DISCLAIMING WARRANTIES THAT WERE NEVER IMPLIED: THE IRRELEVANCE OF UCC SECTION 2-316 FOR ARTICLE 35 OF THE CISG

William P. Johnson*

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* William P. Johnson is dean and professor of law at Saint Louis University School of Law in St. Louis, Missouri. He is grateful for terrific research assistance provided by Faculty Fellows Tyler Winn and Widner Saint-Cyr, both now SLU LAW alumni; consistently excellent research support provided by Vincent C. Immel Law Library Faculty Member Lynn Hartke; and careful review and constructive feedback offered by Michael Korybut on an earlier draft. The author is indebted to the editorial team of the Southwestern Journal of International Law for their kind invitation to participate in this issue and consistent professionalism, careful editing, and patience. Finally, the author is grateful to the inimitable Robert E. Lutz for his many contributions to the field of international law, as well as for his mentorship, support, and friendship over the years. It is a privilege to publish this article in honor of his truly remarkable career.

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1. INTRODUCTION

Standard terms and conditions of sale and standard terms and conditions of purchase—fine print in often tiny script that a commercial party uses to attempt to define and control the governing legal terms of a contract—are ubiquitous in United States trade and commerce. Pre-printed standard terms and conditions, or their electronic equivalent, appear on purchase order documents, order acknowledgment forms, and invoices; are included with quotes and bids; and are often attached as exhibits to negotiated supply agreements, equipment purchase agreements, and other sales contracts.

Well-drafted U.S. style terms and conditions of sale, which the seller's counsel drafts primarily to protect the interests of her client, the seller, usually include some limited express warranty on the goods being offered for sale. That express warranty is likely to consist of a promise by the seller to the buyer that the goods will be of a certain kind and quality, will be free from defects in material and workmanship, or will conform to certain specifications, and so on. Any such express warranty will almost invariably be followed by a disclaimer of implied warranties. That disclaimer will look something like the following clause:

> **ANY AND ALL OTHER WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTY OF MERCHANTABILITY, ANY IMPLIED WARRANTIES OF FITNESS FOR ANY PARTICULAR PURPOSE, AND ANY WARRANTIES ARISING FROM COURSE OF DEALING OR USAGE OF TRADE, ARE HEREBY EXCLUDED AND DISCLAIMED.**[1]

The purpose of the disclaimer is to avoid application of gap-filler provisions under Article 2 of the Uniform Commercial Code (UCC) that would otherwise create default obligations binding on the seller with respect to the goods sold.[2] Including such a warranty disclaimer reflects the reality for many sellers that the price for the goods has been determined in

1. This sample disclaimer language is adapted from a variety of sample terms and conditions of sale and written sell-side sales agreements on file with the author.

2. *See* U.C.C. § 2-314, 1A U.L.A. 497 (2012); U.C.C. § 2-315, 1B U.L.A. 10 (2012).

part by the predicted cost to the seller of warranty claims under its standard express warranty, and reflects an expectation of no additional potential warranty cost that might result from warranty claims outside the scope of the express warranty.[3]

The seller is likely to take the view that the express warranty offers adequate protection to the buyer insofar as it is a promise that the goods will conform to those product requirements on which the parties have expressly agreed and that are reflected in the price. If the seller's standard express warranty is deemed by the buyer to be inadequate, then the seller might agree to negotiate an expanded version of the express warranty, together with a corresponding increase in the price, but will continue to resist inclusion in the parties' bargain of any implied warranties. Including the disclaimer helps the seller avoid the risk of breach-of-warranty claims made by disappointed buyers when the goods are as expressly promised but are nevertheless not precisely what the buyer ultimately realizes the buyer wanted or needed because of the buyer's idiosyncratic circumstances. Breach-of-warranty claims that arise outside the scope of the express warranty are more difficult to predict and, therefore, can be more difficult to account for in the price of the goods.

In the author's experience, the express warranty and related limitation-on-liability provisions of a written, sale-of-goods contract are usually negotiated, at least when the buyer and the seller are sophisticated commercial parties and take the time to enter into a written agreement. The more robust the express warranty is, the more likely it is that the buyer will agree to a disclaimer of implied warranties. This is especially true when the seller has also agreed to reasonable indemnification obligations,[4] thereby giving the buyer more clearly defined protection against certain identified risks associated with purchase and use of the goods, without opening the door to vaguer notions of "merchantability."[5]

Although the provisions of the express warranty and other commercial terms of the agreement may be highly negotiated, the form of the disclaimer

3. "Sellers should be expected to factor that obligation [to provide conforming goods] into the price they charge for the goods." CLAYTON P. GILLETTE, ADVANCED INTRODUCTION TO INTERNATIONAL SALES LAW 83 (2016).

4. For example, the seller might agree to indemnify the buyer from and against third-party infringement claims that could arise if the goods produced by the seller are alleged to infringe upon third-party intellectual property rights, at least when the seller is in the better position to bear such risk.

5. The term "merchantability" as used in the U.C.C. is defined in a way that is open-ended and arguably leaves a great deal of room for argument. "Subsection (2) [of U.C.C. Section 2-314] does not purport to exhaust the meaning of 'merchantable' … and [instead] the intention is to leave open other possible attributes of merchantability." U.C.C. § 2-314 cmt. 6, 1A U.L.A. 497 (2012).

itself is quite uniform across terms and conditions of sale, as well as negotiated sales agreements. Such uniformity in form is unsurprising because there is a statutory basis for the form of the disclaimer, as it appears above.[6] It is drafted to satisfy formal statutory requirements in three related but distinct ways.[7] Specifically, first, the disclaimer is in writing.[8] Second, there is express inclusion of the term "merchantability."[9] Third, the text of the disclaimer is in capital letters, equal to or greater than the surrounding text, and is in boldface type, making it conspicuous.[10] Experienced U.S. lawyers who regularly draft and negotiate sales contracts almost reflexively include this sort of warranty disclaimer when representing the seller, and intentionally do so in the manner prescribed by UCC Section 2-316(2) to satisfy the formal requirements of that statute.[11]

However, not all sales of goods are governed by Article 2 of the UCC. Many sales—including sales involving U.S. buyers and sellers—are governed by an international treaty called the United Nations Convention on Contracts for the International Sale of Goods, or CISG.[12] When it

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6. *See* U.C.C. § 2-316(2), 1B U.L.A. 149 (2012).

7. Under Article 2 of the U.C.C., which governs transactions in goods, U.C.C. § 2-102, certain formalities must be observed when attempting to exclude or modify U.C.C. implied warranties:

> (2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

U.C.C. § 2-316(2), 1B U.L.A. 149 (2012).

8. To effectively exclude an implied warranty of fitness under Subsection (2) of Section 2-316, the disclaimer "must be by a writing." *Id.*

9. To effectively exclude the implied warranty of merchantability under Subsection (2) of Section 2-316, whether the disclaimer is oral or in writing, the disclaimer "must mention merchantability." *Id.*

10. To effectively exclude an implied warranty of fitness under Subsection (2) of Section 2-316, the disclaimer must not only be in writing, but also be "conspicuous," and when the implied warranty of merchantability is disclaimed in writing, any such "writing must be conspicuous." *Id.* The formal requirement that a writing be "conspicuous" can be satisfied in different ways, including when "a heading [is] in capital letters equal to or greater in size than the surrounding text," and when language in the body of a record or display [is] . . . in contrasting type." U.C.C. § 1-201(b)(10) (amend. 2001), 1 U.L.A. 24 (2012).

11. U.C.C. § 2-316(2), 1B U.L.A. 150 (2012).

12. *See* U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG]. Subject to certain exclusions, the CISG governs contracts for the sale of goods between parties whose places of business are in different countries when the countries are "Contracting States" (that is, parties to the CISG). *Id.* art. 1(1)(a). "This Convention applies to contracts of sale of goods between parties whose place of business are in different States: (a) when the States are Contracting States." *Id.* In the typical cross-border sale of goods transaction, unless it is excluded by the parties, the CISG will usually govern the transaction if the

applies to a sales contract, the CISG, rather than Article 2 of the UCC or other domestic sales law, governs the rights and obligations of the seller and the buyer.[13] In those sovereign states that are parties to the CISG and that have not made a declaration under Article 92(1) of the CISG (which is the vast majority of parties), the CISG also governs contract formation.[14]

Like Article 2 of the UCC, the CISG contains a provision, Article 35, that establishes default obligations binding on the seller with respect to the goods sold.[15] For many U.S. lawyers and commentators, Article 35 and its default obligations look quite similar to many of the warranty obligations of Article 2 of the UCC. Indeed, there are seemingly parallel provisions between the UCC and the CISG, as has often been noted by courts and commentators alike.[16] Nevertheless, the obligations are created by two distinct bodies of law. Failure to recognize that the UCC and the CISG are two distinct bodies of law—a simple truth that all too often is ignored or forgotten—has at times led to sloppy analysis and incorrect outcomes.[17]

One example of a recurring imprecise and improper approach to the CISG that has resulted from "UCC bias" is a tendency to view Article 35 of the CISG as essentially the same as UCC Sections 2-313, 2-314, and 2-315.[18] That has undoubtedly contributed to incorrect conclusions regarding

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parties' respective places of business that are most directly involved with the transaction are in countries that have ratified the CISG. *Id.* art. 1(2), 10(a). There are currently ninety-five parties to the CISG, including the United States and most of its major trading partners. *United Nations. Convention on Contracts for the International Sale of Goods*, *Status of Treaties*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&clang=_en (last visited Oct. 23, 2022) [hereinafter CISG Status].

