Vanderbilt Journal of Transnational Law

Volume 34
Issue 5 *November 2001*

Article 5

2001

Harmonizing the Battle of the Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods

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ABSTRACT

As trade between the United States and Canada continues to increase on the heels of the free trade agreements of the early 1990s, the question of which body of commercial law to apply to these transactions becomes increasingly important. The United Nations Convention on Contracts for the International Sale of Goods (CISG) serves as the default governing law for many of these transactions. In spite of its lack of use and the confusion it has brought to choice of law provisions as a self-executing treaty, many scholars have suggested that the CISG can continue to serve as a body of transnational contract law if it is harmonized with the domestic laws of the United States and Canada.

This Note illustrates the existing confusion by looking at a common contract hypothetical, the battle of the forms. It then surveys the various arguments that have been forwarded on behalf of harmonization and argues that international transactions will be ameliorated by efforts at vertical uniformity between domestic laws and the CISG, uniform interpretation of the CISG, and education of the practicing bar.

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I. INTRODUCTION

The United States has strengthened its commitment to free and fair trade with its largest trading partner, Canada, through free trade agreements that have been in effect for the last decade.[1] As a result of this commitment, trade between the United States and Canada has increased, rising to more than $365 billion in 1999.[2] With increased trade, however, comes an increase in private conflicts resulting from that trade and questions of how commercial law should resolve these transnational conflicts.[3] As the United States and other nations contemplate a Free Trade Area of the Americas, one can expect a proportional rise in private conflicts as trade barriers lower throughout the entire Western Hemisphere.[4]

In response to these concerns, a number of commentators have called for a uniform commercial law to facilitate the standardization of business practice in areas of such high-volume transactions, both in the international arena generally and also among NAFTA trading partners.[5] In spite of continuing efforts to produce model laws and international restatements,[6] both the United States and Canada have acceded to the United Nations Convention on Contracts for the International Sale of Goods (CISG), which offers a solution for the

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1. United States Canada Free-Trade Agreement Implementation Act, 19 U.S.C. § 2112 (2000); The North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 296, 32 I.L.M. 605. See Michael W. Gordon, *Some Observations About the NAFTA*, 7 FLA. J. INT'L L. 363 (1992) for a discussion of the promotion of free trade through these and other agreements between the North American countries.

2. United States Census Bureau Website, *Top Ten Countries With Which the US Trades, at* http://www.census.gov/foreign-trade/top/dst/1999/12/balance.html [hereinafter *Top Ten Countries*]. 1999 is the most recent year for which full-year census data is available.

3. Gordon, *supra* note 1, at 363-64.

4. Anthony DePalma, *Talks Tie Trade In the Americas to Democracy*, N.Y. TIMES, Apr. 23, 2001, at A6. President Bush has suggested that such a free trade area would be an extension of NAFTA, and would be grounded in "'the cooperation between Mexico, Canada and the United States.'" *Id.*

5. Boris Kozolchyk, *Highways and Byways of NAFTA Commercial Law: The Challenge To Develop a "Best Practice" in North American Free Trade*, 4 U.S.-MEX. L.J. 1 (1996). For further discussion of the need for a uniform commercial law, *see infra* notes 139-42 and accompanying text.

6. A recent effort to create an international "restatement" of contract law is known as the UNIDROIT principles. International Institute for the Unification of Private Law, Principles of International Commercial Contracts (Rome 1994). An example specific to NAFTA members was the 1994 Mexico City Convention that discussed international choice of law issues. Friedrich K. Juenger, *The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons*, 42 AM. J. COMP. L. 381 (1994).

uniformity problem that is already in place as ratified law in both the United States and Canada.[7]

The CISG is a significant treaty because of the breadth of its application to a wide range of international contracts.[8] The CISG is binding, by default, upon private international transactions where each of the party's nations has ratified the treaty.[9] The CISG is therefore the default governing body of contract law over all U.S. trade in goods with six of its top ten trading partners.[10] As one scholar has put it, the CISG is "in effect the sales law of the North American Free Trade Area created by the NAFTA Treaty and its implementing legislation."[11]

The ratification of the CISG in Canada and the United States illustrates its potential as the governing commercial sale of goods law over the myriad transactions between these nations.[12] There are, however, a number of hurdles to its ultimate success as a uniform trade law.[13] One such hurdle is the need for harmonization between the CISG and the domestic laws with which private parties in the United States and Canada are accustomed. The potential difficulty of this harmonization is illustrated by the classic contract formation dispute known as the "battle of the forms." This Note will identify the battle of the forms problem, describe domestic solutions to this

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7. The CISG was opened for signature April 11, 1980. CISG, Apr. 11, 1980, 19 I.L.M. 671. The United States ratified the CISG on December 11, 1986, with the treaty entering into force on January 1, 1988. 15 U.S.C.A. app. 332 (1998). Canada acceded to the CISG on April 23, 1991 with the treaty entering into force on May 1, 1992. United Nations Commission on International Trade Law Website, *UNCITRAL Status of Conventions and Model Laws, at* http://www.uncitral.org/english/status.pdf (showing the dates of Canada's accession as well as the latest list of countries that have ratified the CISG) [hereinafter *UNCITRAL Status*]. The text of the CISG can also be found in JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 543-75 (3d ed. 1999).

8. Article 1 of the CISG provides that the "Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting State . . . ." HONNOLD, *supra* note 7, at 29.

9. *Id.* Article 6 of the CISG allows for parties to contract out of the CISG's applicability by providing that "[t]he 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.* at 77.

10. The United States' top ten trading partners are Canada, Mexico, Japan, China, Germany, Britain, South Korea, Taiwan, France, and Singapore. *Top Ten Countries, supra* note 2. Of those top ten, six—Canada, China, France, Germany, Mexico, and Singapore—have ratified the CISG. *UNCITRAL Status, supra* note 7.

11. Harry M. Fletchner, *Recent Development: CISG: Another CISG Case in the U.S. Courts: Pitfalls For the Practitioner and the Potential For Regionalized Interpretations*, 15 J.L. & COM. 127, 133 (1995).

12. *See supra* note 2 and accompanying text.

13. For a general discussion of the many hurdles facing the CISG as a uniform sales law, see James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales*, 32 CORNELL INT'L L.J. 273 (1999).

problem in the United States and Canada, describe the solution to this problem forwarded by the CISG, and analyze the challenges of harmonizing the CISG and domestic laws.

II. THE "BATTLE OF THE FORMS" PROBLEM

The twentieth century's increase in mass production and large-scale enterprise brought about the exchange of standardized form contracts in the sale of goods.[14] The standardization of repeated negotiations has efficiency justifications and illustrates an intent by parties to streamline contract negotiation.[15] As an outgrowth of these modern transactions, the "battle of the forms" arises in the contract formation stage when a reply to an offer identifies itself as an acceptance but contains provisions that are inconsistent with those in the offer.[16] Transactions are negotiated as to the fundamental elements—price, quantity, delivery, et cetera—and then the details of the transaction are left to the forms exchanged in the negotiation process, such as purchase orders, sales acknowledgments, and delivery slips. Attorneys draft these forms to serve their client's interests.[17] The details are usually contained in the boilerplate—minimized typeface at the bottom or on the back of the form—and often address limitations of liability, arbitration stipulations, and reservations of power to cancel upon stated contingencies.[18]

The "battle of the forms" dispute arises in a fairly consistent scenario. Accordingly, this Note considers a hypothetical transaction in order to compare the various domestic and international solutions. The buyer, a Tennessee computer parts distributor, submits a purchase order form to the seller, a Canadian computer parts manufacturer, for a supply of a certain quantity and type of computer parts at a specific price. The purchase order contains "boilerplate" contract language in small print on the back of the order. This boilerplate includes a clause that provides for "all disputes to be resolved by the laws and in the courts of Tennessee." The purchase order provides that "acceptance of this order shall be deemed to constitute an agreement upon the part of the seller to the conditions named hereon." The seller responds with a sales acknowledgment form that agrees to the fundamental elements of the buyer's purchase

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14. For a discussion of the negative consequences of this standardization, see Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 631-32 (1943).

15. *Id.*

16. HONNOLD, *supra* note 7, at 182.

17. MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 58 (3d ed. 1998).

18. JOHN P. DAWSON ET AL., CONTRACTS 419 (7th ed. 1998).

order—type of good, price, and quantity—with the caveat that the agreement is "subject to the terms and conditions on the back of this form." Those "terms and conditions" include a provision that limits the seller's liability in the case of defects, and a second provision that calls for disputes to be settled by arbitration in the Canadian province of Saskatchewan.

Two situations typically develop around these "battles":

Situation #1: The parties' agreement breaks down before performance, and one party sues for breach of contract. The Tennessee distributor chooses not to perform his obligations after forms have been exchanged. The Canadian manufacturer moves for arbitration in Saskatchewan on a breach-of-contract theory, according to the terms of his form.

Situation #2: The parties perform, and the agreement breaks down subsequent to that performance. The Canadian manufacturer sends the computer parts accompanied by his own form contract, and the Tennessee distributor accepts shipment, but later finds the computer parts defective and wants his money back. The manufacturer refuses, and the distributor sues in Tennessee state court, according to the terms of his form. The manufacturer answers the suit by pointing to his form, which provides for arbitration in Canada and nevertheless limits his liability for defects.

In each of these situations, two questions must be answered. Is there a contract? If so, what are its terms?[19]

A. *The U.S. Common Law Approach*

Under U.S. common law, a counter-offer operates as an implicit rejection and terminates the offeree's power of acceptance.[20] For an acceptance to be valid, it must exactly correspond with the offer, a requirement known as the "mirror image rule."[21] A purported acceptance that adds conditions or makes any changes to the offer is

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19. HONNOLD, *supra* note 7, at 182-83. Scholars have recognized that the "battle of the forms" is oftentimes more of a contract professor's hypothetical than it is a litigated dispute. *Id.* *See also infra* notes 160-64 and accompanying text. This is perhaps due to the fact that discrepancies remain unnoticed between exchanged forms until a dispute between the parties arises. François Vergne, *The "Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 33 AM. J. COMP. L. 233 (1985). In that situation, most aggrieved parties choose to avoid enforcement of the contract rather than engaging in a protracted dispute over its terms. *Id.*

20. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 94 (4th ed. 1998).

