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# ESSAY<sup>†</sup>

## THE SPHERE OF APPLICATION OF THE VIENNA CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

Kevin Bell\*

The United Nations Convention on Contracts for the International Sale of Goods<sup>1</sup> is “rapidly becoming one of the most successful multi-lateral treaties ever in the field of agreements designed to unify rules traditionally addressed only in domestic

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† The Pace International Essay Contest on the United Nations Convention on Contracts for the International Sale of Goods attracted interest from law students in: Argentina, Australia, Belgium, Brazil, Canada, Czech Republic, Denmark, Egypt, France, Germany, Ghana, Greece, Guyana, Hungary, India, Indonesia, Jordan, Mexico, Nicaragua, Nigeria, Pakistan, Singapore, South Africa, Sweden, Turkey, United Arab Emirates, United Kingdom, United States, and Zambia.

Each essay submitted was reviewed by the Executive Secretary of the Pace Institute of International Commercial Law who selected the top sixteen finalists (each was awarded a Certificate of Merit). The finalist essays were judged by Professor Alejandro M. Garro of Columbia University Law School who selected the top five essays. The factors considered were: Quality of analysis (is it convincing, substantiated); Quality of writing (style, clarity, organization); Thoroughness of research (types and varieties of source materials); Originality (is the author's approach innovative?); and Interest of the subject matter.

On the basis of these criterion Kevin Bell's article, “The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods,” was selected first prize and in addition to the Merit Certificate received five thousand dollars (\$5,000.00).

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<sup>1</sup> United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, Fed. Reg. 6262 (1987) 15 U.S.C.A. app. at 29 (West Supp. 1989), *reprinted* in 3 I.L.M. 668 (1980) (hereinafter “CISG” or “Convention” or “Treaty”).

legal systems.”<sup>2</sup> As of this writing, forty-five nations have ratified, approved or acceded to the Convention,<sup>3</sup> which is likely to become the worldwide law governing international sales transactions.<sup>4</sup> Commentators from developed and developing worlds, civil and common law traditions, have lavished encomia upon the CISG. It’s been called a “quantum leap,”<sup>5</sup> a “new legal lingua franca,”<sup>6</sup> a “milestone,”<sup>7</sup> a “triumph of comparative legal work”<sup>8</sup> and “arguably the greatest legislative achievement aimed at harmonizing private commercial law.”<sup>9</sup> Even its critics regard the CISG as “monumental.”<sup>10</sup>

This is all the more remarkable given the novel character of the Convention. Unlike the typical treaty, the CISG binds, not States, but private parties within those States, hence, business people engaged in the transnational sale of goods. The particular importance of the Convention’s “relatively straightforward and uncluttered”<sup>11</sup> style is surely an element in its success. The CISG is “expressed in the simple phraseology of commerce,”<sup>12</sup> which is appropriate since it is business people who must understand the meaning of its provisions.<sup>13</sup>

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<sup>2</sup> Ronald A. Brand & Harry M. Flechtner, *Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention*, 12 J.L. & COM. 239 (1993).

<sup>3</sup> *Id.*

<sup>4</sup> Volker Behr, *Commentary to Journal of Law and Commerce Case I; Oberlandesgericht, Frankfurt Au Main*, 12 J.L. & COM. 271 (1993).

<sup>5</sup> Brand & Flechtner, *supra* note 2.

<sup>6</sup> John Honnold, *Introduction to the Symposium*, 21 CORNELL INT’L L.J. 420 (1988).

<sup>7</sup> Joseph J. Darby, *Book Review on Commentary on the International Sales Law*, 19 GA. J. INT’L & COMP. L. 222 (1989) (reviewing C.M. Bonnell et. al., THE 1980 VIENNA SALES CONVENTION).

<sup>8</sup> Honnold, *quoted in* Alejandro M. Garro, *Reconciliation of Legal Traditions in the U. N. Convention on Contracts for the International Sale of Goods*, 23 INT’L LAW. 480 (1989).

<sup>9</sup> Joseph M. Lookofsky, *Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules*, 39 AM. J. COMP. L. 403 (1991).

<sup>10</sup> Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO STATE L. J. 266 (1984).

<sup>11</sup> HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 69 (1982).

<sup>12</sup> Glower W. Jones, *Impact of the Vienna Convention in Drafting International Sales Contracts*, 20 IBL 495 (1992).

<sup>13</sup> Kazuaki Sono, *UNICTRAL and the Vienna Sales Convention*, 18 INT’L L.J. 13 (1984).

This note contends that the same clarity, practicality, and predictability informs the Convention's sphere of applicability which, far more than its substantive provisions, is the principal reason for the CISG's unprecedented reception by the international community. Indeed, whether the substantive rules of the Convention constitute a progressive development in the law of sales is a matter of some dispute. Article 19(1)'s almost complete return to the common law mirror image rule, for example, is seen as a "ringing retreat"<sup>14</sup> by one writer, "regressive"<sup>15</sup> by another. Merging disparate, and at times divergent legal systems necessarily entail myriad mutual concessions in order to gain an agreement. The CISG is admittedly a product of compromise, not consensus.<sup>16</sup>

Clearly, adoption of the CISG by a country lacking a fully developed sales regimen will constitute an advance. "However, a State with a modern codified commercial law is left with two, perhaps conflicting, sets of rules for sales after ratification. First, a domestic law of sales for general application, and second, a special set of rules for international sales transactions."<sup>17</sup> In the United States the Convention, where it is applicable, replaces the greater part of article 2, the sales article of the Uniform Commercial Code (UCC).<sup>18</sup> This will take some getting used to.

Fortunately, American lawyers should have little difficulty with the Convention.<sup>19</sup> While some provisions might seem foreign, for example, the CISG can reflect the civil law penchant for specific performance as a remedy, commentators predict that U.S. lawyers will find the Treaty "convenient and familiar,"<sup>20</sup> sufficiently akin to the UCC so that "experience with one

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<sup>14</sup> Brand & Fletchtnr, *supra* note 2, at 244-5.

