the greater the variety of contexts to which a particular rule applies, the more convenient (and less costly) it is for a lawmaker to draft standards that are more open-ended and vague.

Standards solve the complexity problem that plague default rules because the decision maker only specifies the content of the parties' obligations ex post. In this way, a relevant legal principle can be applied in litigation to any particular fact pattern that falls within the broad purposes of the standard. Standards such as "commercial reasonableness" permit courts to impose solutions to disputes that are sensitive to the particular relationship and that may distribute losses more equitably between the parties. Unfortunately, despite the utility of standards in resolving hard cases, standards rarely are a good fit for contracting parties who are attempting to specify obligations ex ante. By reducing predictability and transparency, standards may significantly increase the costs of enforcing contractual obligations.

Vague standards can adversely impact contracting costs in several ways. First, contracting parties typically need specific guidance regarding their performance obligations. For example, a seller generally will want to know what quality level to produce in order to satisfy a contractual obligation. Telling that seller that its product must "at least satisfy the buyer's ordinary purposes" is not a very helpful guide to satisfactory performance.³¹ As

³⁰ This example is drawn from Alan Schwartz & Robert E. Scott, *Contract Theory and The Limits of Contract Law*, 113 Yale L.J. 541 (2003).

³¹ See Uniform Commercial Code § 2-314(2)(C).

another illustration, assume that an exogenous event – such as the war in Iraq – increases production costs and the seller faces large losses. In this situation, both parties need to know whether the seller's performance has been excused. A misjudgment by either buyer or seller could lead to a substantial damages liability. There is significant uncertainty in a legal rule that excuses the seller in this situation *but only if* her performance has become “impracticable.”³² And from the buyer's perspective, directing that his return performance can be suspended *but only if* suspension would be “commercially reasonable”³³ creates similar uncertainty. Standards thus are useful only when the parties can predict accurately the behaviors that courts will find sufficient to satisfy the standard's vague language.³⁴

Standards can also increase the risk of moral hazard and the evasion of contractual responsibilities. When it is unclear what any party must do, contracting parties have an incentive to interpret ambiguous circumstances in their favor. For example, assume that a court rules that the specified price or quantity of goods in a given sales contract was subject to good faith adjustment and a standard of reasonableness. Thereafter, whenever the market price of similar goods falls below the contract price a buyer has an incentive to claim that a refusal to pay the contract price is reasonable. And when raw material costs rise above the contract price, a seller has the incentive to claim that her obligation to deliver the goods in question has become “commercially unreasonable.” In each instance, the non-performing party will argue that neither party assumed that a rise of such actual magnitude could occur. A standard such as this is wise, therefore, only when the party on whom it confers discretion is otherwise motivated to take both parties' interests equally into account.

To be sure, commercial parties often include broad standards of reasonableness or effort in their contracts. Commercial contracts regularly invoke factors such as “best efforts,” “reasonable expenses,” and “reasonable withholding of consent.”³⁵ Not only are explicit best efforts obligations common, they are also the subject of extended negotiations, including negotiation over seemingly minor linguistic variations. But the fact that parties often choose to include in their contracts broad standards of effort or reasonableness does not imply that courts or legislators should attempt to fill gaps with similarly vague terms. The evidence is that parties adopt these standards in the broader context of complex contracts that specify both rules and standards in relatively precise combinations. These combinations of rules and standards anticipate and rely on maxims of interpretation and thereby confine the space within which a court may apply the standard. In any event, when these terms are useful, the parties can always include them in their contract at relatively low cost. Courts and statutory drafters, therefore, are wise to interpret the absence of vague standards in particular cases as instructions to limit their construction to the specific terms of the contract.

³² See UCC §2-615(a). Section 261 of the Restatement (Second) of Contracts contains the same rule in almost the same language.

³³ See UCC §2-609(1).

³⁴ See Schwartz & Scott, *supra* note 30.

³⁵ See University of Missouri-Columbia, Contracting and Organizations Research Institute, *CORI Contracts Library*, at <http://cori.missouri.edu> (last visited 25 February 2005) (Total contracts in CORI database: 24,965. Contracts with “best efforts” terms: 4328 (17.34%); Contracts with “reasonable expenses” terms: 2584 (10.35%); contracts with “reasonably withheld” terms: 38 (0.0015%); contracts with “unreasonably withheld” terms: 3525 (14.12%); contracts with “reasonable” terms: 13,281 (53.20%).

To summarize: The default terms in an ISL will be socially optimal when they do for the parties what the parties cannot as easily do for themselves. Based on this criterion, a good default *rule* is one that applies in very few possible future states of the world, is efficient in a highly heterogeneous set of circumstances, and does not rely on information that parties cannot establish in court. In theory, default standards solve the cost problem that limits the rules a drafting body can efficiently create, and can motivate the party with discretion to maximize joint rather than individual gains. Standards, however, risk undermining the predictability that commercial parties prefer and can create problems of moral hazard. Since combinations of rules and standards in commercial contracts are highly context-specific, it is unlikely that a general default standard will succeed in reducing contracting costs for particular parties.

2.4. The trade-off between legal knowledge costs and problem-solving costs

From the foregoing, it is clear that a successful ISL (1) reduces legal knowledge costs (i.e., the costs of embodying contracting solutions in written agreements) and (2) reduces problem-solving costs by providing the parties with the set of default rules and standards that they would prefer. But there is a tension that frustrates efforts to achieve fully both of these objectives in any uniform law. Minimizing legal knowledge costs requires a uniform legal language and method of characterizing legal rules that apply across heterogeneous economies and cultures. Moreover, to accomplish this objective, the provisions of the uniform law also must be uniformly interpreted across jurisdictions and over time. We will designate as “formally uniform” a law that reduces legal knowledge costs in that fashion.

But a formally uniform law may not be the best way to achieve the policy goals of a successful commercial law statute. This is because crafting good default rules becomes harder the greater the heterogeneity of the economic environments that the law purports to cover. As we have seen, law-makers often resort to standards in such contexts. But contracting parties prefer default rules to standards, unless those standards are embedded in a contract that otherwise constrains discretion. And if creating a useful default rule is not cost-justified, parties prefer designing their own terms to the additional burden of having to opt-out of vague or ambiguous standards. An alternative approach, therefore, would be to narrow the scope of the economic environment that the statute purported to cover so as to regulate only relatively homogeneous environments. Such a law would sacrifice the formal uniformity of a more broadly applicable law, but would also increase the probability that the proposed defaults would offer solutions preferred by many contracting parties. We will designate as “substantively uniform” those laws that provide parties with their preferred solutions to common contracting problems but that in consequence lack a standard language.³⁶

³⁶ One way to think about the distinction between formal and substantive uniformity is to contrast Article 2 of the UCC with the common law of contracts in the United States. Article 2 is formally uniform; it covers 50 plus jurisdictions and contains many uniform default terms but also many vague standards. In the case of common law contracts, there are 50 separate jurisdictions, and thus the linguistic uniformity of the UCC is sacrificed. On the other hand, common law contracts contain many more useful default rules that appear to offer solutions most parties prefer. Thus, in the terms we use here, the common law of contracts is substantively but not formally uniform. It remains an empirical question as to which regime best succeeds in reducing total contracting costs.

With this framework, then, the policy goals that should govern the drafters of ISL can be more precisely stated. The goal of an ideal ISL should be to maximize the total benefits achievable from both formal and substantive uniformity. In general, this objective will require trading off some of the gains from reducing legal knowledge costs in return for greater savings in problem-solving costs. An ISL is optimal, therefore, if it minimizes the sum of (1) the costs of embodying contracting solutions in written agreements, and (2) the costs of solving common contracting problems.

3. The politics of drafting international sales law

The preceding discussion shows that the optimal tradeoffs between rules and standards and between formal and substantive uniformity requires careful and sophisticated policy choices by law-makers who have access to information about the contracting practices of affected commercial parties. We turn in Part III to an analysis of the political economy of a uniform ISL. We argue that, as a practical matter, drafters of ISL have not chosen between rules and standards and between formal and substantive uniformity by considering what legal principles would best achieve the objectives of an optimal ISL. Rather, the key trade offs are much more a function of the structural features of the law-making process than they are a function of conscious policy choice.

3.1. *International sales law and compromise*

The literature on the political economy of legislation typically analyzes the extent to which legal provisions correspond to the public interest by focusing on the incentives of those who are affected by and involved in the drafting and enacting process. These individuals have sufficient interest in the outcome of proposed legislation to overcome the organizational costs that otherwise deter participation in the enactment of specific provisions. Targets of the law, those whose activities the law purports to regulate, have skewed incentives to participate. They would incur the organizational costs necessary for participation only if doing so allows them to acquire or retain legal benefits in excess of those costs. This approach, then, explains the evolution of statutory law by identifying the interests of particular groups that were involved in the drafting process and aligning those interests with the substantive results that emerge in final legislation. This literature typically assumes that if one group dominates the process of lobbying for and drafting legislation, the resulting law will tend to reflect the interests of that group. Moreover, that law will assign entitlements with specificity in order to prevent subsequent interpreters from construing vague statutory language in a manner inconsistent with the deal that the dominant group has struck.³⁷

The concern that dominant interest groups will distort substantive legal results appears to be less of an issue with respect to ISL. This is true for two reasons. First, the parties to international sales transactions tend to be sophisticated actors. As a result, any suboptimal default terms that are embodied in ISL are likely either to be bargained around, at additional

³⁷ See Schwartz & Scott, *Political Economy*, supra note 3.

cost to each party, or to be priced into the contract. Second, and perhaps most importantly for our purposes, the groups whose interests are at stake in international sales – buyers and sellers – do not necessarily have competing interests. Indeed, the notion that these are different groups is itself contestable. Those who are buyers in one international transaction are likely to be sellers in another. A manufacturer in country X that sells its goods to buyers in country Y may still need to obtain materials from country Z. Some sub-groups of buyers, such as consumers, might wish systematically to favor buyers over sellers and thus might lobby for laws that vindicate buyer interests. ISL, however, tends to exclude consumer transactions, so those groups have a reduced interest in the promulgation of the legal rules.³⁸

Moreover, the parties that negotiate ISL on behalf of buyers and sellers – potential Contracting States – are unlikely to favor one of those groups over the other. Even if there are firms within a nation whose only international business involves buying (for instance, firms that sell goods domestically but that require raw materials extracted from another state), there are likely to be other firms in the same state whose only international business is selling (for instance, firms that extract raw materials for sale to firms in other states). Contracting States, therefore, will not necessarily favor buyers or sellers when negotiating ISL.