13. CISG, *supra* note 12, art. 4.

14. *Id*.

15. *Id*. art. 35.

16. *See, e.g.*, Schmitz-Werke GmbH & Co. v. Rockland Indus., Inc., 37 F. Appx. 687, 691 (4th Cir. 2002); Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1028 (2d Cir. 1995); Sunrise Foods Int'l Inc. v. Ryan Hinton Inc., No. 1:17-CV-00457-CWD, 2019 WL 3755499, at *4 (D. Idaho Aug. 8, 2019); Hanwha Corp. v. Cedar Petrochemicals, Inc., 760 F. Supp. 2d 426, 430 (S.D.N.Y. 2011); Raw Materials, Inc. v. Manfred Forberich GmbH & Co., No. 03 C 1154, 2004 WL 1535839, at *3-4 (N.D. Ill. July 7, 2004); *see also* Letter of Submittal from George P. Schultz, U.S. Sec'y of State, to Ronald Reagan, President of the United States of Am. (Aug. 30, 1983), *in* S. Treaty Doc. No. 98-9, at vi (1983) ("It will be noted that the Convention embodies the substance of many of the important provisions of the UCC and is generally consistent with its approach and outlook.") *Id.*

17. For one example of analysis of failure to properly distinguish the U.C.C. and the CISG, *see* William P. Johnson, *The Hierarchy That Wasn't There: Elevating "Usage" to its Rightful Position for Contracts Governed by the CISG*, 32 NW. J. INT'L L. & BUS. 263, 269-75 (2012).

18. *See, e.g.*, Norfolk Southern Ry. Co. v. Power Source Supply, Inc., Civ. Action No. 06-58 J., 2008 WL 2884102, at *5 (W.D. Pa. July 25, 2008) (reasoning that the seller in the dispute before the court has conceded that "although the CISG does not specifically include the implied warranties of fitness and merchantability, CISG art. 35 may properly be read to suggest them"); *see also* CLAYTON P. GILLETTE & STEVEN D. WALT, SALES LAW: DOMESTIC AND

what is required to exclude or modify sellers' obligations that would otherwise become part of the parties' agreement under Article 35 of the CISG.

Some U.S. commentators and courts have taken the view that a written disclaimer in a sale-of-goods contract that is governed by the CISG must satisfy the requirements of UCC Section 2-316 to effectively exclude seller's obligations implied under Article 35 when U.S. law provides the applicable domestic sales law that supplements the CISG.[19] As one highly respected CISG scholar has presented the matter, "some domestic legislation, applicable to commercial transactions, restricts the effectiveness of contract provisions that 'disclaim' implied obligations ('warranties') as to quality of the goods. Is this legislation applicable to sales that are subject to the Convention?"[20]

However, it simply is not the case that the formal requirements of UCC Section 2-316 must be satisfied to modify or exclude CISG Article 35 obligations, as this article seeks to demonstrate. That view of the presumed relevance of UCC Section 2-316 for exclusion or modification of Article 35 obligations misunderstands both (i) the exceptions to the scope of validity under Article 4 of the CISG and (ii) the narrow focus and limited reach of UCC Section 2-316. That misunderstanding undermines predictability, which in turn undermines the goal of the CISG to provide "uniform rules which govern contracts for the international sale of goods" and to "contribute to the removal of legal barriers in international trade and promote the development of international trade."[21]

This article argues that UCC Section 2-316 has no relevance for Article 35 of the CISG, including for purposes of determining the proper means to exclude or to modify obligations that arise under Article 35. This article proposes an understanding of the scope of the validity exception under Article 4 of the CISG which does not reach the formal requirements established by UCC Section 2-316. This article also demonstrates that even

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INTERNATIONAL 372 (3d ed. 2016) (stating that Article 35 creates seller obligations "in a manner that is consistent with many of the characteristics of UCC implied warranties"); JOHN A. SPANOGLE & PETER WINSHIP, INTERNATIONAL SALES LAW: A PROBLEM-ORIENTED CASEBOOK 204 (2d ed. 2012) (comparing UCC implied warranty obligations with Article 35 of the CISG and concluding that the CISG "uses different terminology but yields the same results").

19. *See, e.g.*, Norfolk Southern Ry. Co., 2008 WL 2884102, at *5; *see also* Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT'L L. 1, 85-86 (1993); *see generally* Laura E. Longobardi, *Disclaimers of Implied Warranties: The 1980 United Nations Convention on Contracts for the International Sale of Goods*, 53 FORDHAM L. REV. 863 (1985).

20. JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION ¶ 230, at 256-57 (1982).

21. CISG, *supra* note 12, pmbl.

if the validity exception under Article 4 should be understood to reach the sort of requirements established by UCC Section 2-316, it ultimately matters not because UCC Section 2-316 itself applies only to the relevant provisions of Article 2 of the UCC and not to other bodies of sales law. Finally, this article proposes a better way to approach exclusion or modification of default obligations that arise under Article 35 of the CISG.

2. IDENTIFYING THE PROBLEM

A. U.S. Case Law and UCC Bias

The various approaches that U.S. courts take when analyzing Article 35 of the CISG are mixed—some engaging in careful analysis of the CISG, recognizing that it is a distinct body of law;[22] some leaping too quickly to the conclusion that analysis of seemingly analogous UCC provisions is applicable to the corresponding provisions in the CISG;[23] and some engaging in very little analysis of the CISG at all.[24]

The *Dingxi Longhai Dairy, Ltd.* decision involved a dispute that arose out of a sale of inulin by Dingxi Longhai Dairy, Ltd. ("Dingxi"), a Chinese seller, to Becwood Technology Group LLC, a Minnesota buyer ("Becwood").[25] The CISG governed the contract between the parties, which the court recognized.[26] Nevertheless, in analyzing the buyer's claims pled in "warranty," the court jumped directly to a UCC analysis, citing another decision by a U.S. court for the proposition that "caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code may inform court when applying CISG."[27] The court then proceeded with its analysis, largely ignoring the relevant provisions of the CISG.[28]

Such UCC bias frequently creeps into U.S. courts' analysis with respect to various provisions of the CISG that are before the court. With respect to Article 35, *Norfolk Southern Ry. Co. v. Power Source Supply, Inc.* is the primary U.S. case making an incorrect blanket statement

22. *See, e.g.*, Electrocraft Arkansas, Inc. v. Super Elec. Motors, Ltd., No. 4:09cv00318 SWW, 2009 WL 5181854, at 4 (E.D. Ark. Dec. 23, 2009).

23. *See, e.g.*, Norfolk Southern Ry. Co. v. Power Source Supply, Inc., Civ. Action No. 06-58 J., 2008 WL 2884102 (W.D. Pa. July 25, 2008).

24. *See, e.g.*, Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Group, L.L.C., 718 F. Supp. 2d 1019, 1021 (D. Minn. 2010).

25. *See* Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Group, L.L.C., 718 F. Supp. 2d 1019, 1021 (D. Minn. 2010).

26. *Id.* at 1022.

27. *Id.* at 1025 (citing Chicago Prime Packers, Inc. v. Northam Food Trading Co., 408 F.3d 894, 898 (7th Cir. 2005)).

28. *Id.*

regarding the need to satisfy the requirements of UCC Section 2-316 to disclaim Article 35 obligations.[29]

That case involved the sale of locomotives by a U.S. seller to a Canadian buyer.[30] The sales contract was governed by the CISG.[31] The seller's written bill of sale, which was executed by the buyer, included an express disclaimer, in all-capital letters, of "any implied warranty of merchantability or fitness for a particular purpose."[32] In considering that disclaimer, the court stated that "[t]he validity of the disclaimer cannot be determined by reference to the CISG itself."[33] The court's reasoning was based on Article 4 of the CISG, which generally excludes principles of validity from the scope of the CISG.[34]

That is a seductive claim. Such an approach to analysis of Article 4 of the CISG simplifies that Article and the analysis it requires. Article 4 does indeed provide that the CISG "is not concerned with . . . the validity of the contract or any of its provisions," after all.[35] However, the court's approach fails to recognize that Article 4 is not an absolute statement on the scope of validity within the CISG, insofar as Article 4 also qualifies the exclusion of validity with the clause, "except as otherwise expressly provided in" the CISG.[36] The court's approach also fails to wrestle with the actual scope of the principle of validity to determine whether its meaning should reach the formal requirements established by UCC Section 2-316.

With no reasoning or analysis, the court concluded that it was "necessary to turn to" choice-of-law rules.[37] The court cited three cases to support its conclusion but without analysis or further explanation for its conclusion, instead turning its focus to analysis of formalistic requirements for disclaiming UCC implied warranties.[38] Yet, none of the three cases cited by the court engaged in any analysis of the validity exception of the CISG or the relationship between Article 35 of the CISG and UCC Section 2-316.

