

# COMMENTS

## THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (“CISG”) AND *GENEVA PHARMACEUTICALS TECHNOLOGY CORP. V. BARR LABORATORIES, INC./ APOTHECON, INC. V. BARR LABORATORIES, INC.*: THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK’S APPLICATION AND INTERPRETATION OF THE SCOPE OF THE CISG

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## I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods ("CISG") was adopted on April 11, 1980, and ratified by the United States Senate in 1986. The CISG entered into force between the United States and other States' Parties on January 1, 1988. The CISG has been used to settle thousands of contract disputes around the world by various jurisdictions. However, United States' courts have interpreted and applied the CISG in only a limited number of instances.

In *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc. et al. / Apothecan, Inc. v. Barr Laboratories, Inc. et al.* ("Geneva"),<sup>1</sup> the U.S. District Court for the Southern District of New York interpreted and defined the limited scope of the CISG. The district court's refusal to apply the CISG to certain aspects of the contract between the parties, despite the overall international character of the agreement and the intention of the CISG to govern and ensure the observance of good faith in international trade, is contrary to the intent of the CISG. Part II of this note traces the historical and statutory background of the CISG, including legislative history of the Articles' relevant to the *Geneva* decision. Part III reviews the facts, procedural history, reasoning, and holding of the district court's ruling in *Geneva*, while Part IV examines the district court's correct application of the CISG regarding certain aspects of the contract and its misguided application of New Jersey domestic law with respect to other issues of the contract. Finally, Part V asserts that the district court's application of New Jersey domestic law to issues of a purely international nature completely undermines the significance of the CISG. Furthermore, if American courts follow the precedent set by the district court in *Geneva* and continue to rule in this manner, they will effectively subvert and deem the CISG ineffective as governing law in international disputes.

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<sup>1</sup> 201 F. Supp. 2d 236 (S.D.N.Y. 2002) [hereinafter *Geneva*].

## II. HISTORICAL AND STATUTORY BACKGROUND OF THE CISG

A. *History of the CISG*

On April 11, 1980, a diplomatic conference in Vienna of sixty-two states unanimously approved the CISG, a convention providing uniform law for international sales of goods.<sup>2</sup> The CISG “governs both the formation of many international sales contracts and the rights and obligations of parties to these contracts.”<sup>3</sup> There are at least two areas of sales law in each of the Contracting States that have ratified the Convention: domestic sales law and the CISG.<sup>4</sup> Since sixty-two states have adopted the CISG, its text may be becoming “the basis for a modern *lex mercatoria*,<sup>5</sup> which will make it less necessary to consult uncertain conflict-of-law rules and to apply the domestic sales law of foreign states.”<sup>6</sup> “The CISG does not preempt domestic laws that outlaw certain transactions or invalidate proscribed contracts and oppressive terms; outside this narrow area, the CISG protects the contractual arrangements made by the parties.”<sup>7</sup> Moreover, international parties have the option of excluding the CISG from their contract, resulting in the terms of their contract overcoming any conflicting uniform law provision.<sup>8</sup> The CISG’s rules provide answers to issues that the parties failed to address by contract, similar to the supporting role performed by domestic sales rules such as the United States’ Uniform Commercial Code.<sup>9</sup>

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<sup>2</sup> See INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1-2 (Nina M. Galston & Hans Smit, eds., 1984) [hereinafter Galston].

<sup>3</sup> *Id.* See also United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18, reprinted in [1980] XI UNCITRAL Yearbook 149, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterX/treaty17.asp> [hereinafter CISG].

<sup>4</sup> See *id.*

<sup>5</sup> *Lex mercatoria* (Latin for “mercantile law”) is a system of customary law that developed in Europe during the Middle Ages and regulated the dealings of mariners and merchants in all the commercial countries of the world until the 17th century. Many of the law merchant’s principles came to be incorporated into the common law, which in turn formed the basis of the Uniform Commercial Code. See BLACK’S LAW DICTIONARY 715 (7th ed. 2000).

<sup>6</sup> Galston, *supra* note 2, at 1-2.

<sup>7</sup> JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 3 (Kluwer Law Int’l 1999).

<sup>8</sup> See *id.* at 3-4.

<sup>9</sup> See *id.* at 4.

The "power of agreement" is dealt with by the CISG in two significant ways.<sup>10</sup> "First, the CISG itself was produced by agreement."<sup>11</sup> Individual States from a cross-section of world economies reached an agreement and established, as Contracting States, that they would use the Convention's rules instead of their own domestic laws with respect to international sales contracts.<sup>12</sup> However, buyers and sellers still retain the autonomy to determine the contractual language that best suits their needs.<sup>13</sup> Domestic trade can be constrained or barred by the individual governments of some countries.<sup>14</sup> Nevertheless, "with the collapse of imperial and economic empires, commercial enterprises cannot compel parties in other countries to trade with them and, with the development of international competition, cannot dictate contract terms."<sup>15</sup> In order to thrive, international trade relies on agreement between the parties, whereas domestic trade may be managed by national governments.<sup>16</sup> Therefore, it is necessary to examine the developmental and historical background of the CISG in order to comprehend its importance in the international sales community.

For over fifty years, sales law experts attempted to formulate uniform legal rules governing international sales contracts.<sup>17</sup> The adoption of the 1980 Vienna Convention marked the conclusion of those efforts.<sup>18</sup> The development of legal rules governing international sales contracts can be traced back to three stages.<sup>19</sup> In the 1930s, the Institute for the Unification of Private Law assembled a group of sales law experts from Europe and assigned them the task of preparing a draft text of uniform sales rules.<sup>20</sup> Several draft texts were subsequently

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<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See *id.* A list of CISG Contracting States is available at <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>. (last visited Feb. 4, 2003).

<sup>13</sup> See HONNOLD, *supra* note 7, at 4.

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> See Galston, *supra* note 2, at 1-3.

