THE CISG APPLIES WHEN IT SAYS IT DOES, EVEN IF NOBODY ARGUES IT:
WHY THE CISG SHOULD BE APPLIED EX OFFICIO IN THE UNITED STATES AND A PROPOSED FRAMEWORK FOR JUDGES

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I. CASE STUDY

Consider the following scenario:

A South Korean buyer contracts to purchase bottled mineral water from a New York seller. A dispute between the two arises. The South Korean buyer, the plaintiff, submits a complaint to a New York State court that doesn’t specifically address the applicable law, it merely states the facts and says that it is seeking damages due to “Count two: breach of supply agreements under state law.”¹ The New York seller’s reply stated that the plaintiff failed to meet the requirements for a preliminary injunction under New York State law and cited factors, and it did refer to a specific provision in New York’s Uniform Commercial Code.² The South Korean plaintiff issued a reply memorandum in support of the injunction that discussed why it did, in fact, meet these requirements under New York law, but the plaintiff never mentioned the Uniform Commercial Code in these written submissions.³ At the conclusion of discovery, in March 2010, nearly three years after the submission of the initial complaint, the plaintiff,

¹ Complaint for Plaintiff at 7, Ho Myung Moolsan, Co. Ltd. v. Manitou Mineral Water, 2 Def. Mem. of Law in Opp. at 1, Ho Myung Moolsan, available at westlawnext.com (2007 WL 5041355) (“In addition, Mr. Kwon notes that in or about June and July of 2007, the plaintiffs sent orders for approximately ten containers of water, which orders were significantly greater than those previously placed by the plaintiff (paragraphs “28” and “30” of Kwon opposition affidavit). While Mr. Kwon asserts that Manitou was attempting to fulfill these inordinately large orders, it should be emphasized that Manitou’s efforts to fulfill them were not mandated by law. See N.Y. U.C.C. § 2-306(1) provides as follows: “A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded”).
for the first time, argued that the U.N. Convention on International Sales of Goods (hereinafter the “CISG”) applied, not New York’s Uniform Commercial Code (hereinafter the “U.C.C.”). Given that both South Korea and the United States had ratified the CISG and that the CISG applies to contracts for the sale of goods concluded by parties whose places of business are in different Contracting States, this contract appears to be clearly covered by the CISG. The New York defendant argued that the parties had applied New York law throughout the course of the litigation, and as such, plaintiff’s lawyers, through their conduct, had agreed to waive any right to apply the CISG and that New York local sales law should apply.

What is the proper course of action for the Judge at this point in the litigation process? Should it affect the analysis if the South Korean buyer never brought up the

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5 The original exclusivity contract was signed in December 2004, and the original negotiations for the merger were in 2004. However, new versions of the contract as well as additional orders, i.e. new contracts, for water bottles were made and filled throughout June and July 2007. See Def. Mem. of Law in Opp. supra note 2 at 7. Thus, the contracts in dispute were concluded well after the effective date of ratification in both Countries. See CISG Database List of Contracting States (“South Korea (March 1 2005), United States (1 January 1988)”) available at http://www.cisg.law.pace.edu/cisg/countries/cntries.html.
6 See CISG Art 1(1)(a) “(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States” available at http://www.cisg.law.pace.edu/cisg/text/e-text-01.html.
7 Def. Pre-Trial Mem. of Law in Opp. at 3, Ho Myung Moolsan available at westlawnext.com (2010 WL 4901172) (“In making this argument for the first time, Plaintiffs ignored the fact that the parties have applied New York Law throughout the course of the within litigation that has included extensive motion and appellate practice. Indeed, in Plaintiffs’ amended complaint, Plaintiffs explicitly describe its breach of contract cause of action as a “breach of supply agreement under state law.” (Emphasis added). As such, Plaintiffs have waived any right to apply the law of the CISG and New York Law applies. In any event, under either New York Law or the CISG, it is respectfully submitted that Plaintiff will be unable to prove its cause of action for breach of contract”).
CISG’s applicability and the Judge became aware of the CISG on her own? What if the Judge became convinced that the South Korean buyer’s lawyer sought to game the system by arguing local law until the eve of trial, and only once things appeared bleak, would he try to get a “second bite at the apple” using the CISG? What if the Judge becomes convinced the litigant argued only the local law and waited until the end of the process to argue the actually applicable CISG in order to achieve a strategically valuable delay?

II. SUMMARY OF ARGUMENT

This case is not a mere hypothetical. These are the facts of Ho Myung Moolsan, Co. Ltd. v. Manitou Mineral Water, Inc. a Federal United States trial court decision out of the Southern District of New York. Moreover, this common scenario is likely underreported. In the United States, knowledge of the CISG is rare among both Judges and lawyers. Thus, in cases such as the above, where the case is filled with complicated matters of fact and law and a foreign party is relying on foreign counsel to make its case in a distant forum, it is quite possible for both lawyers to miss the fact that the circumstances are such that local law is displaced by the CISG. Whether one side argues

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the issue quite late in the process, or whether the Judge determines the law applicable on her own, Judges have little guidance as to how best to proceed in this scenario.

It is this author’s contention that the CISG, as a self-executing international treaty in the United States with the preemptive force of Federal law, applies to cases where by its own terms it is applicable. This is so regardless of any local New York State rules that determine a certain length of delay in invoking the CISG amounts to a “tacit waiver.” Thus, when it has rules on point, the CISG displaces local law, even procedural law. In other words, the CISG applies *ex officio*.

Moreover, because the CISG applies, only an effective exclusion of the CISG, as defined by the CISG, gets the parties back out of the CISG. Because the CISG covers agreements to exclude and a post-contractual agreement to exclude is governed by Article 6 on exclusion, Articles 11, 14-24 on formation, and Article 29 on modification, in order to determine that a lawyer’s conduct amounts to a “tacit waiver,” or an agreement to exclude the CISG, the Judge should analyze the conduct under the standards set forth in those articles. It is submitted that under these standards it will be exceptionally rare to fairly conclude that the litigants had either the incentive, or the requisite awareness of the CISG’s existence, to come to an agreement to exclude it in favor of local sales law.

Thus, regardless of the stage in the process it is realized or argued, the CISG should prevail over local sales law when by its terms it is applicable. In a circumstance such as *Ho Myung Moolsan*, I argue that the Judge should either request additional briefs or decide the case under the CISG *sua sponte*\(^\text{10}\).

\(^{10}\) Latin for “on own’s own accord.” According to Cornell University’s law dictionary *sua sponte* is, “used to indicate that a court has taken notice of an issue on its own motion.
Nevertheless, because decisions such as *Rienzi & Sons, Inc. v. N. Puglisi & F. Industria Paste Alimentari*¹¹ (hereinafter *Rienzi*), a United States Federal trial court opinion from the Eastern District of New York, which cites *Ho Myung Moolsan* as precedent, evidence American Judges’ fear of gamesmanship by litigators either seeking to cause delay or attain a “second bite at the apple” under a different law, I propose a path within the CISG for thwarting the strategic litigant. Still, I remain ambivalent as to whether its use would on balance encourage positive results. Finally, I conclude by offering normative reasons, grounded in advancing national interests, for American Judges to apply the CISG *ex officio* and to follow a framework that promotes uniformity in the application of international sales law.

**III. ARGUMENT**

**A. THE CISG APPLIES *EX OFFICIO***

**1. Background of the CISG**

The 1980 U.N. Convention in Vienna on Contracts for the International Sale of Goods (hereinafter the “CISG”) is an international treaty that has been signed and ratified by the United States and over eighty other countries.¹² According to one U.S. opinion, the

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¹² See List of Participating Countries CISG database available at http://www.cisg.law.pace.edu/cisg/countries/countries.html (“Albania, Argentina, Armenia, Australia, Austria, Bahrain, Belarus, Belgium, Benin, Bosnia and Herzegovina, Brazil, Bulgaria, Burundi, Canada, Chile, China (PRC), Colombia, Congo: Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guinea, Guyana, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Japan, Republic of Korea, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Lithuania, Luxembourg, Republic of Macedonia,”).
“CISG was adopted for the purpose of establishing provisions of law to govern the formation of international sales contracts and the rights and obligations of the buyer and the seller. The CISG applies to ‘contracts of sale of goods between parties whose place of business are in different States when the States are Contracting States.’”13 An opinion discussing the Contracting States’ and Congress’s intent in ratifying the CISG said that, “the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic, and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.”14 Congress’s intent in ratifying the CISG as an attempt to reduce transaction costs and promote uniformity and legal certainty can also be inferred from Secretary of State George Schultz’s letter of transmission to Congress explaining, “Sales transactions that cross international boundaries are subject to legal uncertainty - doubt as to which legal system will apply and the difficulty of coping with unfamiliar foreign law. The sales contract may specify which law will apply, but our sellers and buyers cannot expect that foreign trading partners will always agree on the applicability of United States law. Insistence by both parties on this sensitive point can prolong and jeopardize the making of the contract.”15 Thus, the evidence suggests Congress ratified the CISG with

Mauritania, Mexico, Republic of Moldova, Mongolia, Montenegro, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Romania, Russian Federation, Saint Vincent and Grenadines, San Marino, Serbia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Turkey, Uganda, Ukraine, United States, Uruguay, Uzbekistan, Bolivarian Republic of Venezuela, Zambia.”)

13 Asante Technologies, Inc. v. PMC-Sierra, Inc. 164 F. Supp. 2d 1142 (N.D. Cali. 2001) at 1143.
14 Id. at 1144
the intent to promote uniformity, legal certainty, the development of international trade, and the reduction of transaction costs.

2. The CISG and State Sales Law in the United States

Under the United States Constitution all States are bound by treaties of the United States. The importance in subordinating State law to international treaties was recognized in American Constitutional thinking as early as the Republic itself. U.S. Courts and commentators have recognized that the CISG, as a duly ratified and self-executing treaty of the United States, preempts contract claims arising under State law.

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16 U.S. Const. art VI, cl 2 ("This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding.").