This does not mean that all nations will agree on the substantive principles of ISL. To the contrary, in order to be widely accepted, international sales law must attract support from countries with different economic, political, and legal systems. A developed nation and a developing nation may disagree, for instance, on the need for writings or on the time necessary to inspect goods and discover nonconformities because their trades people have different levels of literacy and technological sophistication necessary to satisfy these requirements.³⁹ Nations that have relatively planned economies may prefer a legal regime different from that of nations with market economies. Thus, serious debates among nations about the content of ISL are likely to arise. For instance, there was significant debate at the Diplomatic Conference over the time periods within which a buyer was required to give notice of nonconforming tender. States took various positions on the question, with observable divisions between developed and developing countries and between states that had strict domestic notice requirements and those that had no notice requirements.⁴⁰ As others have suggested, ideological positions that might influence commercial principles are not easily abandoned.⁴¹ Socialist countries (recall that the CISG was drafted before transitions to market economies in many Eastern European and Asian countries) would be less willing to adopt either principles of contractual autonomy or the primacy of customs and trade practices that allegedly evolved from developed nations imposing mandates on trading

³⁸ Article 2(a) of the CISG excludes consumer transactions from its coverage, as long as the seller neither knew nor ought to have known the consumer nature of the purchaser. The exception was intended both to recognize the various consumer protection statutes in different jurisdictions and the relative lack of importance of consumer transactions in international trade. See Honnold, *Documentary History*, supra note 12, at 62 (1989).

³⁹ See Gyula Eörsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 *AM. L. COMP. L.* 333, 349–50 (1983).

⁴⁰ See, CISG Advisory Council Opinion No. 2, *Examination of the Goods and Notice of Non-Conformity*, Articles 38 and 39, <http://cisgw3.law.pace.edu/cisg/CISG-AC-op2.html>.

⁴¹ See, e.g. Arthur Rosett, supra note 1, at 285 (1984).

partners from developing nations. As one would expect, in the negotiations that ultimately generated the CISG, participating states tended to begin by arguing for universalization of their own domestic legal rules.

Given the intentionally diverse membership of the Working Groups, the Drafting Committee and the Diplomatic Conference, there was little likelihood that one group of nations would be able to form a dominant interest group to impose its will on opposing nations. Nor was that the objective of UNCITRAL which, after all, was attempting to correct a situation in which the ULIS and ULF had failed to attract a large number of adoptions because those treaties were considered to have been too “European.” But achieving formally uniform ISL would therefore require significant compromise to create legal principles on which states with dissimilar legal doctrines could agree. The debates that would create those compromises would have to be resolved, if at all, after input from states that have different interests, rather than through imposition of a solution favored by a dominant interest group. Thus, one would anticipate that the resulting legal rules would vary in form from the highly specific entitlements that a dominant interest group would prefer.

In theory, this compromise could take any of a number of forms, not each of which would be inconsistent with the goals of substantive uniformity. For instance, compromise could take the form of logrolling in which a substantive provision that provided a contract solution preferred by one sub-group is included in the convention in exchange for inclusion of a substantive provision preferred by another sub-group. To the extent that both defaults reflect the terms that the broadest number of affected parties would prefer, the result would be substantively uniform. This possibility, however, is less likely where the objective of the convention is to create a body of law containing provisions that intersect with and complement each other, so that each provision must have a certain “fit” with other provisions. If certain principles are selected from some legal-economic systems, while other principles are selected from other legal-economic systems, the result may be a conflicting set of provisions rather than a cohesive whole. It would, for instance, make little sense to develop a commercial law system in which risks were formally allocated in accordance with principles of superior risk bearing, but damages were then predicated on principles of loss sharing, even if the provisions guiding each were both formally and substantively uniform.

Alternatively, compromise might take the form of limiting the application of ISL, either (1) by permitting parties to contract out of specific provisions in individual contracts; (2) by allowing individual nations to reject particularly objectionable or contestable provisions of the convention while adopting more acceptable provisions; or (3) by excluding from coverage portions of ISL on which the background rules of domestic law vary most widely. These strategies increase the acceptability of the convention to states that might otherwise resist it. Because these strategies are explicitly authorized by the treaty’s language, their inclusion in the treaty does not detract from formal uniformity. But the subsequent narrowing of situations in which the ISL applies necessarily limits the scope of substantive uniformity that presumably motivated the ISL’s creation in the first instance.

Finally, drafters in the ISL project may reach compromise by drafting provisions in a manner that reduces the risk that potential Contracting States will take offense. Schwartz and Scott predict that this is the form of compromise that will be adopted whenever academic reformers whose reputation is enhanced by the enactment of any statute that is facially uniform have a significant role in the drafting process. They conclude that the structural

characteristics of the private legislative groups charged with formulation of sales law in the United States will result in the promulgation of many vague standards that vest considerable discretion in subsequent interpreters, such as judges, rather than specifying precise entitlements that follow from described circumstances.⁴² In the international context, the parallel argument suggests, treaties will use vague terms or ambiguous language that nations with different cultures and legal systems can interpret in an unobjectionable manner. Vague language, for instance, may minimize objections because it permits representatives from different legal systems to resolve uncertainties in a manner consistent with their domestic legal principles.⁴³ Satisfaction of contractual obligations may condition on vague criteria such as “reasonableness” rather than on more precise criteria. Since most nations would contend that their domestic legal doctrines are “reasonable,” each nation can believe that subsequent interpretations of that standard would allow it to continue its current practices. At least initially, nothing in this language interferes with formal uniformity. But excessive reliance on vague standards of reasonableness will undermine substantive uniformity. Moreover, this result creates a significant risk that even formal uniformity will break down when national tribunals variously interpret this language to resolve disputes that arise under the treaty.

The context in which ISL is created, thus, not only compels compromise, but compromise of a certain type. There are, of course, potential constraints on drafters’ tendencies to cast obligations too ambiguously. Most obviously, one might imagine that affected commercial parties would intervene to ensure an optimal level of precision in formally uniform ISL. Alternatively, one might imagine that potential Contracting States would decline to ratify formally uniform law that failed to achieve an optimal level of substantive uniformity. In the discussion that follows, however, we suggest that the structural process by which uniform ISL is created systematically leads to over-reliance on vague standards that fail both uniformity goals and to underutilization of the potential constraints on sub-optimal standards.

3.2. *The incentives of ISL drafters*

In this section, we advance the claim that the drafters of uniform law in general, and ISL in particular, have incentives to produce law of suboptimal specificity. While those tendencies may also exist where law is enacted in public legislatures or through judicial precedent, they are likely to be moderated in those contexts by the participation of the commercial groups whose activities will be regulated and who prefer specific rules. But, we contend, the process of making uniform ISL fails to incorporate the interests of affected commercial parties. Those who draft uniform ISL are not representatives of commercial parties, have no accountability to them, and have both constituent interests and self-interest that are inconsistent with the interests of those parties.

In making this analysis, we posit that the substance of ISL is a function of the preferences of those who draft the law, as constrained and modified by the processes through which that law is promulgated and enacted. Ideally, the preferences of law drafters are to serve the

⁴² See Schwartz & Scott, *Political Economy*, *supra* note 3.

⁴³ See, e.g. Garro, *supra* note 8, at text accompanying notes 28–37; Eörsi, *supra* note 39, at 354–55.

public interest and the structure of the law-making process facilitates that objective. Nevertheless, the process by which law is enacted may motivate even publicly interested law drafters to deviate from their policy goals. Elected legislators, for instance, may favor laws that maximize opportunities for re-election, or election to higher office. These legislators may support proposals that benefit groups capable of providing electoral support, notwithstanding that the proposal creates net costs to the public at large. Alternatively, elected legislators may pursue particular ideological goals and vote accordingly, notwithstanding the interests of constituents. Elected legislators typically are assisted or impeded in these efforts by the structures within which they operate. Obviously, elections themselves serve as the primary check on deviation from public interest. Public voting requirements, open meeting laws, and constitutional constraints on the substance of law making (such as private property protections) similarly limit the capacity of legislators to deviate from constituents' interests. Structural characteristics will also affect the legislature's output. The agenda for voting will determine the order in which proposals are considered, and that order is likely to affect the substance of what is ultimately enacted.⁴⁴ Legislative service typically involves repeat play among a relatively small group, so that legislators have opportunities both to logroll on multiple proposals and to create reputations that induce others to defer on matters within a particular member's assumed expertise.

As we indicated above, drafters of ISL are not elected representatives of their countries or of the commercial parties who will be regulated by their activities. They are instead appointed by the governments of states that belong to UNCITRAL. Thus, they necessarily have objectives other than re-election. They may, however, desire the equivalent of re-election, that is, reputational benefits and prestige that flow from participation in a law-making process. We infer from the fact of membership that the states that send participants have accepted the basic tenets of UNCITRAL. That is, while it is plausible that states would belong to UNCITRAL in order to undermine its objectives, we assume that obstructionist efforts would become transparent and that UNCITRAL would be unlikely to include such participants in its drafting efforts. Thus, we assume that the states that participate in UNCITRAL efforts to draft international law share a common view of what would constitute a successful drafting effort. We further assume that those who accept appointment to a UNCITRAL project substantially, but imperfectly, internalize the interests of the state that appoints them. Three reasons support this assumption. First, success for the state is likely to mean success for the individual representative. Whatever reputational benefits the representative can accumulate will likely be domestic, so that service to the state will coincide with personal rewards. Second, the representative may desire appointment to additional projects since these appointments confer reputational benefits. Thus, the representative is motivated to procure the type of "success" that the appointing state desires. Third, the state can appoint whomever it wants to the project. The state has an opportunity to vet potential appointees in advance. The state is unlikely to appoint someone whom it has reason to believe will pursue an agenda inconsistent with that of the state.