21. Vergne, *supra* note 19, at 253. *See also* Henry D. Gabriel, *The Battle of the Forms: A Comparison of the United Nations Convention For the International Sale of Goods and the Uniform Commercial Code*, 49 BUS. LAW. 1053 (1994) [hereinafter Gabriel, *Battle*].

treated like a counter-offer and therefore a rejection.[22] An alternative to acceptance is estoppel: a party's performance, such as the exercise of dominion by the buyer over the sold goods, operates as an acceptance on a theory of estoppel where the offeror can estop the offeree from denying the existence of a contract based upon the offeree's performance.[23]

The common law rules on offer and acceptance have produced the "last shot doctrine" in the battle of the forms.[24] Under this doctrine, each new form is considered to be a counter-offer until the last one is accepted by the conduct of one of the parties.[25] The last party to send a form before performance on the agreement dictates the contract terms via "boilerplate."[26] The Restatement of Contracts, reflecting this common-law approach, provides, "[a] reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer."[27] Under this doctrine, parties trade forms back and forth until the buyer takes possession of the goods. The last form exchanged prior to possession operates as the final counter-offer and this "last shot" becomes the terms of the contract.[28]

The rationale of the mirror-image rule is based on an expectation that the original offeror, making an offer according to his own terms, cannot anticipate being bound on terms other than those that he presented.[29] It is assumed that each part of a contract, not just the primary elements of price, quantity and character of the item exchanged, has a value to the offeror that is incorporated into his original offer.[30] While the common law rule does not assume that any change to the offer is necessarily a deal-breaker, it contemplates that the offeror will want to weigh any changes to determine the value of the contract.[31] The mirror-image rule asserts that additions or modifications to the offer render that offer void, and those changes become a counter-offer, or a "last shot."[32]

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22. *Id.* at 96.

23. This doctrine is summarized in RESTATEMENT (SECOND) CONTRACTS § 56 (1979), which states: "[e]xcept as stated in § 69 or where the offer manifests a contrary intention, it is essential to an acceptance by promise either that the offeree exercise reasonable diligence to notify the offeror of acceptance or that the offeror receive the acceptance seasonably."

24. Gabriel, *Battle*, *supra* note 21, at 1054.

25. *Id.*

26. *Id.*

27. RESTATEMENT (SECOND) OF CONTRACTS § 59 (1979).

28. Gabriel, *Battle*, *supra* note 21, at 1054.

29. CHIRELSTEIN, *supra* note 17, at 54.

30. *Id.*

31. *Id.*

32. *Id.*

The last shot doctrine has been the subject of much criticism as being out of step with commercial reality. Modern transactions, according to this criticism, do not incorporate the kind of detailed negotiation assumed by the mirror-image rule.[33] It is argued that, in many cases, parties do not even read each other's forms, and that even if they do, parties do not have the time to slow down negotiations to iron out minor differences between forms.[34] In most transactions, merchants agree to the basics, forms are exchanged, and contracts are concluded without regard for the differences in boilerplate. This suggests that "business would come to a halt" if parties were forced to read each other's forms.[35]

As modern merchants do not appear to operate under the assumptions of the mirror-image rule, some argue that it has produced perverse responses from the business community.[36] One such response is for businesses to flood each other with an unnecessarily high volume of standard forms with the hope of getting in the last shot.[37] It also has been said to encourage bad faith and unfair surprise by allowing parties to avoid contracts through the insertion of meaningless exceptions in their forms.[38]

Under the U.S. common law approach, Situation #1 would result in a finding of no contract for failure by the seller to accept exactly upon the buyer's terms. There is therefore no agreement subject to arbitration. If however, the buyer accepts the goods and accompanying forms as in Situation #2, he is bound to the manufacturer's terms because they were the last shot.[39] As such, the distributor will be

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33. Gabriel, *Battle*, *supra* note 21, at 1053 (calling the last shot doctrine a "formalist fiction"); DAWSON ET AL., *supra* note 18, at 427 (calling the doctrine "so removed from ordinary commercial understandings, so productive of surprise over governing terms, and so dependent on the vagaries of the sequence of unread forms [as to invite] reform.").

34. CALAMARI & PERILLO, *supra* note 20, at 96-97. This assumption about modern merchants is not universally accepted, even in the United States where the last shot doctrine has been almost entirely abandoned. A federal court has found a contrary customary practice of writing confirmation letters for the purpose of highlighting form differences. Reaction Molding Technologies, Inc. v. General Electric Co., 588 F. Supp. 1280 (E.D. Pa. 1984).

35. HONNOLD, *supra* note 7, at 182.

36. Rick Rawlings, *The Battle of the Forms*, 42 MOD. L. REV. 715 (1979).

37. *Id.*

38. For an example of the strict application of the mirror-image rule, see Poel v. Brunswick-Balke-Collender Co., 110 N.E. 619 (N.Y. 1915). This case has been identified as the "example of why classical contract law needed to be changed in America." Gabriel, *Battle*, supra note 21, at 1058. The absurdity of this kind of result led an English court to modify the rigidity of the mirror image rule in Nicolene Ltd. v. Simmonds, [1953] 1 Q.B. 543.

39. Maria del Pilar Perales Viscasillas, *"Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison With Section 2-207 UCC and the UNIDROIT Principles*, 10 PACE INT'L L. REV. 97, 114-18 (1998). This doctrine, although "anti-economical" and focused on form rather than substance, has been credited as having the positive effect of "easy

forced to drive north in pursuit of his contract claim and hope that the liability limitation does not prevent recovery. The last shot doctrine has been criticized as encouraging contracts of adhesion, as this tends to place sellers in a superior bargaining position to buyers.[40]

B. *The U.S. UCC Approach*

American dissatisfaction with the last shot doctrine led to the adoption of an alternative approach in the Uniform Commercial Code (UCC) that has displaced the U.S. common-law approach.[41] UCC Section 2-207 provides:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
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> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with

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application in practice as a result of the willingness of both parties to recognize which declaration was the last one . . . ." *Id.* at 118.

40. Kessler, *supra* note 14, at 632. Kessler noted that

> [s]tandard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses . . . thus, standardized contracts are frequently contracts of adhesion . . . .

Id. For a contrary example, see *Poel*, 110 N.E. at 619, where it was the buyer who used unfair surprise to avoid a factual bargain.

41. DAWSON ET AL., *supra* note 18, at 427 (1998) (noting that "legal doctrines [referring to the common law mirror image rule] so removed from ordinary commercial understandings, so productive of surprise over governing terms, and so dependent on the vagaries of the sequence of unread forms invited reform.").

> any supplementary terms incorporated under any other provision of this Act.[42]

Under this approach, an acknowledgment is treated as an acceptance of the offer, unless it specifically conditions acceptance upon its own terms, even though it is not a mirror image of the original offer.[43] Subsection (1), therefore, does not preclude the existence of a contract where traditional offer and acceptance have not taken place.[44] As a result, "neither purchaser nor supplier can afterwards refuse performance by seizing upon boilerplate discrepancies that had no economic significance to either party at the time they made their deal."[45] This typically favors the purchaser, whose form, as the original offer, becomes the contract upon the supplier's acknowledgment.[46]

Subsection (2) provides that, between merchants, additional terms are considered part of the contract unless they materially alter it.[47] This would seem to mitigate some of the previous gains to purchasers from subsection (1) by including suppliers' provisions so long as they are immaterial.[48] In practice, however, courts "nearly always find clauses in the acknowledgment form to be 'material,' unless those clauses would be read into the contract in any event because of trade usage or course of dealing."[49]

Subsection (3) addresses situations in which the parties' exchange of forms fails to evidence a contract, but performance suggests otherwise.[50] In this situation, the "contract" is said to

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42. JOHN P. DAWSON ET AL., APPENDIX TO CONTRACTS—UCC ARTICLE 2 (SALES) 23 (1998).

43. CHIRELSTEIN, *supra* note 17, at 59.

44. Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1244 (1982).

45. CHIRELSTEIN, *supra* note 17, at 59.

46. *Id.* This power shift back to the purchaser has been identified as a response to the kinds of concerns raised by Professor Kessler, *supra* note 14, at 631-32. *See also* Caroline N. Brown, *Restoring Peace in the Battle of the Forms: A Framework for Making Uniform Commercial Code Section 2-207 Work*, 69 N.C. L. REV. 893 (1991). Professor Brown argues that the primary purpose of § 2-207 was to "restore the traditional balance of power between offeror and offeree in contract formation when forms are used." *Id.* at 897. "The language of section 2-207 itself," she continues, "indicates the restoration of the offeror to the former position of dominance." *Id.* at 906. This, she argues, more properly recognizes the intent of the parties in that the supplier's response to the purchase order "so strongly evidences assent to the terms of the offer that the [supplier] must do something very definite and perhaps rather extraordinary to effect a counter offer." *Id.* at 907.

47. The fact that subsection (2) refers only to additional terms, while subsection (1) refers to both additional and different terms has been the subject of much debate and illustrates the pitfalls in § 2-207 interpretation. Baird & Weisberg, *supra* note 44, at 1240-42. *See also* 3 R. DUESENBERG & L. KING, SALES & BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE § 3.03[1] (1980).

48. CHIRELSTEIN, *supra* note 17, at 59.

49. Baird & Weisberg, *supra* note 44, at 1246.

50. CHIRELSTEIN, *supra* note 17, at 60.

consist of those terms upon which the parties' forms agree, with conflicting terms from the different boilerplates dropping out and the default of the UCC supplying the remaining terms.[51]

One of the most common justifications for the changes brought by the UCC to the battle of the forms focuses on its original purpose. Commentators argue that the framers of the UCC attempted to devise a standard under which the assent of the parties in a "battle of the forms" dispute could be determined.[52] It has been noted:

> The chief innovation of 2-207 is not its change in the mirror-image rule, but its abandonment of the very principle of a formal rule of offer and acceptance. In place of a formal rule, the section substitutes a general standard under which the court is to look to the gist of the parties' communications to determine if they have formed a contract. In so doing, the court is to overlook any express terms in those communications that do not fairly reflect the parties' agreement.[53]

In spite of these lofty purposes, § 2-207 has been roundly criticized.[54] An example of poor draftsmanship, its language seems inconsistent with its purposes.[55] While the drafters evinced an intent to abandon the strictness of the common-law rules, the end product, particularly § 2-207(2), is a rule that simply transfers bargaining power from the seller back to the buyer without seeking the intent of

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51. William S. Dodge, *Teaching the CISG in Contracts*, 50 J. LEGAL EDUC. 72, 82 (2000). It has been argued that subsection (3) strikes a balance between the need to recognize the minimal substantive value in forms exchanged without agreement and the counter-need to give some effect to the forms to justify their exchange. Brown, *supra* note 46, at 927.