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

<sup>20</sup> See *id.*

prepared.<sup>21</sup> Based on these draft texts, “a number of basic policy decisions on the scope and content of uniform sales rules survive in the 1980 Convention.”<sup>22</sup> The second stage honed earlier texts and culminated with the adoption of uniform sales laws at the 1964 Conference at The Hague.<sup>23</sup> The final stage began due to the narrow international recognition of the 1964 uniform laws.<sup>24</sup> The newly established U.N. Commission on International Trade Law was given the task of studying the reasons for the narrow recognition of the 1964 uniform laws, this gave rise to the drafting of the 1980 Vienna Convention.<sup>25</sup>

The origin of the Vienna Convention begins with the April 29, 1930 appointment of a working group of experts by the International Institute for the Unification of Private Law (“UNIDROIT”) to prepare a uniform international sales law.<sup>26</sup> The working group was made up of representatives from France, Germany, England, and Scandinavia – representatives from the “four principal systems of law which are concerned in any scheme for unification, namely, the Anglo-American, the Latin, the Germanic, and the Scandinavian systems.”<sup>27</sup> A first draft of a Uniform International Law of Sales was completed in 1935 and subsequently distributed to various governments for their remarks by the League of Nations.<sup>28</sup> The notion of a unified law of international sales was internationally supported and most governments approved the 1935 draft text; however, the businessmen of several countries suggested to their respective governments that the unification project was unnecessary.<sup>29</sup> Based on the comments from interested governments,

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<sup>21</sup> *See id.*

<sup>22</sup> *See Galston, supra note 2, at 1-3.*

<sup>23</sup> *See id.*

<sup>24</sup> *See id.* at 1-4.

<sup>25</sup> *See id.*

<sup>26</sup> *See id.*

<sup>27</sup> Galston, *supra note 2, at 1-5.*

<sup>28</sup> *See id.*

<sup>29</sup> *See id.* In one country, opponents of the unification project contended that the draft deviated too much from their own law, while their colleagues from another country stated that the changes in existing law, which the act would introduce, would be too slight to justify the inconveniences involved in its adoption. At the time of completion of the draft in 1935, there had already been a protest against the unification of sales law in one country because the matter had recently been dealt with in a new code, and in another because the matter was going to be regulated soon in a new code and was difficult enough without considering the

the committee prepared a second draft that became available just as World War II commenced, making it impossible to continue collaboration.<sup>30</sup> Despite the war halting this collaboration, one can trace many of the basic decisions about the scope of rules governing international sales contracts to these early texts. In 1950, the governing body of UNIDROIT persuaded the government of the Netherlands to convoke a conference to the previously drafted texts of the mid to late 1930s. At this conference, participants appointed a new special commission of experts from Western European countries to prepare a revised text of the 1939 draft.<sup>31</sup>

In 1964, the government of the Netherlands assembled another international diplomatic conference at The Hague to consider the reports submitted by the special commission and UNIDROIT.<sup>32</sup> Twenty-eight nations sent delegations to the April 1964 conference, mostly from Western Europe.<sup>33</sup> However, the U.S. and several Eastern European countries were officially represented at the conference.<sup>34</sup> After three weeks, the conference adopted two conventions: [T]he Uniform Law on the International Sale of Goods ("ULIS"); and the Uniform Law on the Formation of Contracts for the International Sale of Goods ("ULF").<sup>35</sup> However, it soon became apparent that the ULIS and ULF would not be widely adopted.<sup>36</sup> There were complaints about the sphere of the laws' applications, the abstractness of several key concepts, and the failure to consider the interests of many third world and socialist countries that had not participated in the 1964 conference.<sup>37</sup> United States commentators were finally asked for their contributions to an inter-

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draft. Furthermore, it has also been articulated that the objections to the unification project were rooted in a tendency by businessmen to preserve tradition and legal continuity of laws, rather than move expeditiously toward universal jurisprudence and the unification of sales law. See Ernst Rabel, *A Draft of an International Law of Sales*, 5 U. CHI. L. REV. 543, 563 (1938).

<sup>30</sup> See *id.*

<sup>31</sup> See *id.* at 1-8.

<sup>32</sup> See Galston, *supra* note 2, at 1-9.

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> See *id.* at 1-12.

<sup>37</sup> See *id.* at 1-12 - 1-13.

national, unified sales law after not being formally invited to participate in the pre-1964 drafting process.<sup>38</sup>

The Commission on International Trade Law (“UNCITRAL”) was established by the U.N. General Assembly in 1966. Its task was to promote the “progressive harmonization and unification of the law of international trade.”<sup>39</sup> Initially, a Working Group of fourteen members was appointed by the Commission; however, a fifteenth member was later added.<sup>40</sup> The principal responsibility of the Working Group was to “determine whether the 1964 uniform laws could be modified to increase their acceptability, or whether completely new texts should be drafted.”<sup>41</sup> Subsequently, it was decided by the Working Group that a new draft text based on the ULIS and ULF would provide the utmost prospect for increased acceptability of a uniform sales law.<sup>42</sup> Between 1970 and 1978, the group met a total of nine times: seven times to consider the text of an improved sales convention and two times to draft rules governing the formation of sales contracts.<sup>43</sup> A draft sales text was submitted to UNCITRAL in 1977.<sup>44</sup> In 1978, the group proffered a draft formation text to the Commission.<sup>45</sup> UNCITRAL reviewed the texts and decided to consolidate them into one volume.<sup>46</sup> Additionally, the Commission recommended to the General Assembly that it consider the 1978 UNCITRAL text via a diplomatic conference of interested nations and organizations.<sup>47</sup> Based on the Commission’s recommendation, a diplomatic conference was organized by the General Assembly at UNCITRAL’s headquarters in Vienna from March to April 1980.<sup>48</sup> All sectors of the world community were represented at the Vienna Conference, which included delegations from sixty-

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<sup>38</sup> See *id.* at 1-13.

<sup>39</sup> See United Nations General Assembly Resolution 2205 (XXI), available at <http://www.uncitral.org/en-main.htm>.

<sup>40</sup> See Galston, *supra* note 2, at 1-13.

<sup>41</sup> *Id.*

<sup>42</sup> See *id.*

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* at 1-14.

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

<sup>47</sup> See Galston, *supra* note 2, at 1-14.