That raises the issue of what would constitute "success" for the state, and hence for the individual representatives. UNCITRAL itself defines success in terms of drafting uniform international law that will receive widespread acceptance and adoption. UNCITRAL's

⁴⁴ See William H. Riker, *Liberalism Against Populism* (1982).

charge to the initial Working Group on the International Sale of Goods in 1969 was “to ascertain which modifications of the existing texts might render them capable of wider acceptance by countries of different legal, social and economic systems, or whether it will be necessary to elaborate a new text for the same purpose, or what other steps might be taken to further the harmonization or unification of the law of the international sale of goods.”⁴⁵

Note that the objective was not to consider whether uniform commercial law was desirable. Nor was the objective to create an ideal international sales law, since that goal might be inconsistent with the interests of some states and thus fail to be widely adopted. Rather, the objective was to obtain uniformity. The desire for broad international acceptance may have been particularly salient with respect to the project that led to the CISG because it was explicitly convened in an effort to reverse the failure of the ULIS and ULF to generate substantial international support.

As we noted above, this objective of achieving widespread adoption *über alles* was not officially translated into criteria for selecting participants in the drafting process. The resolution that created UNCITRAL obligated Member States to appoint representatives “in so far as possible from among persons of eminence in the field of international trade.”⁴⁶ Nevertheless, the single-minded objective of securing widespread adoption is the inevitable by-product of the appointment of representatives from academia, government ministries, or legal practice. Missing from this group are representatives of affected commercial interests, who would obviously be concerned about the costs and benefits of a statutory scheme that regulated their transactions, and who would likely pursue the objective of minimizing contracting costs by trading off some of the benefits of formal uniformity in return for greater substantive uniformity.

But why would individuals who neither are drawn from commercial interests nor have those interests as constituents participate in the ISL process? We speculate that, for each participant, the overriding motivation is to achieve reputation and prestige within his or her profession. As we explore below, that motivation will have different effects depending on whether the participant is recruited from academia, government, or the legal profession. But in each case, participation in a UNCITRAL project constitutes public confirmation of the participant’s expertise. Importantly, that reputation is significantly enhanced if the project is successful; that is, if it results in a convention that is widely adopted. Prestige and enhanced reputation will be transitory if the participants either fail to achieve agreement or achieve agreement on a proposal that many potential Contracting States reject. Participants who are affiliated with a project that is widely adopted, on the other hand, will become known by commercial parties and by professional colleagues and will likely have additional opportunities to capitalize on their participation and further enhance their prestige.

ISL participants who wish to enhance their reputations will likely have to seize this opportunity to attain that objective. Public legislators obtain prestige merely by holding their legislative position rather than by virtue of the success of any single piece of legislation. Legislators consider a succession of possible laws, so that failure to achieve success with respect to any particular legislative proposal does not preclude future success. Thus, they can, and do, threaten to hold up legislation to which they object without adversely affecting their

⁴⁵ See Honnold, *Documentary History*, supra note 12, at 15. UNCITRAL Annual Report, A7618 para. 38 (1969).

⁴⁶ See Honnold, *Uniform Law*, supra note 4, at 7.

reputation as successful legislators. Indeed, in some instances, blocking proposed legislation may enhance a legislator's reputation with constituents whose interests would be adversely affected by enactment. Participants in an international commercial law convention, however, gather to consider only a single piece of legislation. Failure to achieve success with respect to the project for which they have expertise cannot be compensated by involvement in another unrelated project on which they are unqualified for appointment. Indeed, failure to achieve success in the initial project may, by itself, diminish opportunities to participate in subsequent projects. But a systematic consequence of the desire to enhance one's reputation for expertise in commercial law is production of an ISL that achieves formal uniformity by sacrificing substantive uniformity. To see how this is the case, we next consider in more detail the incentives of each of the groups typically involved in the drafting process.

3.2.1. *Legal academics*

Initially, it might be thought that legal academics would seek to draft sales law rules that minimize contract drafting costs. After all, law professors typically do not represent interest groups or clients in the drafting process. Moreover, while they serve as representatives of their countries, law professors have professional interests in demonstrating concerns about the merits of the substantive law and in treating the enterprise as a "client." Thus, law professors may be more willing to subordinate the need for compromise, which necessarily drives the process towards vague standards, and work towards what they perceive as "correct" substantive solutions.

Nevertheless, the very fact that legal academics do not have high institutional stakes in the outcome of the project may make them more susceptible to the personal motivations that affect the drafting process. Law professors are likely to participate in such projects because success in drafting a treaty that is enacted enhances their reputation both with other academics and with practitioners in the field.⁴⁷ Law professors thus have incentives to favor the facially vague and ambiguous language that is a necessary precondition to widespread enactment of international conventions. Moreover, vague terms and facial ambiguity must ultimately be resolved by reference to some underlying policy, and this provides professors with opportunities to write and speak about preferable interpretations of the treaty provisions.⁴⁸ Legal academics may also have pecuniary interests in vague or ambiguous treaty provisions once they are enacted. Disputes in international commercial law are frequently resolved by arbitration and legal academics figure prominently in the business of arbitrating disputes. Ambiguous language is more likely to provide opportunities for arbitrators to resolve the disputes that inevitably will arise.

3.2.2. *Legal practitioners*

The second group of potential participants consists of legal practitioners in the area that is the subject of the proposed treaty. These participants also attain professional prestige by participating in the drafting of successful international commercial law. Thus, practitioners, like legal academics, have incentives to draft vague or ambiguous terms in order to maximize

⁴⁷ Schwartz & Scott, *supra* note 3, at 610.

⁴⁸ See the prolific literature generated by the law professors who participated in drafting the CISG at <http://www.cisg.law.pace.edu/cisg/biblio/bib2.html>.

the number of adoptions. But one might believe that these individuals also serve business clients and thus internalize those clients' interests in optimizing the precision of legal rules. This identification with client interests, however, is not likely to influence the form of the rules that emerge from the drafting process. Recall that the targets of international sales law are firms that serve as both buyers and sellers. Thus, even a practitioner who seeks to represent his or her clients' interest will not necessarily seek to draft legal rules that reflect the interests of sellers or buyers. Any client of the practitioner that is affected by the law is likely to be a buyer in some transactions and a seller in others. A vague standard permits the legal practitioner to argue for an interpretation that favors the client in any given case, which may mean advocating one position where the client is selling and an alternative where the same client is buying.

Moreover, there are substantial conflicts that separate the interests of lawyers and those of their clients during the drafting process. The additional contracting costs generated by a treaty comprising vague provisions are largely invisible to the commercial parties who only see the written contract negotiated by their counsel. Lawyers, on the other hand, gain additional income from drafting complex contracts for their clients after the treaty is enacted so as to escape the treaty's vague defaults. Lawyers are further compensated if those vague defaults require interpretation in a subsequent dispute. Indeed, the central goal of vague standards is to postpone the interpretation of the default term until the dispute arises *ex post*. Practitioners, like legal academics, gain additional income by serving as arbitrators in disputes that arise out of interpretation of an ambiguous treaty. In sum, practicing lawyers, like legal academics, have strong incentives to compromise differences in the drafting process by agreeing to vague standards.

3.2.3. *Government officials*

Many of the participants in UNCITRAL projects are government officials. For instance, the United States delegation to the Diplomatic Conference included a member of the State Department, and the head of the Australian delegation was a member of the Attorney-General's Department. We assume that these individuals would also prefer to maximize their professional reputations by participating in a successful process, again defined as promulgating a treaty that is widely adopted. The resulting prestige may increase the participant's opportunity for advancement within the bureaucracy. In states where bureaucrats shift between public and private sectors, participating in the promulgation of ISL is likely to enhance the participant's prospects for lucrative private sector employment. As in the case of other participants, these benefits depend on the success of the project. Government participants, therefore, like their private counterparts, are likely to be concerned primarily with securing enactment and wide adoption, even if the substantive terms fail to solve contracting problems. As Rosett concludes, "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."⁴⁹

In some situations, the prospect of reputational gain is mitigated by other incentives peculiar to bureaucrats. For instance, bureaucrats interested in budget maximization may prefer

⁴⁹ Rosett, *supra* note 1 at 270.

costly programs to inexpensive ones,⁵⁰ or a desire for client service may induce bureaucrats to favor a program that advances the interests of a particular group of constituents. Drafting ISL, however, is unlikely to have significant budget effects on government bureaus. The law that evolves from the drafting process creates default rules for private parties and only rarely will be used by government actors. Similarly, when disputes arise under the law, they are likely to be resolved through judicial agents, not through the bureaus that participated.

In one particular instance, however, the substance of an ISL project is likely to have an adverse effect on a participating bureaucrat's reputation. Presumably, a state would be more likely to adopt an international treaty that simply replicated the default rules of existing domestic commercial law, rather than a treaty that varied dramatically from domestic law. Replication would both validate the propriety of existing domestic law principles and reduce contracting costs for domestic businesses. Adoption of domestic law principles of commercial law would similarly validate the position of the nation as a "leader" in international trade law.

Multinational efforts to promulgate international commercial law, however, cannot readily generate uniform law that allows all nations to codify their domestic law. The great variety of legal systems prevents the representatives of individual nations from injecting their domestic legal principles into international sales law. It is in that sense that compromise is a prerequisite of uniform law. But as we have suggested, the objective function of participants informs the kinds of compromise that will result. For government participants in the process, the inability to obtain international acceptance of a given domestic legal principle may be tolerable as long as the provision that is ultimately adopted does not explicitly reject the domestic law. A government participant who can report to her government that the proposed treaty accommodates domestic legal principles is seen as far more successful than the participant who reports that the proposed treaty conflicts with or rejects domestic principles. This principle of accommodation solves a potential puzzle that would otherwise complicate the willingness of participants to draft a statute with as much ambiguity as we suggest will be embedded in ISL: Why would a state want to adopt a strategy that maximizes the total number of adoptions of a vacuous statute? Although we have posited that participants in the drafting process substantially share the goals of the state that appointed them, their personal objectives that induce them to draft at a high level of generality may still be acceptable to their principals (the states that appointed them) because the latter are primarily concerned to avoid ISL that conflicts with domestic principles. High levels of generality at least gives the appearance of achieving that goal.