<sup>15</sup> Rosett, *CISG Laid Bare: A Lucid Guide to a Muddy Code*, 21 CORNELL INT'L L.J. 576 (1988).

<sup>16</sup> Lookofsky, *supra* note 9, at 404.

<sup>17</sup> Garro, *supra* note 8, at 448.

<sup>18</sup> E. Allan Farnsworth, *Review of Standard Forms or Terms Under the Vienna Convention*, 21 CORNELL INT'L L.J. 440 (1988).

<sup>19</sup> Robert S. Rendell, *The New U.N. Convention on International Sales Contracts: An Overview*, 15 BROOK. J. INT'L L. 42 (1989).

<sup>20</sup> Anita F. Hill, *A Comparative Study of the United Nations Convention on the Limitation Period in the International Sale of Goods and Section 2725 of the Uniform Commercial Code*, 25 TEXAS INT'L L.J. 3 (1990).

will be readily translatable for use with the other.”<sup>21</sup> A State Department official, in his capacity as salesman for the Convention, claims that it is “generally consistent with the approach and outlook of the UCC, which it resembles more than the law of any country.”<sup>22</sup> Another writer views the CISG as a “triumph of the UCC’s approach to contract law.”<sup>23</sup> These appraisals, no doubt, reflect an American bias.

However, the origin or content of the substantive law provisions of the Convention matter less than the international legal community’s willingness to be bound by them. At present, the non-uniformity of substantive legal rules imposes additional transaction costs on businesses engaged in international trade.<sup>24</sup> The “existing chaos”<sup>25</sup> surrounding choice of law problems similarly impairs international commerce.<sup>26</sup> Thus, the Convention’s “central objective was to reduce the legal uncertainty that plagued trade between different legal systems.”<sup>27</sup> At this, the drafters succeeded brilliantly. It is through its greatly simplified sphere of application that the CISG is able to further its stated goal of adopting uniform rules which contribute to the removal of legal barriers to the development of international trade.<sup>28</sup>

This note will briefly examine, necessarily from an American perspective, the scope of the 1964 Hague Sales Conventions,<sup>29</sup> the “ineffectual predecessors”<sup>30</sup> of the CISG. Next, the issues and problems arising out of the Convention’s sphere of

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<sup>21</sup> Richard D. Kearney, *Uniform Law for International Sales Under the 1980 United Nations Convention*, 78 AM. J. INT’L L. 291 (1984) (reviewing JOHN HONNOLD).

<sup>22</sup> Peter Pfund, *quoted in* Elizabeth Hayes Patterson, *United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension Between Compromise and Domination*, 22 STANFORD J. INT’L L. 275 (1986).

<sup>23</sup> Rendell, *supra* note 19.

<sup>24</sup> Peter Winship, *Private International Law and the U.N. Sales Convention*, 21 CORNELL INT’L L.J. 532 (1988).

<sup>25</sup> Honnold, *The Sales Convention: Background, Status, Application*, 8 J.L. & COM. 2 (1988).

<sup>26</sup> Patterson, *supra* note 22, at 266.

<sup>27</sup> HONNOLD, *supra* note 11, at 81.

<sup>28</sup> CISG, *supra* note 1, at Preamble.

<sup>29</sup> The 1964 Hague Convention on the Uniform Law for the International Sale of Goods (hereinafter “ULIS” or “Hague rules”).

<sup>30</sup> Timothy N. Tuggey, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?*, 21 TEXAS INT’L L.J. 541 (1985-6).

applicability provisions, articles 1-6, 10 and 95, will be explained, before concluding.

#### THE SPHERE OF APPLICATION OF THE 1964 HAGUE SALES CONVENTIONS

The voluminous literature on the "half-century of work to free international commerce from the Babel of diverse legal systems"<sup>31</sup> need not be reviewed here.<sup>32</sup> It is worthwhile, however, to briefly consider the scope provisions of the 1964 Hague Conventions, the last grand attempt at international sales law unification before the CISG.

These provisions were largely responsible for the "unhappy fate"<sup>33</sup> of the Hague rules which, while nominally still in force, proved as dismal a failure as the CISG has been a great success. A number of reasons are offered as to why the Hague Conventions failed to gain widespread support from the international legal community. Commonly offered as an explanation is the fact that most of the world was not present at their creation.<sup>34</sup> Of the 28 participants, 19 were from Western Europe which resulted in a "biased and isolated drafting process."<sup>35</sup> The treaty was ratified by no socialist and only one developing country.<sup>36</sup> This Eurocentrism led to the use of untranslatable civil law concepts, certain to be rejected by the common law world.<sup>37</sup> Contrast this cloistered environment with the balanced

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<sup>31</sup> L. Scott Primal, *Computer Software: Should the Vienna Convention on the International Sale of Goods Apply? - A Contextual Approach to the Problem*, 11 COMP. L.J. 197 (1991).

<sup>32</sup> See HONNOLD, *supra* note 11; INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES, Peter Sarcevic & Paul Volken, eds., (1986); CESARE M. BIANCA & MICHEL J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION (1987); Winship, *A Bibliography of Commentaries on the United Nations International Sales Convention*, 21 INT'L LAW 53 (1984).

<sup>33</sup> COMMENTS, *A New Uniform Law for the International Sale of Goods: Is it Compatible with American Interests?*, 2 NW. J. INT'L L. & BUS. 146 (1980).

<sup>34</sup> Honnold, *supra* note 25, at 3.

<sup>35</sup> Francis A. Gabor, *Emerging Unification of Conflict of Laws Rules Applicable to the International Sale of Goods: UNCITRAL and the New Hague Conference on Private International Law*, 7 NE. J. INT'L L. & BUS. 699 (1986).