<sup>48</sup> See *id.*

two nations and eight international organizations.<sup>49</sup> After considerable debate, the UNCITRAL provisions were adopted with relatively few amendments.<sup>50</sup> About 300 amendments were submitted; however, few were incorporated into the final text.<sup>51</sup> Despite several abstentions, the CISG was adopted without a vote against it on April 11, 1980.<sup>52</sup>

### B. *Statutory Background/Legislative History of Relevant CISG Articles*

For the purpose of this note, it is essential to explore the legislative history of the pertinent CISG articles applied by the district court in *Geneva*, namely Articles 4, 8, 11, 14(1), 16(2)(b), and 18(3). While the proceedings at the 1980 Vienna Diplomatic Conference represent an important component of the legislative history of the Convention, much more significant legislative history preceded the Conference. These sources include the Secretariat Commentary on the 1978 UNCITRAL Draft Convention.<sup>53</sup> The Secretariat Commentary is on the 1978 draft of the CISG, not the 1980 official text, which renumbered most of the articles of the 1978 draft.<sup>54</sup> The Secretariat Commentary, while not an official commentary, is the closest counterpart to an official commentary on the CISG and is perhaps the most authoritative source one can cite.<sup>55</sup> The reasons for priority of attention to the Secretariat Commentary are:

“(1) it summarizes and explains relevant conclusions derived from the legislative history of the Convention prior to the Vienna Conference; (2) it was used extensively by the delegates to the Vienna Conference as a guide to the meaning of the provisions of the 1978 draft they considered; (3) based on this Secretariat Commentary and their further deliberations, in most cases the delegates ap-

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<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

<sup>51</sup> See FRITZ ENDERLEIN & DIETRICH MASKOW, *INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS 3* (Oceana Publications, 1992).

<sup>52</sup> See *id.*

<sup>53</sup> See *Legislative History – Summary of UNCITRAL Legislative History of the CISG* at <http://www.cisg.law.pace.edu/cisg/linkd.html> (last visited Oct. 30, 2002).

<sup>54</sup> See *Guide to CISG Articles* at <http://www.cisg.law.pace.edu>.

<sup>55</sup> See *Legislative History – 1980 Vienna Diplomatic Conference*, at <http://www.cisg.law.pace.edu> (last visited Oct. 5, 2002).

proved these provisions of the 1978 draft either verbatim or substantially as written; (4) as an official document prepared pursuant to a resolution of the United Nations General Assembly, the Secretariat Commentary is the closest available equivalent to an Official Commentary on the Convention; and (5) like the Convention, it is obvious from its source and contents that the Secretariat Commentary is not designed to favor legal interpretations prevalent in any one legal system over another.”<sup>56</sup>

Other sources that will be used to determine the legislative history of relevant CISG articles are the UNCITRAL proceedings during the ten years that preceded the 1980 Vienna Diplomatic Conference,<sup>57</sup> Official Comments on Articles of the UNIDROIT Principles, and antecedent uniform law legislation,<sup>58</sup> including the ULIS<sup>59</sup> and the ULF.<sup>60</sup>

CISG Article 4 provides that the “convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such contract.”<sup>61</sup> It further states that the Convention “is not concerned with the validity of the contract, or any of its provisions, or of any usage.”<sup>62</sup> According to the Secretariat Commentary, the scope of the Convention is limited to governing the formation of the contract of sale, and the rights and obligations of the seller and the buyer arising from a contract of sale, unless otherwise expressly provided for in the Convention.<sup>63</sup> Article 4(a) clearly points to CISG Article 11 for further explanation.

CISG Article 11 states that, “a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form.”<sup>64</sup> The Secretariat Commentary focuses on the elimination of writing as evidence of a contract, due in part to the fact that many contracts for the international sale of goods are presently concluded by various modern modes

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<sup>56</sup> *CISG Legislative History Guidance*, at <http://www.cisg.law.pace.edu/cisg/text/roadmap/RoadmapL-14.html> (last visited Oct. 30, 2002).

<sup>57</sup> *See Guide to CISG Articles*, *supra* note 54.

<sup>58</sup> *See id.*

<sup>59</sup> *See id.*

<sup>60</sup> *See id.*

<sup>61</sup> CISG, *supra* note 3, art. 4.

<sup>62</sup> CISG, *supra* note 3, art. 4(a).

<sup>63</sup> *See Guide to CISG Article 4 – Secretariat Commentary*, at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-04.html>.

<sup>64</sup> CISG, *supra* note 3, art. 11.

of communication.<sup>65</sup> However, the official comments to Article 1.2 of the UNIDROIT Principles (which also state that form is not required) assert that “although the article mentions only the requirement of writing, it may be extended to exclude other requirements as to form.”<sup>66</sup> Furthermore, the official comment to UNIDROIT Principle Article 3.2, states that “a contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirements;” confirms that there is no need for consideration.<sup>67</sup> In the U.S. and other common law countries, “consideration is seen as a requirement for the validity, enforceability, modification, or termination of a contract.”<sup>68</sup> However, in a commercial setting, obligations are assumed by both parties to a contract, thus relegating the requirement of consideration to limited practical significance.<sup>69</sup> Furthermore, it is for this reason that “CISG Article 29(1) dispenses with the requirement of consideration in relation to the modification and termination by the parties of contracts for the international sale of goods.”<sup>70</sup> Seemingly, Article 11 “extends this approach to the conclusion, modification and termination of international commercial contracts, which can only bring about greater certainty and reduce litigation.”<sup>71</sup>

CISG Articles 14 and 18(3) are relevant to the offer and acceptance aspects of international goods contract formation. CISG Article 14(1) provides that “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.”<sup>72</sup> Furthermore, the Article states, “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.”<sup>73</sup> The Article itself seems to adequately define “sufficiently definite;” how-

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<sup>65</sup> See Guide to CISG Article 11 – Secretariat Commentary, at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-11.html>.

<sup>66</sup> *Use of the UNIDROIT Principles to Help Interpret CISG Article 11*, at <http://www.cisg.law.pace.edu/cisg/principles/uni11.html>.

<sup>67</sup> See *id.*

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

<sup>70</sup> See *id.*

<sup>71</sup> See *id.*

<sup>72</sup> CISG, *supra* note 3, art. 14(1).

<sup>73</sup> *Id.*

ever, the “indication of an intention to be bound” is quite ambiguous. The Secretariat Commentary states that, “since there are no particular words that must be used to indicate such an intention, it may sometimes require a careful examination of the ‘offer’ in order to determine whether such an intention existed.”<sup>74</sup> Moreover, the Secretariat commentary pronounces that, “if no single communication was labeled by the parties as an ‘offer’ or as an ‘acceptance,’ the requisite intention to be bound will be established in accordance with the rules of interpretation contained in CISG Article 8.”<sup>75</sup>

CISG Article 8 outlines the rules of interpretation regarding the intent of a party to be bound to a contract.<sup>76</sup> Intent is to be determined by statements made and other conduct of a party “where the other party knew or could not have been unaware what that intent was.”<sup>77</sup> Additionally, Article 8 provides a reasonable person test to be applied when seeking to resolve the intent of a party. “Statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.”<sup>78</sup> Moreover, Article 8(2) explains, “statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.”<sup>79</sup> Finally, the Article states that “due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.”<sup>80</sup> The Article 8(3) proviso that states, “. . . due consideration must be given to all relevant circumstances of the case,” which then goes on to enumerate some of the possible relevant circumstances, has been debated as to the exclusivity of the list of circumstances.<sup>81</sup> However, the Secreta-

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<sup>74</sup> CISG Article 14 - Secretariat Commentary, at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-14.html> [last visited Oct. 5, 2002].