3.3. The structural dynamics of the drafting process

3.3.1. Strategies for reaching agreement

The combined desire to promulgate a treaty that will be widely adopted and to avoid explicit conflict with domestic law fosters compromise of a particular type. In order to permit representatives from multiple legal cultures to claim that the proposed treaty is consistent with their domestic legal principles, drafters must follow one of the following strategies. The first should by now be familiar. Using language of reasonableness in vague standards permits

⁵⁰ See William Niskanen, *Bureaucracy and Representative Government* (1971).

each representative to claim that the adopted formally uniform principles are consistent with domestic law because no state will contend that its domestic law is unreasonable.

The second strategy is to permit nations substantial freedom to opt-out of particular provisions of the treaty. As we noted above, permitting opting out deters states from rejecting the treaty because it contains provisions that vary importantly from domestic practice. One might anticipate, for example, that there will be variation among legal systems in the calculation of money damages for non-delivery of goods. Some states might measure damages as of the time of the breach, while others might measure damages from the time of expected performance. But it would be surprising if a legal system allowed no damages at all, so that the variations among legal systems are likely to be somewhat constrained. On the other hand, while some legal systems that adopt a statute of frauds might disagree on what satisfies that requirement, it would not be surprising if there are some systems that have no writing requirement at all. The latter states might find a writing requirement sufficiently foreign to their way of doing business to induce rejection of the treaty as a whole.

Given these variations, one way to maximize adoptions of the proposed statute would be to include a statute of frauds requirement, but permit states that did not have writing requirements in their domestic commercial law to adopt the treaty without that provision. Indeed, the presence of such reservations in commercial law treaties is typically justified on the explicit basis that they increase the number of adopting states, albeit without asking whether the subsequent cost to uniformity as states thereafter opt-out of the treaty provisions is worth incurring.⁵¹

Once reservations are permitted, they tend to proliferate, in part because the right to claim a reservation creates moral hazard. States that are unable to generate consensus or to command a majority in favor of a preferred uniform provision have incentives to behave strategically. Knowing that other representatives value widespread acceptance, the dissenting representative can threaten to withhold approval of the treaty unless the represented state can avoid being bound by proposed provisions that the representative deems particularly offensive.⁵²

⁵¹ See, e.g. Marco Torsello, *Reservations to International Uniform Commercial Law Conventions*, 5 Uniform L. Rev. 85, 119 (2000).

⁵² During the debate on the CISG, for instance, the Czechoslovakian representative claimed that his state, and other Eastern European states, would be disadvantaged by a proposed provision that would make the CISG applicable to contracts between businesses located in Contracting States and businesses located in non-Contracting States. While the Czechoslovakian representative considered that result appropriate for nations that observed “the ordinary rules of law merchant” in international transactions, he suggested that it would be unacceptable to nations that had enacted special legislation to regulate international trade. The Official Records of the Conference reveal the threat and response that resulted:

The net result [according to the Czechoslovakian representative] was that countries like Czechoslovakia would be unable to ratify the Convention because of the effect which article 1(1)(b) would have on the application of their special legislation on international trade.

The only solution for those countries was to limit the application of the Convention to contracts concluded between parties having their places of business in different Contracting States. In that manner, the rules of the special code on international trade would continue to apply to trade transactions involving parties of which one at least did not have its place of business in a Contracting State.

Other participants, however, were unwilling to remove the extensive jurisdictional grant of Article 1(1)(b). In the face of the threat of nonadoption by Eastern European states, the Conference ultimately inserted Article 95,

Law drafters do have some incentives to minimize the capacity of states to opt-out of particular provisions. If Contracting States can opt-out of too many provisions, then the treaty may ultimately be perceived as mere sham, form with no substance, and the reputational benefits that otherwise accrue to the drafters will dissipate. Nevertheless, these costs have a longer temporal horizon than the positive reputational effects that result from permitting nations to opt-out. Allowing reservations generates immediate benefits insofar as it increases the probability that many nations will adopt the treaty. The negative effects that result from easy opting out will materialize, if at all, only in the future. Moreover, the reputational benefits of a widely adopted ISL project are relatively certain, while the negative effects from opting out are relatively uncertain. Thus, the net benefits of permitting opting out may exceed the expected future costs, and drafters could be expected to permit opt-outs as a condition of securing a state's approval.

The net effect of granting states the option to opt-out of disfavored provisions is difficult to assess *a priori*. Wholesale opting out reduces the benefits inherent in formal uniformity. Commercial parties will then be required to expend additional resources to learn of the particular reservations exercised by the various Contracting States. Thus, permitting Contracting States to opt-out of particular provisions will increase linguistic and learning costs over time. This will result in a net increase in contracting costs unless drafting parties deploy the opt-out option to negotiate for more precise default rules that better solve the contracting problem at hand. To the contrary, we argue in the following section that the peculiar consensus-driven process of the UNCITRAL working groups will reinforce the already strong incentives to produce excessively vague and ambiguous defaults.

3.3.2. *Working Groups and consensus*

Our analysis to this point suggests that those who participate in the uniform ISL process are motivated to promulgate sales law defaults that take the form of vague standards rather than precise, bright-line rules even where commercial actors would prefer rules to standards. This is particularly so where the specification of more precise defaults would require narrowing the number and heterogeneity of the contracting states. We conclude this section by suggesting that, in addition, there is a structural feature to the ISL process that further supports the tendency to create vague defaults. Recall that UNCITRAL projects begin with Working Groups who create drafts that are ultimately submitted to a Diplomatic Conference. The Working Groups typically proceed by consensus rather than by any voting procedure. Operating by consensus may well produce a relatively collegial environment for representatives of different states and minimize the disagreements that might materialize if there were formal voting.⁵³ But operating by consensus will also have important implications for the form of the rules that materialize.

Assume, for instance, that parties operate through majority rule. If each representative's preferences about one proposal are not connected to preferences about other proposals, a majority vote system will produce a result that is consistent with the preferences that the median voter holds on that proposal. Those in the minority simply lose on the issue and

which permitted a state to adopt the CISG, but to declare at the time of adoption that it would not adhere to Article 1(1)(b).

⁵³ See Honnold, *Mission and Methods*, *supra* note 6, at 210–11.

their interests are irrelevant to the outcome, except insofar as they determine where on a spectrum of opinion the preference of the median voter lies. If the median voter prefers a given rule, that rule will prevail, even if there is intense interest on the part of the minority for an alternative rule. If the rule preferred by the median voter is relatively precise, there is no need for others in the majority to dilute the level of precision to accommodate those in the minority.

A consensus system works quite differently. The objective of such a system is to avoid dissent, not to override it with a majority. This objective implies creating an outcome that accommodates the interests of all participants. Precise, bright-line rules are unlikely to have that effect, especially when the proposed rule is considered in an environment populated by representatives from different legal, political, and economic cultures. Thus, we would anticipate that the decision to utilize a consensus process at the Working Group stage intensifies the pre-existing preferences of representatives for vague or ambiguous legal standards. To be sure, the Diplomatic Conference ultimately used a majority rule system and held discussions that generated some dissenting votes. Nevertheless, the initial promulgation of a proposed standard by consensus makes it more difficult subsequently to substitute more precise rules in the Diplomatic Conference. Once the preference for a vague standard has been established, it has the advantage of inertia, an effect that is magnified where, as here, many of the individuals who participated in the Working Groups were also delegates at the Diplomatic Conference.

3.4. Ex ante controls on suboptimal ISL: The limits of monitoring

There are mechanisms that, in theory, would control the incentives of drafters to produce ISL that fails to minimize contracting costs. One potential constraint on the drafting process results when affected commercial interests are able to monitor, and thus influence, the substantive content of the proposed treaty. This can be done at either of two junctures. Affected commercial interests could monitor the process of drafting ISL. Alternatively, representatives of those interests could lobby either for the adoption or rejection of a proposed ISL when it reaches the national legislature. Drafters would presumably be attentive to the possibility of opposition at either of these stages. That possibility would motivate them to write substantive provisions that commercial parties prefer because failure to do so would adversely affect the probability of widespread adoption. Thus, the monitoring capacities of affected commercial parties can moderate the incentives of drafters to write laws whose substance is inconsistent with commercial interests. Commercial parties presumably oppose law that sacrifices substance for form and thus, in consequence, fails to minimize contracting costs.

The UNCITRAL process does permit “observers” in the meetings where drafts are discussed by participants. Presumably, these observers could lobby for default rules that are favored by their constituents. Although these observers tend to be international organizations, they may have close counterparts in countries to which the proposed treaty is submitted and these counterparts would have reasons to lobby their domestic legislatures if the proposed treaty contained unfavorable provisions. We might expect, for instance, that domestic trade associations would have the opportunity to monitor proposed legislation that affected their members and lobby against treaties that increased contracting costs. Aware of

this possibility, drafters of ISL who wished to maximize adoptions presumably would avoid proposing treaties that contained language sufficient to provoke opposition in national legislatures. But despite the participation of observers in the process, we predict that there will be little or no monitoring by affected commercial interests. Several reasons support this prediction.