<sup>36</sup> Laszlo Reczei, *The Area of Operation of the International Sales Conventions*, 29 AM. J. COMP. L. 513 (1981).

<sup>37</sup> Honnold, *The Sales Convention in Action-Uniform International Words: Uniform Application*, 8 J.L. & COM. 207 (1988).

representation of all the legal systems of the world ensured by the 62 State participants at the Vienna Convention.<sup>38</sup>

However, in the end the 1964 Rules proved unacceptable due to "serious technical flaws with respect to both policy and clarity."<sup>39</sup> For example, the Hague Sales Convention (ULIS) uses a rule of extreme complexity in defining internationality, "perhaps the least contested question in international judicial practice."<sup>40</sup> It provides that a contract for sale is international, if it involves carriage across a border, if offer and acceptance are effected in different States, or if delivery occurs in a State different from that of contract formation.<sup>41</sup> Compare this needless detail with the simplicity of the CISG, where no borders need be crossed, and even formation and execution may occur within a single State.<sup>42</sup>

The United States did not ratify the Hague Rules, citing their insufficient attention to overseas transactions, their lack of balance between the rights and obligations of buyers and sellers, and their impenetrability.<sup>43</sup> Another reason offered for American standoffishness was the fear that the presentation of a new statute exclusively controlling international sales contemporaneously with the promulgation of the UCC might very well impede the nationwide adoption of the latter.<sup>44</sup>

However, far more criticism was leveled against the Hague Convention's excessive sphere of application.<sup>45</sup> The framers of the ULIS sought to eliminate from the law of international

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<sup>38</sup> BASIC DOCUMENTS ON INTERNATIONAL TRADE LAW, Chia-Jui Cheng, ed. (1986); Brand, *Nonconvention Issues in the Preparation of Transnational Sales Contracts*, 8 J.L. & COM. 167 (1988).

<sup>39</sup> Honnold, *The Draft Convention on Contracts for the International Sale of Goods: An Overview*, 27 AM. J. COMP. L. 225 (1979).

<sup>40</sup> Reczei, *supra* note 36, at 518.

<sup>41</sup> WINSHIP, THE SCOPE OF THE VIENNA CONVENTION ON INTERNATIONAL SALES CONTRACTS, IN INTERNATIONAL SALE OF GOODS 1-10 (Nina Galston & Hans Smit, eds., 1984).

<sup>42</sup> Muna Ndulo, *The Vienna Sales Convention 1980 and the Hague Uniform Law on International Sale of Goods 1964: A Comparative Analysis*, 38 INT'L & COMP. L.Q. 7 (1989).

<sup>43</sup> COMMENTS, *supra* note 33, at 137.

<sup>44</sup> Maureen T. Murphy, *United Nations Convention on Contracts for the International Sale of Goods*, 12 FORDHAM INT'L L.J. 734 (1988-9).

<sup>45</sup> WINSHIP, *supra* note 41, at 1-11.

sales the application of national law.<sup>46</sup> Indeed, both uniform laws provided that "rules of private international law shall be excluded for the purpose of the applications of the present law."<sup>47</sup> This approach was "predicated upon the assumption that rules prepared for international transactions were superior to domestic laws,"<sup>48</sup> which are riddled through with inherent "eccentricities and injustice."<sup>49</sup> Now, there exists a broad consensus that the universality of application of international sales law is a consumation devoutly to be wished; it is "both an impetus and a core characteristic of the CISG."<sup>50</sup> However, this approach could lead to some "shocking results."<sup>51</sup>

Consider the following example: The ULIS mandates that judges in the fora of Contracting States, those where the ULIS has become municipal law, apply the Hague Rules to any and all international sales, even though, neither the seller, the buyer, nor the transaction itself had any contact with any Contracting State.<sup>52</sup> A defender of this position points out that few courts took jurisdiction in cases that had no connection to the forum.<sup>53</sup> Nevertheless, this universalist approach was "roundly condemned as an invitation to forum shopping."<sup>54</sup> An American writer claims that the result would be a "clear violation of what we call due process of law."<sup>55</sup> Many delegates derided this approach as "legal imperialism,"<sup>56</sup> while others described the unbridled application of the law of the forum, no matter what its connection to the transaction in dispute, as "one of the most dangerous rules of private international law."<sup>57</sup>

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<sup>46</sup> Howard J. Berman, *The Uniform Law on International Sale of Goods: A Constructive Critique*, 30 LAW & CONTEMP. PROBS. 355 (1965).

<sup>47</sup> *Supra* note 29 at ULIS art. 2; ULF art. 1-9.

<sup>48</sup> Honnold, *supra* note 25, at 6.

<sup>49</sup> Tunc, *The Uniform Law on the International Sale of Goods-A Reply to Professor Nadelman*, 74 YALE L.J. 1409 (1965).

<sup>50</sup> Bradley J. Richards, *Contracts for the International Sale of Goods: Applicability of the United Nations Convention*, 69 IOWA L. REV. 216 (1983-4).

<sup>51</sup> Nadelman, *The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglia*, 74 YALE L.J. 449 (1965).

<sup>52</sup> Winship, *supra* note 24, at 532.

<sup>53</sup> Tunc, *supra* note 49.

<sup>54</sup> Honnold, *supra* note 25, at 6.

<sup>55</sup> Nadelman, *supra* note 51, at 236.

<sup>56</sup> HONNOLD, *supra* note 11, at 80.

<sup>57</sup> De Winter, *quoted in* Winship, *supra* note 24, at 501.



Abraham Lincoln was fond of asking how many legs a dog would have if you called its tail a leg? The answer, of course, is four: calling a tail a leg does not make it so, no more than issuing an ukase can truly put an end to the admittedly devilish conflict of laws dilemma.