17 James Madison The Federalist Papers (44 January 25, 1788) Restrictions on the Authority of the Several States ("in the third place, as the constitutions of the States differ much from each other, it might happen that a treaty or national law, of great and equal importance to the States, would interfere with some and not with other constitutions, and would consequently be valid in some of the States, at the same time that it would have no effect in others. In fine, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society every where subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members.") available at http://www.constitution.org/fed/federa44.htm.

Thus, with respect to substantive matters such as performance and formation of the contract, the CISG indisputably displaces State sales law when it is applicable.

3. American State Conflicts of Law and Choice of Law Rules and the CISG

A slightly more difficult question is whether the CISG displaces State conflicts of laws and choice of law rules. Considering the above Ho Myung Moolsan case as an example, our litigants in a New York forum would be subject to New York’s “center of gravity” test to determine which law, South Korean or New York, was most closely tied to their case.\textsuperscript{19} However, New York’s conflict of law provision clearly conflicts with the CISG’s definition of internationality, which states that the CISG applies if “parties’ places of business are in two different Contracting States.”\textsuperscript{20} Thus, even if the jurisdiction of South Korea had the more direct relationship to their contract, because the litigants are from two Contracting States, the CISG is the applicable law. A Judge who applied New Senate for the CISG to apply as a self-executing treaty pursuant to the principles espoused by the majority in Medellin can be found in a clear statement by the U.S. President to the Senate demonstrating an understanding that the CISG was self-executing); \textit{See generally James E. Bailey Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales} 32 CORNELL INTERNATIONAL LAW JOURNAL (1999) 273-317; \textit{See, e.g., 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, 166 (1995) (stating that "[I]n the United States, [the CISG] is a self-executing treaty with the preemptive force of federal law.").\textsuperscript{19} \textit{See Babcock v. Jackson,} 12 N.Y. 2d 473 (1963); Betsy Rosenblatt & Michael Silverman \textit{Conflicts of Law} 2007 ("The "center of gravity" approach, first adopted by the Court of Appeals of New York, might be characterized as a simplified version of the "most significant relationship" test of the Second Restatement. This approach authorizes courts to look at all the existing contacts between the various parties to a suit and various jurisdictions. Ultimately, the court should choose the law of whatever jurisdiction is most closely tied to the case.") available at \url{http://cyber.law.harvard.edu/property00/jurisdiction/conflicts.html}.
York’s center of gravity test instead of the CISG’s Article 1(1)(a) to determine the law applicable would breach New York’s obligations under the CISG. Moreover, while New York has its own choice of law rule, which enforces parties’ choice of the applicable law, the CISG has its own provision on party autonomy. Article 6 of the CISG says that parties “may exclude the application of this Convention or… derogate from or vary the effect of any of its provisions.” Thus, scholars and courts from around the world have recognized that when the CISG appears on its face to be applicable, the parties’ choice to exclude the CISG in favor of a different sales law is to be judged according to the standards inside the CISG, namely Article 6. Similarly, many U.S. courts have

21 Admittedly the Judge could still correctly end up with the CISG by applying South Korean law and accurately applying the CISG as part of South Korean law.
23 Frankel v. Citi- Corp Ins. Servs. 913 N.Y.S.2d 254, 259 (2d Dept. 2010) (“New York Courts will enforce a choice of law clause unless 1) the provision is illegal; (2) there is no reasonable relationship between the provision and the parties or transaction; or (3) the provision contravenes “some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”).
recognized that where the parties are from two Contracting States, when parties choose the law of a specific State in their contract, for example, through a clause such as: “disputes arising shall be settled by the law of New York State,” whether this choice of law clause excludes the CISG is not only to be evaluated under the standards for exclusion set in the CISG, but the choice of a State’s law has been consistently interpreted in the United States as actually a choice to apply the CISG. Thus, while not explicitly recognized, it is well settled in the courts of the United States that the CISG’s


rules on conflicts of law and choice of law displace local conflicts rules and choice of law rules regardless of whether one considers these rules to be substantive or procedural.27

4. *Ex Officio* Application of the CISG

*Ex officio* application of a law has been defined as “the application of a rule of International law which has not been mentioned by the parties.”28 Here I define *ex officio* application of the CISG as: the application of the Convention when by its own terms it is applicable, regardless of local procedural rules, and regardless of whether the parties invoke it. Given that the CISG has its own stated test for applicability, dependent on location,29 and its own choice of law standard,30 the CISG’s application is therefore dependent on factors wholly other than whether parties invoke it, plead it, or otherwise rely on it. Thus, the CISG applies at the outset regardless of whether the parties raise it. The parties need not opt-in. Moreover, as discussed in §3 *supra*, the CISG’s rules on exclusion and application preempt local choice of law and conflict of law principles. Thus, because the CISG applies regardless of whether the parties raise it and regardless of local procedural rules, the CISG applies *ex officio*.

Leading CISG scholars have emphasized that the CISG applies *ex officio*.31 American Judges can look to other national court opinions for guidance as well. In fact,

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27 *See generally* Lisa Spagnolo, *supra* note 22 at 197


29 *See* CISG Art 1(1(a), *supra* note 20 (the CISG’s application is dependent on the places of business of the parties being in Contracting States).

30 Parties must explicitly opt-out of the CISG when it is applicable *See infra* §6.

31 I. Schwenzer & P. Hachem, *in* I. SCHWENZER (ED), SCHLECHTRIEM & SCHWENZER: *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)*, at 19-20 para. 3. (2010) (“the applicability of the CISG is not dependant on a claim by the parties, but is to be examined *ex officio* by the court.”); Claude Witz, *Harmonization*
Article 7(1) of the CISG states that “in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade,” and commentators have interpreted this to mean that the CISG’s provisions are to be interpreted autonomously and non-nationalistically, and therefore Foreign Court opinions on the CISG should always be accorded “persuasive value.”


 Franco Ferrari Have the Dragons of Uniform Sales Law Been Tamed? Ruminations on the CISG’s Autonomous Interpretation by Courts Wildy, Simmonds & Hill Publishing (2008) 134-167 at 163 (“In this author's opinion, foreign case law should always be considered as having merely persuasive value. This result is, in essence, what Article 7(1) CISG imposes when it provides that 'regard is to be had [...] to the need to promote uniformity in its application.'”)

32 Franco Ferrari Have the Dragons of Uniform Sales Law Been Tamed? Ruminations on the CISG’s Autonomous Interpretation by Courts Wildy, Simmonds & Hill Publishing (2008) 134-167 at 163 (“In this author's opinion, foreign case law should always be considered as having merely persuasive value. This result is, in essence, what Article 7(1) CISG imposes when it provides that "regard is to be had [...] to the need to promote uniformity in its application."”) available at http://www.cisg.law.pace.edu/cisg/biblio/ferrari18.html#ii; Citing Diedrich, F (1995) "Lückenfüllung im Internationalen Einheitsrecht -Möglichkeiten und Grenzen richterlicher Rechtsfortbildung im Wiener Kaufrecht" Recht der internationalen Wirtschaft 353 ff at 356; Flechtner, HM (2002) 'Recovering Attorneys' Fees as Damages under the U.N. Sales Convention: A Case Study of the New International Commercial Practice and the Role of Case Law in CISG Jurisprudence, with Comments on Zapata Hermanos Sucesores, S.A.
France has explicitly recognized that the CISG applies *ex officio* and in that French Cour de Cassation case the Court stated “the lower court misapplied the applicable law by not considering the Vienna Convention of 11 April 1980 (CISG) *ex officio*.”

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officio… a French Judge must apply the Vienna Convention unless there is a reservation as to its exclusion, as per article 6 CISG.”

The situation is similar in Austria. In an Austrian Supreme Court Case, the Court discussed how the Court of First Instance applied Italian law, and on appeal the Supreme Court remanded the case back to the Court of First Instance saying “In the renewed trial, the Court of First Instance would have to apply the CISG…The CISG is applicable when the contract between the parties falls into the material sphere of application of the Convention. Whether it is applicable is to be assessed ex officio.” Thus, even for the myriad of questions whose solutions may lead the adjudicator back out of the CISG — such as party exclusion of the CISG, excluded types of goods and contracts, validity issues, personal injury issues or requests for specific performance a Court should first assess whether the CISG applies to that particular contract ex officio using the standards set forth in the CISG and its subsequent interpretation.

5. Ex Officio Application and Iura Novit Curia

There is an important distinction between ex officio application and relying on the procedural principle of iura novit curia (“the Court knows the law”) to apply the CISG

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34 4 Ob 179/05k, Supreme Court (Austria), 8 November 2005, available at: http://cisgw3.law.pace.edu/cases/051108a3.html.

35 See CISG full text available at http://www.cisg.law.pace.edu/cisg/text/treaty.html. CISG Article 2 excludes certain types of goods. CISG Article 3 excludes certain types of contracts. CISG Article 4 excludes issues of validity. CISG Article 5 excludes issues of death or personal injury. CISG Article 28 makes forum law relevant for rendering specific performance (“If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.”)
when parties fail to plead or argue it. At its core, the procedural principle of *iura novit curia* allocates the burden of establishing the identity of the applicable law and ascertaining its content.\(^\text{36}\) It defines the very roles and respective responsibilities of the court and parties in relation to the substantive law.\(^\text{37}\) On the other hand, *ex officio* application means the law should be applied regardless of how those responsibilities are allocated.\(^\text{38}\)

In some countries, such as Germany and Portugal, the principle of *iura novit curia* and the Court’s corresponding duty to ascertain and correctly apply either local or foreign law derives from code provisions\(^\text{39}\) while in others it is a matter of legal tradition.\(^\text{40}\) While it appears that in some form or another all legal systems endorse the principle of *iura novit curia*,\(^\text{41}\) Professor Spagnolo breaks *iura novit curia* into a *strict form* practiced by the civil law systems and a *soft form* practiced by the common law systems.\(^\text{42}\) According to her, the “‘strict’ approach to *iura novit curia* obliges the court to *ex officio* identify and

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\(^{37}\) S.L. Sass, ‘*Foreign Law in Civil Litigation – A Comparative Survey*’, 16 AM. J. COMP. L. 332, (1968) at 332

\(^{38}\) See definition of *ex officio, supra* §4

\(^{39}\) §293 German Civil Code; Article 348(1) and 348(2) of the Portugal Civil Code

\(^{40}\) Such as Japan *See* Silvia Ferreri “*Complexity of Transnational Sources*” GENERAL REPORTS OF THE XVIIIth CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW Edited by Karen Brown at 44 (“Japanese academics consider that Judges, not parties, have to find and research cases by themselves”).