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29. *See* Norfolk Southern Ry. Co. v. Power Source Supply, Inc., Civ. Action No. 06-58 J., 2008 WL 2884102 (W.D. Pa. July 25, 2008).

30. *Id.* at *1.

31. *Id.* at *2.

32. *Id.* at *5.

33. *Id.* (citing CISG, art. 4(a)).

34. *Id.*

35. CISG, *supra* note 12, art. 4.

36. *Id*.

37. Norfolk Southern Ry. Co. v. Power Source Supply, Inc., Civ. Action No. 06-58 J., 2008 WL 2884102, at *5 (W.D. Pa. July 25, 2008).

38. *Id.* at *5 (citing Geneva Pharm. Tech. Corp. v. Barr Labs., 201 F. Supp. 2d 236, 282-83 (S.D.N.Y. 2002) *rev'd on other grounds*, 97 F.3d 1, 12-13 (2d Cir. 1996).

The *Geneva Pharmaceuticals Technology Corp.* decision, which was relied on by the court in *Norfolk Southern Railway Company,* involved a complex case with numerous parties and complicated antitrust claims.[39] One of the plaintiffs, a New Jersey company, alleged a breach-of-contract claim against one of the defendants, a Canadian company, in connection with the supply of clathrate, a substance used in the production of certain pharmaceutical products.[40] The Canadian company challenged the formation of the contract and its validity.[41] In considering the validity argument, the court reasoned that, "[u]nder the CISG, the validity of an alleged contract is decided under domestic law."[42] The court continued by stating that the term "validity," as used in the CISG, "refers to any issue by which the 'domestic law would render the contract void, voidable, or unenforceable.'"[43] The court then considered the Canadian company's position that the alleged contract failed for lack of consideration and concluded that the contract was supported by consideration.[44] There is no further analysis of the meaning or scope of the concept of validity, as that term is used in the CISG.[45] There is no analysis of Article 35 of the CISG.[46]

In short, the court's statement in *Norfolk Southern Railway Company,* that "[t]he validity of the disclaimer [in the seller's bill of sale] cannot be determined by reference to the CISG itself," is unsupported either by relevant authority, or by careful analysis.[47] After citing *Geneva Pharmaceuticals Technology Corp.*, the court in *Norfolk Southern Railway Company* concluded that Pennsylvania law was the appropriate domestic law to supplement the CISG, and it stated that "Pennsylvania law requires that the disclaimer be 'conspicuous' and, if the warranty of merchantability is being disclaimed or modified, the 'mention' of the word 'merchantability.'"[48]

That statement was an incorrect statement of law as applied to the facts of the case. While Pennsylvania law might very well require a disclaimer of UCC implied warranties to satisfy the UCC Section 2-316(2) requirements

39. *See* Geneva Pharm. Tech. Corp. v. Barr Labs., 201 F. Supp. 2d 236 (S.D.N.Y. 2002) *rev'd on other grounds*, 386 F.3d 485 (2d Cir. 2004).

40. *Id.* at 281.

41. *Id.*

42. *Id.* at 282.

43. *Id.* at 282 (citing Hartnell, *supra* note 19, at 45).

44. *Id.* at 283-84.

45. *Id.*

46. *Id.*

47. Norfolk S. Ry. Co. v. Power Source Supply, Inc., No. CIV.A. 06-58 J, 2008 WL 2884102, at *5 (W.D. Pa. July 25, 2008).

48. *Id.* at *6.

identified by the court, UCC implied warranties were not part of the sale-of-goods contract that was at issue before the court. That contract was governed by the CISG, and the CISG preempts Article 2 of the UCC, as explained more fully in Section 5 of this article.

Similarly, in *Berry v. Ken M. Spooner Farms, Inc.* the court asserted with virtually no analysis that "[t]he CISG does not govern the enforceability of the exclusionary clause pursuant to an express provision in the CISG," while also citing the *Geneva Pharmaceuticals* decision.[49] The *Berry* decision was reversed on other grounds but has contributed to misunderstanding of the relationship between the CISG and Article 2 of the UCC with respect to disclaimers of warranty and warranty-like obligations.[50]

While respectful disagreement with the courts' failure to engage in careful, robust analysis of the CISG and its distinctive provisions is arguably appropriate, these two courts are hardly alone. U.S. courts routinely engage in analysis that reflects UCC bias.[51] Moreover, the issue of the scope and meaning of validity under the CISG and its relevance, if any, for the relationship between Article 35 of the CISG and UCC Section 2-316 has not been squarely addressed by careful analysis of any U.S. court. Finally, the commentary by U.S. scholars on the issue is also mixed.[52]

B. U.S. Courts Applying the CISG

Some U.S. courts have recognized that when the CISG governs a sales contract, it preempts state contract law to the extent that such law falls within the scope of the CISG. Some have specifically recognized that the CISG preempts UCC Article 2 implied warranties.[53]

In the *Electrocraft Arkansas, Inc.* decision, Electrocraft Arkansas, Inc., a Delaware corporation doing business in Arkansas ("Electrocraft"), was in the business of supplying electric refrigerator motors to refrigerator

49. Berry v. Ken M. Spooner Farms, Inc., No. C05-5538FDB, 2006 WL 1009299, at *1-2 (W.D. Wash. Apr. 13, 2006), *rev'd on other grounds*, 254 F. Appx. 646 (9th Cir. 2007).

50. *See, e.g.*, Susan J. Martin-Davidson, *Selling Goods Internationally: Scope of the U.N. Convention on Contracts for the International Sale of Goods*, 17 MICH. ST. U. COLL. L. J. INT'L L. 657, 686 (2008) (citing Berry v. Ken M. Spooner Farms Inc., No. C05-5538FDB, 2006 WL 1009299 (W.D. Wash. Apr. 13, 2006) for the position that contracting parties should comply with requirements of the UCC even when the contract is governed by the CISG).

51. *See, e.g.*, Johnson, *supra* note 17, at 273-75.

52. *See generally* HONNOLD, *supra* note 20; *cf.* E. Allan Farnsworth, *Review of Standard Forms or Terms Under the Vienna Convention*, 21 CORNELL INT'L L.J. 439, 444 (1988); *see also* Hartnell, *supra* note 19, at 85-86.

53. Electrocraft Arkansas, Inc. v. Super Elec. Motors, Ltd., No. 4:09cv00318 SWW, 2009 WL 5181854, at 4 (E.D. Ark. Dec. 23, 2009).

manufacturers.[54] Super Electric Motors, LTD, a Hong Kong company with a manufacturing facility in China ("Super Electric"), produced refrigerator motors, which it sold to Electrocraft from time to time.[55] Electrocraft asserted that Super Electric motors began to fail at an unacceptable rate due to manufacturing defects and claimed to possess approximately 300,000 defective motors supplied by Super Electric.[56]

Electrocraft brought an action against Super Electric, claiming violations of Article 35 of the CISG and Article 2 of the Uniform Commercial Code.[57] Super Electric argued that the CISG preempted Electrocraft's breach-of-warranty claims under Article 2 of the UCC, and the court agreed, reasoning that "[s]tate law causes of action that fall within the scope of federal law are preempted."[58] Application of the CISG would therefore preempt the buyer's claims under Article 2 of the UCC, which is state law, when "such claims fall within the scope of the CISG."[59]

Similarly, in *Alpha Prime Dev. Corp.* concerning an equipment purchase agreement, a motion for partial summary judgment brought by the buyer and a motion to strike brought by the seller were before the court.[60] The claim was brought by Alpha Prime Development Corporation ("Alpha Prime"), the buyer of a refurbished piece of coal mining equipment, specifically a Holland 610 Loader, against the seller, Holland Loader Company, LLC ("HLC").[61] Alpha Prime sought summary judgment based on HLC's failure to deliver the equipment and HLC's refusal to refund Alpha Prime's money.[62] The court denied the motion for summary judgment.[63]

The parties agreed the claim was governed by the CISG.[64] Applying the CISG, the court concluded that under the CISG, when there is a writing between the parties, that writing is evidence of the parties' agreement, but

54. *Id.* at *1.

55. *Id.*

56. *Id.*

57. *Id.* at *1, *4.

58. *Id.* at *4.

59. *Id.* at *4 (citing Asante Technologies, Inc. v. PMC–Sierra, Inc., 164 F. Supp. 2d 1142, 1151–52 (N.D. Cal. 2001); Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH, No. 1:05–CV–00702, 2006 WL 2924779, *1, *3 (S.D. Ohio Oct. 10, 2006)).

60. Alpha Prime Development Corp. v. Holland Loader Co., LLC, Civil Action No. 09–cv–01763–WYD–KMT, 2010 WL 2691774, *1, *1 (D. Colo. July 6, 2010).

61. *Id.*

62. *Id.*

63. *Id.* at *7.