#### THE SPHERE OF APPLICATION OF THE CISG

The 1980 Vienna Sales Convention retreats significantly from the universalist posture taken in the 1964 Hague Conventions, adopting instead an accommodationist stance.<sup>58</sup> The CISG explicitly incorporates private international law rules into the text of the Convention itself, thus, in many jurisdictions, the CISG is self-executing, obviating any need, after ratification, for separate municipal enabling legislation.

Articles 1-6, 10, and 95 are the most important provisions for determining the Convention's sphere of application. Articles 1, 10, and 95, read together, define the manner in which international sales fall within the Convention's scope; articles 2-5 list transactions which remain without; and article 6 affirms the drafter's fidelity to the principle of party autonomy.

#### *Articles 1, 10, and 95*

Article 1 is a conflict of laws rule that separates international sales of goods from domestic ones.<sup>59</sup> It contains the basic jurisdictional statement of the Convention,<sup>60</sup> laying down a single criterion of internationality: the seller and buyer must have their places of business in different States. This rule greatly simplifies the analysis of what constitutes the national diversity sufficient to trigger application of the Convention. No inquiry need be made as to domicile, place of incorporation, nor seat of power.<sup>61</sup> American lawyers should note that this is not parallel to the concept of "doing business" which determines whether minimum contacts exist to render a corporation amenable to

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<sup>58</sup> Winship, *supra* note 24, at 517.

<sup>59</sup> Helen Elizabeth Hartnell, *Rousing the Sleeping Dogs: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT'L L. 11 (1993).

<sup>60</sup> B. Blair Crawford, *Drafting Considerations Under the 1980 U.N. Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 196 (1988).

<sup>61</sup> HONNOLD, *supra* note 11, at 77.

suit in a particular jurisdiction.<sup>62</sup> Note also that article 1(3) excludes as irrelevant the nationality of the parties. Neither the location of the goods themselves, nor the location of the negotiations between the parties, is necessarily dispositive.

While the Convention does not define place of business, the drafting history seems to "construe it as requiring a permanent and regular place for the transaction of general business, not including a temporary place of sojourn during ad hoc negotiations."<sup>63</sup> Neither a warehouse, the office of the seller's agent, nor a booth at a trade show would seem to qualify as a place of business.

However if, as is frequently the case, one or both of the parties to the contract have multiple places of business, article 10(a) provides that the relevant place of business will be the one with the "closest relationship to the contract and its performance." Ambiguity may arise if one office is more closely connected with the formation of the contract and a second office is more closely associated with a party's performance of his contractual obligations.<sup>64</sup> The drafter of the contract should address this problem by identifying each party's relevant place of business in the text of the contract. A simple way to do this is by introducing the contract with a preamble tailored to the Convention.<sup>65</sup> Note, however, that a bare contractual recital may not provide a safe haven if the totality of the facts point to a different place of business.<sup>66</sup>

The problem is compounded by the mobility of business people in modern commerce. Since business deals are facilitated by face-to-face meetings, a wide variety of forms of intermediaries has arisen to connect sellers and buyers in different countries.<sup>67</sup> The negotiation or conclusion of contracts through subsidiaries, branch offices, franchises, or consultants

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<sup>62</sup> Rosett, *supra* note 10, at 279.

<sup>63</sup> Honnold, *quoted in* Richards, *supra* note 50, at 220.

<sup>64</sup> RALPH H. FOLSOM, MICHAEL WALLACE GORDON, & JOHN A. SPANOGLE, JR., *INTERNATIONAL BUSINESS TRANSACTIONS IN A NUTSHELL* 75 (West Publishers, St. Paul)(1989).

<sup>65</sup> ALBERT H. KRITZER, *GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS*, 75 (1989).

<sup>66</sup> Crawford, *supra* note 60, at 197.

<sup>67</sup> Rosett, *supra* note 10, at 277.

may "mask the localization"<sup>68</sup> of each parties' place of business, effectively excluding the Convention, hence, national diversity is destroyed. Increasingly, for economic reasons, or to avoid rules of origin, quantity restrictions, or unfavorable tariffs, firms are disbursing their production facilities so that the last stage of production may occur in the State where the product is to be sold. This, too, may result in reducing the number of transactions which would otherwise be subject to the Convention.<sup>69</sup>

Finally, there is the undisclosed principal issue, addressed in article 1(2). At least one writer believes that the word "appears" in the article may not be a wholly objective standard. Assume that a foreign-accented buyer, listed in the Yellow Pages under "Export Agent," arrives at seller's place of business and specifies packing requirements which suggest long travel, and requests delivery f.a.s or f.o.b. a port. Is the seller put on notice that the sale might be subject to the Convention?<sup>70</sup> The better view seems to be that there is no duty to inquire, but parties are free to adduce facts which show that the seller did know that the sale was international, and those cited above would surely be relevant to the inquiry. In any event, the burden of proof should rest with the party seeking to apply the Convention.

Once the requisite national diversity has been established, the question becomes whether the transaction bears a prescribed relation to one or more Contracting States.

#### *Article 1(1)(a)*

Article 1(1)(a) attempts to create a bright line, an area of certainty.<sup>71</sup> If the two States in which the parties have their relevant places of business are Contracting States, and the litigation is brought before a forum in either State or in another

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<sup>68</sup> Patrick Thieffry, *Sale of Goods Between French and U.S. Merchants: Choice of Law Considerations Under the U.N. Convention on Contracts for the International Sale of Goods*, 22 INT'L LAW. 108 (1988).

<sup>69</sup> CURTIS R. REITZ, *THE UNIFORM COMMERCIAL CODE AND THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, IN NEGOTIATING AND STRUCTURING INTERNATIONAL COMMERCIAL AGREEMENTS*, 12 (Shelley P. Battram & David N. Goldsweig, eds., 1990).

<sup>70</sup> Rosett, *supra* note 10, at 277.

<sup>71</sup> HONNOLD, *supra* note 11, at 88.