<sup>75</sup> *See id.*

<sup>76</sup> CISG Article 8- Secretariat Commentary, at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-08.html> [last visited Jan. 2004].

<sup>77</sup> CISG, *supra* note 3, art. 8.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *See* CISG, *supra* note 3, art. 8(3).

riat Commentary provides some guidance by stating that the list contained in the Article does “not necessarily include all circumstances of the case that are to be taken into account.”<sup>82</sup> Also, it has been said that, “the rules of interpretation laid down in CISG Article 8 have no direct predecessor in the ULF or ULIS. Nevertheless, they can be traced back to experience gained with the rules of interpretation scattered throughout those two laws.”<sup>83</sup> Thus, in ascertaining the legislative history of Article 8, it is necessary to examine the CISG antecedents ULIS and ULF. ULIS Article 9(3) and ULF Article 13(2) are identical, and assert “where expression, provisions or form of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned.”<sup>84</sup> Based on the experience gained under ULIS/ULF rules of interpretation, intent may be determined through a “course of dealing.”<sup>85</sup> A course of dealing consists of “practices that have developed between the parties in the course of protracted business relations.”<sup>86</sup> Additionally, “the rules established by ULIS and ULF imply that if the parties’ subjective intentions do not coincide, the objective meaning of their declarations must be determined by interpretation.”<sup>87</sup> Therefore, declarations made by parties engaged in international trade will almost always be subject to some form of interpretation in order to better assess the overall intent of the parties.<sup>88</sup>

CISG Article 18(3) applies to the acceptance aspect of contract formation.<sup>89</sup> CISG Article 18(3) declares that:

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<sup>82</sup> See Annotated Text of CISG Article 8 – Secretariat Commentary, at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-08.html> [last visited Nov. 3, 2002].

<sup>83</sup> COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 69 (Peter Schlechtriem ed., Oxford 1998) (quoting Wener Junge), available at <http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-u-08.html> [last visited Nov. 3, 2002].

<sup>84</sup> See Legislative History, CISG Antecedents, Match-up of CISG Article 8 with ULIS/ULF provisions (quoting ULIS Article 9(3) and ULF Article 13(2)), at <http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-u-08.html> [last visited Nov. 3, 2002].

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> See *id.*

<sup>89</sup> CISG, *supra* note 3, art. 18.

if by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment *the act* is performed, provided that the act is performed within a reasonable amount of time, if not time is fixed, with due account taken of the circumstances of the transaction.<sup>90</sup>

The Secretariat Commentary defines “the act” necessary to establish acceptance as “an act authorized by the offer, recognized practice, or usage.”<sup>91</sup> Customarily, the “act” would be the shipment of the goods or the payment of the contract price, however it could also be another act performed by a party.<sup>92</sup> The UNIDROIT Principles concur with the commentary’s interpretation, stating that, “provided that the offer does not impose any particular mode of acceptance, the indication of assent may either be made by an express statement or be inferred from the conduct of the offeree.”<sup>93</sup>

CISG Article 16(2)(b) has a significant relationship to the *Geneva* decision. It provides, in part, that an offer cannot be revoked “if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.”<sup>94</sup> This would seemingly create an implied form of promissory estoppel. The UNIDROIT Principles help clarify the meaning and intent of the above language. The offeree’s reliance on an ‘offer’ “may have been induced either by the conduct of the offeror, or by the nature of the offer itself (e.g., an offer whose acceptance requires extensive and costly investigation on the part of the offeree or an offer made with a view to permitting the offeree, in turn, to make an offer to a third party).”<sup>95</sup> Furthermore, the UNIDROIT Principles state that “the acts that the offeree must have performed in reliance on the offer

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<sup>90</sup> *Id.* (emphasis added).

<sup>91</sup> See Guide to CISG Article 18 - Secretariat Commentary, at <http://www.cisg.law.pace.edu/cisg/text/seccomm/seccomm-18.html> [last visited Oct. 5, 2002].

<sup>92</sup> See *id.*

<sup>93</sup> See Use of the UNIDROIT Principles to Help Interpret CISG Article 18, at <http://www.cisg.law.pace.edu/cisg/principles/uni18.html> [last visited Jan. 2004].

<sup>94</sup> CISG, *supra* note 3, art. 16(2)(b).

<sup>95</sup> See Use of the UNIDROIT Principles to Help Interpret CISG Article 16, at <http://www.cisg.law.pace.edu/cisg/principles/uni16.html> [last visited Jan. 2004].

may consist of making preparations for production, buying or hiring of materials or equipment, incurring expenses, etc., provided that such acts could have been regarded as normal in the trade concerned, or should otherwise have been foreseen by, or known to, the offeror.”<sup>96</sup> Unfortunately, the Secretariat Commentary does not comment on the possible “implicit” promissory estoppel nature of Article 16(2)(b); however, the UNIDROIT principles seemingly interpret the article as such.

III. DISCUSSION OF *GENEVA PHARMACEUTICALS TECHNOLOGY CORP. V. BARR LABORATORIES, INC./APOTHECON, INC. V. BARR LABORATORIES, INC.*

A. *Facts and Procedural History*

The defendant ACIC/Brantford (“ACIC”), a Canadian corporation, manufactured a chemical ingredient (clathrate) for use in the production of an anticoagulant medication (warfarin sodium).<sup>97</sup> In 1994, ACIC supplied plaintiff, Geneva Pharmaceuticals Technology Corp. (“Pharmaceuticals”), a United States company, with samples of clathrate, and in 1995 confirmed that it would support Pharmaceuticals’ application for the approval by the Food and Drug Administration (“FDA”) as the supplier of the ingredient for the manufacture of the drug.<sup>98</sup> In 1995, ACIC also issued a reference letter to the FDA confirming it would serve as supplier of clathrate to Barr.<sup>99</sup> Later in 1995, ACIC executed a confidential contract for the exclusive supply of commercial quantities of clathrate to Barr.<sup>100</sup> This contract stated that a material breach would occur if ACIC were to proceed with sales of commercial quantities to Pharmaceuticals.<sup>101</sup> When Pharmaceuticals received approval for the manufacture of the drug in 1997, it submitted a purchase order to ACIC for the purchase of commercial quantities of clathrate, which was refused by ACIC.<sup>102</sup>

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<sup>96</sup> See *id.*

<sup>97</sup> See Geneva, *supra* note 1, at 242, 248.