52. John E. Murray, Jr., *An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 11, 38 (1988) (hereinafter Murray, *Essay*). Karl Llewellyn, the "father of the UCC," focused his efforts on a concern that the courts abandon the formalistic "mirror-image" rule for a standard that recognizes the factual bargain of the parties. *Id.* According to Llewellyn, the kinds of parties involved in a "battle of the forms" were those that dickered over price, quantity, and delivery and had no concern for or awareness of the "boilerplate" that was inserted by their lawyers. *Id.* Llewellyn wanted the UCC to recognize what the parties had in fact recognized—that a deal had been consummated. *Id. See also* Peter A. Alces & David Frisch, *Commenting on "Purpose" in the Uniform Commercial Code*, 58 OHIO ST. L.J. 419, 454-55 (1997); John E. Murray, Jr., *The Chaos of the 'Battle of the Forms'*, 39 VAND. L. REV. 1307 (1986) [hereinafter Murray, *Chaos*]; John E. Murray, Jr., *A New Design for the Agreement Process*, 53 CORNELL L. REV. 785 (1968).

53. Baird & Weisberg, *supra* note 44, at 1237.

54. Section 2-207 has been called an "enigma" that has brought "more controversy than clarity" to the battle of the forms arena. Brown, *supra* note 46, at 894. Commentators have even gone so far as to call the state of the law in this area "chaos." Murray, *Chaos*, *supra* note 52, at 1308.

55. Instead of instructing courts to seek out the intent of the parties, § 2-207(2) imposes the fine print of the buyer rather than the seller. Baird & Weisberg, *supra* note 44, at 1244.

the parties.[56] In theory, this produces a "first shot" rule that simply substitutes for the common law last shot rule.[57] Under this theory, the party who sends his form first, usually the buyer with a purchase order, is "master of the offer" and binds the subsequent transaction.[58] If § 2-207 was meant to substitute rigid rules for flexible standards, subsection (2) seems to have fallen short of that goal.[59]

Another major criticism of § 2-207 involves its judicial history. Commentators have argued that the *Roto-Lith* decision provided a poor initial interpretation, followed by mixed subsequent interpretations.[60] Courts have applied it reluctantly in certain instances, over-applied it in others, and have avoided interpreting it too literally.[61] Some have argued, however, that § 2-207's misuse by the courts has, at times, actually served to promote the drafters' original intent.[62] For instance, although § 2-207(2) seems to produce a formalistic first shot rule, courts have interpreted it instead to produce more of a "knockout" rule, where terms of disagreement are dropped as if the parties were silent and the UCC's provisions govern.[63] This seems like an overuse of § 2-207(3) by the courts, by applying it to situations beyond just contract-by-performance, but has been supported as a correction against the somewhat formal statutory language of § 2-207(2) in order to honor the parties' intent.[64]

Under the UCC approach, the buyer and seller indicated an intent to contract in hypothetical Situation #1. The seller's sales acknowledgment would be deemed an acceptance of the buyer's purchase order. The seller's provision on limitation of liability would

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56. Vergne, *supra* note 19, at 253. This "harshness" toward sellers deprives them of protection that they might have had from their own forms, because additional terms will be ignored under § 2-207(2). *Id.*

57. Whether § 2-207(2) produces a first shot rule has been a subject of considerable debate among contracts scholars. For an argument that it does not produce this rule in practice, see Baird & Weisberg, *supra* note 44, at 1247.

58. *Id.*

59. Baird & Weisberg, *supra* note 44, at 1240-41.

60. David Frisch, *Commercial Common Law, the United Nations Convention on the International Sale of Goods, and the Inertia of Habit*, 74 TUL. L. REV. 495, 517-29. The *Roto-Lith* case was the first opportunity courts had to interpret § 2-207. Roto-Lith, Ltd. v. F.P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962), *overruled by* Ionics, Inc. v. Elmwood Sensors, Inc., 100 F.3d 184 (1st Cir. 1997). Rather than treating this as a consideration of first instance, however, the *Roto-Lith* court ignored § 2-207(2) and applied the mirror-image rule. Frisch, *supra*, at 526. It then ignored § 2-207(3) and applied the last shot rule. *Id.* at 526-27.

61. SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS 142 (4th ed. 1990).

62. Baird & Weisberg, *supra* note 44, at 1247.

63. *See id.*

64. Two commentators note this judicial overuse of subsection (3) as supportive of their belief that "whether § 2-207 is a badly drafted statute is not of great concern, because courts have used it for nearly three decades in a manner consistent with the principles on which it rests." Baird & Weisberg, *supra* note 44, at 1248.

probably not become part of the contract, because it would be viewed as "material" under § 2-207(2)(b).[65] The arbitration provision, as a "different" but not "additional" term, would probably be rejected under the same reasoning.[66]

The case of contract-by-conduct in Situation #2 would be governed under § 2-207(3).[67] The knockout rule would apply, making the terms of the contract those that the parties had agreed upon and excluding all of the disputed terms.[68] Remaining terms would be supplied by the UCC default rules.[69]

C. *The Canadian Approach*

Commercial law in Canada is rooted in English common law.[70] Canadian sale of goods law is traceable to England's 1893 Sale of Goods Act.[71] U.S. advances in contract law have increasingly influenced Canada because of its close ties with its neighbor to the south.[72] Canadian sales law remains distinct from both England and the United States because it lacks national uniformity.[73] As with the

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65. *See supra* note 49 and accompanying text.
66. *See supra* note 47 and accompanying text.
67. *See supra* note 50 and accompanying text.
68. *See supra* note 51 and accompanying text.
69. *Id.*
70. Jacob S. Ziegel, *The Future of Commercial Law in Canada*, 20 U.B.C. L. REV. 1, 3 (1986) [hereinafter Ziegel, *Future*]. Professor Ziegel notes that this connection to English law "is hardly surprising given the close political, economic, cultural and legal ties that bound the nascent Canadian federation to the United Kingdom." *Id.*
71. Laura A. Donner, *Recent Development: Impact of the Vienna Sales Convention on Canada*, 6 EMORY INT'L L. REV. 743, 746 (1992). It is important to note that Quebec, with its separate historical ties to France, developed a civil law system independent of the other Canadian provinces and therefore does not fit into the characterizations described above. *See also* Lisa K. Tomko, Note, *United States Convention on the International Sale of Goods: Its Effect on United States and Canadian Sales Law*, 66 U. DET. MERCY L. REV. 73, 73 n.1 (1988). However, Quebec has adopted the CISG along with all of the other Canadian provinces. *See, e.g.*, Jacob S. Ziegel, *Canada's First Decision on the International Sales Convention*, 32 CAN. BUS. L.J. 313, 313 n.1 (1999) [hereinafter Ziegel, *First Decision*].
72. Errol P. Mendes, *The U.N. Sales Convention & U.S.-Canada Transactions; Enticing the World's Largest Trading Bloc To Do Business Under a Global Sales Law*, 8 J.L. & COM. 109, 143 (1988). Professor Mendes notes that the movement of Canada toward American contract principles is "inevitabl[e]," but warns that until that move is complete "there will remain significant differences between Canadian and American commercial law . . . ." *Id.*
73. Donner, *supra* note 71, at 746. Although the United States does not have a federal contract law, the broad acceptance of the UCC by the states has made it the de facto national contract law in the United States. *See also* Henry D. Gabriel, *The Inapplicability of the United Nations Convention on the International Sale of Goods as a Model for the Revision of Article Two of the Uniform Commercial Code*, 72 TUL. L. REV. 1995, 1998 (1998) [hereinafter Gabriel, *Inapplicability*] (commenting that the

common law generally, however, there are principles that outline the Canadian approach to the battle of the forms. Those principles are similar to the American common law approach and emphasize the mirror image rule and the last shot doctrine.[74]

There are, however, ways in which Canadian law has mitigated the harshness of the common law rules in contracts-by-conduct. The first is to avoid the severity of the last shot doctrine where the parties have not had prior dealings.[75] In *Tywood Industries, Ltd. v. St. Anne-Nackavic Pulp & Paper Co.*, the buyer's form was deemed to be the last shot and contained a clause that required arbitration.[76] The court declined to enforce the arbitration clause, however, because the buyer did not object when the seller failed to return the purchase order form.[77] The court was apparently moved by a sense of equity to protect the seller where the buyer had not explicitly made his acceptance conditional upon the terms of his form.[78]

Canadian law has also mitigated the common law rules by allowing for contracts-by-conduct to contain those provisions upon which the parties agree.[79] The last form in the battle, then, does not supply open terms.[80] This is very similar to UCC § 2-207(3), which knocks out disagreement between forms in contracts-by-conduct and fills the gaps with UCC default rules.[81] In Canadian law, it is unclear what source of law will be used to supply open terms to the contract-by-conduct.[82]

The Canadian approach has suffered from the same criticisms that have been leveled at the U.S. common law approach. It has remained intact, however, despite efforts to supplant it with a

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influence of the UCC on American commercial practices has been "quite considerable" because it "has been adopted in some form in all fifty states.").

74. Morris G. Shanker, *"Battle of the Forms": A Comparison and Critique of Canadian, American and Historical Common Law Perspectives*, 4 CAN. BUS. L.J. 263, 268-69 (1980).

75. Gabriel, *Battle*, *supra* note 21, at 1056.

76. Tywood Industries, Ltd. v. St. Anne-Nackawic Pulp & Paper Co., 100 D.L.R.3d 374 (Ont.H.C. 1979).

77. *Id.* at 377-78.

78. *Id.*

79. Shanker, *supra* note 74, at 267. Professor Shanker inferred this rejection of the last shot doctrine from a proposed Ontario Sale of Goods Act. *Id.* Because the language of that Act was similar to that provided by UCC § 2-207(3), he argued that the outcome in a contract-by-conduct situation would be the same as that provided by the UCC. *Id.* at 266 n.7.

80. *Id.* at 268.

81. Gabriel, *Battle*, *supra* note 21, at 1057.

82. Professor Shanker assumes that the terms will be provided by the Ontario Sale of Goods Act. Shanker, *supra* note 74, at 268. However, subsequent writings have indicated that this might not be true. *See, e.g.*, Gabriel, *Battle*, *supra* note 21, at 1057 (noting that the source for this development in Canada is the common law, not statute); Tomko, *supra* note 71, at 85 (calling this area of Canadian law one of "huge . . . uncertainty which could be alleviated by a uniform set of rules").

uniform law modeled after the UCC.[83] The Ontario Law Reform Commission rejected adoption of § 2-207 on the grounds that:

> [s]o long as the "agreement" is still executory and the parties have not proceeded beyond the exchange of forms, there is no undue hardship in applying existing rules of offer and acceptance and finding that there is no concluded agreement between the parties. The "mirror image" rule of acceptance may enable one or the other party to escape from a bargain that he no longer finds to his liking but such cases do not appear to arise often in practice.[84]

Under the Canadian approach, as under the U.S. common law approach, the seller would have no claim for contract damages in Situation #1 for failure of agreement.[85] In Situation #2, however, the attempts by Canadian law to mitigate the mirror image rule might change the outcome of the contract-by-conduct. If the parties had no prior dealings, the harshness of the last shot doctrine could be avoided by not enforcing the seller's additional provision on limitation of liability under the authority of *Tywood Industries*.[86] It is not clear how that case would dispose of the different provisions on contract enforcement. Another possibility for avoiding the last shot doctrine would be to set the terms of the agreement as those upon which the parties agreed, and throw out different or additional terms.[87] In this case, there would be little guidance as to what the open terms should be, resolving only that the distributor would be unable to require enforcement in Tennessee and that the manufacturer would be unable to enforce his arbitration and liability limitation clauses.[88]

D. *The CISG Approach*

The CISG offers its own solution to the battle of the forms in Article 19:

> (1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.
>
> (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without under delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

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83. Shanker, *supra* note 74, at 273-74.
84. ONTARIO LAW REFORM COMM'N, 1 REPORT ON SALE OF GOODS 83-84 (1979).
85. *See supra* note 74 and accompanying text.
86. *See supra* notes 76-78 and accompanying text.
87. *See supra* note 79 and accompanying text.
88. *See supra* note 82 and accompanying text.