Contracting State, the Convention applies. For tribunals sitting in Contracting States, the purpose of sub.(1)(a) is to eliminate the need to go through a conflict of laws analysis,<sup>72</sup> since under these circumstances the rules of private international law are irrelevant.<sup>73</sup> In a sense, sub.(1)(a) adopts a *lex fori* conflicts rule<sup>74</sup> but, unlike the 1964 Hague Conventions, the result is not inequitable since both States in adhering to the Convention manifested a willingness to be bound. Thus, "those who would shop for forum can no longer shop for law."<sup>75</sup>

This result can be defeated only if the litigation takes place in a third, non-Contracting State, and the rules of private international law of that State apply its own law or that of a fourth, non-Contracting State.<sup>76</sup> Even here, however, a non-Contracting forum will likely apply the Convention since its private international law rules will point to the State with the "most significant relationship" to the transaction, or to the party with the "most characteristic performance," almost invariably the law of the seller or the buyer.<sup>77</sup> The odds of the CISG not being applied in circumstances contemplated by sub.(1)(a) grow increasingly remote as more States adhere to the Convention.

#### *Article 1(1)(b) and the Article 95 Declaration*

While there is no record of any objection to the official interpretation of article 1(1)(a),<sup>78</sup> the same cannot be said for article 1(1)(b), which implicates the Convention when the rules of private international law lead to the application of the law of a Contracting State. The incorporation of conflict of laws analysis into the Treaty increases the number of situations in which the Convention applies, and may even lead to its application in instances not contemplated by the contracting parties.<sup>79</sup> This expanded applicability, though, remains a far cry from the

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<sup>72</sup> Winship, *supra* note 24, at 520.

<sup>73</sup> WINSHIP, *supra* note 41, at 1-20.

<sup>74</sup> Winship, *supra* note 24, at 520.

<sup>75</sup> Lookofsky, *supra* note 9, at 404.

<sup>76</sup> KRITZER, *supra* note 65, at 63.

<sup>77</sup> HONNOLD, *supra* note 11, at 89.

<sup>78</sup> Winship, *supra* note 24, at 520.

<sup>79</sup> Isaak I. Dore & James E. DeFranco, *A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code*, 23/24 HARV. INT'L L.J. 55 (1982-83).

universality of the Hague Rules, since in this instance the Contracting forum must at least have some connection to the transaction, if not to the parties.

Nevertheless, a number of States were uneasy with the reach and uncertainty of sub.(1)(b).<sup>80</sup> To meet these objections, the Conference added article 95, which permits Contracting States to reject sub.(1)(b).<sup>81</sup> This compromise ensured that the CISG would not go the way of the Hague Conventions. In effect, a party in a State making an article 95 declaration will, in most circumstances, not find himself within the scope of the CISG unless he is dealing with a party in another Contracting State.

The article 95 reservation narrows the applicability of the Convention and enlarges the applicability of the domestic law.<sup>82</sup> A Contracting State whose domestic law is ill-suited to international transactions should not declare.<sup>83</sup> On the other hand, "a State whose domestic law is modern and well-suited to international transactions may well conclude that the Convention's greatest value is within the area defined by sub.(1)(a), transactions between two Contracting States."<sup>84</sup>

Article 1(1)(b) is not the law of any ratifying country which, pursuant to article 95, has declared a reservation to sub.(1)(b).<sup>85</sup> This was the course chosen by the United States. As Professor Farnsworth states:

Congress cited two reasons for opting-out of article 1(1)(b):

First, it found that international choice of law rules are uncertain and could lead to disharmony between Contracting States.

Second, Congress felt that article 1(1)(b) would displace U.S. domestic law more frequently than foreign law. For example, where the U.S. contracts with a non-Contracting State, if private international law points to application of the non-Contracting State's law, its domestic law applies. On the other hand, if private international law points to application of U.S. law, article 1(1)(b) would dictate application of the Convention.<sup>86</sup>

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<sup>80</sup> Gabor, *supra* note 35.

<sup>81</sup> HONNOLD, *supra* note 11, at 82.

<sup>82</sup> HONNOLD, *supra* note 11, at 87.

<sup>83</sup> HONNOLD, *supra* note 11, at 87.

<sup>84</sup> HONNOLD, *supra* note 11, at 87.

<sup>85</sup> KRITZER, *supra* note 65, at 76.

<sup>86</sup> Farnsworth, *supra* note 18.

However, it is not clear that States making an article 95 reservation will avoid the complexity of a world of non-uniform rules of private international law, or avoid application of the Convention in cases where both parties are not from Contracting States.<sup>87</sup>

Consider: State A, a Reserving State contracts with State B, a non-Contracting State. If State A is the forum, then the Convention will never be applied. Thus, an American party to a contract is assured that an American forum will apply the Convention only if the other party's place of business is located in another Contracting State. If, however, the forum is within State B, and its choice of law rules point to a Contracting State, then the CISG may well be the governing law of the contract. "Thus, the article 95 reservation does not provide that the Reserving State shall apply its own domestic law-it merely frees it from article 1(1)(b). Therefore, the narrower applicability of the Convention that results from rejecting sub.(1)(b) is relevant only in determining the Convention's applicability to a party located in a State that has also rejected 1(1)(b)."<sup>88</sup>

"In short, the fact that States have responded differently to the option offered by article 95 should present no serious difficulties once it is understood that the choice is exercised in the interest of parties in a State that makes this choice, and the fora of other States should respect that choice."<sup>89</sup>

#### *Articles 2-5: Exclusions from the Convention*

It is in the realm of general principles that certainty and universality are needed. Any attempt at defining special terms is to disregard the differences which exist in the practice of the many different types of trade.<sup>90</sup>

The Convention's scope is limited. It applies only to international transactions; it governs only commercial sales of goods; and it does not apply to specific types of questions.<sup>91</sup> The common thread running through these exclusions is the concern of

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<sup>87</sup> Winship, *supra* note 24, at 523.

<sup>88</sup> HONNOLD, *supra* note 11, at 92.