\(^{41}\) Spagnolo, *supra* note 22 at 186 (“In truth, some version of *iura novit curia* exists in all jurisdictions”)

\(^{42}\) *Id.* (“While civil law jurisdictions overtly acknowledge the principle, it has been claimed that it has no application in common law jurisdictions. Yet it is probably more accurate to say that common law courts operate under a ‘soft’ form of *iura novit curia* in relation to domestic law, since common law judges also have an inherent power to apply points of law not invoked by counsel.”)
apply the substantive law it considers applicable to the case. A ‘soft’ approach to *iura novit curia* authorizes this, but does not demand it.”

Thus, if our case study, *Ho Myung Moolsan*, had occurred in a jurisdiction with the *strict form* of *iura novit curia*, the outcome would have been similar to its occurrence in a jurisdiction that relied on *ex officio* application. The Judge, regardless of the parties’ submissions, would have applied the CISG if they realized it was applicable. Still, even for jurisdictions with the *strict form* of *iura novit curia*, relying on the principle of *iura novit curia* presupposes that where this procedure is not available, the outcome would be different. Relying on *iura novit curia* carries an implicit assumption that in those systems without *iura novit curia*, the CISG would not be applied unless the parties argue it. Moreover, perhaps in the future, parties will have to argue the CISG for it to be applied, not only in jurisdictions without the strict form of *iura novit curia*, but also in jurisdictions that rely on provisions of a civil code to justify *iura novit curia*, as theoretically, these provisions could be adjusted. Another difference between *ex officio* application and application through *iura novit curia* could come about in jurisdictions that permit *iura novit curia* but have different procedures for taking judicial notice of foreign law as opposed to domestic law. Even though the CISG is often recognized as forming a part of the national domestic law, theoretically, relying on the theory of *iura novit curia* as opposed to *ex officio* application could lead to different outcomes in certain systems.44

43 *Id.*

44 With respect to Article 7(1)’s command to interpret the Convention uniformly this can cut both ways. *Ex officio* application would lead to more uniform outcomes. On the other hand, if it is true that there are widespread differences in *iura novit curia* procedures in
6. Iura Novit Curia and International Obligations

Still, while Courts have more often applied the CISG to non-pleading parties by explicitly relying on the principle of *iura novit curia* rather than *ex officio* application, Professor Spagnolo convincingly argues that a Contracting State that relied on local procedural rules to ignore aspects of the Vienna Convention would breach its international obligations.45 Even where the CISG is effectively incorporated into national law, Professor Spagnolo argues the domestic law directs the Courts to honor the international obligations of the Contracting State.46 She points to Article 27 of the Vienna Convention on the Law of Treaties,47 which states “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”48 Even for nations that did not sign or ratify the Vienna Convention on the Law of Treaties, it is widely believed that Article 27 is “solidly based on customary international law.”49

different legal systems, it is less likely the delegates sought to address these difficult legal and cultural questions at a Sales Convention and left open the use of *iura novit curia* with respect to the CISG as an external gap to be filled by national law pursuant to Article 7(2).

45 Spagnolo, *supra* note 22 at 186
46 Id.
47 The United States has signed but not ratified the Vienna law of Treaties and considers most of it to form part of customary international law See http://www.state.gov/s/l/treaty/faqs/70139.htm (“Is the United States a party to the Vienna Convention on the Law of Treaties? No. The United States signed the treaty on April 24, 1970. The U.S. Senate has not given its advice and consent to the treaty. The United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.”).
49 MARK EUGEN VILLIGER COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 375 available at https://books.google.com/books?id=btGhVmrJN1oC&pg=PA374&lpg=PA374&dq=article+27+vienna+law+of+treaties+united+states&source=bl&ots=ULwAf9dR7w&sig=Etv2sH9iDQqsBp5Le9XQfjqQpm0&hl=en&sa=X&ei=aENAVcbdI4e0sAT3voGABQ&ve
Moreover, Spagnolo discusses how national systems accept the view that, as officers of the national government, it will be the national courts that have the duty to fulfill certain treaty obligations.\textsuperscript{50} Thus, those nations bound by the Vienna Convention on the Law of Treaties\textsuperscript{51} could not rely on the repeal of \textit{iura novit curia} or any other internal procedural rules to ignore an international obligation. Given that Article 1(1)(a) of the CISG is an international obligation to be performed by the Courts of Contracting States, regardless of whether \textit{iura novit curia} is available, is \textit{strict} or \textit{soft}, is limited to foreign law or otherwise, the CISG should be applied when the parties are from two different Contracting States. Thus, regardless of whether Courts consider \textit{iura novit curia} to be available in their jurisdiction, when by its own terms the CISG is applicable, the lack of \textit{iura novit curia} should not act as an obstacle to application of the CISG when it is the correct applicable law, even if the parties fail to plead or raise the Convention. Therefore, Court decisions explicitly relying on \textit{iura novit curia} to determine that the CISG applies even where parties fail to raise it are not necessarily wrong, but it is this author’s contention that the Courts may have taken a more direct route to application of the CISG through \textit{ex officio} application.

\textsuperscript{50} Spagnolo, \textit{supra} note 22 (“In \textit{Fothergill v. Monarch Airlines Ltd [1981] AC 251 (U.K.)} in relation to Article 32 of the Vienna Convention on the Law of Treaties and consultation of \textit{traveaux préparatoires} by English courts in interpretation of a treaty, Lord Diplock stated: By ratifying that Convention, [the] Government has undertaken an international obligation on behalf of the United Kingdom to interpret future treaties in this manner and since under our constitution the function of interpreting the written law is an exercise of judicial power and rests with the courts of justice, that obligation assumed by the United Kingdom falls to be performed by those courts.”).

\textsuperscript{51} Or those that recognize Article 27 embodies an already existing principle of Customary International Law like the United States. \textit{See supra}, note 47.
Nevertheless, American Judges can look to foreign opinions applying the CISG to silent parties, albeit relying on *iura novit curia* rather than *ex officio* application, as persuasive authority that the CISG is the default set of rules when parties are from different Contracting States, that parties must “opt-out” of the CISG in accordance with the CISG’s standards rather than “opt-in” through their pleadings, and that the decision-maker has a duty to apply the CISG when its terms are satisfied. These include Italian, German, and Mexican cases.

52 Tribunale di Vigevano, Italy, 12 July 2000, available at [http://cisgw3.law.pace.edu/cases/000712i3.html](http://cisgw3.law.pace.edu/cases/000712i3.html) (“In the present case, it does not appear from the parties' arguments that they realized that the United Nations Convention was the applicable law before the hearing that was held pursuant to article 183. We cannot, therefore, conclude that they implicitly wanted to exclude the application of the Convention by choosing to refer exclusively to national Italian law. Thus according to the principle *iura novit curia*, it is up to the judge to determine which rules should be applied and for the reasons mentioned above, the applicable rules are those in the Vienna Convention.”); Tribunale Civile di Cuneo, Italy, 31 January 1996, available at [http://cisgw3.law.pace.edu/cases/960131i3.html](http://cisgw3.law.pace.edu/cases/960131i3.html) (“One must refer to the Vienna Convention [CISG] to determine the substantive rules applicable to this dispute. Although the parties did not refer to the CISG, its rules must be followed by this Court from the principle *iura novit curia*, apart from the pleadings of the parties.”); Tribunale di Padova, Italy, 25 February 2004, available at [http://cisgw3.law.pace.edu/cases/040225i3.html](http://cisgw3.law.pace.edu/cases/040225i3.html) (“In the instance case, from the pleadings of the respective counsel, it does not turn out that the parties were aware of the applicability of the CISG; therefore, they could not have excluded -- even implicitly -- the application of the CISG, by choosing to make an exclusive reference to the Italian law. As a result, by virtue of the principle of *iura novit curia*, it is for the judge to determine the applicable rules [F]or all the reasons stated above, the rules have to be those present in the articles of the CISG at issue.”)

53 Appellate Court (OLG) Hamm, Germany, 9 June 1995, §§ I & II, available at [http://cisgw3.law.pace.edu/cases/950609g1.html](http://cisgw3.law.pace.edu/cases/950609g1.html) (“The fact that the parties chose German law, as indicated by their behavior in the litigation proceedings is without consequence. Such an implicit choice of law is deemed to have taken place where the parties assumed, throughout their lawsuit, that a certain legal system applies, especially where they referred to its statutory provisions. This happened here; the parties have referred to the provisions of the BGB in the proceedings before the two lower courts. This choice of German law, in turn, leads to the application of the CISG which is part of German law.
and which has, within its scope of application, priority over the German Civil Code. Indications that the parties have excluded the CISG by their implicit choice of law are neither submitted nor apparent in any other way.”); Landesgericht [District Court](LG) Landshut, Germany, 5 April 1995, available at http://cisgw3.law.pace.edu/cases/950405g1.html (“The application of the CISG was also not excluded under Art. 6 CISG. The fact that the [buyer] bases its claim and the [seller] its defense on provisions of the BGB, does not change anything. The CISG is uniform law, thus also directly German law. The parties can only exclude the application of the CISG by explicit agreement, but that was not done here. The mere agreement that German law applies would not be sufficient according to the prevailing opinion on the application of Art. 6 CISG.”)