> (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.[89]

Section 1 of Article 19 embraces the common law notion of offer and acceptance embodied in the mirror image rule.[90] It does so for a number of reasons. The first is that the mirror image rule is consistent with both common law and civil law systems, so that the CISG is broadly in line with the many different legal traditions that it attempts to accommodate.[91] The second is that, however harsh it may seem, the mirror image rule is more predictable and much easier to apply than its UCC counterpart.[92] The drafters of the Convention considered adopting the UCC approach, but explicitly rejected it with the sanction of the American delegates, who admitted the difficulties in applying § 2-207 and seemed content to revert to the pre-UCC doctrine.[93]

Section 2 of Article 19 attempts to mitigate the severity of the mirror image rule by allowing for non-material terms to remain in a contract.[94] This relaxation "is premised on the idea that, at least at

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89. HONNOLD, *supra* note 7, at 183-84.

90. Gabriel, *Battle*, *supra* note 21, at 1058 (commenting that Article 19 embraces the common law mirror image rule). *See also* Magellan Int'l Corp. v. Salzgitter Handel GmbH, 1999 U.S. Dist. LEXIS 19386, *17 (N.D. Ill. 1999) (noting that "[Art. 19(1)] reflects the common law's 'mirror image' rule that the UCC has rejected."); Filanto S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1238 (S.D.N.Y. 1992) (finding that "[the CISG] reverses the rule of Uniform Commercial Code § 2-207, and reverts to the common law rule."); Dodge, *supra* note 51, at 82 (noting that "[t]he CISG . . . adopts what is essentially a mirror-image rule."); Courtney Parrish Smart, Comment, *Formation of Contracts in Louisiana Under the United Nations Convention For the International Sale of Goods*, 53 LA. L. REV. 1339, 1351 (1993) (recognizing that "[t]he Convention adopts the 'mirror image' rule in article 19(1)."); Donner, *supra* note 71, at 749 (noting that "Paragraph 1 [of Article 19] appears consistent with the Canadian mirror image requirement."); Murray, *Essay*, *supra* note 52, at 41 (arguing that "Article 19(1) is designed to replicate the 'matching acceptance' rule of the common law notwithstanding the repudiation of that concept under the Uniform Commercial Code."); Tomko, *supra* note 71, at 88 (arguing that "[Article 19] is much like the Canadian mirror image rule.").

91. Vergne, *supra* note 19, at 255. The author notes that the CISG approach is similar to the English and American common law systems, as well as the civil law systems of France, Germany, Japan, and most Scandinavian countries. *Id.*

92. *See supra* note 30. *See also* Vergne, *supra* note 19, at 256 (commenting that "[i]t should be noted that the solution of Article 19 is simpler and easier to apply than the UCC's.").

93. Murray, *Essay*, *supra* note 52, at 39-40. Professor Murray finds it unsurprising that the CISG delegates could not be persuaded to adopt the UCC approach. He attributes this to the judicial evolution of § 2-207, calling it a "miserable flop." *Id.* *See supra* note 44. *But see supra* note 50 (suggesting that the judicial evolution of § 2-207 might be one of its few redeeming qualities).

94. HONNOLD, *supra* note 7, at 167 (noting that while paragraph (1) of Article 19 "states the traditional and widely accepted" mirror image rule, "[p]aragraphs (2)

some point, the parties' reliance on the transaction deserves protection."[95] Although this is inconsistent with the traditional mirror image rule, it represents the same kind of attempts at mitigation made by courts applying equitable principles to alleviate the rule's harshness.[96] Section 2 has been analogized to § 2-207 as an attempt by the drafters to exhibit a degree of sensitivity to the intent of the parties.[97] The broad definition of materiality in section 3, however, suggests that few provisions will prevent a party from escaping a contract and that therefore the harshness of the mirror image rule remains.[98] Much of the criticism leveled at this approach comes from defenders of the UCC who attack it in the same vein as they did the U.S. common law approach.[99]

One notable absence from Article 19 is any kind of separate provision for contracts-by-conduct. The CISG seems conflicted in its approach to this problem.[100] Since Article 19 is silent on this issue, contracts-by-conduct are addressed in a manner similar to the U.S. common law approach where performance constitutes acceptance of the other party's last shot.[101] This rejects both the UCC approach in § 2-207(3) and that forwarded by Canadian courts.[102] Article 8(2) of the CISG, however, provides that ambiguities between forms in the face of performance "are to be interpreted according to the

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and (3) state exceptions from the traditional rule."). It has been noted that while paragraphs 2 and 3 attempt to mitigate the harshness of the mirror image rule, "[that] mitigation is almost not worth the candle." Murray, *Essay*, *supra* note 52, at 41.

95. Vergne, *supra* note 19, at 250.

96. For an English example mitigating the mirror image rule, see *supra* note 29. For the Canadian examples, see *supra* notes 60-66 and accompanying text.

97. Murray, *Essay*, *supra* note 52, at 42-43.

98. Dodge, *supra* note 51, at 83. *See also* Murray, *Essay*, *supra* note 52, at 40 (commenting that although Article 19 is not a complete adoption of the mirror image rule, "the differences between that antiquarian view and CISG are insignificant.").

99. The bulk of comparison between the CISG and the UCC has come in the context of revision of the UCC. Most commentators reject the notion that the CISG should serve as a model for UCC revision. *See, e.g.*, Gabriel, *Inapplicability*, *supra* note 73; Viscasillas, *supra* note 39; Franco Ferrari, *The Relationship Between the UCC and the CISG and the Construction of Uniform Law*, 29 LOY. L.A. L. REV. 1021 (1996) (discussing differences between CISG and UCC concepts) [hereinafter Ferrari, *Relationship*]; Peter Winship, *As the World Turns: Revisiting Rudolf Schlesinger's Study of the Uniform Commercial Code "In the Light of Comparative Law"*, 29 LOY. L.A. L. REV. 1143 (1996) (examining the UCC in light of comparative law) [hereinafter, Winship, *As the World Turns*]; Richard E. Speidel, *The Revision of UCC Article 2, Sales In Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 NW. J. INT'L L. & BUS. 165 (1995) (analyzing uniformity and harmony in commercial law); Gabriel, *Battle*, *supra* note 21; Peter Winship, *Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 LOY. L. REV. 43 (1991) (reviewing the similarities and differences between the CISG and the UCC) [hereinafter Winship, *Domesticating*].

100. HONNOLD, *supra* note 7, at 115.

101. Viscasillas, *supra* note 39, at 114-15.

102. *Id.*

understanding that a reasonable person of the same kind as the other party would have had in the same circumstances."[103] This suggests that doubt should be resolved against the party who created it, but still remains far short of the knockout rule of § 2-207(3).[104]

The interpretation of Article 19 in American courts illustrates its radical difference from UCC § 2-207. Although U.S. courts have only rarely interpreted the CISG (a subject to be discussed more fully later), two cases have interpreted Article 19 in adjudicating the battle of the forms. The first, *Filanto, S.p.A. v. Chilewich International Corp.*, involved the sale of shoes between an Italian footwear manufacturer and an American export-import firm.[105] The buyer, Chilewich, sent a purchase order to Filanto that contained a clause requiring arbitration in Russia.[106] Filanto responded with an acknowledgment that accepted the Chilewich order, but excluded the arbitration clause from the agreement.[107] The parties subsequently negotiated orally over the arbitration clause, but proceeded to perform on the contract before reaching a complete agreement.[108]

The U.S. District Court for the Southern District of New York ruled that this action was governed not by the UCC, but rather by the CISG.[109] Although Filanto's acknowledgment would be "an acceptance with a proposal for a material modification" under UCC § 2-207, CISG Article 19(1) required it to be considered a counter-offer.[110] Chilewich did not implicitly accept this counter-offer through his non-objection under 19(2) because the Court found the arbitration clause to be a material alteration under 19(3).[111] The Court ultimately found, however, that subsequent oral negotiations evinced Filanto's assent to arbitration and it sent the case to Russia to settle the dispute as agreed.[112] Thus, the court invoked Article 19, but avoided its harsh outcome by considering evidence beyond the exchanged writings.[113]

While the *Filanto* case illustrates the room left in the CISG for court creativity in seeking out the intent of the parties, another recent case, *Magellan International Corp. v. Salzgitter Handel*

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103. HONNOLD, *supra* note 7, at 115.
104. *Id.* at 191-92.
105. *Filanto*, 789 F. Supp. at 1230.
106. *Id.* at 1231-32.
107. *Id.* at 1232.
108. *Id.* at 1233.
109. *Id.* at 1237.
110. *Id.* at 1238.
111. *Id.*
112. *Id.* at 1240.
113. *Id.* Professor Dodge argues that, in allowing the battle of the forms analysis to go astray under Article 19, the court was probably trying to achieve the same result that it would have reached under the UCC. Dodge, *supra* note 51, at 84. If that theory is valid, then this part of *Filanto* illustrates the same need for uniform interpretation as discussed subsequently in this Note. *See infra* notes 165-67 and accompanying text.