First, monitoring is a costly activity. Thus, prospective monitors will only act when they conclude that doing so generates net expected benefits. Initially, one might surmise that monitoring costs are low for organizations such as trade associations. These groups have legislative offices whose primary function is to scrutinize proposed legislation that may affect association members and to lobby legislators. Thus, the marginal cost of identifying, analyzing, and lobbying with respect to a proposed ISL should be low. But international commercial treaties are not written with respect to individual industries. Rather, as in the case of the CISG, they are drafted broadly to regulate the trade practices of multiple industries. As a consequence, monitoring constitutes a club good for the industries that the proposed treaty purports to regulate. As in the case of public goods generally, each industry affected by the proposal would benefit from monitoring, but each could obtain the same benefit without incurring the commensurate costs if some other beneficiary with similar interests were to undertake the effort. For instance, both shoe manufacturers and chemical manufacturers that sell their products internationally will be covered by the CISG. Each, therefore, would benefit from monitoring the proposed treaty in order to ensure that it did not adversely affect sellers generally. Each, however, could obtain greater benefits if it did not monitor the proposed legislation, but the other party did. As a consequence, each has an incentive to avoid monitoring in the hopes that the other will do so, and monitoring for all industries is likely to be underproduced.⁵⁴

Second, we suspect there is a correlation between the desire of the ISL drafters to secure widespread adoption of treaties and the monitoring incentives of affected commercial interests. Again, costly monitoring is worth incurring where failure to do so threatens to impose significant adverse effects. Recall, however, that the preference of drafters to encourage adoption of a formally uniform treaty will lead them to include provisions that facilitate opting out of objectionable provisions by individual nations. Moreover, as we noted in Part IIA, the policy goals of a uniform sales law require the preservation of the principle of party autonomy whereby individual parties can opt-out of the treaty and/or particular provisions that they disfavor. Drafters of ISL have incentives to preserve this principle as it contributes to the probability of successful enactment. Consequently, affected commercial

⁵⁴ Monitoring may also be underproduced because the associations best qualified to perform the task do not necessarily share their members' interests. For instance, representatives from the International Chamber of Commerce were among the observers at the Diplomatic Conference. See Honnold, *Uniform Law*, *supra* note 4, at 10 n. 11. The ICC might be seen as a surrogate for commercial interests generally, and thus a useful surrogate for the interests of both commercial buyers and sellers in ensuring that ISL was drafted at an optimal level of precision. But the ICC also operates lucrative dispute resolution services for commercial actors.

See <http://www.iccwbo.org/court/english/arbitration/introduction.asp>. As we suggested above, vague or ambiguous language increases the quantity and cost of ex post dispute resolution and enhances the authority of arbiters because they have opportunities to influence the content of commercial law. Thus, entities that profit from the provision of dispute resolution services have incentives to accept vague language, even if doing so increases costs to their members.

parties will be motivated to monitor the existence of a right of easy opt-out rather than to monitor the entire treaty for terms that may increase contracting costs. This is especially true where the costs of vague standards are mediated through lawyers and thus hidden from the commercial parties themselves.

3.5. *Ex post controls on suboptimal ISL*

Even if affected commercial interests cannot effectively monitor *ex ante* the incentives of drafters of ISL to promulgate sub-optimally vague standards, enacting bodies could minimize the adverse consequences of vague terms *ex post*. This could be accomplished either through treaty provisions that admonish arbiters to adhere to precedent, or by creating a single entity charged with making authoritative interpretations of the treaty. In this way, precedent could crystalize around the standards thereby providing parties with guidance.⁵⁵

The most obvious method of precluding non-uniform interpretations of ISL is to create an entity that is charged with making authoritative interpretations that bind other courts and arbitrators. This procedure would counteract any “homeward” biases affecting national courts otherwise charged with administering the law, and would resolve the inevitable conflicts that would arise as arbiters from different legal cultures construed the many vague standards of the treaty. The drafters of ISL are unlikely to create such a tribunal, however. Any such tribunal would necessarily diminish the sovereignty of national courts within adopting nations. While some nations might be willing to accept reduced sovereignty over commercial matters in order to secure more uniform international law, other nations, particularly those heavily invested in international trade, would likely be unwilling to do so. Thus, the proposal of such a tribunal would undermine the objective of attaining universal adoption of the treaty. In the alternative, the drafters of ISL can opt for a voluntary mechanism for maintaining formal uniformity.⁵⁶ The limitations of such an approach have been well rehearsed.⁵⁷ The tendency for a homeward bias induces tribunals both to ignore non-domestic law and to assume that “international” interpretations reflect domestic ones. Even tribunals that wish to promote uniform interpretation can only consider those precedents of which they are aware, and translations that are readily accessible in multiple languages are likely to be sporadic and of uneven quality.⁵⁸ The goal of internationality, which

⁵⁵ See Ian Ayres, *Making a Difference: The Contractual Contributions of Easterbrook and Fischel*, 59 U. Chi. L. Rev. 1391 (1992).

⁵⁶ This strategy of signaling a desire for uniform interpretation without creating a means by which to ensure it has been similarly employed in other international commercial law treaties. See Marco Torsello, *The CISG's Impact on Legislators: The Drafting of International Contract Law Conventions*. In F. Ferrari (Ed.), *The 1980 Uniform Sales Law* 199, 236 (2003).

⁵⁷ See, e.g. 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)*, 17 J. L. & Com. 187 (1998).

⁵⁸ The most accessible sources for translations are websites dedicated to the CISG. See, e.g. <http://www.cisg.law.pace.edu/>; <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=14315>. But even these contain only occasional translations from the original opinion. Frequently, the translations contain only abstracts of the original opinion. Many of the translations are difficult to follow and appear to be unreliable.

assumes a single authoritative solution, may be further undermined if, as in the case of the CISG, the treaty is promulgated in “authoritative” versions of the treaty in multiple languages, since provisions within the treaty may not translate into equivalent meanings.⁵⁹ Finally, as a practical matter, some courts are simply unlikely to yield to the admonition for internationality. The absence of any allusion to decisions of other jurisdictions in Judge Posner’s decision to include attorneys’ fees in damages under the CISG, for instance, suggests that even where ostensibly relevant decisions are available, some tribunals are likely to believe that proper international practice can be deduced from domestic principles alone.⁶⁰

In summary, both the *ex ante* and *ex post* forces that might correct the biases of the ISL drafting process are likely to be ineffective in the institutional context that creates ISL. The bias against precise terms and bright-line default rules (even where they present the favored solution to particular contracting problems) can, in theory, be moderated by *ex ante* monitoring. But the subtle effects of that bias on contracting costs together with the structural dynamics of the drafting process make effective monitoring unlikely. Moreover, the proliferation of vague terms will generate varying interpretations by different courts and arbiters over time and thus will undermine even the initial benefits of reduced legal knowledge costs. But the same factors that produce consensus over vague language will stymie efforts to create tribunals that can provide uniform interpretations. In an important sense, the end result of the effort to produce ISL will be the worst of both worlds—a sales law that lacks *both* substantive and formal uniformity and thus is likely to result in a net increase in contracting costs.

4. Testing the predictions: An analysis of CISG

Our analysis to this point suggests that the structure of the ISL drafting process would produce a treaty (1) that contained many vague and ambiguous provisions resulting in formal uniformity without substantive uniformity; (2) that allowed nations otherwise bound by CISG provisions to contract out with relative ease; and (3) that would generate divergent interpretations undermining even the initial benefits of formal uniformity. In this Part, we ask whether the CISG displays those characteristics. By and large, we find our theoretical predictions confirmed by the terms of the treaty. To be sure, correlation does not prove causation. Some of the pressure to produce vague standards results from the heterogeneity of circumstances covered by any uniform law and not from the peculiar processes for drafting this treaty. For instance, given the range of goods covered by the CISG, we would anticipate that drafters could not easily specify a precise period of inspection for every case. Perishable goods should be inspected more quickly than nonperishable goods, and goods for which there is minimal variation in demand or price might properly warrant a longer inspection period than goods that suffer seasonable variations in demand or price. Thus, a

⁵⁹ See, e.g. Flechtner, *supra* note 57, at 189–93.

⁶⁰ See *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385 (7th Cir. 2002); Harry Flechtner and Joseph Lookofsky, *Viva Zapata! American Procedure and CISG Substance in a US Circuit Court of Appeal*, 7 *The Vindobona Journal* 93, 102–03 (2003).

generic standard such as “as short a time as possible” might be the only possible default that fit heterogeneous circumstances.

That does not imply, however, that such a default is substantively optimal. If parties would prefer a more precise contract provision governing the time for inspection, then the vague standard “as short a time as possible” would be inefficient: It would require wasteful drafting resources to create it and additional resources for parties subsequently to opt-out of the disfavored default. One lesson from this analysis is simply that any uniform law that seeks to cover heterogeneous contexts will necessarily contain more vague default standards than the affected commercial parties would otherwise prefer. Our claim, therefore, is not that CISG provisions consistent with our predictions demonstrate that the UNCITRAL drafters have promulgated a uniquely inefficient set of international sales law rules. Rather our claim is that *any* uniform law covering heterogeneous contexts will systematically generate vague and abstract defaults and that the peculiar process that produced the CISG exacerbates that fundamental tendency. It is this pessimism about the incapacity of uniform international sales law to generate the default rules that parties prefer that leads us in Part V to consider alternative schemes for regulating international sales transactions.

4.1. Vague default standards and ambiguous language

As we predict, vague standards pervade the CISG. We have already indicated that the CISG fails to resolve some basic issues of ISL, such as what constitutes a “sale” or a “good” subject to its coverage. It is perhaps sufficient to add that, even with respect to those issues the CISG does address, parties’ obligations and entitlements tend to condition on criteria that must be resolved subsequent to their transaction. Van Alstine has demonstrated that in no fewer than 31 instances, the CISG “variously measures the parties’ conduct from the perspective of a ‘reasonable person,’ defines rights or obligations with reference to what is ‘reasonable’ or ‘unreasonable,’ [or] requires certain actions or notices within a ‘reasonable’ time.” Other evidence of vagueness includes the definition of a “fundamental breach,” the existence of which is necessary to permit a party to avoid a contract and bring an action for damages. Article 25 classifies a breach as “fundamental” if it “results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract.”