64. *Id.* at *4.

the writing is not dispositive.[65] In support, the court cited Article 11 and Article 8 of the CISG.[66]

In this case, the buyer's motion for partial summary judgment was based, in part, on obligations arising under Article 35 of the CISG.[67] The court quoted relevant parts of Article 35 and concluded genuine issues of material fact existed and, accordingly, denied the motion.[68] In reaching its conclusion, the court made no reference to Article 2 of the UCC, nor did it rely on the statutory text of the UCC to interpret or to apply any provision of the CISG. Rather, the court laudably used the text of the CISG itself, together with other relevant sources, for understanding its meaning and thereby successfully resisted any temptation to leap to a UCC analysis.[69]

As more U.S. courts wrestle with the CISG text and resist the urge to import UCC understanding into CISG analysis, better understanding of the CISG is likely to follow. As other courts continue to jump to a UCC analysis of CISG provisions, lack of uniformity and corresponding uncertainty will continue.

3. UNDERSTANDING THE BODIES OF LAW

The careful analysis necessary to avoid importing UCC bias into CISG analysis requires understanding the law. A threshold understanding of UCC Article 2 and the CISG is likely to lead to recognition that there are similarities. A deeper understanding will lead to recognition that the two bodies of law are in fact distinct.

A. Implied Warranties Under Article 2 of the UCC

The Uniform Commercial Code (UCC) is a model U.S. law that, once adopted by the applicable legislative body of an individual U.S. state or territory, becomes part of the law of that state or territory. The UCC consists of eleven articles; Article 2 of the UCC governs "transactions in goods."[70] Article 2 of the UCC has been adopted by every U.S. state except Louisiana, and it has been adopted by the District of Columbia and certain

65. *Id.*

66. *Id.* at *4-5.

67. *Id.* at *5.

68. *Id.* at *5, *7.

69. *See generally* RICHARD HYLAND, CISGAC OPINION NO. 3, PAROL EVIDENCE RULE, PLAIN MEANING RULE, CONTRACTUAL MERGER CLAUSE AND THE CISG § 2.2 (2004); Official Commentary to 1978 Draft of CISG, art. 33, ¶ 8, reprinted at 2 Guide to the Int'l Sale of Goods Convention 20–240 (West 2009); Alpha Prime Development Corp. v. Holland Loader Co., LLC, Civil Action No. 09–cv–01763–WYD–KMT, 2010 WL 2691774, *1,*4-6 (D. Colo. July 6, 2010).

70. U.C.C. § 2-102, 1B U.L.A. 149 (2012).

U.S. territories as well.[71] It is therefore broadly applicable to domestic sale-of-goods transactions in the United States (excluding those governed by the internal laws of Louisiana).[72]

Several sections within Article 2 of the UCC establish warranties that are made by a seller to a buyer in a sale-of-goods transaction.[73] One purpose of warranties "is to determine what it is that the seller has in essence agreed to sell."[74] Article 2 warranties include the warranty of good title,[75] the warranty against infringement,[76] various express warranties,[77] the implied warranty of merchantability,[78] implied warranties arising from course of dealing or usage of trade,[79] and implied warranties of fitness for particular purpose.[80]

Especially relevant for this Article are the UCC implied warranties contained in UCC Sections 2-314 and 2-315. The implied warranty of merchantability is created by UCC Section 2-314(1): "Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."[81] Subsection (2) then provides a non-exhaustive list of minimum requirements that must be satisfied for goods to be considered merchantable.[82] To be merchantable, goods must satisfy each of the following:

> "(a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and (e) are adequately contained, packaged, and labeled as the agreement may require; and (f) conform to the promise or affirmation of fact made on the container or label if any."[83]

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71. U.C.C. Article 2, Sales, *Map*, https://www.uniformlaws.org/committees/community-home?CommunityKey=403dd218-8f13-42e2-97b8-d630cd775eba (last visited Oct. 24, 2022).

72. *See* U.C.C. § 1-301 (b)(10) (amend. 2001), 1 U.L.A. 57 (2012).

73. *See* U.C.C. §§ 2-312, 2-313, 2-314, 1A U.L.A. 281, 301, 497 (2012); U.C.C. § 2-315, 1B U.L.A. 10 (2012).

74. U.C.C. § 2-313 cmt. 4, 1A U.L.A. 302 (2012).

75. U.C.C. § 2-312(1), 1A U.L.A. 281 (2012).

76. U.C.C. § 2-312(3), 1A U.L.A. 281 (2012).

77. U.C.C. § 2-313, 1A U.L.A. 301 (2012).

78. U.C.C. § 2-314(1), 1A U.L.A. 497 (2012).

79. U.C.C. § 2-314(3), 1A U.L.A. 497 (2012).

80. U.C.C. § 2-315, 1B U.L.A. 10 (2012).

81. U.C.C. § 2-314(1), 1A U.L.A 497 (2012).

82. U.C.C. § 2-314(2), 1A U.L.A. 497 (2012).

83. *Id.*

Implied warranties of fitness for particular purpose arise under UCC Section 2-315: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."[84] UCC implied warranties can also be created as a result of course of dealing or usage of trade: "[u]nless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade."[85]

Under Article 2, once made, express warranties cannot then be effectively disclaimed (assuming the express warranty can be established by the buyer, overcoming any hurdles such as the parol evidence rule of UCC Section 2-202).[86] By way of contrast, implied warranties can be modified or excluded, but only when the requirements of UCC Section 2-316 are satisfied:

> "Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.'"[87]

Subsection (3) of UCC Section 2-316 provides additional, narrow ways that the implied warranties could be excluded or modified.[88] Consistent with the UCC's general respect for freedom of contract,[89] the parties therefore can exclude or modify Article 2 implied warranties; the modification or exclusion simply must satisfy the applicable formal requirements of UCC Section 2-316 to be effective.[90] If an attempted disclaimer has not been made in the specific form required by the relevant

84. U.C.C. § 2-315, 1B U.L.A. 10 (2012).

85. U.C.C. § 2-314(3), 1A U.L.A. 497 (2012).

86. U.C.C. § 2-316(1), 1B U.L.A. 149-50 (2012) ("Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the [parol evidence rule] negation or limitation is inoperative to the extent that such construction is unreasonable"). *Id.*

87. U.C.C. § 2-316(2), 1B U.L.A. 150 (2012).

88. U.C.C. § 2-316(3), 1B U.L.A. 150 (2012).

89. U.C.C. § 1-302(a), (b)(10) (amend. 2001), 1 U.L.A. 71 (2012) ("Except as otherwise provided . . . the effect of provisions of the [Uniform Commercial Code] may be varied by agreement"). *Id.*

90. U.C.C. § 2-316(2), 1B U.L.A. 150 (2012).

provision of UCC Section 2-316, then the applicable UCC implied warranty has not been effectively disclaimed.[91]

B. Seller's Obligations Under Article 35 of the CISG

When the CISG governs the sale of goods, Article 35(1) of the CISG requires the seller to deliver goods that conform to certain specific requirements of the contract: "The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract."[92] In addition, Article 35(2) creates default obligations binding on the seller with respect to conformity of the goods, even when not expressly required by the contract itself:

> (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
>
> *(a)* are fit for the purposes for which goods of the same description would ordinarily be used;
>
> *(b)* are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
>
> *(c)* possess the qualities of goods which the seller has held out to the buyer as a sample or model;
>
> *(d)* are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.[93]

Thus, Article 35(2) causes the obligations listed in that article to become implied terms of the parties' agreement that are binding on the seller. In addition, however, Article 35(3) creates a default carveout when certain circumstances exist: "The seller is not liable under subparagraphs *(a)* to *(d)* of the preceding paragraph for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity."[94]

There are obvious parallels between Article 35 of the CISG and the warranty provisions of Article 2 of the UCC. For example, Article 35(2)(a) looks quite similar to UCC Section 2-314(2)(c), using similar, though not precisely the same, terminology with respect to the requirement that the

91. U.C.C. § 2-316 cmt. 3 & 4, 1B U.L.A. 150 (2012).
92. CISG, *supra* note 12, art. 35(1), 16 I.L.M. 12, 1489 U.N.T.S. 11.
93. CISG, *supra* note 12, art. 35(2), 16 I.L.M. 12, 1489 U.N.T.S. 11.
94. CISG, *supra* note 12, art. 35(3), 16 I.L.M. 12, 1489 U.N.T.S. 11.

goods be fit for ordinary purposes.[95] Similarly, Article 35(2)(c), which provides that goods do not conform unless they "possess the qualities of goods which the seller has held out to the buyer as a sample or model," is seemingly analogous to the Article 2 express warranty created under UCC Section 2-313(1)(c) when a sample or model "is made part of the basis of the bargain."[96] Indeed, commentators have noted the striking similarities between the obligations imposed on the buyer under Article 35 of the CISG and UCC Article 2 warranty provisions.[97]

Yet, to properly understand and apply the CISG, it is essential to acknowledge that the two sources of law are distinct and should not be conflated. Notably, Article 35 does not use the term warranty, nor does it make any mention of merchantable or merchantability.[98] It is the failure to recognize the differences that has often led to confused or mistaken analysis.[99] As Franco Ferrari has argued, it is both "impermissible and dangerous to assert that the concepts of the CISG and the UCC are analogous."[100] In Section 5 below, this article explains how that applies to this analysis.