<sup>98</sup> See *id.* at 251-52.

<sup>99</sup> See *id.* at 248.

<sup>100</sup> See *id.* at 249, and 261-62.

<sup>101</sup> See *id.* at 249.

<sup>102</sup> Geneva at 245.

Pharmaceuticals claimed that, under the CISG, it had a contract with ACIC for the sale of commercial quantities of clathrate, and that ACIC breached that contract by refusing to supply the ingredient after the drug was approved.<sup>103</sup> Pharmaceuticals argued that, according to industry practice, supplying sufficient quantities of clathrate to support an FDA application creates a contract for future supply.<sup>104</sup> Pharmaceuticals also claimed that ACIC should be liable under the doctrine of promissory estoppel under the law of the State of New Jersey.<sup>105</sup> Pharmaceuticals contended that a claim of promissory estoppel based on the otherwise applicable domestic law is not preempted by and does not conflict with the CISG.<sup>106</sup>

Judge Robert W. Sweet decided this case on May 10, 2002, in the U.S. District Court for the Southern District of New York. As to the applicable law, the court held that the claim should be decided in accordance with the CISG because the alleged sales contract involved the international sale of goods.<sup>107</sup> As to the merits of the case, the court held that under Article 9 of the CISG, “the usages and practices of the industry are automatically incorporated into any agreement governed by the CISG, unless explicitly excluded by the parties.”<sup>108</sup> Thus, the court agreed with Pharmaceuticals’ argument that industry practice should be analyzed at trial in order to determine whether a contract existed.<sup>109</sup>

The court analyzed the elements of offer, acceptance, validity, and performance relevant to the question of contract formation under the CISG.<sup>110</sup> The court held that based on the facts alleged by Pharmaceuticals, the contract of future supply was sufficiently definite under Article 14 of the CISG.<sup>111</sup> On the topic of acceptance, the court held that under Article 18(3), the provision of the reference letter could qualify as an act indicat-

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<sup>103</sup> See *id.* at 261-262.

<sup>104</sup> See Geneva, *supra* note 1, at 282.

<sup>105</sup> See *id.* at 286.

<sup>106</sup> See *id.*

<sup>107</sup> See *id.* at 281.

<sup>108</sup> See *id.*

<sup>109</sup> See Geneva, *supra* note 1, at 282.

<sup>110</sup> See *id.* at 281.

<sup>111</sup> See *id.* at 281-82.

ing assent to a contract.<sup>112</sup> The court analyzed the nature of the contract and held that, based on Articles 14 and 18 of the CISG, a contract was formed.<sup>113</sup> Whether ACIC's acts actually indicated assent to a contract would be analyzed at trial on the basis of industry custom.<sup>114</sup>

The court also examined Pharmaceuticals' argument that "consideration" was lacking as a question of validity.<sup>115</sup> The court held that validity of the contract, pursuant to Article 4(a), is to be decided under domestic law determined by the application of conflict of laws analysis.<sup>116</sup> The court held that New Jersey law should apply.<sup>117</sup> Applying New Jersey law, the court held that consideration was sufficient on the basis of the alleged facts.<sup>118</sup>

Finally, the court agreed with Pharmaceuticals that a domestic law claim for promissory estoppel does not conflict with the CISG.<sup>119</sup> The court noted that the state law of promissory estoppel is generally preempted by the CISG when used to avoid the need to prove the existence of a "firm offer" pursuant to Article 16(2)(b).<sup>120</sup> However, the court also held that a state law promissory estoppel claim *is not* preempted when used to prove that a promise was made on which Pharmaceuticals relied.<sup>121</sup> According to the court, because the CISG does not express a reliance principle in its determination of whether or not a contract has been formed, the state law doctrine of promissory estoppel applies in circumstances where no contract is formed.<sup>122</sup> Thus, under this decision, promissory estoppel is preserved as an independent state law claim in the event that the court concludes that no contract has been formed.

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<sup>112</sup> See Geneva, *supra* note 1, at 282.

<sup>113</sup> See *id.*

<sup>114</sup> See *id.*

<sup>115</sup> See *id.* at 283-84.

<sup>116</sup> See *id.*

<sup>117</sup> See *id.*

<sup>118</sup> See Geneva, *supra* note 1, at 283-84.

<sup>119</sup> See *id.* at 286-87.

<sup>120</sup> See *id.*

<sup>121</sup> See *id.*

<sup>122</sup> See *id.*

## IV. ANALYSIS

The U.S. District Court for the Southern District of New York had the task of determining the applicability of the CISG to the *Geneva* case. The district court correctly recognized the international nature of the contract as a whole under Articles 14 and 18 of the CISG and offer and acceptance based on CISG Articles 14 and 18(3). However, the decision of the district court was clearly flawed with respect to the “consideration” issue, pursuant to CISG Articles 4 and 11, and the modified form of promissory estoppel articulated in CISG Article 16(2)(b).

Pursuant to CISG Article 1, which states that the CISG “applies to contracts of sale of goods between parties whose places of business are in different states when the States are Contracting States,”<sup>123</sup> the district court correctly identified the parties to the contract as being a Canadian corporation (ACIC) and a U.S. company (Pharmaceuticals). Additionally, the default governing nature of the CISG with respect to international contracts, unless specifically excluded pursuant to Article 6 of the CISG,<sup>124</sup> authorizes its use in governing the particular contract at issue in this case. Therefore, the district court correctly identified the international character of the ACIC/Pharmaceuticals transaction based on the fact that the basic requirement of Article 1 was met and thus its initial application of the CISG was proper.

The district court also, accurately identified the existence of offer and acceptance pursuant to CISG Articles 14 and 18(3). Article 14 of the CISG states two requirements for the creation of an offer: it must (1) be “sufficiently definite,” meaning that it “indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and price” and (2) “indicate the intention of the offeror to be bound in case of acceptance.”<sup>125</sup> Here, Pharmaceuticals argued that the reference letter provided by Barr in connection with the development of warfarin sodium constitutes an offer, and Pharmaceuticals’ subsequent conveyance of the letter to the FDA constitutes a commitment that ACIC would supply commercial quantities of

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<sup>123</sup> CISG, *supra* note 3, art. 1.