Uncertainty results not only from the many vague standards, but also from the use of ambiguous language that may have different meanings in different cultures. Just as the phrase “chicken” may have different meanings in different contexts,⁶¹ different legal cultures may understand the same formal legal rule to assign entitlements differently. Any such ambiguity may easily be resolved by stating explicitly which entitlement the rule embodies. But the drafters of the CISG at least occasionally preferred to retain the ambiguity, presumably to maximize acceptance. For example, Article 16(2) provides that an offer cannot be revoked:

- (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

⁶¹ See *Fragilment Importing Co. v. B.N.S. Int’l Sales Corp.*, 190 F. Suppl. 116 (1960).

- (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

The provision in (a) is ambiguous as to what happens to an offer that states a fixed time for acceptance but does not explicitly provide that the offer is revocable prior to that time. In at least some common law countries, an offer is generally revocable until acceptance; the inclusion of a period after which the offer lapses has no effect on the revocability of the offer prior to that time. Civil law, however, provides that inclusion of an expiration time for acceptance implicitly indicates that the offer is irrevocable until that time. Thus, an offer that included a clause stating that acceptance must occur “prior to January 1” might be deemed to preclude revocation prior to that date by civil lawyers, but revocable even before that date by common lawyers.

This distinction was not lost on participants at the Diplomatic Conference. The delegate from the United Kingdom introduced an amendment to clarify the provision with an explicit statement that indicating a fixed period without any “clear indication that the offer was intended to be irrevocable” did not make the offer irrevocable.⁶² The Japanese delegate responded that it could not accept such an amendment and that the proper reading of the provision was consistent with the civil law tradition: “when the offeror fixed a time for acceptance, the offer was irrevocable during that time.”⁶³ The Norwegian and United States delegates suggested that the language remain as it was (and as it now stands) and that the matter be left for the courts to resolve.⁶⁴ Hence, the United Kingdom’s proposed amendment was rejected by a 31 to 7 vote.

The West German delegate then proposed that the provision be redrafted to “state unambiguously that fixing a time for acceptance of itself made the offer irrevocable.”⁶⁵ This amendment met the same fate as the one that the United Kingdom proposed. Although the French delegate complained that “a compromise grounded in ambiguity was undesirable,”⁶⁶ and the Greek delegate asserted that it was “not acceptable that one interpretation would apply when the parties to a contract were nationals of a common law country and another when those parties were nationals of a civil law country,”⁶⁷ an explicit desire for ambiguity and resolution through subsequent interpretation ruled the day. The United States delegate expressed a desire to retain the implicit compromise and deemed an effort to impose the civil law interpretation on common law legal systems would be “unacceptable in the United States.”⁶⁸ After additional colloquy, in which no delegate was willing to abandon its domestic position on the issue, the West German delegate declared that he would not press the issue and would “rely on courts to find some reasonable common interpretation in cases of difficulty.”⁶⁹ The Article was adopted as written and deliberate ambiguity prevailed.

⁶² Honnold, *Documentary History*, *supra* note 12, at 499.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 500.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 500–01.

4.2. *The ability to opt-out*

4.2.1. *Opting out by contracting states*

The CISG entirely omits some issues that are crucial to sales disputes, but that were considered too controversial to be addressed within any treaty that would garner substantial adoption. Most notably, Article 4 excludes from coverage any rules dealing with contract “validity.” Domestic law on issues such as unconscionability were considered too variable to permit resolution on a universal basis. The result is a contraction of the sphere in which the CISG could plausibly promote either formal or substantive uniformity.

Even within those areas that the CISG purports to govern, however, opting out imposes a constraint on the possible scope of uniformity. We suggested above that uniform law drafters who seek to maximize adoptions would include an opt-out procedure whereby individual nations that adopted the uniform law would be permitted to opt-out of certain provisions to which they objected strongly. We predicted that this procedure would have the direct effect of reducing opposition to a proposed international commercial law because adopting states would be able to avoid being governed by provisions they opposed. As we noted above, the CISG retains the right of Contracting States to opt-out of disfavored provisions of the treaty. Article 92(1) permits states to adopt the CISG, but to declare at the time of approval that they will not be bound by Part II, concerning the formation of contracts, or Part III, concerning the Sale of Goods. Article 93 permits a Contracting State to take exceptions for certain territorial units. Article 94 permits Contracting States that have the same or closely related international sales rules as another state to declare that the CISG does not apply to transactions between businesses located in those states. Article 95 permits a state to adopt the CISG, but to avoid being bound by the jurisdictional provision that makes the treaty applicable in contracts between businesses in Contracting States and businesses in non-Contracting States. Article 96 permits a Contracting State whose legislation includes a statute of frauds for contracts of sale to make a declaration that conflicting provisions in the CISG do not apply to an international sales contract that involves a party that has its place of business in that state.

The ability to make these declarations has been widely utilized. The Scandinavian countries – Denmark, Finland, Sweden, and Norway – have declared that they would not be bound by Part II concerning contract formation. Several states have submitted Article 93 declarations to except certain of its territories from coverage by the CISG. For instance, Australia has declared that the Convention shall not apply to the territories of Christmas Island, the Cocos (Keeling) Islands and the Ashmore and Cartier Islands.⁷⁰ China, Singapore, St. Vincent, and Grenadines, and the United States have exercised the Article 95 right to declare that they would not be bound by Article 1(1)(b), which makes the CISG applicable to contracts between a business located in a Contracting State and a business located in a non-Contracting State.⁷¹ Argentina, Belarus, Chile, Estonia, Hungary, Latvia,

⁷⁰ See <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>.

⁷¹ The Czech Republic and Slovakia pose interesting cases. Recall that Czechoslovakia initiated the opposition to Article 1(1)(b) because it, along with other Eastern European nations, had enacted special legislation to govern international sales. When the Czech Republic and Slovakia deposited instruments of succession with the United Nations in 1993, they did not confirm or reject the reservation. It is therefore unclear whether the successor nations have also succeeded to the reservation. See Fritz Enderlein, *Vienna Convention and Eastern European Lawyers*, *International Sales Quarterly* 12 (June 1997); <http://www.cisg.law.pace.edu/cisg/biblio/vienna.html>.

Lithuania, Russian Federation, Ukraine, and perhaps China⁷² have made Article 96 declarations.

Finally, although there is no explicit reservation with respect to Article 46, which adopts the European position that allows buyers to require specific performance by a seller without any showing of unique circumstances, Article 28 assuages the concerns of those jurisdictions, such as the United States and England, that permit specific performance only in exceptional circumstances. Article 28 permits courts to refuse to enter a judgment for specific performance unless it would do so under its own law in respect of similar sales contracts not governed by the CISG. While the interpretation of “similar sales contracts” is fraught with its own difficulties,⁷³ the insertion of Article 28 reduces the risk that sellers sued in their home jurisdiction will face performance obligations that exceed those to which they are accustomed under domestic law.

4.2.2. *Opting out by individual parties*

We also predicted that provisions of the proposed law would be drafted as defaults, so that individual parties governed by the law could bargain around its provisions. Permitting individual parties to opt-out is consistent with the policy goal of minimizing contracting costs by providing parties only with the terms they prefer. But permitting individual parties to opt-out also has the secondary effect of reducing the incentives of affected parties to monitor the drafting process.⁷⁴

Moreover, we predicted that the ability of individual parties to opt-out of CISG entirely would be widely exercised, reflecting the failure of the treaty to provide the default terms that affected commercial parties would otherwise prefer. A successful “substantively uniform” ISL would result in only a minimal amount of opting out. To be sure, parties in industries that had created extensive and longstanding tools of self-regulation might be less in need of state-supplied uniform law, and thus might in any case exercise their Article 6 right to exclude CISG from their contracts. But if the substantive provisions of CISG reflect the solutions to common contracting problems which most commercial parties prefer, we would anticipate that wholesale opting out would not occur for most international sales transactions.

Article 6 explicitly authorizes parties to individual contracts to opt-out of the CISG entirely. Parties may contract out of the CISG either by an explicit statement or implicitly, such as by agreeing to a specific provision of domestic law that conflicts with the parallel provision in the CISG. We are not aware of any study of the rate of opting out in contracts to which the CISG would otherwise be applicable.⁷⁵ Professor De Ly reports

⁷² China has filed a similar declaration, but it is not couched in the precise phraseology called for by Article 96. See discussion at <http://www.cisg.law.pace.edu/cisg/countries/cntries-China.html>.

⁷³ See Steven Walt, *For Specific Performance Under the United Nations Sales Convention*, 26 *Texas Int'l L. J.* 211 (1991).

⁷⁴ This is because potential monitors of the law drafting process would find it unnecessary to incur monitoring costs if parties could bargain around undesirable defaults. See discussion in Part IVE3 *supra*.

⁷⁵ To the same effect, see Filip De Ly, *Opting Out: Some Observations on the Occasion of the CISG's 25th Anniversary* 25, 28, in Franco Ferrari, *Quo Vadis CISG?* (2005); Filip De Ly, *The Relevance of the Vienna Convention for International Sales Contracts—Should We Stop Contracting It Out?*, 4 *Business Law International* 241, 242 (2003).

that some commodity associations have explicitly excluded the CISG from their contracts, but that is consistent with the view that industries with longstanding self-regulatory regimes will benefit least from generic law-making efforts.⁷⁶ He further suggests that attorneys in those countries whose domestic law is closest to that of the CISG may be least likely to counsel exclusion.⁷⁷ Nevertheless, our anecdotal evidence from conversations with attorneys who deal in international sales is that a substantial amount of opting out occurs.