GmbH, suggests that the strict application of the mirror image rule may be more common.[114] *Magellan* involved a dispute over whether the pleading requirements for a breach of contract had been met under the CISG.[115] Article 19 governed in determining whether there had been an adequate offer and acceptance to constitute a contract.[116] Magellan, an American distributor of steel products, negotiated for a deal with Salzgitter, a steel trader in Germany, in which Salzgitter would act as middle man in the acquisition of steel bars.[117] In its first letter, Magellan provided Salzgitter with written specifications for the product, proposed pricing, and agreed to issue a letter of credit as payment.[118] Salzgitter responded by proposing prices higher than Magellan suggested.[119] Magellan then accepted those increases and memorialized the material terms of the deal in the form of two purchase orders.[120] Salzgitter accepted those purchase orders, but sent its own confirmation form that differed from Magellan's purchase orders with respect to vessel loading conditions, dispute resolution, and choice of law.[121]

While the parties attempted to reconcile these differences, Salzgitter began to press Magellan to open its line of credit.[122] Although Magellan wanted to "fine-tune" all aspects of the deal before going forward, Salzgitter pushed Magellan to accept the deal on assurances that the details had been settled.[123] Magellan opened the line of credit, but then was asked to amend the line of credit to permit inclusion of substitute guarantees of delivery.[124] When Magellan refused to change the letter of credit, Salzgitter found the refusal to be a breach of contract and stopped delivery.[125] This prompted Magellan to withdraw the line of credit and sue on what he felt was Salzgitter's breach by failing to deliver.[126] Salzgitter responded to the suit with a Rule 12(b)(6) motion to dismiss for failure to state a claim.[127]

The Court addressed its decision regarding Salzgitter's 12(b)(6) motion by stating that, although the CISG did not make specific reference to pleading requirements, the general structure of the CISG

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114. *Magellan*, 1999 U.S. Dist. LEXIS 19386, at *15.
115. *Id.* at *13.
116. *Id.*
117. *Id.* at *2.
118. *Id.* at *2-3.
119. *Id.* at *3.
120. *Id.*
121. *Id.*
122. *Id.* at *4.
123. *Id.* at *5.
124. *Id.*
125. *Id.* at *6.
126. *Id.*
127. *Id.* at *1.

illustrated the "common sense" requirements of contract formation, performance by the plaintiff, breach by the defendant, and injury to the plaintiff.[128] The court focused its battle of the forms discussion on whether there was a sufficient offer and acceptance to constitute a contract.[129] Although Magellan's purchase orders certainly constituted an offer, Salzgitter's response with price changes was viewed as a counter-offer under Article 19(1) rather than an acceptance under the UCC.[130] The court found the subsequent exchanges by the parties to be continued offers and counter-offers that concluded with Magellan's performance when it issued the line of credit.[131] As this decision was limited to the 12(b)(6) ruling, the court did not discuss what the terms of the contract would be, but was content to find only that a contract existed based on Magellan's performance.[132] In finding a contract-by-conduct, the court seems to have implied that the last shot doctrine would apply.[133] If this is the case, Magellan's performance constituted "complete (mirrored) assent" to the last form sent by Salzgitter.[134] As such, the terms of the contract would include the provisions of its confirmation form that specified vessel loading conditions, dispute resolution, and choice of law.[135] If the CISG made any attempt to mitigate the harshness of the last shot doctrine in contracts-by-conduct, that buried attempt was lost on the court in *Magellan*. Magellan illustrates that the reality of Article 19 is its strict adherence to the mirror image rule and that efforts at mitigation are dependent on a court's discretion.

Under the CISG approach, then, the computer parts manufacturer and distributor would seem to be back where they found themselves under the U.S. common law approach. There would be no enforceable contract under Situation #1. The last shot doctrine would govern the dispute in Situation #2, favoring the manufacturer as the party who wrote the last form and allowing his provisions on contract enforcement and liability to govern the disagreement.[136] One hope for the distributor, however, would be to point to conduct outside of the writings that indicated the manufacturer's accession to his terms.[137] Barring the existence of these facts, however, the manufacturer is advantaged under this approach.

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128. *Id.* at *15.
129. *Id.*
130. *Id.* at *17.
131. *Id.* at *18.
132. *Id.*
133. *Id.* It should be noted that no mention of the last shot doctrine was made in the court's opinion.
134. *Id.*
135. *Id.* at *4.
136. *See supra* notes 90-93 and accompanying text.
137. *See supra* note 113 and accompanying text.

III. HARMONIZING THE CISG WITH DOMESTIC LAWS[138]

A. *The Need for Vertical Uniformity*

One of the most evident challenges to harmonizing the CISG with the domestic laws of the United States and Canada is in the previously illustrated fact that each offers distinct solutions to issues like the battle of the forms problem. It has been argued that uniformity among these approaches—what is known as vertical uniformity between domestic law and international law—is necessary between nations like the United States and Canada that share high volumes of transactions, and that the need for uniformity increases as the volume of trade increases.[139] It is also argued that a single set of rules would give transnational trading partners a sense of certainty, and that this sense of certainty would promote the free flow of goods between nations and stimulate economic and social development.[140] The need for vertical uniformity is increasingly evident amidst a changed understanding of commercial transactions that now is "rooted in the centralization and interdependence of international markets. . . ."[141] Vertical uniformity would eliminate the

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138. This Note distinguishes between harmonization as solutions to the battle of the forms that are compatible and uniformity as solutions to the battle of the forms that are identical. René David, *The International Unification of Private Law*, *in* 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 5 (1971); Martin Boodman, *The Myth of Harmonization of Laws*, 39 AM. J. COMP. L. 699, 700-02 (1991). *But see* Steven Walt, *Novelty and the Risks of Uniform Sales Law*, 39 VA. J. INT'L L. 671, 674 n.4 (1999) (treating uniformity and harmonization of law as synonyms); Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 268 (1984) (arguing that the CISG is not an instrument for harmonization, but is instead an independent body of commercial law for a very specified subset of international trade).

139. Kozolchyk, *supra* note 5, at 1. Kozolchyk, the Director of the National Law Center for Inter-American Free Trade, argues that the high-volume, high-speed transactions that have come as a result of the opening of borders among North American nations "require rules that can be applied to each transaction as uniformly, quickly, mechanically or automatically as possible." *Id.* at 2. He argues that the "top-down" approach of achieving uniformity through legislation like the CISG needs to be balanced by a "bottom-up," or "best practices," approach that develops the uniform law based on the experiences of practitioners and their clients in order to best suit their needs. *Id.* at 7. This kind of an approach to the battle of the forms could help to settle the dispute over which of the approaches outlined above is most suitable, or might even result in the development of a new approach that proves to be superior to those of either the UCC or its competitors. *See infra* notes 232-34 and accompanying text.

140. Speidel, *supra* note 99, at 170.

141. *Id.* at 170-71. For a historical discussion of the development of the need for vertical uniformity, see Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183, 184-97 [hereinafter Ferrari, *Uniform Interpretation*].

jurisdictional lines between domestic and international law that seem arbitrary to parties that contract internationally.[142]

Canadian lawmakers might yield to the CISG solution for the sake of uniformity since the Canadian solution to the battle of the forms problem shares the same basic mirror image principles as the CISG solution.[143] However, the goal of vertical uniformity in Canada could be derailed by limitations within the Canadian Constitution. The Constitution of 1867 fails to give its federal government a clear power to implement treaties.[144] For this reason, Canada has been kept from playing a role in the debates that developed the CISG in 1980 and delayed its ratification of the CISG until 1992.[145] In the end, Canada ratified the CISG only because each of the provinces chose to adopt it of their own volition.[146] Efforts at vertical uniformity in the battle of the forms could require the same kind of independent adoption by each of the provinces. While this could have the same successful outcome as the CISG enjoyed, it opens the possibility that each province would extend its own solution, in which case uniformity would be frustrated.

Efforts at vertical uniformity between the CISG and U.S. contract law face a much more pronounced initial obstacle. The CISG and the UCC are very different in their solutions to the battle of the forms.[147] Although U.S. scholars have generally recognized the abundance of problems associated with the UCC approach, there

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142. Speidel, *supra* note 99, at 171. *See also* Michael Kabik, *Through The Looking-Glass: International Trade in the "Wonderland" of the United Nations Convention on Contracts for the International Sale of Goods*, 9 INT'L TAX & BUS. LAW. 408, 409 (1992) (noting that "[i]nternational trade has been hindered by a myriad of distinct domestic laws governing the sale of goods . . ." and finding that United States' adoption of the CISG was a step toward uniformity that offers many benefits to American business interests.); Susanne Cook, Note, *The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 50 U. PITT. L. REV. 197 (1988) (noting that international trade has a special need for universal and predictable rules). *But see* Walt, *supra* note 138, at 672 (arguing that "uniformity in law is a mixed blessing and not an unqualified good."). Professor Walt finds three risks in vertical uniformity: (1) uniformity can increase the impact of inefficient rules, increasing the transaction costs to parties where domestic rules might have left a transaction unregulated; (2) legislative uniformity risks a divergence of application in the absence of a single interpretive tribunal (an issue that is discussed *infra* in text accompanying notes 165-205); and (3) where a uniform law is novel in its approach, it risks uncertainty in what it actually requires. *Id.* at 672-73.

143. *See supra* note 90 and accompanying text.

144. Ziegel, *Future*, *supra* note 70, at 21-22.

145. *See id.* at 22-23. Canada's lack of involvement in the development of international law is also attributed to a lack of interest among Canadian legal scholars coupled with a failure to recognize the importance of this development to Canada's trading interests. *Id.* at 23. This may, however, be a historical criticism that no longer has as much force, in light of Canada's involvement in NAFTA and its ratification of the CISG.

146. Ziegel, *First Decision*, supra note 71, at 313 n.1.

147. *See supra* notes 41-69 and 89-137 and accompanying text.

seems to be a collective hesitance to abandon it for the mirror image rule.[148] Much of this discussion has come in the context of UCC revision, where many have specifically rejected the CISG as a model, in spite of the uniformity that such revision would provide.[149]

It is in this setting that the CISG has received much of its criticism, as many U.S. scholars question its ability to act as a vehicle for harmonization and vertical uniformity.[150] One such criticism focuses on the sources of law upon which the CISG was based. As an international effort focused on the goal of a final product that could be ratified by nations with vastly different legal traditions, the CISG did not develop with a sense of a common background law.[151] In fact, its authors designed the CISG to operate independently of domestic laws, creating instead its own sphere of international transactions.[152] The drafters of the UCC, on the other hand, deliberately designed it amidst the background of U.S. common law such that "there are fall-back principles that reduce the need for complete elaboration of all aspects of contract law in a code."[153] This was one of the driving principles behind the formation of the UCC—codified law could only be effective if it was considerate of the evolved contract principles in which it would operate.[154] Karl Llewellyn argued that any effort to codify commercial law in the absence of this kind of consideration "would be shortsighted, and ultimately ineffective."[155] Attempts to achieve vertical uniformity between the CISG and the UCC may result in many areas of uncertainty and incompatibility as a result of this difference in background law.[156]

One possible solution to this incompatibility would be to displace UCC provisions with the CISG in areas where the differences between them are minimal and maintain diversity in areas where the differences are substantial, such as the battle of the forms.[157] Some

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148. *See supra* note 99.

149. *Id.*

150. *Id.*

151. Speidel, *supra* note 99, at 172. Spiedel argues that the CISG represents more of a compromise between legal traditions than a response to the realities of international trade. *Id.* at 175.