54 Georgia Pacific Resins, Inc. v. Grupo Bajaplay, S.A. de C.V, Fourth Panel of the Fifteenth Circuit Court [Federal Court of Appeals], Mexico, 9 August 2007, available at http://cisgw3.law.pace.edu/cases/070809m1.html (“La Convención por virtud del artículo 133, de la Constitución Política de los Estados Unidos Mexicanos, adquiere la característica de Ley Suprema de la Nación que la hace prevalecer sobre las leyes federales y locales y viene a desplazar y sustituir en lo que respecta a la formación del contrato de compraventa de mercaderías de tipo internacional al Código de Comercio y al Código Civil Federal, aplicación que es de orden público y que el juzgador debió realizar de manera oficiosa, no resultando un derecho extranjero sino que es auténtico derecho nacional y por lo tanto, no está sujeto a prueba por lo que la Sala responsable debió fundar y motivar la sentencia reclamada, y en especifico el análisis de los elementos de la acción de pago ejercitada en base a la Convención multicitada… habiendo argumentado equivocadamente, la Sala responsable al respecto, que ninguna de las partes invocó a su favor que el asunto natural se ventilara bajo la aplicación de la citada Convención, agregando que aún así la acción ejercitada era improcedente, en virtud de que no se acreditó el primer elemento de la acción, consistente en la relación contractual, mediante la celebración de la compraventa de resina y como consecuencia, el cumplimiento de las obligaciones a cargo del actor, como fue la entrega de la mercancía y el incumplimiento de las mismas cargo del demandado, derivadas del propio contrato; sin embargo, lo así argumentado por la sala carece de sustento jurídico, en virtud de que de conformidad con el artículo 133 de la Constitución Política de los Estados Unidos Mexicanos, ésta última, las leyes generales del Congreso de la Unión y los Tratados Internacionales que estén de acuerdo con ella, constituyen los Tratados Internacionales por debajo de la Constitución General de la República, pero por encima de las leyes federales y locales. Bajo esta premisa, en el caso que nos ocupa, es claro que como afirma el apoderado de la parte actora, dado los principios de derecho "da mihi factur, dabo tibi ius", y "iura novit curia", esto es, "dame los hechos, que yo te daré el derecho" y "el tribunal es el que conoce el derecho", no tenía por que, como lo sostiene la Sala responsable, solicitar alguna de las partes.” [Author’s Unofficial Translation] “The Convention by virtue of Article 133 of the Mexican Constitution acquires the characteristics of the Supreme Law of the nation and it thus prevails over the federal laws and local laws and comes to displace and act as a substitute for the Commercial Code and the Federal Civil Code with respect to issues of formation of international sales contracts. The Judge need not have
In summary, the CISG has its own rules on application that are wholly divorced from whether the CISG was raised or plead — namely Article 1(1)(a) and Article 6. Thus, both scholars and national courts have recognized that the CISG automatically applies when these terms are met. Regardless of whether the system permits or restricts *iura novit curia*, Courts should follow the *iura novit curia* line of cases to determine that the CISG’s application does not require any opt-in or invocation by the parties, and that an analysis of whether the adjudicator should look back outside the CISG to answer a question should be done according to the CISG’s own standards.

**B. The CISG’s Standards for Exclusion**

1. **Clear Opt-Out**

Having established that the question of whether the CISG has been excluded is to be answered according to the CISG’s own standards, a decision-maker must look to those standards to determine whether the exclusion meets their threshold.

As stated above, Article 6 does give parties the right to agree to exclude the CISG. Thus, before any agreement could be analyzed to determine whether it meets the threshold for exclusion, one must analyze whether under the CISG the parties have in fact taken official notice because this is not foreign law but rather the true national law and for this reason, the case should not have been subject to the below Chamber’s test but rather the decision should be established and justified and specifically an analysis of the payment action based on the oft-mentioned Convention should occur...the below Chamber having incorrectly argued that because none of the parties had invoked the cited Convention throughout, adding that the claim still was inadmissible because the contract was not proven, neither was delivery of the goods under the contract; however the Chamber’s argument lacks legal basis because the Convention is the supreme law pursuant to Article 133 of the Mexican Constitution and supercedes local and federal laws. Under this principle of *iura novit curia* or “give me the facts and I will give you the law” or “the Court knows the law”, it is not necessary, as the below Chamber held, for the Court to solicit anything from the parties.”
come to an agreement regarding the applicable law. Most often, these agreements would be set out in writing along with the provisions of the original contract. Whether a contract was formed under the CISG is to be determined according to Articles 8, 11 and 14-24. Disputes related to exclusion would arise where the parties are in agreement that a contract was concluded, but disagree as to the meaning of the choice of law provision included in that contract. Under the CISG, the meanings of statements and provisions in a contract are to be interpreted according to Article 8. Article 8 states that “For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent…” Thus the inquiry is whether the parties’ contract provision evidences the requisite intent to exclude the CISG, as defined by the CISG. A choice of law that selects the “Law of New York State to govern any disputes” could conceivably be an exclusion of the CISG. On the one hand, effective interpretation could lead a decision maker to conclude that where the CISG was already applicable, parties would not willingly incur transaction costs to contract for a law they already had. Thus, the only way to give this provision any effective meaning would be to treat it as an exclusion. On the other hand, Article 7(2) of the CISG states, “Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private

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55 CISG Article 8 available at http://www.cisg.law.pace.edu/cisg/text/e-text-08.html
56 See Steven D. Walt Sales Law Domestic and International Foundation Press 2014 St. Paul Minn. at 67 (“Rational contracting parties do not incur contracting costs to provide terms that applicable default rules already make applicable to their agreement. Providing such terms is a waste of resources. Assuming parties do not waste resources, the choice of law in Asante [Choosing California Law] clearly intended to exclude the CISG.”).
international law.” A choice of New York law therefore could be intended as the selection of New York law to be the gap-filling law, not as displacing the CISG. Moreover, a choice of law usually comes alongside a choice of forum and Article 28 of the CISG only requires specific performance when it is due under the Convention and only when also available under the forum’s local law.\(^{57}\) Thus, parties choosing to settle disputes “in New York Courts applying New York Law” may intend only to point to the forum’s availability of specific performance and the law applicable for gap filling, and not have intended to exclude the CISG.\(^{58}\) The standard for \textit{ex ante} exclusion has therefore been debated. While a minority of opinions suggest that implicit exclusion that nevertheless manifests a clear intent to exclude can suffice\(^{59}\), the majority of scholars\(^{60}\)

\(^{57}\) Article 28 CISG (“If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.”)

\(^{58}\) The author readily admits that in reality pre-dispute parties almost always have no actual intentions with respect to the applicable law. Given that lawyers are often unaware of the CISG, it is in many ways ridiculous to assume that professional traders and businesspeople would understand the gap-filling and specific performance provisions of the CISG enough to impact the crafting of the clause. Nevertheless, parties, along with their counsel, draft contracts, and do have intentions whether the clause their lawyer crafted is incorporated in the contract. Given that a lawyer could understand the impact these provisions may have, law firms, as well as standard forms circulated amongst the relevant business community, may come to develop a habit of pointing to “New York law” even though the parties have no actual intention to exclude or to highlight NY law as the correct gap-filling law. Thus, these alternative reasons for selecting a particular State Law aside from exclusion effectively combat Walt’s effective interpretation argument.

\(^{59}\) Olivaylle Pty Ltd \textit{v} Flottweg GmbH & Co KGAA (No 4) (2009) 255 ALR 632, Federal Court, Australia, 20 May 2009 available at \url{http://cisgw3.law.pace.edu/cases/090520a2.html} (“The Contract provides, "Australian law applicable under exclusion of UNCITRAL law." The Sale of Goods (Vienna Convention) Act, being a law of a State is an 'Australian law'. The contractual reference to "UNCITRAL" is reference to the United Nations Commission on International Trade Law, the acronym for which is "UNCITRAL". In my opinion, for reasons which follow, "UNCITRAL law" is a reference to the Vienna Convention. That the Vienna Convention
and national court opinions\(^6^1\) hold that explicit opt-out is required. Moreover, the CISG’s high threshold for \textit{ex ante} exclusion has been recognized repeatedly in the United

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\hspace{1cm} is an adopted part of the relevant Australian law does not mean that the contractual statement "Australian law applicable under exclusion of UNCITRAL law" is to be construed as thereby rendering applicable a convention that the parties to it sought expressly to exclude. Rather, the Contract evidences an intention to exclude the Vienna Convention altogether from application\(^6^0\)


\hspace{1cm}\hspace{1cm}\hspace{1cm} Oberster Gerichtshof [Supreme Court], Austria, 22 October 2001 \url{http://cisgw3.law.pace.edu/cases/011022a3.html} ([A]n implicit exclusion may only be assumed if the corresponding intent of the parties is sufficiently clear. If it cannot be established with sufficient clarity that an exclusion of the Convention was intended (taking into account the criteria provided by Art. 8 CISG for the interpretation of a party's statements and other conduct), then the CISG is to be applied'); Sté Ceramique Culinaire de France v. Sté Musgrave Ltd, Cour de Cassation, France, 17 December 1996 available at \url{http://cisgw3.law.pace.edu/cases/961217f1.html} (‘[r]eferring only to the law of a Contracting State in a clause...is not sufficient’); Oberster Gerichtshof [Supreme Court], Austria, 26 January 2005 available at \url{http://cisgw3.law.pace.edu/cases/050126a3.html}; Bundesgerichtshof [Federal Supreme Court](BGH), Germany, 25 November 1998 available at \url{http://cisgw3.law.pace.edu/cases/981125g1.html}; Federal Supreme Court (BGH), Germany, 23 July 1997 (Benetton I) available at \url{http://cisgw3.law.pace.edu/cases/970723g1.html} (translation A. Raab); Federal Supreme Court (BGH), Germany, 23 July 1997 (Benetton II), NJW 1997, 3309, 3310 at 3310 available at \url{http://cisgw3.law.pace.edu/cases/970723g1.html}; Kantonsgericht [District
States. Even more, Courts have recognized that this high threshold for exclusion, i.e. an affirmative opt-out requirement, “promotes uniformity and the observance of good faith in international trade, two principles that guide interpretation of the CISG” under CISG Article 7(1).