<sup>89</sup> HONNOLD, *supra* note 11, at 94.

<sup>90</sup> Ndulo, *supra* note 42, at 4.

<sup>91</sup> Farnsworth, *The Vienna Convention: History and Scope*, 18 INT'L LAW. 19 (1984).

the drafters to avoid the impairment of mandatory national law (commonly referred to as imperative law, public policy, *jus cogens*, etc.). These laws include State economic regulations, as well as legislation intended to protect the rights of economically weaker parties such as consumers and employees.<sup>92</sup>

As Professor Honnold stated it, "it would have been folly to try to overturn domestic rules prohibiting and invalidating various types of transactions and contract provisions-the Convention does not intrude in this sensitive domain."<sup>93</sup> Some matters simply have to be left to local law.<sup>94</sup>

Note that article 6 enables parties to opt-out of virtually any CISG provision, subject to the above mentioned prohibitions. More difficult for the drafters was the question of whether parties to a transaction excluded by articles 2-5 might, nevertheless, agree to have the CISG govern the transaction. Several delegations feared that this technique might allow parties to avoid domestic consumer protection legislation. Respect for party autonomy made it difficult to formulate a workable limitation, and in the end it was agreed that parties should not be foreclosed from agreeing to have the Convention apply to a transaction otherwise excluded as long as the policy behind the specific exclusion is not contravened.<sup>95</sup>

## Article 2

The CISG gives no clear definition of either "goods" or "contract for sale."<sup>96</sup> One writer wryly suggests that this is due to broad agreement as to these terms.<sup>97</sup> However, as conflicting definitions abound, the opposite is closer to the truth.

Article 2 expressly excludes six categories of transactions from the Convention. "Three are based upon the nature of the transaction, and three are based upon the nature of the goods."<sup>98</sup> The categories excluded are goods bought for personal, family or household use (consumer goods), unless the

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<sup>92</sup> Gabor, *supra* note 35, at 697.

<sup>93</sup> Honnold, *supra* note 25, at 8.

<sup>94</sup> Crawford, *supra* note 60, at 191.

<sup>95</sup> WINSHIP, *supra* note 41, at 1-34.

<sup>96</sup> Richards, *supra* note 50, at 227.

<sup>97</sup> Winship, *International Sales Contracts Under the Vienna Convention*, 17 UCC L.J. 60 (1984-85).

<sup>98</sup> Tuggey, *supra* note 30, at 543.

seller does not know that the use of the goods was so intended. The exclusion of consumer sales serves the purpose of avoiding problems of conflict between the Convention and the mandatory rules of domestic law designed to protect the consumer.<sup>99</sup> Municipal laws in this area vary widely from State to State, with some nations offering scant protection to their citizens and others requiring much higher duties of care from their sellers. It would have been disastrous for the drafters to attempt to unify these disparate rules within the Convention.

The remaining exclusions of sale by auction, under authority of law, or of securities, vessels, or electricity are again reflections of the Convention's concern for developed national law and recognition of conflicting national definitions of goods.<sup>100</sup> Here, the Convention beats a practical retreat from universality. It's worth noting, here, that any tangible item, not expressly excluded, should be considered a good.<sup>101</sup>

### *Article 3*

Article 3(1) states that if a substantial part of the materials necessary for manufacture or production of the goods is supplied by the buyer, the CISG does not apply. Similarly, article 3(2) excludes transactions where the seller furnishes the preponderant part of the labor or other services. The difficulty is that "substantial" and "preponderant" are undefined and will be, no doubt, the "object of some interesting linguistic comparisons between the different language versions."<sup>102</sup> Conflicting interpretations from national courts seem likely.<sup>103</sup>

Article 3 is fully developed, than is the analogous provision of the UCC which looks to the essence of the contract as its predominant purpose. The CISG also provides no specific guidance concerning mixed, unfinished, or unsevered goods, minerals, crops, etc.<sup>104</sup>

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<sup>99</sup> KHOO, EXCLUSIONS FROM THE CONVENTION, IN COMMENTARIES ON THE INTERNATIONAL SALES LAW 37 (1987).

<sup>100</sup> Tuggey, *supra* note 30, at 543..

<sup>101</sup> Honnold, *quoted in* Richards, *supra* note 50, at 239.

<sup>102</sup> Crawford, *supra* note 60, at 198.

<sup>103</sup> Tuggey, *supra* note 30, at 543.

<sup>104</sup> Rosett, *supra* note 10, at 280.



"Difficulties will arise in borderline cases, where know-how is the goal, but things such as drawings, models, manuals, etc. are what is actually transferred. Such technology transfers frequently occur as part of a layered transaction which may or may not be deemed a sale of goods."<sup>105</sup> One solution might be the doctrine of the severability of contracts, by which a court may break the service and sales components of the contract in two. The better approach, though, is that a single set of rules should apply to the entire contract whenever there are significant relationships between the goods and service elements of that contract.<sup>106</sup>

One writer offers a two-part test to be applied to determine whether a contract is mixed. First, a quantitative judgment as to the predominant purpose of the agreement is to be reached, followed by a subjective judgment of the intent of the parties as to the intent of the agreement.<sup>107</sup> Clearly, litigation in municipal courts will be required to flesh out this provision.

#### *Article 4*

Article 4 limits the Convention's scope to the formation of the contract and the rights and obligations of the seller and buyer arising from such contract. The CISG is not concerned with the validity of the agreement (unless otherwise expressly provided in the Convention) or of any of its provisions, leaving such issues as; error, mistake, fraud, duress, unconscionability, and illegality to be determined solely by the application of municipal law. Essentially, read together, "articles 4 and 6 create a tripartite hierarchy, with domestic mandatory law on top, the agreement of the parties in the middle, and the CISG at the bottom. This was the price paid by the Convention's sponsors for its acceptance by the adopting nations."<sup>108</sup>

It is beyond the scope of this note to examine each issue which may rise to a validity claim,<sup>109</sup> but a review of article 4 is in order. The drafters of the CISG "viewed domestic laws on contract validity as the vehicle for a society's political, social,

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<sup>105</sup> Crawford, *supra* note 60, at 199.