152. *Id.* at 175.

153. *Id.* at 171.

154. Peter A. Alces & David Frisch, *Commercial Codification as Negotiation*, 32 U.C. DAVIS L. REV. 17, 47 (1998).

155. *Id.*

156. Gabriel, *Inapplicability*, *supra* note 73, at 2003.

157. This has been articulated as "a more persuasive intermediate position" for achieving uniformity between the CISG and the UCC. Winship, *Domesticating*, *supra* note 99, at 48. Under this approach, there is a three-part strategy: (1) identify issues that are so important so as to justify differences between the UCC and the CISG; (2) identify issues so unimportant that unnecessary differences, even in language, can be eliminated for the sake of uniformity; and (3) establish devices to ensure that parties know how the CISG and the UCC complement each other. *Id.* at 47-49.

argue that there are a number of advances in the UCC, including its efforts to protect the buyer in § 2-207, that "express underlying cultural and social expectations" that are unique to the contract law of the United States.[158] In these areas, expectations should be preserved unless uniformity is absolutely essential.[159]

There is one comfort in this discussion: perhaps vertical uniformity in the battle of the forms is not sufficiently important to justify supplanting the social and cultural expectations of either the United States or Canada. The battle of the forms is an area that is litigated with such infrequency that parties do not seem to change their contractual behavior based upon the regime in which they operate.[160] Commenting on the paucity of litigation in this area, one scholar noted:

> [i]t is fortunate that problems arising out of the "battle of the forms" do not arise more frequently for legal science has not yet found a satisfactory way to decide what the parties have "agreed" when they have consummated a transaction on the basis of the routine exchange of inconsistent forms.[161]

Similarly, a Canadian corporation noted that even though it processed more than eighteen thousand contracts per year that were potentially subject to a battle of the forms, it had gone for seventeen years without such a problem.[162] That company found that the risks of contractual uncertainty were virtually non-existent where litigation was only a remote possibility.[163] Professor Gabriel's *Practitioner's Guide to the CISG and the UCC* noted that, although the two codes have different theoretical approaches to the battle of the forms, those differences "may have little practical effect" because both codes "make a contract enforceable after delivery and acceptance and the majority of disputes arise after the goods have been delivered and found to be defective or not what the buyer wanted."[164] In this light, the disparities between the CISG and the domestic laws of Canada and the United States might be tolerable for the simple fact that they do not attract much attention in litigation.

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158. Speidel, *supra* note 99, at 186.

159. *Id.* at 186-87.

160. HONNOLD, *supra* note 7, at 182-83.

161. *Id.* at 183.

162. Grant G. Murray, *A Corporate Counsel's Perspective of the "Battle of the Forms"*, 4 CAN. BUS. L.J. 290, 293-94 (1980).

163. *Id.* at 295.

164. HENRY GABRIEL, PRACTITIONER'S GUIDE TO THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) AND THE UNIFORM COMMERCIAL CODE (UCC) 63 (1995).

B. *The Need for Uniform Interpretation of the CISG*

If the CISG is to become a body of law that can be used predictably by parties to international contracts, judges and arbitrators who sit in different foreign jurisdictions must interpret it uniformly.[165] This presents another challenge to harmonization—interpretation by diverse jurisdictions. Uniformity is only possible where a text is not only legislated for uniform applicability, but also grows consistently through uniform judicial interpretation.[166] Growth of the CISG toward uniformity requires that national courts promote uniformity of application in CISG case law.[167]

One of the first obstacles to such international development is the language barrier between the many different nations that have adopted the CISG.[168] The CISG is printed in many different official and unofficial language versions, opening the possibility for diverse interpretations based only on translation.[169] Although the shared language between the United States and most of Canada mitigates this language barrier, it could become a source of difficulty between

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165. 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, 6 (1993). Predictability is one of the most important goals of a uniform law, and will be lost so long as the CISG is interpreted divergently. *Id.* at 7. Interpretation of the CISG without a sense for international judicial uniformity "would only entail consequences that certainly are contrary to the goals intended to be achieved by the elaboration of a uniform law." Ferrari, *Uniform Interpretation*, *supra* note 141, at 203.

166. Michael F. Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 VA. J. INT'L L. 729, 731-32 (1987). The experience of American lawyers with the UCC has been used as an example of the need for uniform interpretation. *Id.* at 732. The official commentary to the UCC notes the importance of "uniformity of construction," and it has been argued that such uniformity is even more important in the international context. *Id.*

167. Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443, 483 (1989). Because the CISG has been made the law of both Canada and the United States, it is treated in this Note as a source that demands acknowledgment and use by lawyers and judges in this part of the world. However, some choose to treat the CISG as only a possible solution for the needs of international trade. *See id.* at 482 (arguing that the CISG should be judged by whether it improves the need for unification of trade laws). In spite of this, the CISG continues to receive support as a workable solution to these needs. John E. Murray, Jr., *The Neglect of the CISG: A Workable Solution*, 17 J.L. & COM. 365, 379 (1998) [hereinafter Murray, *Neglect*]. *But see* James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales*, 32 CORNELL INT'L L.J. 273, 276 (1999) (arguing that the CISG's "misguided goal, its character as a multinational treaty, its specific provisions, and its incorporation into the United States as a self-executing treaty" have contributed to its failure to achieve uniformity).

168. Ferrari, *Uniform Interpretation*, *supra* note 141, at 205.

169. Murray, *Neglect*, *supra* note 167, at 366.

the United States and Quebec, where the official language is French.[170]

UNCITRAL, the United Nations body that works to implement the CISG and promote other efforts at international trade harmonization, has attempted to alleviate the language barrier problem by centrally processing the decisions of national tribunals interpreting the CISG, translating those decisions into the various official languages for use by the tribunals of other nations.[171] This at least provides for a single official translator of decisions.[172]

UNCITRAL's distribution of foreign decisions illustrates another barrier to development of international case law. The CISG instructs courts in Article 7 that "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application. . . ." This calls courts to rise above their domestic perspectives and make decisions in the context of an international, as opposed to a domestic, perspective.[173] This has been identified as the key issue to uniformity: that the interpreter of the CISG "must consider the decisions rendered by judicial bodies of other contracting States . . . in which case such decisions can have either the value of precedent . . . or [at least] a persuasive value."[174] Such a perspective should lead to the development of an international

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170. Because Quebec has its own unique cultural and legal traditions, it is often omitted from comparisons between the United States and Canada. Donner, *supra* note 71, at 746 n.26.

171. Ferrari, *Uniform Interpretation*, *supra* note 141, at 206.

172. *Id.*

173. HONNOLD, *supra* note 7, at 88. Article 7 calls for an autonomous interpretation of the CISG—one that is "independent from the particular concepts of a specific legal system"—even when it involves interpreting words that are familiar through their domestic use. Ferrari, *Relationship*, *supra* note 99, at 1024. This kind of an approach precludes recourse to domestic interpretive techniques, which would introduce innumerable conflicts into attempts at uniform interpretation. *Id.* at 1025. *See also* Murray, *Neglect*, *supra* note 167, at 367. Murray notes that the imperative of Article 7 is quite unclear in application, but assumes that it requires a court "to transcend its domestic perspective and become a different court that is no longer influenced by the law of its own nation state." *Id.* The imperative of autonomous interpretation is particularly challenging because, in the case of the CISG, there is no background law on which to rely to fill the gaps in the case of poor or incomplete drafting (unlike the UCC, which was drafted in the context of and acknowledged the background common law). *See also* Gabriel, *Inapplicability*, *supra* note 73, at 2003; Frisch, *supra* note 60, at 507. The expectation that a national court could involve itself in an autonomous interpretation has been said to "border on the absurd." Murray, *Neglect*, *supra* note 167, at 373.

174. Ferrari, *Uniform Interpretation*, *supra* note 141, at 204-05. In 1988, when the CISG was first established as law in the United States, it was predicted that its success would depend upon the extent to which U.S. courts would consider foreign decisions in their own interpretation of the Convention. Cook, *supra* note 142, at 198. Based upon that prediction, the success of the CISG in the United States has been minimal. *See infra* text accompanying notes 176-80.

body of case law that would aid in the goals of uniformity and predictability.[175]

Experience shows, however, that judges are interpreting and applying the CISG through the lens of domestic law and without regard to the interpretations of foreign tribunals. This is, perhaps, most blatantly revealed by a recent U.S. case that, instead of applying the CISG with an international perspective, suggested that the domestic principles of UCC Article 2 "may also inform a court where the language of the relevant CISG provision tracks that of Article 2."[176] The court made continued reference to the CISG and even recognized the international character of its position in the case, but in the end it was unable to lift itself out of its domestic perspective.[177]

This same failure to divorce decision-making from the domestic perspective plagued the cases discussed earlier that adjudicated the battle of the forms under the CISG. In *Filanto*, the court adjudicated an issue ancillary to Article 19 by citing the Restatement (Second) of Contracts and then adding, almost as an afterthought, that "[t]he Sale of Goods Convention itself recognizes this rule."[178] Similarly, in *Magellan*, the court identified itself as in a position of "first impression" because no U.S. court had specified pleading requirements for breach of contract claims under the CISG.[179] In analyzing this issue of "first impression," the court made no reference to decisions of other national tribunals that may have been on point or even whether an attempt to locate such decisions was made.[180]

Possibly it is just too much to ask judges to ignore their domestic understandings in order to facilitate uniform interpretation of the CISG.[181] A number of commentators, however, have held out hope that the goal of uniform interpretation is still attainable. There are a number of different suggestions on how that goal can be reached.

One theory suggests that the CISG itself provides ample guidance for its own interpretation. Professor Hillman offers that the CISG not only provides specific rules to govern international trade,

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175. Hartnell, *supra* note 165, at 6 (arguing that the Convention's success depends upon its development as a predictable instrument).

176. Delchi Carrier S.p.A. v. Rotorex Corp., 71 F.3d 1024, 1027-28 (2d Cir. 1995). *See also* Murray, *Neglect*, *supra* note 167, at 369-71. The United States is not the only nation guilty of using a domestic interpretive perspective rather than autonomous interpretation. An Italian court interpreted Article 79 of the CISG in light of its domestic understanding of performance. *Id.* at 371.

177. *Delchi Carrier*, 71 F.3d at 1028.

178. Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1240 (S.D.N.Y. 1992).