<sup>124</sup> CISG, *supra* note 3, art. 6 (Article 6 states, “the parties may exclude the application of this convention.”).

<sup>125</sup> CISG, *supra* note 3, art. 14.

clathrate to Pharmaceuticals. Pharmaceuticals claimed that a well-established custom in the industry is the reliance on implied, unwritten supply commitments.<sup>126</sup> Additionally, ACIC affirmed under oath that, "the predominant practice is for these commitments not to be embodied in formal legal documents."<sup>127</sup> Furthermore, ACIC stated:

When a supplier provides access to a manufacturer to its Drug Master File and the manufacturer relies upon such access as the basis of its New Drug Submission, it is the custom and the understanding of both the manufacturer and the supplier that, upon the issuance of the Notice of Compliance, the supplier will supply the product.<sup>128</sup>

"The alleged contract clearly identifies the goods at issue, clathrate."<sup>129</sup> "Pharmaceuticals alleges that the parties had already agreed to a price and to the production of 'commercial quantities' of clathrate and admitted no discussion took place regarding a delivery schedule."<sup>130</sup> "However, accepting as true Pharmaceuticals' allegations of an industry custom, the contract was sufficiently definite."<sup>131</sup> Further, the alleged contract indicated Pharmaceuticals' intention to be bound; it would only send a purchase order if it in fact needed a commercial quantity of clathrate.<sup>132</sup>

The *Oberlandesgericht (Provincial Court of Appeal) Frankfurt*, in a case in which a Swiss seller brought an action against a German buyer for payment of the purchase price of 330 boxes of textile yarn, refused to find the existence of an offer.<sup>133</sup> Pursuant to CISG Article 14, the court ruled that the plaintiff's invoice to the buyer failed to sufficiently define the goods, the quantity, and the price, and thus could not be considered as an effective offer.<sup>134</sup> However, the court ruled that under CISG Article 8, a "reasonable person" test must be applied regarding the

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<sup>126</sup> See Geneva, *supra* note 1, at 282.

<sup>127</sup> See *id.*

<sup>128</sup> *Id.*

<sup>129</sup> See *id.*

<sup>130</sup> See *id.*

<sup>131</sup> See *id.*

<sup>132</sup> See *id.*

<sup>133</sup> Germany 30 August 2000 Appellate Court Frankfurt, available at <http://cisgw3.law.pace.edu/cases/000830g1.html>.

<sup>134</sup> See *id.*

legitimacy of the offer. Therefore, it must be established that a reasonable person in the position of the buyer would have understood the invoice as an offer for sale.<sup>135</sup> The court stated that that was not established. In contrast, in *Geneva* the goods were sufficiently defined in the reference letter and based on trade usage, Pharmaceuticals reasonably construed the reference letter to be an offer. Therefore, based on the reasonable person standard, Pharmaceuticals could infer that the reference letter represented an offer.

Furthermore, in *United Technologies International Inc./Pratt and Whitney Commercial Engine Business v. Magyar Legi Kozlekedesi Vallalat (Malev Hungarian Airlines)*,<sup>136</sup> Pratt and Whitney (“Pratt”), an American manufacturer of aircraft engines, engaged in extensive negotiations with Malev, a Hungarian manufacturer of Tupolev aircraft (“Malev”). Malev made two alternative offers of different types of aircraft engines without quoting an exact price. Pratt chose the type of engine from the ones offered and placed an order. The Legfelsobb Birostag (Supreme Court) of Hungary found, pursuant to Article 14(1), that “the offer and acceptance in this transaction were vague and, as such, ineffective since they failed to explicitly or implicitly fix or make provisions for determining the price of the aircraft engines ordered.”<sup>137</sup>

In *Geneva*, however, the contract clearly identifies the goods at issue, and allegations existed that the parties had already agreed to a price and to the production of “commercial quantities” of clathrate.<sup>138</sup> This would fulfill the requirement of the Supreme Court of Hungary, that the price be determined explicitly or *implicitly*. Additionally, the U.S. District Court for Southern District of New York, in making its determination, accepted as true Pharmaceuticals’ allegations of an industry custom. Based on these facts and allegations, the district court

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<sup>135</sup> See *id.*

<sup>136</sup> *United Technologies International Inc./Pratt and Whitney Commercial Engine Business v. Magyar Legi Kozlekedesi Vallalat (Malev Hungarian Airlines)*, Legfelsobb Birostag (Supreme Court – Hungary), Sept. 25, 1992, available at <http://cisgw3.law.pace.edu/cases/920925h1.html> [last visited Oct. 5, 2002].

<sup>137</sup> See *id.*

<sup>138</sup> See *Geneva*, *supra* note 1, at 281-82.

found that the contract was sufficiently definite to constitute an offer.<sup>139</sup>

The district court also addressed whether an acceptance had occurred between the parties.<sup>140</sup> Relying on the provision of the CISG addressing oral offers, the defendant (ACIC) argued that the offer had to be accepted immediately.<sup>141</sup> However, Pharmaceuticals relied on a contract established by the conduct of the parties. In such a situation, CISG Article 18(3) applies. It states that, "the offeree may indicate assent by performing an act, such as one relating to the dispatch of goods or payment of the price," and "the acceptance is effective at the moment the act is performed, provided the act is performed" either within the time fixed by the offeror, or if no such time is fixed, within a reasonable time.<sup>142</sup> It is also necessary to apply CISG Article 8(3) to the analysis. Article 8(3) provides that "in determining the intent of the party, or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances including trade usages."<sup>143</sup> Pharmaceuticals alleges that it was industry custom that the provision of a reference letter and its subsequent submission to the FDA indicates acceptance.<sup>144</sup> Moreover, Pharmaceuticals has had an extensive course of dealing with ACIC that would fulfill the reasonable person test expressed in Article 8(3).

The district court incorrectly addressed the issue of "consideration" with respect to the present transaction. The court should have relied on court decisions outside American jurisdictions before ruling that New Jersey domestic law applies to this transaction and thus a requirement of "consideration" exists.

In a decision of the *Court of Arbitration of the International Chamber of Commerce Case No. 9474* decided in February 1999,<sup>145</sup> the court held that "consideration" was not a requirement in determining the validity of the contract at issue. In that case, the plaintiff bank entered into a contract with defen-

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<sup>139</sup> See *id.* at 282.

<sup>140</sup> See *id.*

<sup>141</sup> See *id.*

<sup>142</sup> CISG, *supra* note 3, art. 18.