<sup>106</sup> Honnold, *quoted in* Richards, *supra* note 50, at 239.

<sup>107</sup> Richards, *supra* note 50, at 240.

<sup>108</sup> Farnsworth, *supra* note 18, at 441.

<sup>109</sup> See Hartnell, *supra* note 59.

and economic philosophies.”<sup>110</sup> Contract validity was seen as an issue that seldom arose among international merchants and which was most likely to appear in the context of domestic law.<sup>111</sup> The obvious intent behind the clause was “to ensure that the Convention neither disturbed deeply ingrained notions of public policy, nor tried to legislate what that policy should be for all nations. Neither would have succeeded, and the CISG would simply not have been adopted.”<sup>112</sup>

The result, however, is that article 4 is likely to create more problems and litigation than any other provision of the Convention. Since there is no uniformity among jurisdictions on the grounds for declaring a contract invalid, article 4 may well prove to be a “methodological quagmire,”<sup>113</sup> blocking the development of a “jurisprudence of validity,”<sup>114</sup> and hindering the evolution of an effective international sales law.

In the near term, parties, especially in civil law countries,<sup>115</sup> may seek to escape liability by attacking the validity of a contract or contract provision. However, a way out of this potential black hole is offered by Professor Honnold. He argues that the drafters of the CISG did not intend to equate validity with all mandatory domestic law, since the Convention could never achieve its goal of unification if domestic law governed an issue which the Convention addresses. Municipal law should animate, not displace, the CISG, in the same way that the “ocean of the common law” has undergirded development of the UCC.<sup>116</sup>

Thus, it is the CISG which displaces domestic law when a factual situation triggers a provision of both. Consequently, it is insignificant whether domestic law labels a particular issue one of validity. The crucial question is whether the domestic rule is triggered by the same operative facts which invoke a rule

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<sup>110</sup> Christine Moccia, *The United Nations Convention on Contracts for the International Sale of Goods and the Battle of the Forms*, 13 FORDHAM INT'L L.J. 677 (1989-90).

<sup>111</sup> *Id.*

<sup>112</sup> Crawford, *supra* note 60, at 191.

<sup>113</sup> Hartnell, *supra* note 59, at 15.

<sup>114</sup> Hartnell, *supra* note 59, at 15.

<sup>115</sup> Thieffry, *supra* note 68, at 1020.

<sup>116</sup> Honnold, *quoted in* Thieffry, *supra* note 68, at 1021.

of the Convention.<sup>117</sup> This is elegant, and the future, one hopes, belongs to Honnold. We live in the present, however, and it seems unalterable that the validity question will linger as one of the most vexing and troublesome provision of the CISG.

Article 4(b) avoids the issue of the passing of title in goods. The CISG was careful here not to intrude into the sensitive realm of creditor's rights and insolvency proceedings. It is difficult to imagine awarding, through application of the supremacy clause, superior priority rights to foreign claimants.<sup>118</sup>

### Article 5

The decision to exclude claims based on death and injury to persons was taken with little debate and no opposition.<sup>119</sup> The reasons for exclusion include the rapid and uneven development of national law regulating "product liability," and the possibility of specialized international solutions to the problem.

The only complexity with regard to this provision occurs when both property losses and personal injuries arise out of the same incident, as is frequently the case. The economic damage caused by a defect will be determined by the Convention's damage rules, while the graver harm will be resolved through application of the residual municipal law.

### Article 6

The Convention applies to contracts for the sale of goods within its application, unless, the parties exclude its application in whole or in part.<sup>120</sup> A party's freedom to contract is a uniformly recognized principle of contract law,<sup>121</sup> and article 6 "embodies a vigorous affirmation of this principle."<sup>122</sup>

At the outset, it is worthwhile to consider the effect of silence on the governing law of the contract. Prior to the Convention, a party in a difficult negotiation might have been willing to

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<sup>117</sup> Honnold, *quoted in* Christopher R. Heiz, *Validity of Contracts for the International Sale of Goods*, April 11, 1980, and *Swiss Contract Law*, 20 VAND. J. TRANSNAT'L L. 648 (1987).

<sup>118</sup> Honnold, *supra* note 25, at 8.

<sup>119</sup> WINSHIP, *supra* note 41, at 1-38.

<sup>120</sup> J. D. Feltham, *The United Nations Convention on Contracts for the International Sale of Goods*, 348 J. BUS. L. (1981).

<sup>121</sup> Gabor, *supra* note 35, at 697.

<sup>122</sup> WINSHIP, *supra* note 41, at 1-33.

forego having a choice of law clause in the contract, hoping to prevail later should a dispute arise. After ratification of the CISG, however, the effect of this omission is to choose the Convention as the law of the contract if the requirements of article 1 are satisfied.

The drafters of the CISG deleted a reference in the 1964 Hague Rules specifying that exclusions from the treaty could be express or implied, reviving a long-standing debate over the means by which parties may exclude the Convention.<sup>123</sup> Some writers have taken this to mean that only express exclusions are enforceable under the CISG,<sup>124</sup> while others claim the same result is in accordance with the Convention's overarching principle of uniformity.<sup>125</sup> However, the commentary points out that the deletion occurred because "special reference to implied exclusions might have encouraged courts to conclude, on insufficient grounds, that the Convention had been excluded."<sup>126</sup> Most commentators incline toward the view that, while implied exclusions, given their inherent ambiguity, are to be discouraged, nowhere are they prohibited. Article 6 does not require that parties use any particular language to opt-out, nor does it even require a writing.