Wholesale opting out does not necessarily demonstrate that the CISG fails to incorporate substantively optimal default rules. The same motivations that may have informed the CISG drafting process may also affect those lawyers who draft contracts for firms involved in international trade. Attorneys have incentives to avoid learning about novel law, and thus they incorporate into their contracts legal principles with which they are already familiar. This possibility is consistent with De Ly's observation that attorneys and trade associations in The Netherlands, the law of which largely reflects CISG principles, tend not to exclude the CISG.⁷⁸ In any event, we would expect to see a lag between the time of adoption and the embrace of even an optimal commercial law by lawyers otherwise unfamiliar with its terms. Given that the CISG is still in its first decade in many jurisdictions, attorneys may not wish to subject their clients to the uncertainties of its provisions until domestic courts have produced more definitive interpretations of even relatively precise obligations. Finally, De Ly suggests that opting out may exemplify the CISG's success in balancing the interests of buyers and sellers. He speculates that non-CISG domestic law may be more favorable to either buyers or sellers, and that parties who believe that they have sufficient bargaining power to impose clauses on other parties at low cost will attempt to incorporate the more favorable domestic clause into their contracts.⁷⁹

We are skeptical that the current pattern of opting out is primarily attributable to attorney ignorance or self-interest or unequal bargaining power rather than a reflection of the treaty's substantive failures. Competition among attorneys and the capacity to attract business or to obtain advancement within a firm by developing expertise, especially in a growth area such as international sales, should offset tendencies towards slack in learning about the CISG. Unequal bargaining power explanations also seem unpersuasive. Parties in international trade tend to be sophisticated repeat players. This suggests that contractual risk allocations will be priced into contractual terms, and efforts at advantage taking will generate reputational costs. Moreover, while particular provisions of domestic law may favor either buyers or sellers, it is less clear that any nation's law would systematically favor one group over the other. As we have noted above, those who act as sellers will also act as buyers. As a result, even dominant firms in domestic commerce have little reason to create law that systematically favors one side over the other. Persistent and substantial opting out of the CISG, therefore, is likely to reflect a distaste for its substantive terms.

⁷⁶ *Id.* at 242.

⁷⁷ *Id.* at 244–45 & n. 18.

⁷⁸ *Id.* at 244 n. 18.

⁷⁹ *Id.* at 243.

4.3. Non-uniform judicial interpretation

We indicated above that one mechanism for maintaining formal uniformity consists of admonishing courts and arbitrators that apply provisions of ISL to defer to precedents decided in other forums. Article 7(1) thus exhorts courts and arbitrators that interpret the CISG to have regard for “its international character and the need to promote uniformity in its application. . .” That admonition, however, appears to have been honored largely in the breach. Significant debate exists about the degree of deference that courts of one Contracting State should give to opinions from courts of another Contracting State. No court takes the position that precedent alone binds foreign courts in their interpretation of the CISG. It is difficult to disagree with Joseph Lookofsky’s conclusion that foreign court decisions “*at most* must have ‘persuasive’ (non-binding) value,” where persuasion ultimately depends on the reasoning of the prior court rather than the mere existence of its opinion.⁸⁰ As a result, we would expect that foreign courts will do little more than “take account” of relevant foreign decisions.⁸¹ Uniform interpretation will follow, if at all, only if courts in various jurisdictions agree that a particular resolution of an issue raised by the CISG is desirable on its own merits, rather than because it was selected as the appropriate resolution by some other court. Where multiple reasonable resolutions of an issue exist, there is little reason to believe that consensus on a single resolution will emerge.

To date, the failure to defer to prior foreign decisions has led to interpretive variations that seem inconsistent with the admonition of Article 7(1). The dispute over the period in which buyers must provide notice of non-conformity is only the most notorious example of non-uniformity in the case law.⁸² The current Draft UNCITRAL Digest, which purports to summarize case law under the CISG, demonstrates the pervasiveness of judicial disagreement over issues such as the role of estoppel in interpreting the “good faith” obligation of parties under Article 7,⁸³ the existence of and terms of a contract created through an exchange of standardized forms,⁸⁴ the standards by which to measure whether the goods are of the quality required by Article 35,⁸⁵ the calculation of interest rates for damages,⁸⁶ the award of attorneys’ fees,⁸⁷ and damages in “lost volume” cases.⁸⁸

These interpretive disparities might initially be considered to be the inevitable result of a relatively new body of statutory law that will be resolved with the passage of time. Given the absence of any uniform means of resolving disputes and the natural antipathy that any

⁸⁰ Joseph Lookofsky, CISG Foreign Case Law: How Much Regard Should We Have? In F. Ferrari, H. Flechtner, & R. A. Brand (Eds.), *The Draft UNCITRAL Digest and Beyond*: 216, 218 (2004).

⁸¹ *Id.*

⁸² For a history of the dispute and suggestions for its proposed resolution, see note 40 *supra* and accompanying text; Harry M. Flechtner, *Buyer’s Obligation to Give Notice of Lack of Conformity* (Articles 38, 39, 40 and 44), in Ferrari et al., *supra* note 80, at 377.

⁸³ See Ferrari et al., *supra* note 80, at 501, 539.

⁸⁴ See *id.* at 595 (Article 19, paragraph 6).

⁸⁵ See *id.* at 631; Netherlands Arbitration Institute Case No. 2319 (Rotterdam, October 15, 2002), available at <http://cisgw3.law.pace.edu/cases/021015n1.html>.

⁸⁶ See Ferrari et al., *supra* note 80, at 814–16.

⁸⁷ See *id.* at 787–88.

⁸⁸ See *id.* at 790–91.

jurisdiction will have to subordinating its opinion to the decision of another jurisdiction, however, there are neither the incentives nor the mechanisms for reducing interpretive variance. To the contrary, we would anticipate that as decisions become more numerous and are handed down by additional jurisdictions, without any formal mechanism for deciding which decisions are “correct,” the scope of non-uniform interpretation will increase.

5. The alternative to uniform ISL: Competition for law

Criticism of the CISG requires an answer to the question: compared to what? The same compromises that gave rise to ambiguous language and vague standards within the CISG are largely inevitable in any effort to generate uniform ISL. Prior efforts arguably foundered on a failure to achieve sufficient compromise.⁸⁹ Similarly, the very nature of international sales law will either require some vague standards or require parties to bargain over precise terms in the absence of any defaults (as they do with price terms, for example). Thus, even if the results in the CISG are less than ideal, one might be tempted to claim that they are the necessary cost of obtaining a respectable degree of international uniformity.

That response, however, begs an essential question that is insufficiently examined in the literature on the CISG. The underlying assumption of that literature is that any defects in the CISG are worth incurring because they are necessary to achieve uniformity. But is uniformity either a desirable or achievable objective in international sales law? To be sure, in the absence of uniform law, parties to international sales transactions will have to make choices about which national law should govern their transaction, and that law is likely to contain many broad standards. Thus, vague standards in international sales law are problematic only if they increase contracting costs, net of the savings from the parties’ having to learn only one body of law rather than several bodies of national law. That is a difficult empirical claim to maintain in the absence of information about the level of vagueness that exists in a world without the CISG or some plausibly superior ISL.

Nevertheless, the enterprise of ISL is suspect because it reflects a peculiar anomaly about law making. Once we think of law as a product of a particular set of preferences and structures, its production has the characteristics of other, more tangible products. The standard impetus for improving more mundane products, however, involves competitive markets rather than harmonization. Certainly, harmonization has its benefits where, for instance, network effects will cause the value of a product to increase with the number of users. It is less clear, however, that commercial law, even international commercial law, shares enough of the characteristics of goods with network effects to overcome the tendencies of harmonized law to take suboptimal forms. Indeed, at least in the United States, a significant literature dealing with corporate law, a close cousin of commercial law, asserts that competition among decentralized government units will create more efficient legal rules.

Some jurisdictions have explicitly marketed their commercial law as a superior product and eliminated or reduced jurisdictional barriers that would otherwise preclude commercial

⁸⁹ Van Alstine, *supra* note 5, at 725–26.

parties from taking advantage of their law. The state of New York, for instance, has enacted a statute permitting parties in a case involving more than \$250,000 to choose New York law to govern their transaction even if that transaction has no other contact with New York.⁹⁰ And at least one plausible explanation for England's continued refusal to adopt the CISG is the belief of decision makers in that nation that its well-developed body of commercial law is superior to the CISG and will continue to be selected as the law governing sales transactions by well-informed commercial actors.⁹¹ To be sure, these efforts may themselves be the result of successful interest group capture by protectionist commercial lawyers of these jurisdictions.⁹² But even if that is the case, the ultimate success or failure of those groups should be determined by the ability of the domestic law that they are protecting to survive in the marketplace for international commercial law. Even if English attorneys constitute a formidable interest group dedicated to maintaining the primacy of English commercial law, they cannot easily compel commercial actors from other jurisdictions to apply English law to their contracts if some alternative body of legal principles is superior.⁹³

This last point suggests the potential irrelevance of the normative question: Is a uniform ISL preferable to competition among alternative state systems? Ignored in the debate over the relative merits of the CISG has been the fact that sales law regulates a consensual activity. This means that the parties to contractual agreements have a choice between the CISG as the governing law of their transaction and other alternatives. The peril that the CISG faces is that most commercial parties may simply choose to opt-out of it entirely in favor of less costly alternatives. That is certainly the prediction that follows from our analysis of the dynamics of the ISL lawmaking process. It is tempting to suggest, therefore, that even if our criticisms are accurate, they are beside the point. Sophisticated parties will not be injured because they will negotiate for more hospitable governing law. Unsophisticated parties, on the other hand, will not necessarily be harmed because, but for the CISG, their transactions would have been governed by some alternative body of law of which they were presumably unaware (that is the source of their being unsophisticated) and that does not necessarily make them better off than the CISG does.

This "so what" response ignores the ways that elevating the CISG to the default governing law in ISL creates costly barriers to the further development of optimal commercial law rules for international trade. First, take the case in which parties did not choose governing law. In the absence of the CISG, the governing law of a specific jurisdiction would apply, and that law would be determined by international choice of law rules. While we cannot say that every jurisdiction's law that might be selected in this event would be superior to the CISG, those domestic laws will tend to be superior over time, at least to the extent that commercial actors in those jurisdictions have the capacity to influence the development

⁹⁰ See N.Y. General Obligation Laws § 5-1401 (2001).

⁹¹ See, e.g. J.S. Hobhouse, *International Conventions and Commercial Law: The Pursuit of Uniformity*, 106 L. Quarterly Rev. 530 (1990). For a more skeptical view, see Roy Goode, *Insularity or Leadership? The Role of the United Kingdom in the Harmonisation of Commercial Law*, 50 Int'l and Comp. L.Q. 751 (2001).