2. Ex Ante v Ex Post Standards

International interpretation by courts and scholars, as well as opinions within the United States, establish that when analyzing parties’ ex ante attempt to exclude the CISG, an agreement evidencing clear intent to exclude the CISG is required. On the other hand,

62 Valero Marketing, supra note 26; Ajax, supra note 26; American Mint, supra note 26; Travelers, supra note 26 (“absent an express statement that the CISG does not apply, merely referring to a particular state's law does not opt out of the CISG”); Easom, supra note 26 (“stating choice of Canadian Law not sufficient to exclude the CISG); Asante Technologies, supra note 13; St Paul Guardian Insurance Company, supra note 26 (“Where parties ... designate a choice of law clause in their contract -- selecting the law of a Contracting State without expressly excluding application of the CISG' this results in application of the CISG 'as the law of the designated Contracting state’); BP International, supra note 26 ('Where parties seek to apply a signatory's domestic law in lieu of the CISG, they must affirmatively opt-out of the CISG').

63 Travelers, supra note 26.
standards for demonstrating the intent to exclude have wildly differed with respect to alleged *ex post* attempts at exclusions. Some Courts have concluded that the late stage

64 CISG Advisory Council No. 16, *supra* note 25 at §5.2 (“There are a number of cases where parties did not refer to the CISG in pleadings or argument, or only did so upon appeal, despite the fact it was the applicable law. The applicability of the CISG has been overlooked in first instance hearings due to failure by parties to plead or argue the CISG, leading to decisions based on domestic law. In some decisions, reference to domestic law without mention of CISG during proceedings led to the conclusion that the CISG was 'inapplicable'. In some cases, non-application of the CISG has been upheld upon appeal, sometimes on the basis that the manner in which proceedings were conducted precludes application of the CISG. Alternatively, the CISG has sometimes been applied upon appeal for the first time, or the matter remitted to lower courts with a direction to determine the case pursuant to the CISG. Conversely, in other cases, the CISG was applied by the court regardless of the fact that counsel did not present CISG based arguments, or inadequately argued the CISG.""); For decisions based on domestic law See, e.g., Oberlandesgericht [Appellate Court](OLG) Naumburg, Germany, 13 February 2013 [http://cisgw3.law.pace.edu/cases/120213g1.html](http://cisgw3.law.pace.edu/cases/120213g1.html); Italian Imported Foods Pty Ltd v. Pucci Srl, New South Wales Supreme Court, Australia, 13 October 2006 [http://cisgw3.law.pace.edu/cases/061013a2.html](http://cisgw3.law.pace.edu/cases/061013a2.html); Gammatex International Srl v. Shanghai Eastern Crocodile Apparels Co. Ltd., Shanghai First Intermediate People's Court, China, 21 August 2002 available at [http://cisgw3.law.pace.edu/cases/020821c1.html](http://cisgw3.law.pace.edu/cases/020821c1.html) (translation W. Long); Y. Xiao & W. Long, *Selected Topics on the Application of the CISG in China*, 20 Pace Int'l L.Rev. 61, at 71 (2008) available at [http://www.cisg.law.pace.edu/cisg/biblio/xiao-long.html](http://www.cisg.law.pace.edu/cisg/biblio/xiao-long.html) (“Application of the CISG in China”). In some decisions, reference to domestic law without mention of CISG during proceedings led to the conclusion that the CISG was 'inapplicable'. See Shanghai First Intermediate People's Court, China, 22 March 2011 available at [http://cisgw3.law.pace.edu/cases/110322c1.html](http://cisgw3.law.pace.edu/cases/110322c1.html) (the parties' arguments at first instance were based only on Chinese domestic law. On appeal the court upheld this as a choice of Chinese domestic law, concluding that this meant 'the parties agreed on the application of [Chinese domestic law] during the proceedings at 1st instance, thereby excluding the application of the CISG). For cases where non-application of the CISG has been upheld upon appeal: See Industrias Magromer Cueros y Pieles SA v. Sociedad Agrícola Sacor Limitada, Corte Suprema [Supreme Court], Chile, 22 September 2008 available at [http://cisgw3.law.pace.edu/cases/080922ch.html](http://cisgw3.law.pace.edu/cases/080922ch.html); Jorge Plaza Oviedo v. Sociedad Agrícola Sacor Limitada in J. Oviedo-Albán, *Exclusión tácita de la ley aplicable e indemnización de perjuicios por incumplimiento de un contrato de compraventa internacional (a propósito de reciente jurisprudencia chilena)*, 14 INT'L LAW, REVISTA COLOMBIANA DE DERECHO INTERNACIONAL 191, at 203, note 22 & 214 (2009) at 194, 195, 198, 199 & note 7.
of the litigation process precluded application of the CISG.\(^\text{65}\) Other courts have raised the CISG for the first time on appeal,\(^\text{66}\) or remitted it to the lower courts with directions to apply the CISG.\(^\text{67}\) One Court concluded that an agreement by counsel during the proceedings to apply Dutch law to the process did not amount to an exclusion of the CISG.\(^\text{68}\) Scholars have decried the gap between \textit{ex ante} strict standards for exclusion and varying standards for \textit{ex post} exclusion.\(^\text{69}\)

For three reasons, the better approach would be to apply the strict \textit{ex ante} standard, which requires the demonstration of a clear intent to exclude, to all stages of the contractual and litigation process. First, it is widely established among scholars and

\(^{65}\) GPL Treatment \textit{v.} Louisiana-Pacific Corp., 894 P. 2d 470 (Or. Ct App. 1995) (domestic 'in writing' requirement was displaced by the CISG, but counsel for plaintiff failed to raise this until late in the trial, and case was decided on basis of UCC) available at [http://cisgw3.law.pace.edu/cases/950412u1.html](http://cisgw3.law.pace.edu/cases/950412u1.html).

\(^{66}\) Oberlandesgericht [Appellate Court](OLG) Naumburg, Germany, 13 February 2013 available at [http://cisgw3.law.pace.edu/cases/120213g1.html](http://cisgw3.law.pace.edu/cases/120213g1.html); Oberlandesgericht [Appellate Court](OLG) Linz, Austria, 25 July 2008, GZ 3 R 46/08t-49 (applying CISG despite lower court and parties overlooking the CISG in Landesgericht [District Court] despite that at first instance, both parties and the court referred to domestic law.). The above cases were explicitly cited by the CISG Advisory Council No. 16, \textit{supra} note 25.


\(^{68}\) Eyroflam SA \textit{v.} PCC Rotterdam BV, Rechtbank [District Court](Rb) Rotterdam, Netherlands, 15 October 2008 available at [http://cisgw3.law.pace.edu/cases/081015n2.html](http://cisgw3.law.pace.edu/cases/081015n2.html) (holding that a choice of Dutch law during proceedings led to applicability of CISG).

\(^{69}\) CISG Advisory Council No. 16 \textit{supra} note 25 at §5.2 (“It is unsatisfactory that different evidentiary standards be employed in the interpretation of Art. 6 CISG. As concluded above, the better view is that the evidentiary standard for intent to exclude the CISG should be the same at all stages, although it may manifest in different ways depending on whether exclusion is \textit{ex ante} or \textit{ex post}. Further, as there is a high level of consistency amongst the decisions of courts and tribunals about the high level of clarity required for exclusion at the contractual stage, this is the appropriate degree of intent for a single uniform standard.”)}
courts that at the \textit{ex ante} stage, clear intent to exclude is required. On the other hand, there is widespread disagreement at the \textit{ex post} stage. Thus, applying the \textit{ex ante} standard to \textit{ex post} scenarios would result in a more easily promoted uniform rule. Second, and implicit in the reasoning of the first, is that cautiously inferring exclusion of the Convention helps to promote uniformity in international trade because it results in more predictable application of the Uniform Convention. Because an interpretation of Article 6’s right to exclude that adopts the strict \textit{ex ante} approach helps to promote uniformity and predictability in international trade, it is the interpretation preferred by Article 7(1) of the Convention.\footnote{Promotion of uniformity in the CISG’s interpretation is described by Schlechtriem as a ‘maxim’. \textit{See} P. Schlechtriem, \textit{in} P. SCHLECHTRIEM & I. SCHWENZER (Eds), \textit{COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)}, Art. 6, at 38, §IVA.} Third, \textit{ex post} attempts to exclude are modifications under the CISG, which scholars recognize require clear intent, simply by virtue of the fact that an agreed bargain already exists.\footnote{CISG Advisory Council No. 16, \textit{supra} note 25 at §5.2 (“Scholarly opinion suggests any type of modification under Art. 29 CISG requires clear intent, simply by virtue of the fact that an agreed bargain already exists.”); \textit{Citing} U. Magnus, \textit{Incorporation of Standard Contract Terms under the CISG}, \textit{in} C. B. Andersen & U. Schroeter (Eds), Sharing International Commercial law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday, 303 at 324 (2008)(‘Kritzer Festschrift’); P. Perales Viscasillas, \textit{Abstract, BSC Footwear Supplies Ltd v. Brumby St., Audiencia Provincial de Alicante, Spain,} (2000) at 172 available at \url{http://cisgw3.law.pace.edu/cases/001116s4.html}; M. Schmidt-Kessel, \textit{in} Schwenzer 3\textsuperscript{rd} edn, Art. 8, at 172 para. 53; Macromex Srl v. Globex International Inc., American Arbitration Association Award, 23 October 2007 \url{http://cisgw3.law.pace.edu/cases/071023a5.html} (aff’d 2008 WL 1752530 (S.D.N.Y.); aff’d 330 Fed Appx. 241 (2\textsuperscript{nd} Cir. 2009)(“failure to object to a unilateral attempt to modify a contract is not an agreement to modify a contract”) available at \url{http://cisgw3.law.pace.edu/cases/090526u1.html}; Solae, LLC v. Hershey Canada, Inc., 557 F.Supp.2d 452, (D. Del. 2008) available at \url{http://cisgw3.law.pace.edu/cases/080509u1.html} (“Nothing in the [CISG] suggests that the failure to object to a party’s unilateral attempt to alter materially the terms of an otherwise valid agreement is an ‘agreement’ within the terms of Article 29.”).} Thus, while there are American decisions like \textit{Ho Myung}
Moolsan, to the contrary, to permit exclusion, American Judges should at all stages in the contractual and litigation process require an agreement that evidences clear intent to exclude the CISG.