4. THE PRINCIPLE OF VALIDITY AND REQUIREMENTS AS TO FORM

Some misapplication of UCC Section 2-316 to analysis of modification or exclusion of obligations arising under Article 35 of the CISG is due to Article 4 of the CISG and its exclusion of principles of validity from the scope of the CISG. Article 4 provides, in relevant part, that "except as otherwise expressly provided in" the CISG, the CISG "is not concerned with . . . the validity of the contract or of any of [the contract's] provisions."[101]

95. *Compare* CISG, *supra* note 12, art. 35(2)(a), 16 I.L.M. 12, 1489 U.N.T.S. 11, *with* U.C.C. § 2-314(2)(c) 1B U.L.A. 150 (2012).

96. *Compare* CISG, *supra* note 12, art. 35(2)(c), 16 I.L.M. 12, 1489 U.N.T.S. 11, *with* U.C.C. § 2-313(1)(c) 1B U.L.A. 150 (2012).

97. *See, e.g.*, Susan J. Martin-Davidson, *Selling Goods Internationally: Scope of the U.N. Convention on Contracts for the International Sale of Goods*, 17 MICH. ST. J. INT'L L. 657, 684 (2008).

98. CISG, *supra* note 12, art. 35, 16 I.L.M. 12, 1489 U.N.T.S. 11.

99. *See generally* Johnson, *supra* note 17, at 270.

100. Franco Ferrari, *The Relationship Between the UCC and the CISG and the Construction of Uniform Law*, 29 LOY. L.A. L. REV. 1021, 1023 (1996).

101. CISG, *supra* note 12, art. 4, 16 I.L.M. 2-3, 1489 U.N.T.S. 2.

A. Validity and its Scope under the CISG

The line of reasoning that has led to the conclusion that an attempted exclusion of Article 35 obligations must satisfy the formal requirements of UCC Section 2-316 relies on Article 4 of the CISG and its reservation of principles of validity.[102] The basic thrust of the argument is that because the fundamental question that is the focus of a disclaimer analysis is the validity of that disclaimer as a means of effectively eliminating obligations that would otherwise arise under applicable law, the CISG cannot be the source of law that a court should use to analyze an apparent disclaimer of the seller's obligations under Article 35. Instead, questions of validity should be answered by applicable domestic law that supplements the CISG.

For instance, one scholar asserted that the CISG "does not address the validity of warranty disclaimers… [and] [a]s a result, their validity is determined by applicable domestic law."[103] The scholar concluded that an attempt to disclaim those obligations that arise under Article 35 of the CISG may have to comply with requirements under Section 2-316 of the UCC.[104]

Ultimately, the issue has been largely presented as a choice between viewing UCC Section 2-316 as a rule of validity on the one hand, or as a rule of interpretation on the other.[105] Under that approach, commentators have concluded that if the issue presents a question of validity, then the requirements of UCC Section 2-316 must be satisfied in order to disclaim Article 35 obligations, whereas if the issue presents a question of interpretation, such requirements need not be satisfied.[106] However, approaching the analysis in this way creates a false binary choice and is misleading. It is a false choice because that approach ignores the express limitation on the scope of the validity exception, that is, that validity is outside the scope of the CISG, "except as otherwise expressly provided in" the CISG.[107] Thus, even if it is the case that UCC Section 2-316 is better viewed as a rule of validity, it is a rule of validity that is not within the scope of Article 4(a). This is so because requirements as to form are expressly within the CISG by virtue of CISG Article 11, the requirements of UCC Section 2-316 are fundamentally requirements as to form, and the

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102. *See, e.g.*, Hartnell, *supra* note 19, at 85-86.

103. STEVEN D. WALT, SALES LAW: DOMESTIC AND INTERNATIONAL: CASES, PROBLEMS, AND MATERIALS 284 (2014).

104. *See id.* at 285-86.

105. *See id.* at 284; *see also* HONNOLD, *supra* note 20, at 258-59; CLAYTON P. GILLETTE & STEVEN D. WALT, SALES LAW: DOMESTIC AND INTERNATIONAL 377-78 (3d ed. 2016).

106. *See, e.g.*, Hartnell, *supra* note 19, at 85-86.

107. CISG, *supra* note 12, art. 4, 16 I.L.M. 2-3, 1489 U.N.T.S. 2.

requirements of UCC Section 2-316 are therefore preempted by Article 11 of the CISG.

B. Validity and the Article 4 Exception

The CISG is a treaty. To understand the meaning of the term validity as used in the CISG, applicable international law governing treaty interpretation requires beginning with the text of the treaty itself.[108] However, the term validity is not specifically defined within the CISG. The term appears in only one location anywhere in the CISG: Article 4.[109] Commentators have observed that because validity is undefined by the CISG there is debate regarding its meaning and scope.[110]

Section 4 of this article does not seek to determine a comprehensive definition of the term validity as used in the CISG or to determine the scope of that concept. Determining a comprehensive definition for the concept of validity under the CISG would be a significant undertaking indeed.[111] It is not necessary to do so for purposes of this, article, however, as it is enough to demonstrate that the formal requirements of UCC Section 2-316 are not within the meaning of validity as used in the CISG. To that end, this article focuses on the clause in Article 4 of the CISG that provides, "except as otherwise expressly provided in" the CISG.[112]

C. Validity Does Not Include Requirements as to Form

One distinguished CISG scholar has described as "unassailable" a U.S. court's "premise that applicable domestic law governs the validity of a clause disclaiming" Article 35 obligations.[113] He then concluded that the requirement of UCC Section 2-316(2) that an effective disclaimer must expressly mention the term merchantability "appears to state a rule of

108. Vienna Convention on the L. of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. While the United States is not a party to the Vienna Convention, the Vienna Convention is widely recognized as a codification of customary international law governing treaties. *See, e.g.*, Restatement (Fourth) of the Foreign Rel. L. of the U.S. § 301, Reporter's Note 1 (Am. L. Inst. 2018). To the extent the Vienna Convention is a codification of customary international law, it is generally binding as a matter of international law even on those states that are not parties to the Vienna Convention. *See, e.g.*, Statute of the Int'l Ct. of Just. art. 38(1)(b), Oct. 24, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

109. CISG, *supra* note 12, art. 4.

110. *See, e.g.*, Hartnell, *supra* note 19, at 19-21; Martin-Davidson, *supra* note 97, at 680-81

111. For a thorough and thoughtful analysis of the validity exception, *see generally* Hartnell, *supra* note 19.

112. CISG, *supra* note 12, art. 4.

113. Harry M. Flechtner, *Selected Issues Relating to the CISG's Scope of Application*, 13 VINDOBONA J. INT'L COM. L. & ARB. 91, 97 (2009).

'validity' within the (autonomous) meaning of Article 4(a) CISG."[114] That claim requires a more careful look, however, because of the carveout contained in Article 4. As acknowledged by Flechtner, principles of validity are outside the scope of the CISG, "*except as otherwise expressly provided*" in the CISG.[115]

As is clear from the introductory clause of Article 35(2), Article 35 establishes default obligations only; the parties can agree to derogate from those default obligations or to exclude them altogether.[116] This is consistent with the general principle of party autonomy, or freedom of contract, that is contained in Article 6 of the CISG and reflected throughout the CISG.[117] If the introductory clause of Article 35(2) were to merely restate the party autonomy principle established under Article 6 of the CISG, then the introductory clause would be superfluous and unnecessary for the parties to have the ability to modify or to exclude Article 35 or any part of it. It is therefore noteworthy that the right to agree otherwise is expressly included in Article 35. It is further noteworthy that Article 35 lacks any requirement as to how the parties should manifest their agreement. All that is required under Article 35 for the parties to vary the obligations for conformity contained in that article, is that the parties so agree.[118] This is arguably an instance when the CISG "otherwise expressly provide[s]" in the sense of Article 4,[119] and a domestic principle of validity relating to how the parties "have agreed otherwise"[120] should not render the parties' agreement unenforceable.

This is consistent with and supported by other provisions of the CISG that reject requirements as to form for effectiveness.[121] The principle has its strongest general statement in Article 11, which explicitly rejects a writing requirement or any other requirement as to form for the formation of an enforceable contract: "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form."[122] Similarly, Article 29(1) provides "[a] contract may be modified or terminated by the mere agreement of the parties."[123] Part II of the CISG,

114. *Id.*

115. *Id.* at 92 (quoting CISG, *supra* note 12, art. 4).

116. CISG, *supra* note 12, art. 35(2).

117. "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions." *Id.* art. 6.

118. *See id.* art. 35(2); *see also id.* art. 11.

119. *Id.* art. 4(a).

120. *Id.* art. 35(2).

121. *See id.* art. 11.