⁹² For development of this argument, see John Linarelli, *The Economics of Uniform Laws and Uniform Lawmaking*, 48 Wayne L. Rev. 1387 (2003).

⁹³ Indeed, Linarelli suggests that English business lawyers have bemoaned the apparent loss of business in international trade. The loss, however, is not attributed to the CISG, but to the increasing dominance of legal institutions in New York City. See id. at 1432.

of their domestic commercial law. That is because, unlike domestic commercial law that might govern the transactions, any flaws in the CISG are likely to be locked in. There exists no mechanism by which the CISG can be amended to take into account technological or structural changes in commercial transactions, or to alter legal principles that turn out, in practice, to operate less well than the law drafters anticipated. When combined with the fact that no tribunal can correct errors of national courts or command that one interpretation of a provision be favored over another, the incapacity to adapt the CISG to changing conditions suggests that it will necessarily evolve as an inferior alternative to the more adaptable sales law rules of individual states.

Now take the case of sophisticated actors who will actually bargain about the governing law for their transaction. One might argue that the CISG, in fact, expands the choices available to commercial parties choosing among competing commercial law regimes. They can select the law of a particular jurisdiction if they so choose. The CISG, on this understanding, is simply one more option on the menu of sales law from which parties can select. Moreover, bargaining around the CISG imposes no greater cost than the parties would incur were there no uniform ISL. In that case, after all, parties would have to negotiate about which jurisdiction's law should govern their contract. Thus, the CISG adds no net costs and reduces them for parties who find the CISG defaults desirable.

This argument fails, however, because the option of contracting away from the CISG default is not costless. To be sure, it is tempting to argue that a default rule that suits even a smaller plurality of parties would at least save the costs of contracting in those cases. But writing defaults for minority preferences imposes costs on all those parties who would prefer to contract out. These costs are not trivial. Self-evidently, the benefits from having a rule that suits only a plurality of parties will yield a lower social gain than a rule that satisfies a majority of contracting parties. These more limited benefits are likely to be outweighed by the added cost to the majority who must contract away from the default rather than draft their contract on a blank slate.

In addition, courts tend to regard state-created defaults as presumptively fair or efficient and this institutional bias further increases the cost of contracting out.⁹⁴ Thus, disfavored defaults impose a cost on the majority of contracting parties who wish to adopt any among a range of specially designed alternatives. Furthermore, there are costs to a bad default rule other than the costs related to bargaining around it. Parties may simply fail to bargain around the CISG based on a perception that uniform ISL provides appropriate legal rules for all parties. The very presence of formally uniform ISL provides the appearance of substantively uniform rules. Thus, the existence of formal uniformity may lull unsophisticated parties into the belief that their transaction is governed by substantively optimal defaults. In this event, sophisticated parties who recognize the inferiority of the CISG to a domestic law may decline to opt-out for fear that their position will be seen as a signal of obstinacy or undesirable idiosyncrasy that would scare off a potential trading partner.

Additionally, the presence of a default alters the calculus about whether to contract around its defaults. The CISG may be inferior to the law of a particular state with respect to a sales transaction. Nevertheless, the expected loss that materializes from selecting the CISG may

⁹⁴ See, e.g. *Hayward v. Postma*, 312 Mich. App. 720, 724, 188 N.W. 2d 31,33 (1971) (parties must use clear and unequivocal language to shift liability for risk of loss from seller to buyer).

be less than the costs associated with bargaining for the alternative law. Assume, for instance, that a party to a transaction estimates that a dispute with a 1% probability of materializing is more likely to require \$10,000 more in litigation costs under a vague or ambiguous CISG provision than under an alternative sales law. Thus, the party has an incentive to bargain out of the CISG and into the legal regime that avoids the more expensive dispute. Nevertheless, because there is only a 1% probability that the dispute will materialize, the expected cost of retaining the CISG (which will apply to the transaction unless the parties contract out) is only \$100. If it would cost the party in excess of \$100 to opt-out of CISG and into the other legal regime, then CISG will be retained as the governing law. But that only means that the CISG's status as a default for ISL provides it with an artificial advantage unrelated to its merits, because any other regime requires parties to incur the costs of contracting out. Of course, any default, including the domestic law that would be selected by choice of law rules in the CISG's absence, suffers the same advantage. But that fact only emphasizes the need to ensure that the default governing law minimizes the types of costs that we have attributed to the CISG.

Finally, commercial parties may have preferences over the interpretive style that accompanies a particular sales law regime. Interpretive styles for commercial law vary from those that invite contextual readings of contract language to those that caution interpreters to apply the "plain meaning" of written contract language unless the parties have specified otherwise. Tribunals that follow the former strategy retain significantly more latitude to construe, from all available sources, the intent of the parties. One of us has previously argued that most commercial parties would prefer the latter interpretive style.⁹⁵ This is because any increments in accuracy that are gained from the contextual style come at the cost of significantly higher litigation expenses. Consequently, most commercial parties are content to stand on the written contract most of the time.⁹⁶ Parties to international transactions, where the scope of trade usage or other contextual evidence is likely to be more contestable (and more costly to contest), are even more likely to prefer textualist interpretive strategies.⁹⁷

The CISG, on the other hand, appears to endorse the contextual interpretive style. We say "appears to" because the history and effect of the relevant Article are uncertain, and the intentions of the drafters are unclear from the language of the Article itself.⁹⁸ Article 8(3) provides that "[i]n determining the intent of a party [to a contract] . . . 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, [and trade] usages. . . ." Because this language only obliquely refers to extrinsic evidence of the type that common law lawyers would look for in order to discern the interpretive style adopted by the CISG,⁹⁹ commercial

⁹⁵ See Schwartz & Scott, *Contract Theory*, supra note 30.

⁹⁶ Id.

⁹⁷ See Clayton P. Gillette, *Harmony and Stasis in Trade Usages for International Sales*, 39 Va. J. Int'l L. 707 (1999).

⁹⁸ Although the drafting history is inconclusive, courts have concluded that the CISG displaces the parol evidence rule, which would preclude introduction of contextual evidence. On the inconclusiveness of the drafting history, see, Clayton P. Gillette and Steven D. Walt, *Sales Law: Domestic and International* 170–73 (Rev. ed. 2003). On judicial interpretation, see, e.g. *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino*, 144 F.3d 1384 (11th Cir. 1998).

⁹⁹ Compare U.C.C. §2-202.

parties and their legal advisors could easily fail to comprehend the effects of such a directive. Nevertheless, courts appear systematically to have concluded that the CISG displaces the parol evidence rule and invites contextual interpretation. If affected commercial parties would prefer a plain meaning regime as the default interpretive style, then Article 8(3) as applied is inconsistent with those preferences. While parties who were aware of that regime could simply opt-out,¹⁰⁰ the need to do so raises all the cost considerations just discussed. Moreover, the inconclusiveness of Article 8(3) may lead some parties erroneously to adopt the CISG for their contract unaware that doing so simultaneously adopts an interpretive style contrary to their preferences.

These considerations do not, however, argue for abandoning CISG as a source of governing law. The presence of an internationally acceptable ISL does confer some benefits. For instance, the international development of CISG provides assurances to parties that the law is unlikely to contain highly peculiar provisions that could serve as traps for the unwary or authorize commercially unreasonable conduct. The auspices of the United Nations, in short, provides a “Good Housekeeping” seal that domestic laws, especially laws of nations that are not major trading nations, cannot easily replicate. This is a valuable signal. But its value may be captured by allowing parties to transactions that would otherwise be governed by more suspicious domestic law to opt into the CISG, rather than by denominating it as the default law for all ISL.

6. Conclusion

In many respects, the drafting process of the CISG exemplifies all of the problems with the creation of sales law default rules by quasi-private legislative bodies. These bodies suffer from the same deficits as ordinary legislative bodies but, in addition, lack many of the constraints on legislative behavior that mediate the product of ordinary legislatures. Where the products of this drafting process are rules governing commercial sales transactions, there is no reason to expect interest group competition to emerge and influence the process, either negatively or positively. Parties to commercial sales transactions are both buyers and sellers, and thus there is little risk that one group or class will be distributionally disadvantaged over another. But, by the same token, the absence of interest group pressure generates a legislative product that is shaped primarily by the motivations and incentives of the drafters themselves. In the case of international sales law, the incentives to maximize initial adoptions generate default rules that are formally uniform but whose substantive terms are vague and ambiguous.

Commercial parties value clarity and predictability, which they can achieve in their contracts by carefully drafted combinations of bright-line rules coupled with broader standards. The promulgation of many vague default terms is inconsistent with the need to balance standards with rules. Thus, commercial parties frequently will opt-out of the CISG’s vague terms.

¹⁰⁰ It remains unclear whether parties can opt out of Article 8(3), say, with an appropriate merger clause. Such a clause might well raise an issue of validity. If so, that question is left to domestic law under Article 4(a) and under some domestic law the merger clause may not be given its preclusive effect. See Gillette & Walt, *supra* note 98, at 175–76.

This, in turn, will undermine one of the principal goals of a uniform ISL—to reduce the legal knowledge costs associated with different rules governed by different legal regimes. In the case of the CISG, the lack of meaningful uniformity is exacerbated by the failure to create interpretive mechanisms that, over time, might have given substantive content to the vague default standards.

The upshot is a treaty whose provisions are likely to become less and less useful as time goes on. Indeed, we predict that CISG ultimately will lose out in competition with alternative legal regimes. The most likely competitors are prominent domestic law systems that offer the kinds of substantive rules preferred by commercial parties. Should that prediction materialize, then CISG would simply remain as a costly impediment to the sort of harmonization that has occurred in the common law of contracts in the United States. In the United States, a natural experiment with multiple common law regimes has shown that economic and cultural forces over time produce a remarkable degree of harmonization around substantively uniform rules of contract law. It is unlikely that this phenomenon is unique to the American experience. Powerful market forces push toward harmonization across diverse cultures and jurisdictions. These market forces and not the normative preferences of bureaucrats and academic reformers will determine the ultimate shape of international sales law.

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