C. CISG’s Standards on Modification

An *ex post* agreement to exclude the CISG is effectively a modification of the original contract. Modifications are covered by the CISG. CISG Article 29 states, “a contract may be modified or terminated by the mere agreement of the parties”\(^72\) departing from the common law rule requiring consideration for the promise to be binding. Nevertheless, modifications still require a clear intent to be bound.\(^73\) Moreover, offers to modify must be sufficiently definite.\(^74\) Hence, for post-litigation conduct to amount to an exclusion under the CISG, the parties must have, through a sufficiently definite offer and acceptance, come to an agreement that evidences a clear intent to exclude.

Another consideration is that if one understands the context of these modifications, an offer to exclude the CISG when it would impact the case would never be met with a rational acceptance. An *ex post* offer to exclude the CISG would take place in the litigation context when the parties are already at war. Unless the party is unaware or apathetic to the advantages conferred by the CISG, the party receiving the offer would never agree to accept it and exclude a law more beneficial to its cause than the law its

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73 CISG Advisory Council No. 16, *supra* note 25 (“Pursuant to Art. 14 CISG, *ex post* offers to exclude under Article 29 should exhibit an 'intent to be bound.'").

74 CISG Article 14 available at [http://www.cisg.law.pace.edu/cisg/text/e-text-14.html](http://www.cisg.law.pace.edu/cisg/text/e-text-14.html) (“(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.”).
opponent is seeking to impose. As stated by Professor Ulrich Schroeter, “at this stage, it is almost impossible to imagine an exclusion scenario that does not involve professional malpractice from at least one of the party representatives involved. In case both counsel know about the CISG’s applicability and still decide to agree on its exclusion, such a decision will almost necessarily violate the interest of one of the parties since the change in the applicable law with usually affect the outcome of the case, thereby improving one party’s position and worsen that of the other party. As the facts of the case are at this stage already clear, counsel for the latter party cannot agree to the Convention’s exclusion without violating his client’s interest, thereby committing malpractice.”  

D. APPLYING THE CISG’S STANDARDS FOR EXCLUSION TO LITIGATION CONDUCT

Applying all these standards to the facts stated above for Ho Myung Moolsan, we see that the Court too readily concluded the CISG was excluded. First, the original submissions clearly indicated that the buyer was from South Korea and the seller from New York. As these are different Contracting States and the contract is on its face a contract for the sale of goods, the CISG applies ex officio. Thus, regardless of whether it is raised, for the CISG to be excluded, the thresholds of CISG Articles 6, 8, 11, 14-24 and 29 must be met. The South Korean buyer’s complaint which stated, “Count two: breach of supply agreements under state law” cannot amount to an exclusion of the CISG in favor of New York’s commercial code because it mentions neither the Uniform Commercial Code nor the CISG. Again, the CISG is indisputably included in “State

75 U.G. Schroeter, supra note 60.
76 Complaint, supra note 1 at 1.
77 Id.
law."\textsuperscript{78}

Now, the New York seller’s reply did state that the plaintiff failed to meet the requirements for a preliminary injunction under New York State law and cited factors, and it did refer to a specific provision in New York’s Uniform Commercial Code.\textsuperscript{79} It is possible that the reference to the Uniform Commercial Code amounted to an offer to exclude the CISG, but given that this was a wildly complicated dispute and the contract claims formed a small part, it is quite likely that the New York defendant submitted a brief that answered the “state law” claims using the U.C.C., and never considered the possibility of the application of the CISG. Indeed, if it had intended to make a sufficiently definite offer to exclude the CISG, it may have made this offer more conspicuous than a single reference to a provision of the U.C.C. buried inside a lengthy brief. For similar reasons, the South Korean buyer’s reply brief\textsuperscript{80} that detailed the reasons it was entitled to specific performance under New York law, should not be considered an acceptance or a new offer to exclude. First, according to Article 28 CISG, the party would still have had to demonstrate it was entitled to specific performance under New York law. Second, given that almost no focus in any of the submissions was placed on the contract claims, it

\textsuperscript{78} See note 26 for U.S. cases applying the CISG when a specific State’s law was selected.  
\textsuperscript{79} Def. Mem. of Law. supra note 2 “In addition, Mr. Kwon notes that in or about June and July of 2007, the plaintiffs sent orders for approximately ten containers of water, which orders were significantly greater than those previously placed by the plaintiff (paragraphs “28” and “30” of Kwon opposition affidavit). While Mr. Kwon asserts that Manitou was attempting to fulfill these inordinately large orders, it should be emphasized that Manitou's efforts to fulfill them were not mandated by law. See N.Y. U.C.C. § 2-306(1) provides as follows: “A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded”.  
\textsuperscript{80} Pl.'s Mem. in Supp., supra note 3.
is unlikely that the parties had investigated the legal issues to the requisite extent necessary to be aware that that kind of reference to local law amounts to the clear intention to exclude required by the CISG. At this point, the best inference is that the parties and the Court were simply unaware of the CISG’s existence. Third, the South Korean buyer’s silence in the face of what possibly may be an offer to exclude cannot amount to an acceptance under the CISG. CISG Article 18 states that, “a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.”

The next written submission by the South Korean buyer, albeit at the conclusion of discovery, in March 2010, nearly three years after the submission of the initial complaint, argued that the U.N. Convention on International Sales of Goods (CISG) applied, not New York’s Uniform Commercial Code. Thus, the Court’s conclusion that the parties’ conduct “amounted to a tacit waiver” to exclude the CISG is patently wrong if one uses the CISG’s standards. For the reasons stated above, none of this behavior fairly amounts to an agreement to exclude under Articles 6, 8,11, 14-24. Thus the CISG should have been applied.

E. PROPOSED OPTIONS FOR JUDGES

1. Judges’ Concerns

In a case like *Ho Myung Moolsan* the Judge’s interests are not difficult to discern. The case touched on contract claims, fraud, RICO and disputes relating to a merger with

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83 See Ho Myung Moolsan, *supra* note 5.
one of the buyer’s subsidiaries. The litigation spanned multiple years and involved much appellate practice and motions. The Judge has a fair, legitimate interest in resisting unnecessary, protracted litigation, and has an institutional interest in quickly moving cases off his docket. This author contends that this is the true reason behind wildly divergent outcomes in opinions on ex post attempts to exclude the CISG — the greater the urgency in moving cases off the docket and the longer that the particular case appears to require for its resolution, the more likely the Judge would accept tacit waiver as an effective exclusion. This isn’t entirely lazy or reflective of institutional interests, interpretations that reduce adjudication costs improve the ex ante value of the contract to the parties. However, as a matter of positivist law, the CISG was Congress’s attempt to promote international trade through the reduction of adjudication costs and transaction costs accomplished via increased uniformity and predictability. Poor application of the CISG’s standards increases uncertainty, leads to more oft-concluded exclusion of the law deemed by Congress to be cost-reducing, and may lead to strategic delay. Thus while assuming tacit exclusion may end the case and reduce the adjudication costs in the particular dispute, in the long run, this method of interpretation could increase adjudication costs. Moreover, this method of interpretation may not even decrease costs.

84 Id.
85 For statements by United States Judges regarding their desire to move civil cases quickly off their docket See generally OVERLOADED COURTS, NOT ENOUGH JUDGES: THE IMPACT ON REAL PEOPLE People for the American Way (February 2012) available at http://www.pfaw.org/sites/default/files/lower_federal_courts.pdf.
86 Admittedly, this alleged correlative relationship could be more scientifically measured. Still, this author contends it can be inferred from the relative ease with which Courts, bound to decide a case, infer tacit exclusion of the CISG compared with Arbitral Tribunals, paid to decide the case at hand. Compare ICC Arbitration Case No. 7565 of 1994 (Coke case) (refusing to find tacit waiver) available at http://cisgw3.law.pace.edu/cases/947565i1.html with Ho Myung Moolsan, supra note 5.
in the current dispute as it could lead to further disputes and appeals. Thus, the Judge should conclude that the CISG applies even if it is late in the process.

2. Option 1: Dismissal

The next question therefore is how should the Judge proceed? One harsh option discussed by Professor Spagnolo is that where the CISG is not mentioned in argument, “the case can be justifiably dismissed on the basis that any local procedural rules which might have constrained the court to the law argued by counsel are effectively displaced by the CISG. The judge does not go so far as to apply the substantive provisions of the CISG, but pursuant to the court’s obligation to apply the CISG ex officio, takes judicial notice of its existence and effect in displacing the law argued by counsel. Counsel has simply not made its case.” 87 This was the result in a South Australian Supreme Court case where the parties failed to argue the CISG. In Perry Engineering v. Bernold 88 a party, having already attained a default judgment, sought damages and submitted a claim based on the Australian Sale of Goods Act. Amazingly, the Judge rejected the request for damages saying, "The statement of claim has been drawn up on the assumption that the South Australian Sale of Goods Act applies. This seems to me to be fatal to the plaintiff's ability to proceed to judgment." 89

3. Option 2: A Sua Sponte decision applying the CISG

Another option is for the Judge to analyze the case under the CISG sua sponte. Proponents of the adversary system contend that adversary testing is essential to a full

87 Spagnolo, supra note 25.
89 Id.
exploration of the facts necessary to ensure reliable fact-finding.\textsuperscript{90} Moreover, it is true that in the United States we heavily rely on the adversarial process and it is an important aspect of our legal culture. Nevertheless, the United States does permit its Judges to make \textit{sua sponte} decisions.\textsuperscript{91}

Moreover, while the CISG would be the applicable law regardless of such local procedural rules, fortunately, specifically with respect to applying law not argued by the parties, U.S. Federal Rule of Civil Procedure 44.1 states, “In determining foreign law,\textsuperscript{92} the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.”\textsuperscript{93} Thus, the Judge in \textit{Ho Myung Moolsan} could have collected materials on the CISG on his own, and rather than either assume a waiver, dismiss the case, or request a re-argument which would extend the process, he simply could have decided the contract claims based on the CISG. Judges have relied explicitly on FRCP 44.1 to apply foreign law without notifying the parties when they consider it the applicable law.\textsuperscript{94}


\textsuperscript{91} Spagnolo, \textit{supra} note 25 at 217

\textsuperscript{92} The reference to FRCP 44.1 should not be interpreted as a statement that the CISG is foreign law. It is well established that the CISG forms part of New York law, French law, Swiss law etc. See \textit{Valero Marketing supra} note 26; \textit{Société Ecole et Bureau v. Société Federal Trait supra} note 33 (“substantive French law on International sales of goods is the CISG”); ICC Arbitration Case, \textit{supra} note 86 (“swiss law includes the CISG”).