122. *Id.*

123. *Id.* art. 29(1).

which establishes principles relating to formation of the contract for sale, contains numerous provisions that contemplate contract formation occurring by means not requiring the observation of formalities.[124]

Article 96 allows states to qualify the application of Article 11 by entering a declaration that the state will retain applicable domestic requirements for a writing as a condition to enforcement of a contract.[125] Such a declaration could conceivably have the effect of requiring an Article 35 disclaimer to be in writing, at least if the domestic requirement were that specific. However, very few states have made an Article 96 declaration; the United States specifically has not.[126]

Article 11 of the CISG is focused, in part, on rejecting any writing requirement, such as that contained in the UCC's statute of frauds, as Flechtner noted in his article.[127] But Article 11 is not limited to a rejection of a writing requirement; it goes on to provide that a contract "is not subject to *any* … requirement as to form."[128] This is an instance when the CISG "otherwise expressly provide[s]" in the sense of Article 4, with respect to any domestic principle of validity, when that apparent principle of validity is essentially a requirement as to form. That includes statutes of frauds or other requirements that a contract be in writing to be enforceable, as noted by Flechtner.[129] It is not limited to statutes of frauds, or there was no reason to include the second part of Article 11. The combination of the introductory clause in Article 35(2) and Article 11 is arguably enough to obviate any need to satisfy the formalities of UCC Section 2-316 by placing UCC Section 2-316 requirements within the carveout created by Article 4.

D. The UCC and Freedom of Contract

The UCC generally establishes a broad freedom of contract.[130] Additionally, Article 2 of the UCC rejects formal requirements with respect to formation of a contract.[131] Other provisions of Article 2 further reflect the realities of day-to-day commercial practice of buyers and sellers and,

124. *E.g., id.* art. 18(1) ("A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance.")

125. *Id.* art. 96.

126. CISG Status, *supra* note 12.

127. Flechtner, *supra* note 113, at 92-93.

128. CISG, *supra* note 12, art. 11, 16 I.L.M. 671, 1489 U.N.T.S. 3. (emphasis added).

129. Flechtner, *supra* note 113, at 93.

130. U.C.C. § 1-302(a), 1 U.L.A. 71 (2012).

131. U.C.C. § 2-204(1), 1 U.L.A. 667 (2012).

accordingly, do not establish strict requirements as to form for the parties to reach agreement.[132]

There are some notable exceptions whereby Article 2 establishes limited formalistic requirements. These include the statute of frauds,[133] firm offers,[134] and disclaimers of implied warranties.[135] In those instances, Article 2 requires some formal requirements to be satisfied for an agreement to be enforceable. For example, in the case of the statute of frauds, UCC Section 2-201 provides that, with some specific exceptions, "a contract for the sale of goods for the price of $500 or more is not enforceable," unless there is some writing that satisfies the discrete requirements of that section.[136] There are three such requirements for the writing that are "definite and invariable."[137] Those requirements are that the writing evidence a contract was made; that it be signed; and that it specify a quantity.[138]

In each case, the foregoing statutory requirements as to form help to prevent unfair surprise. But none of those statutory provisions or requirements is focused on the substantive fairness of the bargain that was struck.

Other provisions of the UCC police the parties' bargain for fairness, though such exceptions are quite limited.[139] The most notable is the doctrine of unconscionability.[140] In addition, there are limits on the ability of the parties to limit potential liability, when such limitation on potential liability would cause a remedy to "fail of its essential purpose."[141] If the remedy would fail of its essential purpose, then the purported limitation on liability is not enforceable, nor is an attempted exclusion of consequential damages that is unconscionable.[142] None of these statutory provisions is focused primarily on requirements as to a form that must be satisfied; rather, each is focused on one way or another on fairness of the terms of the bargain.

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132. *See, e.g.*, U.C.C. § 2-201, 1 U.L.A. 533 (2012) (providing for a contract to form through a battle of the forms).

133. U.C.C. § 2-201, 1 U.L.A. 533 (2012).

134. U.C.C. § 2-205, 1 U.L.A. 712 (2012).

135. U.C.C. § 2-316, 1B U.L.A. 149-50 (2012).

136. U.C.C. § 2-201(1) (amend. 2002), 1 U.L.A. 533 (2012).

137. U.C.C. § 2-201, cmt. 1 (amend. 2002), 1 U.L.A. 534 (2012).

138. U.C.C. § 2-201(1) (amend. 2002), 1 U.L.A. 533 (2012); U.C.C. § 2-201, cmt. 1 (amend. 2002), 1 U.L.A. 534 (2012).

139. U.C.C. § 2-302, 1A U.L.A. 155 (2012).

140. *Id*.

141. U.C.C. § 2-719.

142. *Id*.

E. UCC Section 2-316 Creates Requirements as to Form

UCC Section 2-316 and its requirements are more like those statutory provisions that create writing requirements and other requirements as to form than those provisions focused on fairness. One purpose of UCC Section 2-316 is to seek "to protect a buyer from unexpected and unbargained language of disclaimer . . . ."[143] Some commentators have focused on that purpose of UCC Section 2-316 when concluding that it is a rule of validity, similar to the doctrine of unconscionability.[144] But one stated purpose of UCC Section 2-316 does not alter its nature as a series of requirements as to form. In that sense, UCC Section 2-316 is much more like the statute of frauds than it is like the concept of unconscionability.

Seller's counsel must draft a disclaimer of UCC implied warranties specifically to satisfy formal statutory requirements in three related but distinct ways for that disclaimer to be effective.[145] Specifically, first, the disclaimer must be in writing.[146] Second, the disclaimer must expressly include the term "merchantability."[147] Third, the text of the disclaimer must be conspicuous.[148] Each of those requirements is a requirement as to form.

In contrast, the concept of unconscionability is not focused on satisfaction (or lack thereof) of formal requirements under the statute.[149] Rather, the "basic test is whether, in light of the general commercial background and the commercial needs of the particular trade or case, the

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143. U.C.C. § 2-316, cmt. 1 (amend. 2002), 1B U.L.A. 149 (2012).

144. *See, e.g.,* Hartnell, *supra* note 19, at 86.

145. Under Article 2 of the U.C.C., which governs transactions in goods, certain formalities must be observed when attempting to exclude or modify U.C.C. implied warranties:

> (2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

U.C.C. § 2-316(2), 1B U.L.A. 149 (2012).

146. To effectively exclude an implied warranty of fitness under Subsection (2) of Section 2-316, the disclaimer "must be by a writing." *Id.*

147. To effectively exclude the implied warranty of merchantability under Subsection (2) of Section 2-316, whether the disclaimer is oral or in writing, the disclaimer "must mention merchantability." *Id.*

148. To effectively exclude an implied warranty of fitness under Subsection (2) of Section 2-316, the disclaimer must not only be in writing, but also be "conspicuous," and when the implied warranty of merchantability is disclaimed in writing, any such "writing must be conspicuous." *Id.* The formal requirement that a writing be "conspicuous" can be satisfied in different ways, including when "a heading [is] in capital letters equal to or greater in size than the surrounding text," and when language in the body of a record or display [is] . . . in contrasting type." U.C.C. § 1-201(b)(10) (amend. 2001), 1 U.L.A. 24 (2012).

149. *See* U.C.C. § 2-302 (amend. 2002), 1A U.L.A. 155 (2012).

clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."[150] The doctrine of unconscionability under the UCC is therefore focused on fairness. It is a flexible tool, available to the court to refuse to enforce an otherwise enforceable clause. In that sense, there is a strong argument that the concept of unconscionability is a principle of validity in the meaning of Article 4 of the CISG.[151] The statute of frauds contained in UCC Section 2-201, on the other hand, is a writing requirement and is outside the scope of the CISG.[152]

Thus, it does not matter whether UCC Section 2-316 is viewed as a rule of validity or as a rule of interpretation; either approach leads to the same conclusion, because the concept of validity, as used in the CISG, does not include requirements as to form within its scope. Relevant for this analysis, that includes requirements as to form with respect to how parties agree to modify or to exclude Article 35 obligations. The requirements of UCC Section 2-316 for effective disclaimer of UCC implied warranties are requirements as to form.[153]

In other words, Article 4 of the CISG generally excludes questions of validity from its scope.[154] However, Article 4 also includes an express carveout for any validity question that is "otherwise expressly provided" in the CISG.[155] Article 11 expressly rejects writing requirements, such as a statute of frauds, for a contract to be valid, and it also expressly rejects any requirement as to form.[156] UCC Section 2-316 is more like the statute of frauds than unconscionability and, in any event, is a statute setting forth requirements as to form. By operation of the carveout in Article 4, and the provision of Article 11 of the CISG, the requirements under UCC Section 2-316 are therefore outside the scope of the validity exception of Article 4. This is bolstered by the introductory clause of Article 35(2), which expressly contemplates exclusion or modification of the obligations under that article by agreement of the parties, without imposing requirements as to the form of that party agreement. This understanding of Article 35(2) also

150. U.C.C. § 2-302, cmt. 1 (amend. 2002), 1A U.L.A. 156 (2012).

151. Hartnell, *supra* note 19, at 80-84 ("The prevailing view is that domestic rules permitting courts to exercise control over . . . unconscionable contracts constitute rules of validity and thus apply to contracts for the international sale of goods pursuant to article 4(a)."). *Id.*

152. *See* HONNOLD, *supra* note 20, at 152-53.

153. For example, for a disclaimer of the U.C.C. implied warranty of merchantability to be effective, the disclaimer "must mention merchantability" and, in case of a writing, "must be conspicuous." U.C.C. § 2-316(2) (amend. 2002), 1B U.L.A. 149 (2012).