<sup>143</sup> CISG, *supra* note 3, art. 8(3).

<sup>144</sup> *Id.*

<sup>145</sup> ICC Arbitration Case No. 9474 of February 1999, available at <http://cisgw3.law.pace.edu/cases/999474i1.html> [last visited Oct. 5, 2002].

dant for printing and delivery of banknotes.<sup>146</sup> According to the defendant, once the banknotes were delivered and received, the bank did not fulfill any of its' obligations.<sup>147</sup> The bank's representations and statements evinced a "relinquishment of rights and an intent not to assert any rights, i.e. a waiver or estoppel of its rights."<sup>148</sup> According to the court, the bank is estopped from asserting claims of non-performance against the defendant due to the defendant's continued reliance on the bank's assurance of performance, the bank's inconsistent conduct and the subsequent harm that resulted.<sup>149</sup> Moreover, according to "the rules applied in international practice, a forfeiture of rights can be said to occur without consideration or reliance."<sup>150</sup> Hence, consideration is not a necessary component for the amendment of a sales transaction.<sup>151</sup>

Similarly, in *Calzaturificio Claudia S.N.C. v. Olivieri Footwear Ltd.*,<sup>152</sup> the U.S. District Court for the Southern District of New York held that, "unlike the UCC, under the CISG, a contract need not be evidenced by a writing."<sup>153</sup> Furthermore, the court held that "a contract of sale is not subject to any other requirement as to form."<sup>154</sup> "Consequently, the standard UCC inquiry regarding whether a writing is fully or partially integrated has little meaning under the CISG and courts are therefore less constrained by the 'four corners' of the instrument in construing terms of the contract."<sup>155</sup> In this case, *Calzaturificio*, an Italian manufacturer of shoes, alleged that *Olivieri* had agreed to purchase shoes but had failed to pay the price for four lots.<sup>156</sup> The court determined that a contract governed by

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *See id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Clazaturificio Claudia S.N.C. v. Olivieri Footwear Ltd.*, 1998 U.S. Dist. LEXIS 4586 (S.D.N.Y. Apr. 6, 1998), available at <http://cisgw.3.law.pace.edu/cases/980406u1.html> [last visited Jan. 2004].

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

the CISG is not subject to any requirements as to form.<sup>157</sup> A requirement as to form includes "consideration."<sup>158</sup>

In *Geneva*, the district court, using *Fregara v. Jet Aviation Business Jets*, concluded that the "essential requirement of consideration is a bargained-for exchange of promises or performance that may consist of an act, forbearance, or the creation, modification, or destruction of a legal relation."<sup>159</sup> The court, while referring to the Restatement (Second) of Contracts, asserted that Pharmaceuticals maintains, "that the consideration for the implied-in-fact contract was primarily its forbearance, claiming it relied on ACIC/Brantford's reference letter in connection with its submission to the FDA."<sup>160</sup>

However, based on existing international case law and explicit language in the CISG, consideration is not required. Article 4 limits the sphere of application to the rules on formation of contract. The CISG's rules on the formation of contract do not expressly apply to validity of the contract issues.<sup>161</sup> Therefore, domestic law should govern issues concerning the validity of a contract.<sup>162</sup> "This deference to domestic provisions regarding validity is only binding, however, so long as the convention does not include an express provision to the contrary. . . [a]s a result, domestic law regulates such matters as the capacity to contract and the consequences of mistake, gross unfairness, unconscionability and fraud."<sup>163</sup> Seemingly, this is the provision that the district court applied in the present case. Yet, the court should have continued its examination of the CISG, because if it had, it would have been directed to Article 11. Article 11 expressly provides that "a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form."<sup>164</sup> Requirements as to form would include "consideration." Pursuant to CISG Article 11, there is an express provision asserting that "consideration" is not a necessary element.

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<sup>157</sup> *Id.*

<sup>158</sup> See Clazaturificio, *supra* note 152.

<sup>159</sup> See *Geneva*, *supra* note 1, at 283.

<sup>160</sup> *Id.*

<sup>161</sup> See PETER SCHLECHTRIEM, UNIFORM SALES LAW – THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 31 (1986).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> CISG, *supra* note 3, art. 11.

Therefore, the district court incorrectly examines the issue of “consideration,” despite the fact that the CISG expressly provides that it is not a necessary element and that deference is only paid to domestic law in the event that the CISG does not address a particular issue. Here, Article 11 expressly addresses this issue and New Jersey domestic law should not have been applied.

The district court also improperly held that New Jersey domestic law applies to a promissory estoppel claim by Pharmaceuticals rather than the modified version of promissory estoppel articulated in CISG Article 16(2)(b). Article 16(2)(b) provides that an offer is irrevocable “if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.”<sup>165</sup>

The district court should have relied on *Vienna Arbitration Proceeding SCH-4318* decided on June 15, 1994.<sup>166</sup> In that case, an Austrian seller and a German buyer entered into a contract for the sale of rolled metal sheets.<sup>167</sup> The agreed upon delivery terms of the goods were installments “FOB Rostock.”<sup>168</sup> The buyer received the first two deliveries and subsequently sold the rolled metal sheets to a Belgian company who then shipped them to a Portuguese manufacturer.<sup>169</sup> The Portuguese manufacturer determined that the goods were defective and refused to accept any further deliveries of the goods.<sup>170</sup> The German buyer sent a notice of non-conformity of the goods with contract specifications to the Austrian seller, but the seller refused to pay damages, alleging the untimely character of the notice.<sup>171</sup> The buyer then commenced the arbitration proceeding. The buyer argued that the seller had waived its right to raise the defense that notice of non-conformity was not timely given, but the arbitrator held that the intention of a party to waive this right must be clearly established.<sup>172</sup> Based on this

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<sup>165</sup> CISG, *supra* note 3, art. 16(2)(b).