More likely, however, the decision to opt-out would be explicit or implicit in a choice of law clause in a written contract. The ambiguity created by the continued use of pre-printed, pre-CISG "form contracts will, it is safe to say, provide fertile ground for controversy in the application of article 6."<sup>127</sup> Consider the effect of the following clause: THIS CONTRACT IS TO BE GOVERNED BY CALIFORNIA LAW. Had the United States not ratified the Vienna Convention, this provision would be deemed an effective exclusion (if one were necessary), since it expressly selects the law of a non-Contracting State. However, the CISG entered into force in the U.S. on January 1, 1988, thus, the clause is ambiguous. Most writers would agree that it is not an effective exclusion. "When the parties agree to refer to the law of a Contracting State one cannot speak of an implied

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<sup>123</sup> Murphy, *supra* note 44, at 736.

<sup>124</sup> Dore & DeFranco, *supra* note 79, at 53.

<sup>125</sup> Murphy, *supra* note 44, at 743.

<sup>126</sup> BONELL, PARTIES' AUTONOMY, IN COMMENTARIES ON THE INTERNATIONAL SALES LAW 52 (1987).

<sup>127</sup> REITZ, *supra* note 69, at 3.

exclusion of the Convention."<sup>128</sup> This is a tautology, since the CISG is the law of California for international sales.

Litigation in Germany under the 1964 Hague Rules has concluded that choosing the "law of Germany" in an international sales contract refers to the Hague Convention rules that Germany made applicable to such contracts.<sup>129</sup> There is little doubt that a German judge would apply the CISG in the same circumstances today.

As a matter of strict constitutional construction, the same result should attain in an American court. The CISG, as a federal treaty, should preempt the California provision through operation of the supremacy clause. However, this analysis may not reflect reality;<sup>130</sup> at least not reality as it is practiced in the United States of America. Given the general lack of awareness of the CISG, it's not unlikely that an American judge would rule that a boilerplate choice of law clause pointing to California law does not evince an intent to invoke the CISG.<sup>131</sup> It should be open to the parties to proffer evidence of their actual intent as to exclusion.<sup>132</sup> One senses that a judge here would probably invoke California's UCC.

The decision reached in *Filanto S.p.A. v. Chilewich*,<sup>133</sup> "the first U.S. case to pay any significant attention to the Convention,"<sup>134</sup> reinforces the view that American judges might manifest a "homeward trend"<sup>135</sup> in interpreting the CISG. There, the court "treated the CISG, not as governing law, but merely as one set of principles."<sup>136</sup> This will prove a troublesome interpretation over the long run.<sup>137</sup> However, it seems likely that, as judges, lawyers and business people gain familiarity with the CISG, its application both in contracts and in courthouses will no doubt be given wider effect. For the present, though, the obvious lesson for drafters of contracts is to expressly exclude the

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<sup>128</sup> BONELL, *supra* note 126, at 56.

<sup>129</sup> Honnold, *supra* note 25, at 9.

<sup>130</sup> Crawford, *supra* note 60, at 193.

<sup>131</sup> Crawford, *supra* note 60, at 163.

<sup>132</sup> Winship, *supra* note 97, at 66.

<sup>133</sup> 789 F. Supp. 1229 (1992).

<sup>134</sup> Brand & Flechtner, *supra* note 2, at 239.

<sup>135</sup> Tuggey, *supra* note 30.

<sup>136</sup> Brand & Flechtner, *supra* note 2, at 247.

<sup>137</sup> Crawford, *supra* note 60, at 193.

CISG and to cite to "provisions of the UCC," "domestic," "internal," or "municipal" law, if this is one's intention. If one is choosing the CISG, one should always choose, as well, the residual municipal law one wishes to govern issues falling outside the scope of the Convention.

A final issue relating to party autonomy is whether parties can opt-in to the CISG in circumstances not contemplated by article 1. Note that article 6 recognizes only the ability of parties to exclude the Convention, it has no provision allowing for adoption. However, business moves much more quickly than law, and it is not difficult to imagine entrepreneurs in two non-Contracting countries wishing to utilize the CISG to facilitate their negotiations. They should be allowed to. "Frequently, haggling over a business contract results in the application of the law of some neutral country, whether or not either party has any understanding of that country's law."<sup>138</sup> This is surely less desirable than employing the CISG as a compromise choice of law, which would both enhance party autonomy, and increase the uniformity of legal rules. While traditionalists might shudder at the prospect of allowing parties to select non-national law to govern their contract, modern choice of law principles should allow for the selection of a treaty designed specifically for this type of transaction.<sup>139</sup>

#### CONCLUSION

The unprecedented surge in international commerce during recent decades has created a need for a uniform law on the international sale of goods.<sup>140</sup> The CISG, through its clarity, practicality, and predictability seems to have met that need. It's fairly safe to predict that the Convention will be the predominant law in force around the globe in a very short time.<sup>141</sup>

Less than two per cent of the gross national product of the United States in 1950 concerned international trade. Today that figure is 25 per cent, and conservative estimates place it at 40 to 50 per cent by the end of the decade.<sup>142</sup> The resulting

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<sup>138</sup> Crawford, *supra* note 60, at 189.

<sup>139</sup> REITZ, *supra* note 69, at 4.

<sup>140</sup> Murphy, *supra* note 44, at 727.

<sup>141</sup> REITZ, *supra* note 69, at 2.

<sup>142</sup> REITZ, *supra* note 69, at 2.

massive displacement of American domestic law (i.e., article 2 of the UCC) will be a "once-in-a-lifetime event for most lawyers in this country."<sup>143</sup> The CISG represents a "relatively simple bridge between the U.S. system and the rest of the world."<sup>144</sup> Not only can American lawyers no longer safely ignore international law,<sup>145</sup> it is now their professional responsibility to master it.

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<sup>143</sup> REITZ, *supra* note 69, at 1.

<sup>144</sup> Crawford, *supra* note 60, at 205.

<sup>145</sup> Crawford, *supra* note 60, at 205.