154. CISG, *supra* note 12, art. 4, 16 I.L.M. 671, 1489 U.N.T.S. 3.

155. *Id.*

156. *Id.* art. 11.

gives the introductory clause meaning that is independent of Article 6 of the CISG.

5. THE NARROW APPLICATION OF UCC SECTION 2-316

The foregoing analysis identifies a third way of looking at UCC Section 2-316 and demonstrates that that section is irrelevant for Article 35 of the CISG. However, it is ultimately unnecessary to analyze whether UCC Section 2-316 is within or outside the scope of CISG Article 4 validity for purpose of analysis of a disclaimer of seller's obligations under Article 35. It is unnecessary, because UCC Section 2-316 applies only to UCC implied warranties, and not to CISG obligations. Indeed, the tension identified in the preceding section is borne in large part out of a reluctance to accept that if the CISG governs a contract, then Article 2 of the UCC is not the governing body of law.

The argument advanced by some commentators is that even though the CISG displaces Article 2 of the UCC, the validity exception of Article 4 of the CISG causes UCC Section 2-316 to survive and remain applicable. That approach fails to recognize that the analysis never reaches UCC Section 2-316, because UCC Section 2-316 applies only to the UCC implied warranties, and the UCC implied warranties have quite clearly been preempted. The question therefore is not whether UCC Section 2-316 is excluded by the carveout in Article 4 or remains within its scope; the question is simply whether Article 2 of the UCC has been preempted by the CISG, thereby rendering the implied warranty provisions of the UCC entirely inapplicable in the first instance. In that case, the analysis never reaches UCC Section 2-316 because that section applies only to UCC implied warranties, which do not form part of a sale-of-goods contract governed by the CISG.

A. The CISG Preempts Article 2 of the UCC

The CISG preempts Article 2 of the UCC, both as a matter of U.S. constitutional law and as a matter of international law.

The CISG is a treaty that was signed by the executive on behalf of the United States and was ratified by the U.S. Senate in accordance with Article II of the U.S. Constitution.[157] The CISG is therefore a treaty that was made under the authority of the United States. The U.S. Constitution makes it

157. U.S. CONST. ART. II, § 2, CL. 2. Article II establishes the treaty power: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." *Id.*

clear that all treaties made under the authority of the United States are the supreme law of the land.[158] The CISG is therefore part of the supreme law of the United States. Additionally, the CISG is a self-executing treaty.[159] Because it is self-executing, the CISG requires no implementing legislation to become law within the United States; it automatically became law within the United States (and part of the supreme law of the land) upon its entry into force.[160]

This uncontroversial proposition has been recognized by U.S. courts. In reversing a district court's grant of summary judgment, the Ninth Circuit stated that, "because the President submitted the [CISG] to the Senate, which ratified it … there is no doubt that the [CISG] is valid and binding federal law."[161] As part of the supreme law of the land, treaties made under

158. *See* U.S. CONST. ART. VI. Article VI provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. ART. VI, § 1, CL. 2.

159. *See* Letter of Submittal from George P. Schultz, U.S. Secretary of State, to Ronald Reagan, President of the United States of America (Aug. 30, 1983), *reprinted in* U.S. Treaty Doc. No. 98-9, at vi (stating "the Convention is subject to ratification by signatory states (Article 91(2)), but is self-executing and thus requires no federal implementing legislation to come into force throughout the United States.") [hereinafter Letter of Submittal]; *see also* Chicago Prime Packers, Inc. v. Northam Food Trading Co., 408 F.3d 894, 897 (7th Cir. 2005) (describing the CISG as "a self- executing agreement between the United States and other signatories"); Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1027 (2d Cir. 1995) (Describing CISG as a self-executing agreement between the United States and other signatories); Several U.S. District courts have also recognized that the CISG is a self-executing treaty. *See, e.g.*, Electrocraft Ark., Inc. v. Super Elec. Motors, Ltd., No. 4:09cv00318 SWW, 2009 WL 5181854, at *5 (E.D. Ark. Dec. 23, 2009); Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Group, L.L.C., Civ. No. 08-762 (DSD/SRN), 2008 WL 2690287, at *1 n.1 (D. Minn. July 1, 2008); *see also* Forestal Guarani, S.A. v. Daros Int'l, Inc., Civ. Action No. 03-4821 (JAG), 2008 WL 4560701, at *2, n.4 (D.N.J. Oct. 8, 2008); Sky Cast, Inc. v. Global Direct Distribution, LLC, Civ. Action No. 07-161-JBT, 2008 WL 754734, at *4 (E.D. Ky. Mar. 18, 2008); Am. Mint LLC v. GOSoftware, Inc., No. Civ.A. 1:05-CV-650, 2006 WL 42090, at *3 (M.D. Pa. Jan. 6, 2006); Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 2d 1229, 1237 (S.D.N.Y. 1992).

160. *See* Letter of Submittal, *supra* note 159, at vi; *see also* Whitney v. Robertson, 124 U.S. 190, 194 (1888); Foster & Elam v. Neilson, 27 U.S. 253, 314 (1829); Restatement (Third) of the Foreign Relations Law of the United States § 111(3).

161. Chateau des Charmes Wines Ltd. v. Sabaté USA Inc., 328 F.3d 528, 530 (9th Cir. 2003) (citing Public Notice 1004, U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods: Official English Text, reprinted in 15 U.S.C. App.; Letter of Transmittal from President Reagan to the Senate of the United States (Sept. 21, 1983), *reprinted* in 15 U.S.C. App.); *see also* Valero Marketing & Supply Co. v. Greeni OY, 373 F. Supp. 2d 475, 479 n.7 (D.N.J. 2005), *rev'd on other grounds*, 242 Fed. App'x 840, 845 (3d Cir. 2007).

the authority of the United States are binding on individual states.[162] Such treaties preempt state law.[163]

Numerous U.S. courts have recognized that the CISG preempts Article 2 of the UCC.[164] Some courts have reached that conclusion specifically with respect to Article 2 warranty provisions.[165]

B. UCC Section 2-316 Applies Only to UCC Implied Warranties

Article 2 itself makes it clear that UCC Section 2-316 is limited to the implied warranties created by Sections 2-314 and 2-315. The warranty of title and the warranty against infringement created by UCC Sections 2-312(1) and 2-312(3), respectively, are purposefully not designated as "implied warranties," even though the warranty of title and warranty against infringement are also plainly not express warranties.[166] They are warranties that are created by operation of law, without requiring either party to do anything affirmatively for either warranty to exist. In that sense, those warranties are in fact implied terms of the contract for sale. Yet, neither is designated as an "implied warranty" under Article 2 of the UCC.[167] Consequently, UCC Section 2-316 is not applicable with respect to disclaimer of the warranty of title or disclaimer of the warranty against infringement. Indeed, official comment 6 to UCC Section 2-312 makes this

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162. *See* Ware v. Hylton, 3 U.S. 199, 236 (1795) (holding that a treaty cannot be the supreme law of the land if any act of a state legislature stands in its way); *see also* Skiriotes v. State of Fla., 313 U.S. 69, 72-73 (1941) (citing The Paquete Habana, 175 U.S. 677, 700, 20 S. Ct. 290, 44 L. Ed. 320 (1900), and (holding that "international law is a part of our law and as such is the law of all States of the Union, but it is a part of our law for the application of its own principles, and these are concerned with international rights and duties and not with domestic rights and duties"), *reh'g denied*, 313 U.S. 599.

163. Asakura v. City of Seattle, 265 U.S. 332 (1924); *see also* Restatement (Third) of the Foreign Rels. L. of the U.S. § 111(1), § 111 cmt. d.

164. MCF Liquidation, LLC v. Int'l Suntrade, Inc., No. 4:13-CV-00514-HCA, at 6 (S.D. Iowa Nov. 16, 2015) (concluding that the CISG "preempts state law causes of action arising from the formation of a contract of sale and the rights and obligations of the Seller and Buyer"); Forestal Guarani, S.A. v. Daros Int'l, Inc., Civ. Action No. 03-4821 (JAG), 2008 WL 4560701, at *2, n. 4 (D.N.J. Oct. 8, 2008) ("[T]he CISG, a treaty of the United States, preempts state contract law and common law, to the extent that those causes of action fall within the scope of the CISG."); *see also* Valero Marketing & Supply Co., 373 F. Supp. 2d at 479, n.7; Usinor Industeel v. Leeco Steel Prods., Inc., 209 F. Supp. 2d 880, 884 (N.D. Ill. 2002); Asante Techs., Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142, 1151-52 (N.D. Cal. 2001).

165. Electrocraft Arkansas, Inc. v. Super Elec. Motors, LTD, No. 4:09cv00318 SWW, 2009 WL 5181854, at *4 (E.D. Ark. Dec. 23, 2009) (concluding that the buyer's warranty claims under Article 2 of the UCC were "preempted and subsumed by the CISG").

166. *See* U.C.C. § 2-312, 1A U.L.A. 281 (2012).