179. Magellan Int'l Corp. v. Salzgitter Handel GmbH, 1999 U.S. Dist. LEXIS 19386, *15 (N.D. Ill. Dec. 7, 1999).

180. *Id.*

181. *See supra* note 173 and accompanying text.

but it also contains general principles, derived from the rules and organized into a coherent framework.[182]

Hillman's first principle is that the CISG is designed to ensure "the enforcement of the parties' intentions."[183] According to Hillman, the drafters had a "respect for individual freedom, including the right to employ one's economic resources."[184] He finds support for this principle in Articles 11, 29, and 8, as well as in Article 19(2), which, by partially abrogating the mirror image rule in the battle of the forms, allows for the parties' intentions in contract formation to remain where different or additional terms are immaterial.[185]

A second principle that Hillman extracts from the CISG is that it was designed to help "parties realize the fruits of their exchange by avoiding disputes," suggesting that "[a] party who enters an international sales contract expects cooperation and reasonable conduct by its counterpart. . . ."[186] He again finds that Article 19(2) specifically supports this goal by requiring the offeror to object to immaterial discrepancies in order to prevent them from becoming part of the contract, thus balancing the notice requirement with the reasonableness, or materiality, of the offeree's terms.[187]

A third principle within the CISG is a commitment to keep a deal together, even in the face of problems that surface between the parties.[188] Article 19(2), by requiring affirmative objection to immaterial terms, "encourage[s] or require[s] communication between

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182. Robert A. Hillman, *Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity*, *in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 21, 26 (1995).

183. *Id.* at 27. This principle can be gleaned from Article 6, which allows parties to contract out of the CISG altogether. *See supra* note 9 and accompanying text. To Hillman, the language of Article 6 shows the respect of the CISG for freedom of contract over regulation of private behavior. Hillman, *supra* note 182, at 27.

184. *Id.* For a discussion of this right as a respect for individual freedom, *see* John Dalzell, *Duress by Economic Pressure I*, 20 N.C. L. REV. 237 (1942).

185. Hillman, *supra* note 182, at 27. Article 11 provides that "[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." HONNOLD, *supra* note 7, at 135. Article 29(1) states that "[a] contract may be modified or terminated by the mere agreement of the parties." *Id.* at 229. Article 8(1) says that "statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was." *Id.* at 115. Hillman's reliance on Article 19(2) to make a substantive difference to parties is controversial. *See supra* note 98 and accompanying text (arguing that the practical effect of 19(2) is to do little to minimize the harshness of 19(1)'s mirror image requirement).

186. Hillman, *supra* note 182, at 27-28. *See also* C.M. BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW 80-81 (1987).

187. Hillman, *supra* note 182, at 28 n.77. Hillman argues that "[t]he duty to act reasonably may be the Convention's most pervasive general principle." *Id.* at 28. To support this, he cites to numerous Articles of the CISG, including 60(a), 30-34, 32(3), 18(2), 39(1), 47(1), 63(1), 65(1), 16(2)(b), 29(2), and 47(2). *Id.* at 28-30 nn.69-93.

188. *Id.* at 27.

the parties to resolve problems before a total contract breakdown."[189] Hillman also finds that the inadequate remedies for contract breach offered by the CISG in Articles 77 and 86 encourage parties to "complete their deals rather than rely on the Convention's legal apparatus to make them whole."[190]

Under this theory, judges should look to these systematic principles rather than their own domestic understandings in adjudicating difficult legal issues like the battle of the forms.[191] In deciding whether an additional or different boilerplate clause is "material," the judge presumably should be guided by the commitment of the CISG to the intent of the parties, the avoidance of disputes, and contractual obligation.[192]

The authenticity of these principles seems questionable in the battle of the forms, where Article 19(1) commits the CISG to an approach that is expected to result in fewer enforceable contracts than other approaches.[193] Hillman's principles, at least in this particular setting, seem contrary to what has been the overwhelming interpretation of Article 19: a choice by the CISG drafters to embrace the mirror image rule in spite of its harshness to business reality.[194] Moreover, even if one were to accept these principles as indeed implicit in Article 19 and other parts of the CISG, they face two additional obstacles. First, the controversy over their verity illustrates that, even if true, they are hardly self-evident. This suggests that litigants will risk the same aberrant interpretation

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189. *Id.* at 30.

190. *Id.* at 32. Article 77 provides:

> [a] party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

HONNOLD, *supra* note 7, at 456. Others have understood this section only as a reflection of the common law "duty to mitigate," and not a remedy that is somehow inadequate for the aggrieved party. *Id.* Article 86(1) states, "[i]f the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances." *Id.* at 523. Hillman also finds a fourth principle—the CISG's commitment to make aggrieved parties whole—that is not included in the main discussion because it is not derived from the Article 19 battle of the forms provision. Hillman, *supra* note 182, at 32-33.

191. Hillman, *supra* note 182, at 37. Hillman argues that recognition of these principles will lead judges to develop a "systematic methodology" for autonomous interpretation of the CISG. *Id.* He adds that the use of case law will help only if judges are first guided by these principles. *Id.* Otherwise, conflicting case law will develop based on domestic perspectives that will harm the goal of uniformity. *Id. See also* BIANCA & BONELL, *supra* note 186, at 90-92; HONNOLD, *supra* note 7, at 142-45.

192. Hillman, *supra* note 182, at 21.

193. *See supra* note 90 and accompanying text.

194. *See supra* note 93 and accompanying text.

problems found in interpretations of the rules themselves.[195] Second, because they are not self-evident, any success in adopting them will require some kind of uniform dissemination.[196] Hillman answers these objections by arguing that adherence to the four corners of the CISG document for interpretive guidance is less risky than the interpretation that the CISG is currently receiving through the development of an international body of case law.[197]

Although Hillman's theory downplays the role of case law development as a means for uniform interpretation of the CISG, there are others who suggest that the development of international case law is necessary to satisfy the Article 7 requirement of autonomous interpretation.[198] As important as this is, U.S. development of CISG case law in the United States graphically illustrates the need for supplemental mechanisms to promote uniform international jurisprudence.[199]

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195. Sunil R. Harjani, *The Convention on Contracts for the International Sale of Goods in United States Courts*, 23 HOUS. J. INT'L L. 49, 60 (2000) (noting that "[c]ommentators vary greatly on their understanding of [the purposes inherent in the CISG] and provide different solutions to promote uniformity and international character.").

196. *See supra* notes 171-75 and accompanying text (discussing the efforts by UNCITRAL and others at uniform dissemination).

197. Hillman, *supra* note 182, at 38. If the U.S. experience is indicative of the risks associated with the development of case law absent grounding principles, Hillman's assessment of those risks is accurate. *See supra* notes 176-81 and accompanying text.

198. *See* Hartnell, *supra* note 165, at 46. Professor Hartnell argues that the Articles of the CISG that pertain to its scope (such as Article 4(a)'s rejection of a validity requirement for Convention applicability) should be developed on a case-by-case basis that incorporates concepts of public policy and the development of international jurisprudence. *Id.* She argues, however, that validity can only be understood in light of domestic views of contract, which places Article 4(a) in conflict with Article 7's requirement of autonomous interpretation. *Id.* at 49. Others argue that all parts of the CISG are subject to the Article 7 requirement and should be interpreted "teleologically;" that is, in accordance with its purpose of international unification of commercial law. Peter Schlechtriem, *Unification of the Law for the International Sale of Goods*, *in* XIITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW (GERMAN NATIONAL REPORT) 141 (1987). Under this contrary view, all parts of the CISG should be interpreted independent from all national laws. *Id.* at 128.

199. Sturley, *supra* note 166, at 800-01 (discussing generally the constraints of domestic law upon international law uniformity). Professor Sturley argues that the wide variety of domestic constraints upon courts drive them into conflicting interpretations of international uniform law. *Id.* at 800. He suggests a number of steps to address this problem, including recognizing among international legal scholars the impact of domestic law upon interpretation of international uniform law, considering measures to reduce the influence of domestic law, increasing awareness among national courts as to the dangers of interpreting uniform laws in accordance with domestic doctrine, and developing institutional measures to avoid conflicts in the interpretation of uniform law. *Id.* at 800-01. The institutional measures could include better choice of law rules, increased availability of international case law (such as that attempted by UNCITRAL), and even the creation of international tribunals to ensure separation from domestic influence. *Id.* at 801. For a discussion of the wide variety of

One possible mechanism is the adoption of official CISG comments to aid judges in applying the CISG with international consistency. It has been suggested that such comments could offer interpretive guidance as well as illustrations for each article of the CISG.[200] One commentator has offered the U.S. experience with UCC comments as a guide to the development of CISG comments.[201] He notes that the success of the UCC can be attributed to the statements of purpose in its commentary that were, in fact, Karl Llewellyn's solution to the need for uniform interpretation.[202] He argues that the introduction of official comments into the CISG

> . . . could be the catalyst in educating bench and bar throughout the world in pursuit of the elusive goal of autonomous interpretation and construction of the Convention. They could eliminate manufactured difficulties and become a major force in promoting familiarity and use of the Convention through a reasoned analysis of the purpose of each Article, in pursuit of the general purposes and policies of the entire Convention.[203]

Official CISG comments could provide international canons of statutory interpretation that would cut through the multitude of differing domestic standards.[204] Since courts in the United States are familiar with the role of official comments in a code, the addition of such comments to the CISG would at least help American judges to look beyond their own borders and perhaps avoid the kind of damaging results seen in the cases described above.[205]

It is possible that official CISG comments would embrace and codify the principles that Professor Hillman finds inherent in the existing text of the CISG. If this happens, the codification of these principles would overcome the problems of apparentness and dissemination under which Hillman's theory currently struggles. Perhaps such comments would clarify whether Article 19 is intended to require a complete, mirrored acceptance to form an enforceable

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political issues associated with the establishment of international adjudicative tribunals, see Anthony DePalma, *Nafta's Powerful Little Secret: Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say*, N.Y. TIMES, Mar. 11, 2001, at BU1.

200. Murray, *Neglect*, *supra* note 167, at 375.

201. *Id.*

202. *Id.* at 376. For additional discussion of the role of comments in the UCC, see Robert H. Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597. *See also* Alces & Frisch, *supra* note 52.

203. Murray, *Neglect*, *supra* note 167, at 378-79.

204. Sturley, *supra* note 166, at 744-45 (discussing how domestic canons constrain U.S. courts but also acknowledging that domestic laws will make interpretive conflicts inevitable in the absence of "stronger considerations of international uniformity.").

205. Cook, *supra* note 142, at 200. *See also* Paul Lansing, *The Change in American Attitude to the International Unification of Sales Law Movement and UNCITRAL*, 18 AM. BUS. L.J. 269, 272 (1980) (discussing the role that the UCC had in changing American willingness toward favoring international uniformity).

contract or whether, as Hillman's minority position suggests, it is intended to reflect the realities of real-world contracting.