\textsuperscript{93} Federal Rule of Civil Procedure 44.1, text and notes available at https://www.law.cornell.edu/rules/frcp/rule_44.1

\textsuperscript{94} See Jinro America, Inc. v. Secure Invs., Inc., C.A.9th, 2001, 266 F.3d 993 (district court did not err by failing to notify parties that it was considering outside materials to determine Korean law, especially considering that parties did not offer any materials of their own); \textit{In re} Minnesota Kicks, Inc., 48 B.R. 93, 100 (Bankr. D. Minn. 1985) (The judge, in rejecting the trustee’s argument that Rule 44.1 required notice from a party rather than the bench said, “I do not think this precludes me from raising the question nor
4. Option 3: Request Re-argument

In a scenario where the issue is more complicated, a Judge may seek a different option and request the aid of counsel in resolving the contract claims. Similarly to the solution proposed above, American Judges already have the ability to request further clarification or submissions from counsel with respect to domestic law and Federal Rule of Civil Procedure 44.1 already allows U.S. Judges to request additional materials on foreign laws.\(^95\) Judges have explicitly relied on FRCP 44.1 to do so.\(^96\)

Now while it could extend the process to request counsel to re-brief the contract issues under the CISG, in the long run, Congress’s theory in adopting the CISG is that predictable and uniform application of the Convention promotes international trade and reduces transaction costs. Requesting parties to re-argue under the CISG not only gives the CISG effect similarly to the above two solutions, but it may lead to increased awareness of the CISG because the parties must specifically analyze the issue under the CISG. On the other hand, a policy of requesting re-argument on the CISG does encourage ignorance among lawyers by reducing the penalty for unawareness. American lawyers are

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\(^95\) Federal Rule of Civil Procedure 44.1, text and notes available at https://www.law.cornell.edu/rules/frcp/rule_44.1 (“The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail. On the other hand, the court is free to insist on a complete presentation by counsel.”)

\(^96\) Unitas Containers Ltd. v. Oilnet Ltd., 848 F. Supp. 2d 1358 (S.D. Fla. 2012) (“The Court has determined that additional briefing that includes reference to sources on English law is necessary.”) available at https://casetext.com/case/unitas-containers-ltd-v-oilnet-ltd
already hopelessly ignorant of the CISG. Still, this solution does promote the CISG more than flippantly assuming tacit waiver.

While neither of the three options are as easy for the Judge as assuming a tacit waiver, aside from concluding the parties agreed to a valid exclusion under Article 6, these three options are the only way to give legal effect to the CISG. While I offer normative reasons why the CISG should be applied, as a matter of American Constitutional law and customary international legal obligations, this author argues that it is clear that the CISG is the correct applicable law in these circumstances.

F. THWARTING THE STRATEGIC LITIGANT

1. Defining the Problem

Aside from the harsh proposal that claims not invoking the CISG should be dismissed, the other two options would have an unintended consequence. The difficulty is that this creates an opportunity for a litigant who finds the U.C.C. to be slightly more favorable or neutral relative to the CISG. For she can make her case under the U.C.C. until it becomes apparent she will lose and only then invoke the applicability of the CISG so as to get “a second bite at the apple.” Additionally, a party doomed to defeat and resigned to dilatory tactics may opt to not raise the CISG until the latest possible moment with the hopes of instigating a re-argument and an extension of the dispute. This was the concern of the Judge in Rienzi & Sons, Inc. v. N. Puglisi & F. Industria Paste Alientari. There, the Judge concluded that “had plaintiff intended to take advantage of the CISG it would have referenced the CISG at some point prior to opposition to summary judgment. This is particularly true since the CISG does not have a parole evidence rule or Statute of

97 P.L. Fitzgerald, supra note 9.
98 Rienzi & Sons, supra note 11.
Frauds, which affects the outcome if this case. To change course now, after the defendants have relied on New York law through the close of discovery and up until opposition of the summary judgment motion, would be prejudicial to defendants. Defendants cannot be expected to alter course on the eve of trial because plaintiff now realizes that a different law is more favorable to its position. That is gamesmanship at its worst.”

Thus, if we maintain the strict standard used in ex ante analysis for the ex post litigation conduct, it may be necessary to find a way to prevent strategic behavior by a lawyer seeking to take advantage of a Judge and opposing party that are unaware of the CISG. This is especially so because local procedural concepts such as “undue prejudice to the opposing side” are displaced by the CISG when it has provisions on point. Here, the local court, as a matter of international law, cannot rely on its internal rules to ignore international obligations like CISG Article 1(1)(a) and thus the Court cannot rely on “undue prejudice to the defendant” to ignore the CISG.

As stated, the proposed solution is to implore Judges to apply the CISG when it applicable to honor treaty obligations and promote predictability and uniformity in International sales law, even if this does mean increasing the transaction and adjudication costs of that particular contract. This can best be done by affirmatively asking the parties if they are aware the CISG is applicable early in the process and asking whether they have somehow agreed to exclude it. When the parties fail to argue the CISG, if the Judge realizes it is prima facie applicable, she should decide the case sua sponte or request re-argument.

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99 Id.
However, to avoid this risk of gamesmanship that the *Rienzi* decision seems bent on repressing, as well as to give Judicial recognition to the CISG’s natural applicability in these international cases, a proposed corollary to the above solution is that Judges could rely on litigation conduct as acquiescing to an amendment to the contract within the meaning of Arts 29 (modification) and 14-24 (formation) that excludes the CISG pursuant to Art 6.

2. Proposed Solution

To be able to satisfactorily exclude the CISG when the strategic litigant seeks to apply it, the Judge must have determined that the strategic party’s conduct evidences an intent to exclude the CISG in favor of local sales law provisions. According to Article 8(2), where this intent is not known, it is to be interpreted according to the intent that a reasonable person in the same circumstances as the other party would have had.100 If a reasonable lawyer heard the other side refer to specific local sales law codes in making their case, a reasonable lawyer who is aware of the natural applicability of the CISG would interpret those statements as evidencing an intent to exclude.101 Now it is true, that the nonstrategic lawyer in this case may in fact have been unaware of the CISG, and given its obscurity this is actually quite likely, thus in reality it is possible this litigant was not aware the other side’s statements indicated an intent to exclude because they couldn’t have known what was to be excluded, therefore the reference to local provisions would not be interpreted as having the intent to exclude the CISG. However, given that this defendant is arguing against application and for exclusion, it will never argue that it

100 CISG Article 8(2) available at [http://www.cisg.law.pace.edu/cisg/text/e-text-08.html](http://www.cisg.law.pace.edu/cisg/text/e-text-08.html).
101 It is a fair counterpoint to say that a reasonable lawyer who understands the CISG is applicable and sees his opponent argue local sales law may merely realize his opponent has an assymetrical lack of awareness of the CISG.
lacked awareness of the CISG but rather that it always meant to exclude it. On the other hand, the allegedly strategic lawyer has the difficulty of convincing the Judge that despite what the Judge has deemed to be strategic behavior, it was not aware of what it is accused of intending to exclude, and lacking that awareness of the CISG, it also lacks the requisite intent to be bound by the exclusion. Here, however, if the Judge has already come to the conclusion that opportunistic and gaming behavior is occurring, it must necessarily follow that this Judge considers the strategic lawyer aware of the CISG. Moreover, this lawyer could not have been unaware that the other party’s statements referring to specific local sales of goods codes in its briefs and arguments were an intention to apply a law different from that which the strategic litigant knew was naturally applicable — the CISG. Thus, while Judges are cautioned against too readily finding tacit waiver of the CISG, a truly strategic actor’s conduct would have the requisite awareness of the CISG to fairly state that it could not have been unaware that the other party’s statements indicated an intent to apply a different law and is thus an exclusion of the CISG.

This is limited by the fact that while the “strategic litigant” cannot argue it was not aware of the CISG, the circumstances of the case may make it difficult for the other side to credibly argue that it was aware of the CISG (such as where the CISG would have been beneficial but they never brought it up). Still, this nonstrategic litigant would have no reason to argue otherwise and if a litigant were being strategic and seeking to switch laws and cause delay, it is likely that the other side would have some credible reason for arguing the case the way it did given its ultimate success.

3. Is the Behavior Strategic?
A difficulty then arises as to how exactly a Judge can be confident that she is facing strategic behavior as opposed to a litigant genuinely unaware of the CISG who fortuitously realizes a) they have a second bite at the apple and b) a reason to delay the resolution of the case. Below, I suggest factors for weighing the inferences in determining whether the behavior is strategic for both scenarios.

a) The “second bite at the apple”

One scenario where it is highly unlikely that the litigant is being strategic is one where the CISG would cement a positive outcome for the litigant, but nevertheless she argues local sales law. In the United States cases turning on the parol evidence rule or the statute of frauds could provide a litigant with a rock-solid defense to an oral modification allegation or terms outside the final written expression. In this scenario, it is unlikely that a litigant would argue the case first under the U.C.C., and only if it becomes apparent that things have gone poorly argue the CISG, because the CISG presents a clear path to victory. Thus, it is fair to say that the better the litigant’s case under the CISG, the less likely that litigant argued the local sales law out of a strategic motive and more likely the litigant was genuinely unaware. This approach does mean however, regardless of how one feels about the result, that when the alleged strategic litigant is most interested in seeking to apply the CISG, the CISG is more likely to be applied.