167. *Id.*

explicit: "The warranty of subsection (1) is not designated as an 'implied' warranty, and hence is not subject to Section 2-316(3)."[168]

John Honnold addressed this point as follows: "Section 2-316 [of the UCC] was explicitly designed to fit with Section 2-314 that established the implied warranty of 'merchantable quality,' and with Section 2-315, that established the implied warranty of fitness for purpose."[169] Harry Flechtner has made a similar observation: "the UCC requirements [of Section 2-316(2)] are simply inapplicable as a matter of U.S. domestic law: those requirements apply only in transactions governed by Art. 2 UCC, not in transactions governed by the CISG."[170]

Some U.S. commentators and decision makers naturally instinctively cling to those UCC concepts they know well. That is not the approach contemplated by the CISG, and it undermines the CISG's purpose to promote uniformity. It confuses the distinctive nature of the CISG and its provisions, creating a risk of inappropriately lumping together the two distinct bodies of law. For example, one scholar indicates that "[u]nder both the UCC and the CISG, sellers of goods are free to disclaim the implied warranties of merchantability and fitness in their contracts with buyers."[171] That is imprecise, insofar as it suggests that implied warranties of merchantability and fitness arise under the CISG. While there are analogous provisions in Article 35 of the CISG, those provisions are distinct from the UCC implied warranties.

Article 35 does not resurrect UCC Sections 2-313, 2-314 and 2-315 just because they appear to be analogous in certain respects. On the contrary, Article 35 preempts those UCC sections and the UCC warranties they create. Failing to recognize that the CISG is a distinct source of law, separate from and independent of Article 2 of the UCC, will continue to undermine the very purposes for which the CISG was created, namely, "the adoption of uniform rules which govern contracts for the international sale of goods."[172] That is undesirable from a rule-of-law perspective insofar as it

168. *See* U.C.C. § 2-312, cmt. 6., 1A U.L.A. 282 (2012).

169. HONNOLD, *supra* note 20, at 258. Honnold continues: "UCC 2-314 and 2-315 would of course, be supplanted by Article 35(2) of the Convention. It would be awkward to require a contract to 'mention merchantability' in order to disclaim an implied obligation under Article 35(2)(a) that is somewhat different from UCC 2-314 and does not itself refer to 'merchantability.'" *Id.*

170. Flechtner, *supra* note 113, at 97.

171. Bryan D. Hull, *UNITED STATES AND INTERNATIONAL SALES, LEASE, AND LICENSING LAW: CASES AND PROBLEMS* 83 (2d ed. 2012). Notably, however, Hull also acknowledges that "[t]he CISG has no specific technical requirements for disclaimers of [seller's obligations under Article 35 that are analogous to] warranties." *Id.*

172. CISG, *supra* note 12, pmbl.

can, and often does, lead to the misapplication of applicable law. It is also undesirable insofar as it can hinder, rather than facilitate, engagement by U.S. companies in international trade and commerce: "The expansion of American business and industry will hardly be encouraged if . . . we insist on a parochial concept that all disputes must be resolved under our laws . . .. [w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."[173]

If the CISG applies by its terms, and it has not been excluded by the parties, then the CISG preempts Article 2 of the UCC. Consequently, Article 2 does not apply with respect to any matter that is addressed by the CISG or by the principles on which the CISG is based. Article 35 of the CISG therefore preempts UCC Sections 2-313, 2-314, and 2-315. UCC Section 2-316 is concerned with effectiveness of disclaimers of warranties otherwise arising specifically by operation of UCC Sections 2-314 and 2-315. Because those warranty provisions are preempted by Article 35 (and Article 9) of the CISG, no warranties arise under Article 2 of the UCC, and the parties and the decision maker should never get to UCC Section 2-316.

Even to the extent that UCC Section 2-316 may be properly characterized as a rule of validity (as opposed to fundamentally a requirement as to form), it is a section concerned only with the validity of disclaimers of those obligations arising under UCC Sections 2-314 and 2-315 specifically, and not as a matter of any other body of law. On its face, UCC Section 2-316 simply does not apply to, or have anything to do with, Article 35 of the CISG.

6. CONTINUING RELEVANCE OF PRINCIPLES OF VALIDITY

This article does not argue that no principles of validity are relevant for analysis of effectiveness of a disclaimer of obligations under Article 35 of the CISG. It is certainly possible that an attempted disclaimer could be ineffective because it is invalid under an applicable domestic principle of invalidity, such as coercion or duress (or their equivalent), when that principle of invalidity is not primarily concerned with requirements as to form and is not focused solely on specific obligations arising under domestic law, as is the case with UCC Section 2-316. There are non-U.S. decisions reaching that conclusion.[174] When U.S. law supplements the CISG, it is theoretically possible that a provision of a contract purporting to

173. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972).

174. *See, e.g.*, Oberlandesgericht Köln 22 [Cologne Higher Regional Court] May 21, 1996, 22 U 4/96 (Ger.)

modify or to exclude Article 35 obligations could be found to be unconscionable, for example. As a matter of U.S. law, that is quite unlikely in a transaction between merchants, but the CISG itself would not preclude that possibility.

7. HOW SHOULD THE ANALYSIS PROCEED?

In a sale of goods governed by the CISG, Article 35 creates default obligations that are binding on the seller with respect to the seller's performance and the goods sold.[175] Sophisticated sellers will usually attempt to modify or exclude some or all those default obligations. Article 35(2), Article 6, Article 11, and Article 8 of the CISG are the applicable articles for appropriate analysis of a claim that a seller's obligations implied at law under Article 35 have been disclaimed.

Article 35(1) of the CISG obligates the seller to deliver goods that "are of the quantity, quality and description required by the contract."[176] Article 35(2) provides that goods that fail to satisfy certain requirements established by Article 35 are nonconforming.[177] Specifically, "goods do not conform with the contract unless they" satisfy each of the applicable requirements set forth in paragraphs (a) through (d) of Article 35(2).[178]

Under Article 6, the parties are free to derogate from, or vary the effect of, any of the provisions of the CISG, subject only to the limited limitations imposed by Article 12 of the CISG.[179] Article 12 does not apply to Article 35.[180] Therefore, Article 6 provides a starting point that the parties are free to derogate from Article 35, and they are free to vary the effect of Article 35. Article 6 identifies no form that must be adopted and no requirements that must be satisfied to derogate from or vary the effect of any of the provisions of the CISG.[181]

Article 35 itself expressly establishes the right of the parties to opt out of the obligations implied as a matter of Article 35.[182] Article 35(2) provides that goods that fail to satisfy certain requirements established by Article 35 are nonconforming.[183] However, under the introductory proviso of Article 35(2), the implied obligations only arise when the parties have

175. CISG, *supra* note 12, art. 35.
176. *Id*. art. 35(1).
177. *Id.* art. 35(2).
178. *Id.*
179. *Id.* art. 6.
180. *Id.* art. 12.
181. *Id.* art. 6.
182. *Id.* art. 35(2).
183. *Id.*

not "agreed otherwise."[184] And Article 35 does not identify any means by which the parties must agree otherwise, nor does it impose any requirements as to the form of such agreement. It is enough under Article 35(2) for the parties simply to agree.

That agreement may be manifested in a clear, written form—as in a written disclaimer of Article 35 obligations included in a written agreement signed by both parties. But the agreement does not have to take that form. Instead, the language of Article 35 simply requires party agreement.[185]

To discern the parties' intent regarding their agreement, Article 8 of the CISG requires a court to give due consideration "to all relevant circumstances of the case," including but not limited to the negotiation history, the parties' established practices, and the conduct of the parties after formation of the contract, when determining party intent.[186] Article 8 gives primacy to actual intent, as opposed to a contrary objective intent, when the actual intent of the parties can be established.[187]

The question therefore is not whether formalistic requirements established by Section 2-316 have been satisfied in an agreement governed by the CISG for the obligations implied under Article 35 to be disclaimed; the question is simply, did the parties agree that those obligations should be disclaimed? The CISG requires—indeed, it allows—nothing more than that.

8. CONCLUSION

The CISG is an important effort to provide a uniform framework that is available to lawyers and their clients engaging in sales transactions in jurisdictions all around the world. Each jurisdiction presents its own distinctive bodies of law, and those laws present different, and often unexpected, gap fillers, remedies, rules, default allocations of risk and responsibility, and so on, which must be navigated each time a new jurisdiction is encountered. The navigation required can be fraught with unexpected twists and turns. That creates transaction costs with respect to learning about those laws, and it creates risk with respect to missing an important aspect of the same. The swirling mix of various domestic laws that could apply creates uncertainty for those contracting parties unfamiliar with them.

The CISG can help reduce those costs and that uncertainty, but it is only helpful if lawyers understand it and courts apply it uniformly and in

184. *Id.*
185. *Id.*
186. *Id.* art. 8.
187. *Id.*

ways that reflect its actual distinctive nature. It is counterproductive when, by contrast, bias favoring the UCC—or any other body of preempted domestic sales law—creeps in and distorts understanding. In the case of the CISG Article 35 obligations, the contortions engaged in to make sense of the assumed relationship between its implied obligations and the formalistic requirements of UCC Section 2-316 can be avoided altogether by simple recognition that UCC Section 2-316 is irrelevant to analysis of the parties' agreement to exclude or modify Article 35 of the CISG.