C. *The Need for a More Educated Bar*

A third obstacle to harmonization of the CISG with the domestic laws of the United States and Canada is the lack of familiarity with the CISG among the practicing bar. Many of the same problems highlighted in the discussion about the need for uniform interpretation stem from this lack of familiarity.[206] Even though it was ratified by the United States more than twelve years ago, only a handful of federal court decisions have substantively interpreted the CISG, with only two addressing the battle of the forms.[207] This paucity of case law suggests that lawyers and judges in the United States do not know about the CISG, even though it potentially governs hundreds of billions of dollars worth of U.S. trade.[208]

This ignorance has been anecdotally confirmed by a recent survey of the Florida Bar.[209] Although most law school faculty in Florida indicated familiarity with the CISG, they also noted that the CISG was not being taught in contracts or sales courses.[210] The response of practitioners was particularly disturbing. The survey found that an astonishing thirty percent of the members of the Florida Bar Section on International Law indicated reasonable

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206. Murray, *Neglect*, *supra* note 167, at 371 (expressing concern that lack of familiarity with the CISG is causing lawyers to avoid it out of fear).

207. *See, e.g.*, MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova d'Agostino, S.p.A., 144 F.3d 1384 (11th Cir. 1998) (holding the parol evidence rule inapplicable under the CISG); Delchi Carrier S.p.A. v. Rotorex Corp., 71 F.3d 1024 (2d Cir. 1995) (determining damages available under the CISG for nonconforming goods); Viva Vino Import Corp. v. Farnese Vini S.r.l., 2000 U.S. Dist. LEXIS 12347 (E.D. Pa. 2000) (holding that CISG did not apply because agreements were not for a specific sale of goods); Magellan Int'l Corp. v. Salzgitter Handel GmbH, 1999 U.S. Dist. LEXIS 19386 (holding that plaintiff properly alleged a cause of action under the CISG to withstand a Rule 12(b)(6) motion); Medical Marketing Int'l, Inc. v. Internzionale Medico Scientifica, S.R.L., 1999 U.S. Dist. LEXIS 7380 (E.D. La. 1999) (interpreting the CISG's public laws and regulations provision); Mitchell Aircraft Spares, Inc. v. European Aircraft Serv. AB, 23 F. Supp. 2d 915 (N.D. Ill. 1998) (following the *MCC-Marble* parol evidence finding); Calzturificio Claudia s.n.c. v. Olivieri Footwear Ltd., 1998 U.S. Dist. LEXIS 4586 (S.D.N.Y. 1998) (holding that the CISG does not contain a statute of frauds or a parol evidence rule); Helen Kaminski Pty. Ltd. v. Marketing Australian Prods., Inc., 1997 U.S. Dist. LEXIS 10630 (S.D.N.Y. 1997) (holding that the CISG's scope does not include distributorship agreements); Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229 (S.D.N.Y. 1992) (interpreting a battle of the forms under the CISG).

208. *See supra* note 10 and accompanying text.

209. Michael Wallace Gordon, *Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles as Reflected In One State's (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar With An International Practice, and (3) Judges*, 46 AM. J. COMP. L. 361 (1998).

210. *Id.* at 364-65.

knowledge of the CISG.[211] Further, only fifteen percent drafted a provision in a contract that described the applicability of the CISG.[212] The survey received a similar response from Florida judges, and noted that there are no reported cases in Florida that involve the CISG.[213]

The Canadian experience has been substantially similar. Even though the CISG has been the law in Canada since 1992, the first reported decision involving the CISG did not come down until December 1998, ending almost seven years of silence on the issue.[214] One commentator has said, "[i]t is safe to assume that the level of consciousness about the Convention is very low among commercial lawyers in Canada. . . ."[215]

The ignorance of Canadian and U.S. lawyers toward the CISG is illustrated by *GPL Treatment, Ltd. v. Louisiana-Pacific Corporation*.[216] That case involved an oral purchase agreement followed by a written confirmation form.[217] When the agreement broke down, GPL Treatment, a small business in Canada, sued the U.S.-based Louisiana-Pacific Corporation for breach of contract.[218] Louisiana-Pacific defended by claiming that the agreement failed under the UCC's statute of frauds provision.[219] GPL asserted that the agreement did not violate the statute of frauds under an exception to the UCC rule.[220] GPL also belatedly tried to argue that the CISG rather than the UCC governed this dispute, but it raised this issue too late and the trial judge refused to hear that argument.[221] GPL narrowly won the case under the UCC, but this would have been a much easier case had GPL properly raised the applicability of the CISG.[222]

Unquestionably, CISG should have been the governing law over this dispute, as the parties were from different countries that had both ratified the CISG; neither party had opted out of the CISG.[223] Had it been used, GPL would have never had to argue through a statute of frauds claim because the CISG specifically rejects a statute

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211. *Id.* at 368.
212. *Id.*
213. *Id.* at 369.
214. Ziegel, *First Decision, supra* note 71, at 313. That case was *Nova Tool & Mold Inc. v. London Industries, Inc.*, [1998] 84 A.C.W.S. (3d) 1089 (Can.) (only mentioning the CISG in a short passage and not giving a view as to its applicability).
215. Ziegel, *First Decision, supra* note 71, at 318.
216. GPL Treatment v. Louisiana-Pacific Corp., 894 P.2d 470 (Or. Ct. App. 1995).
217. *Id.* at 471.
218. *Id.*
219. *Id.* at 472.
220. *Id.* at 474.
221. *Id.* at 477 n.4.
222. Dodge, *supra* note 51, at 75.
223. *See supra* note 8 (providing Article 1 applicability of the CISG).

of frauds requirement.[224] The plaintiff's tardy submission of an issue of such magnitude as the applicable governing law illustrates the ignorance of the bar with respect to the CISG. It also shows the risks associated with that ignorance, and stands "as a stark warning that all practitioners whose practice encompasses commercial matters should be familiar with the Convention."[225] One commentator has noted, "[t]he plaintiffs gave up an argument that was a sure winner and were forced to rely instead on [the UCC], which presented a much closer question . . . and cost the plaintiffs a good deal more in attorney's fees."[226]

The solution to this problem of ignorance rests in educating and informing American and Canadian lawyers. It has been argued that this needs to start in first-year contracts courses.[227] Doing so will allow students to compare and contrast the varied approaches taken by the UCC, the common law, and the CISG to such problems as the battle of the forms.[228] The development of these comparative skills will serve students well as they later have to choose among these approaches in the chance that they find themselves drafting or litigating over choice of law provisions in international contracts. In order to facilitate exposure to students, contracts professors need to be informed about the CISG and casebooks need to incorporate it into the covered materials.[229]

Education through first-year contracts courses will have a delayed effect as students matriculate into the practicing bar. For this reason, efforts must be increased to educate at the practitioner level.[230] Although it has been noted that programs such as continuing legal education (CLE) courses have made efforts to educate the bar to the CISG, the record as discussed above begs for additional resources.[231]

It may be that informed practitioners will choose to opt out of the CISG through Article 6 and be governed by the domestic laws with which they are more familiar.[232] It may even be that, with time, one of the outlined approaches to the battle of the forms will prove to be the dominant choice among parties to international contracts.[233]

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224. Dodge, *supra* note 51, at 75.

225. Fletchner, *supra* note 11, at 131.

226. Dodge, *supra* note 51, at 75.

227. *Id.* at 77-78. *See also* Gordon, *supra* note 209, at 371 (urging that "every student ought to be 'red-flagged' about the CISG in the required contracts class."). Professor Gordon also indicates that he would be concerned about the quality of his education if he went through law school without knowing about the CISG. *Id.*

228. Dodge, *supra* note 51, at 73.

229. *Id.* at 77.

230. Fletchner, *supra* note 11, at 138.

231. Gordon, *supra* note 209, at 362 n.4.

232. Ziegel, *First Decision*, *supra* note 71, at 318; *see also* Dodge, *supra* note 51, at 79.

233. For a rare American argument that the mirror image rule is superior to the UCC approach, see Baird & Weisberg, *supra* note 44, at 1251-62. Baird and Weisberg

Whatever the future holds for the battle of the forms, it is imperative to international harmonization that lawyers become educated about the CISG if only so that its effectiveness can be measured against those offered by domestic laws.[234]

IV. CONCLUSION

The battle of the forms is an area of commercial law whose solutions remain unsettled. The United States relies predominantly on the UCC approach, looking to the intent of the parties and finding agreement even though the parties have not indicated complete assent. Canadian domestic law is based largely on the common law mirror image rule, which requires complete assent to all aspects of a contract in order to find agreement. The CISG adopts an approach to the battle of the forms that embraces the mirror image rule, but attempts to soften it through an allowance for non-material terms to become part of a contract.

The differences in approach to the battle of the forms must be reconciled to facilitate harmonization of commercial law between the United States and Canada. The CISG can be that vehicle for harmonization as the already extant law of both countries. There are a number of challenges, however. Paramount among these is the need for vertical uniformity. Vertical uniformity would facilitate harmonization by ensuring that the varied approaches are

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argue that the mirror image rule allows parties to tailor boilerplate terms to suit their own needs, while the UCC standards-based approach allows a court to supply UCC gap-fillers that may not suit either of the parties' interests. *Id.* at 1251. They also argue that the harshness of the mirror image rule could be mitigated through the adoption of a de minimis approach to prevent parties from escaping obligations where a different or additional contract term makes no difference to the substance of the deal. *Id.* at 1252-53. This problem of escaping contracts through meaningless boilerplate provisions is not an issue with which courts are often forced to deal. *Id.* at 1253. This is due to the fact that such conduct usually occurs in industries with high price fluctuation, like commodity exchanges, while most battle of the forms situations arise in a manufacturing context. *Id.* Finally, they argue that

> commercial law works best when it makes it easy for merchants to design the contract terms suited to their needs and when it assures them that the terms they draft will prove binding. Formal rules, we believe, despite their poor repute in the judicial history of commercial law, may achieve these goals far better than the conventional wisdom has recognized.

Id. at 1262.

234. It has been suggested, however, that education as a solution to ignorance among the bar "is only part of the remedy; time may prove to be the other as more decisions applying CISG are published and courts develop a method of interpretation that takes into account the international context of CISG and produces predictable results within acceptable degrees of variation." V. Susanne Cook, *CISG: From the Perspective of the Practitioner*, 17 J.L. & COM. 343, 351 (1998).

assimilated into a uniform approach to the battle of the forms, both domestically and between nations.

There must be other efforts aimed at harmonization because of the continued popularity of the UCC in the United States. One such effort is to increase uniformity of interpretation of the CISG through the availability of international case law, the development of CISG comments, and the effort to find purposive principles within the CISG document itself. Another effort is to educate the bar, both domestically and abroad in such a way as to ensure use of the CISG. Although the CISG has struggled in its early life as an international commercial code, there is hope that, through such efforts, it will be the vehicle for harmonization that was envisioned by its founders.

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