<sup>166</sup> Vienna Arbitration Proceeding SCH-4318, June 15, 1994, available at <http://cisgw.law.pace.edu/cases/940615a4.html>.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Vienna Arbitration Proceeding SCH-4318, *supra* note 150.

burden of proof, the arbitrator determined that a waiver by the seller did not occur. "However, since the seller had behaved in such a way that the buyer was led to believe that the seller would not raise the defense (e.g., after receiving the notice, the seller had continued to ask the buyer to provide information on the status of the complaints and had pursued negotiations with a view to reach a settlement),"<sup>173</sup> the arbitrator held that, "while estoppel was not expressly settled by the CISG, it formed a general principle underlying the CISG, based on Article 16(2)(b)."<sup>174</sup> Thus, the arbitrator awarded damages to the buyer for lack of conformity of the goods.<sup>175</sup>

In *Geneva*, the district court stated, "the fact that Article 16(2)(b) appears to employ a modified version of promissory estoppel suggests that if a plaintiff were to bring a promissory estoppel claim to avoid the need to prove the existence of a 'firm offer,' the claim would be preempted by the CISG."<sup>176</sup> Pharmaceuticals utilized "promissory estoppel to prove that a promise on which it relied should be recognized as binding as if it were a contract."<sup>177</sup> The court stated that if the CISG had contemplated a "reliance" principle in its determination of whether a contract had been formed, this promissory estoppel claim would be preempted.<sup>178</sup>

Many commentaries seem to disagree with the courts' application of Article 16(2)(b) and its limited application to "firm offers." "The provision is designed to cover those cases in which not just the offer itself, but rather other conduct by the offeror or the special circumstances and exigencies of the proposed transaction enable and necessitate the offeree's presumption that the offer would be valid for a certain length of time."<sup>179</sup> The American promissory estoppel doctrine is very similar to Article 16(2)(b), with one critical difference.<sup>180</sup> The American promissory estoppel doctrine explicitly states that the offeree's

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Geneva*, *supra* note 1, at 286-87.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Schlechtriem, *supra* note 145, at 52.

<sup>180</sup> Henry Mather, *Firm Offers Under the UCC and the CISG*, 105 *DICK. L. REV.* 31, 48 (2000).

reliance must have been foreseeable to the offeror and that the offeree's reliance be detrimental; Article 16(2)(b) of the CISG does not.<sup>181</sup> However, despite the lack of express language requiring those elements, they are provided for in *Geneva*. Based on trade usage and a course of dealing between Pharmaceuticals and ACIC, Pharmaceuticals relied on the reference letter as being equivalent to a contract. Therefore, it would have been foreseeable to ACIC that Pharmaceuticals would rely on the letter as binding. Furthermore, the lack of an express language requiring that the offeree's reliance be detrimental is not determinative. If an offeree relies, as Pharmaceuticals did, and the offeror subsequently breaches, that reliance will always be detrimental to the offeree. Additionally, and despite these omissions in the express language of 16(2)(b), "it can be expected that many tribunals will apply Article 16(2)(b) in much the same fashion as American courts have used promissory estoppel."<sup>182</sup> A court applying Article 16(2)(b) could determine that an offeree's reliance on an offer being irrevocable was unreasonable if the reliance was not reasonably foreseeable to the offeror.<sup>183</sup>

This would not be the case in *Geneva*. Again, based on trade usage and a prior course of dealing between the two parties, it should have been reasonably foreseeable to ACIC that Pharmaceuticals would rely on the binding nature of the reference letter. The offeree must seemingly have "(1) had a good reason for believing that the offer was irrevocable and (2) acted reasonably in relying on that belief (i.e. did not engage in a foolhardy form of reliance)."<sup>184</sup> Furthermore, if the offeree were to use the offer in preparing his own offer to a third person or were to undertake a costly investigation in order to decide whether to accept the offer, "both provisions will probably be met so long as the offeror had some understanding of the offeree's position."<sup>185</sup> The latter would seemingly apply in this case since Pharmaceuticals undertook a costly investigation in order to satisfy several FDA required steps in order to commence pro-

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<sup>181</sup> *See id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 48-49.

duction of warfarin sodium. It is evident that the CISG contemplates a modified or implicit version of promissory estoppel and the district court incorrectly allowed New Jersey domestic law to govern the issue through its injudicious reading of CISG Article 16(2)(b).

Therefore, the district court's misguided application of New Jersey law rather than relevant CISG provisions, with respect to the "consideration" and promissory estoppel issues, effectively undermines the intention of the CISG to govern and ensure the observance of good faith in international trade, as well as creating a uniform set of rules governing contracts for the international sale of goods. It also illustrates the U.S. courts' reluctance to accept the CISG's governing capabilities when U.S. corporations are involved in international sales disputes.

## V. CONCLUSION

The United States and other States' Parties entered into the CISG, intending it to govern and ensure the observance of good faith in international trade. Article 7 of the CISG provides the following:

- (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
- (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.<sup>186</sup>

"The general scheme of Article 7 is that the judge should give an 'international' rather than a 'domestic' interpretation to the CISG."<sup>187</sup> Pursuant to Article 7(1), a judge should not initially look to any domestic law when interpreting any provisions of the CISG.<sup>188</sup> The focus of the judge should strictly be on the

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<sup>186</sup> CISG, *supra* note 3, art. 7.

<sup>187</sup> Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 MINN. J. GLOBAL TRADE 105, 106 (1997).

<sup>188</sup> *Id.*

overall intention of the CISG.<sup>189</sup> Article 7(2) explicitly states that the source of interpretation of the CISG should be the text of the CISG itself.<sup>190</sup> If an issue is not specifically identified within the text of the CISG, the “general principles” on which it is based should be examined.<sup>191</sup> The “general principles” are not identified or described in its text; however, based on the CISG text itself, the Secretariat Commentary and its legislative history, it is feasible to determine many of those principles.<sup>192</sup> “In identifying those general principles, it should be kept in mind that the CISG’s overall objective is to promote international trade by removing legal barriers that arise from different social, economic, and legal systems of the world.”<sup>193</sup> The general principles provision can have different effects on a legal proceeding – “the narrow effect of guarding against the use of local (and divergent) legal concepts in construing the specific provisions” or “the broader effect of authorizing tribunals to create new rules not directly based on the textual provisions.”<sup>194</sup> The rationale for ascertaining the general principles of the CISG is to produce the “narrow effect” discussed above and thus assist in the prevention of domestic law interpretations of the CISG.<sup>195</sup> The law should be autonomous and interpreted within its own “four corners;” American judges should not be determinative in a dispute between parties from different countries. Here, however, the U.S. District Court for the Southern District of New York has applied New Jersey domestic law to issues that should be governed by express CISG provisions. The reluctance by the court to apply these provisions, despite the truly international nature of the contract and the parties, completely undermines the significance of the CISG. If U.S. courts continue to rule in this manner, they will effectively subvert and deem irrelevant the governing nature of the CISG in international sales transactions.

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 116-17.

<sup>193</sup> See Koneru, *supra* note 187, at 116.

<sup>194</sup> See *id.*

<sup>195</sup> See *id.* at 117.