Another factor a Judge could consider is the timing of discovery of evidence, and whether new revelations related to the advantages and disadvantages of the

102 Compare CISG Article 8(3) and 11 with U.C.C 2-201 and U.C.C. 2-202
103 The Judge in Ho Myung Moolsan did seem to think it significant the request came after the close of discovery. However, a fair reading suggests he was most concerned with the length of time that had passed over the course of discovery and not the coinciding of events, which is the crucial element in the inquiry.
applicable law. The Judge could compare the timing to the lawyers’ motion strategy and fairly conclude strategic behavior is occurring.\textsuperscript{104}

\textbf{b) Strategic Delay}

Nevertheless it is possible that the strategy was actually geared toward causing delay. Factors possibly relevant in that inquiry are stated below:

First, the strength of the opponent’s case is relevant in that the greater the strength of the case, the more likely behavior is motivated by a desire to attain a strategic delay. Second, a Judge can look at whether the litigant has undertaken other obviously dilatory measures. Third, the Judge can look towards the cash-flow nature of the business and whether it may lead the strategic party to seek to avoid paying the award for a time. Fourth, the Judge can weigh whether the strategic party seeks to use the threat of damaged cash flow interests of the nonstrategic party and the threat of delay to affect a settlement claim.

\textbf{4. Weaknesses in the Approach}

The proposed path for thwarting the strategic litigant — highlighting their necessary awareness of the CISG to infer an intent to exclude — has drawbacks. First, while there clearly is awareness of the CISG by one party, and ultimately the intention by the other party to exclude the CISG, the exact requirements for exclusion may not be met. While the strategic litigant delays raising the CISG, and watches opposing counsel

\textsuperscript{104} This author acknowledges the possibility, for example, that discovery of proof of an oral modification via phone record could lead one to research oral modifications under the U.C.C. and the unaware lawyer may see references to the CISG and realize it is applicable. As a matter of comparing inferences however, I consider the other scenario more likely.
bumble through local sales law and thus has the requisite awareness of the CISG for exclusion, and while the strategic litigant has the intent to mislead the other party, the strategic litigant never actually has the intent to be bound by the arguments they raise; they are merely delaying and therefore never ultimately intended to exclude. On the other hand, Article 8(3) does say that “all relevant circumstances” can be taken into account in determining intent. Thus, whatever empirical facts are leading the Judge to conclude that strategic behavior is occurring could help to infer the requisite intent to exclude.

Another reason for not adopting the proposed path for thwarting the strategic litigant is that the entire enterprise may not be desirable in the first place. The CISG creates opportunities for strategic behavior in other places and this doesn’t lead to interpretations that conflict with the CISG’s principles and provisions.

\[105\] UNCITRAL Commentary on the 1978 Draft Convention Article 12 (CISG Article 14) “In order for a proposal to constitute an offer it must indicate the intention of the offeror to be bound in the case of acceptance.” available at http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-14.html


\[107\] See Generally Article 16, Article 17 and Article 18. Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance. An acceptance is effective the moment it reaches the offeror and an offer is terminated once rejection reaches the offeror. Thus, a buyer can accept a contract using snail mail, spend the next few days or weeks speculating on the price, and if the Contract becomes unfavorable, call before the acceptance reaches the offeror and reject it immediately over the phone. The buyer gets the benefit of the late rejection but is able to lock the seller into the original offer as of the time the letter is sent out because the acceptance is effective, regardless of revocation of the offer, as of the moment of dispatch.
Another reason to hesitate is that the path rewards ignorance. Indeed, the truly oblivious lawyer stands to benefit the most from application of the framework. Where the exclusion would work an obvious disadvantage, a lawyer raising the CISG late in the process could credibly argue that they never intended to exclude the CISG. Thus, the solution to a problem created by widespread ignorance is to reward those who are most obviously ignorant and punish those strategic lawyers who have the most to gain by having an asymmetrical advantage with respect to knowledge of the CISG. Given that under this framework, lawyers obviously unaware of the CISG would have the most likely chance of remedying their error and successfully invoking the CISG at a late stage, this framework may rescue these lawyers from inevitable professional malpractice suits. Thus, with respect to awareness of the CISG, this path may lessen the beneficial effect of professional malpractice suits on the American bar.\textsuperscript{108}

Nevertheless, it may be best to provide American Judges a path for thwarting the strategic litigant within the CISG, rather than permitting the \textit{Ho Myung Moolsan} and \textit{Rienzi} line of cases that too readily exclude the CISG to expand. Overall, this author contends that this path best promotes the applicability of the Convention and predictability and uniformity in its application. Thus it is therefore the interpretation to be preferred under CISG Article 7(1).

\textbf{G. NORMATIVE REASONS TO APPLY THE CISG \textit{EX OFFICIO}}

Even for an American Judge that accepts that as a matter of technical black letter international law and customary international obligations, the CISG should apply \textit{ex officio}, he may go on to ask: “Why bother?”

\textsuperscript{108} For an account of malpractice suits and the effect it could have on promoting the CISG \textit{See} U.G. Schroeter, \textit{supra} note 60 at 29.
The Judge may offer the following reasons for being apathetic regarding the CISG. First, American businessmen often exclude the CISG, so perhaps its promotion is not really desirable. Second, a Judge could fairly point to the myriad similarities between the U.C.C. and the CISG and conclude that this much legal legwork is unwarranted given that it ultimately may barely affect the outcome. Third, a Judge may fairly say that everyone gets to hire their own lawyer, and if your lawyers don’t argue the right law, nothing should rescue you.

Each of these points could be criticized. First, scholarly work suggests that exclusion is usually due to ignorance, not due to a preference for the Uniform Commercial Code. Moreover, even if the CISG were to be considered undesirable from a business perspective, the future will undoubtedly involve more international conventions, more international sales transactions, and more countries ratifying the CISG. From an efficiency and effectiveness perspective, international agreements will become more important in our increasingly interconnected world. Regardless of one’s views on the effectiveness of the CISG, one would hope American law could comfortably accept that the ratification of international conventions by Congress would promote positive outcomes. It is not for American Judges to decide, but Congress, whether

109 Koehler & Guo, 20 Pace Int’l L. Rev. 45, 50 (2008). (“The past surveys among legal practitioners revealed a number of reasons for an exclusion of the CISG in contracts drafted for their clients. That the CISG “is generally not widely known” was mentioned in 2004–7 by 51.5% of the German and 54.2% of the U.S.-American lawyers.”).

application of international conventions is in the national interest.\textsuperscript{111} Additionally, the United States already has a reputation for ignoring autonomous interpretations\textsuperscript{112} of the CISG and for being ignorant of its existence.\textsuperscript{113} This evidence of non-enforcement of international conventions actually weakens the United States’ delegates’ negotiating positions in international agreements. Where foreign delegates must not only factor in the costs of a concession, but also the risk of costs inherent in the eventual non-enforcement of the ultimate agreement, they are either more likely to not conclude international agreements with the Untied States, or to request greater concessions than otherwise.

Similarly, the idea that non-enforcement is more acceptable where the U.C.C. and the CISG are similar is contrary to national interest. International conventions that adopt concepts from our legal system should be enforced with at least equal rigor to those international conventions that impose wholly foreign concepts on American courts. Moreover, this theory for non-enforcement also weakens the Untied States’ ability to incorporate its own legal concepts into international agreements because foreign delegates would rightly conclude that any provisions that shadowed American legal concepts would be ignored inside the United States and not interpreted autonomously. Moreover, there are, in fact, many key differences between the CISG and the U.C.C. The

\textsuperscript{111} See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987)(“the question of whether local law is displaced by treaty law is one of congressional intent. The purpose of Congress is the ultimate touchstone.”)
\textsuperscript{112} Franco Ferrari \textit{Homeward Trend and Lex Forism Despite Uniform Sales Law} 13 VINDOBONA JOURNAL OF INTERNATIONAL COMMERCIAL LAW & ARBITRATION (1/2009) 15-42 (“The homeward trend is discernible mainly in the United States. There, unfortunately, courts seem not only to rely on it as regards specific issues, but also as a matter of principle.”); Salama, S., (2006) 38 U. MIAMI INTER-AM. L. REV. 225, at 225, (“[i]n practice it has been found that U.S. courts rely on the "homeward trend" more often than other judges in interpreting the CISG.”).
\textsuperscript{113} Fitzgerald \textit{supra} note 9; Spagnolo \textit{supra} note 9 at 137.
The starkest difference is that oral contracts and modifications are permitted under the CISG, while all contracts must be written under the U.C.C.\textsuperscript{114} Another difference is that parol evidence is admissible under the CISG, but not the U.C.C.\textsuperscript{115}

Finally, a Judge should not overly rely on the parties’ ability to choose counsel as a ground for non-enforcement. A foreign litigant, as in \textit{Ho Myung Moolsan}, likely relies on American lawyers to argue the case in an American forum. While the litigant selects her own lawyer, the foreign litigant should be able to over time, internalize the applicable law into her business practices, and when disputes arise, confidently rely on foreigners in a foreign forum to fairly adjudicate her dispute taking into account the international obligations that the foreign nation owes her home nation. While it would be fair to punish foreign litigants in the hopes that their malpractice suits against American lawyers will increase awareness of the CISG, it is unfair to expect the average foreign litigant to correctly perceive when their lawyer has made a strategic error they could rely upon in a malpractice suit to be conducted according to local State malpractice rules. Thus, a foreign businessman, like in \textit{Rienzi}, should be able to be confident that parol evidence and oral modifications of international sales contracts will be enforced in any Contracting State. They should not, merely by the misfortune of selecting a lawyer who didn’t realize that the case would have been easily won under the CISG, be deprived of this confidence. This is especially so when, often, these foreigners reside in jurisdictions that can be counted on to give effect to international agreements.

\textbf{IV. Conclusion}

\textsuperscript{114} Compare CISG Article 11 with U.C.C. 2-201
\textsuperscript{115} Compare CISG Article 8(3) with U.C.C 2-202
Thus, American Judges, if they care about American interests, should follow clear international law and apply the CISG *ex officio*. This *ex officio* application, and the resulting CISG standards it incorporates into the dispute, likely preclude any exclusion of the CISG by mere unawareness or silence on the part of counsel. Thus, the *Ho Myung Moolsan* and *Rienzi* line of cases should no longer be relied upon and that line of precedent permitted to die.