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Selling Goods Internationally:
by Susan J. Martin-Davidson ©

The Scope of the CISG: Challenges to a Uniform Interpretation

What is an “international” sale of goods? The answer to this question is of growing concern to buyers and sellers and the lawyers who represent them as the law governing these transactions has undergone a significant change. Until recently, international sales contracts have been governed by the law chosen by the parties or by international choice of law principles. If the choice was the law of the United States, a state-law version of Article 2 of the Uniform Commercial Code (hereinafter, UCC 2)\(^1\) was the usual point of departure in resolving disputes. The governing law in the United States changed on January 1, 1988, when the Convention on Contracts for the International Sale of Goods\(^2\) became the self-executing source of law\(^3\) for international

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1 In 2003, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) approved amendments to UCC 2. As of publication, no state has adopted the proposed amendments. Citations in this article are to un-amended Article 2 (2000).
2 The Convention is the drafting product of a 14-State Working Group established by the United Nations Commission on International Trade Law (UNCITRAL). Commercial law scholars and lawyers from many parts of the world were enlisted in the project. For a thorough discussion of the chronology of events and the documentary history of the Convention, see Honnold, Documentary History of the Uniform Law For International Sales (1989). Ratification of the CISG makes it the self-executing law of 50 States, the District of Columbia and U.S. territories.
3 The effect of a “self-executing” treaty is explained in a recent Mexican decision reversing a trial court that failed to apply the CISG. Editorial remarks by Alejandro Osuna González, summarize the Circuit Court’s opinion: “[T]he fundamental rights of claimant Georgia Pacific Resins, Inc. had been violated by the Superior Court when it refused to consider the CISG when evaluating the merits of the case. … [I]t was irrelevant whether or not the parties had mentioned that the CISG was the applicable law because of the principle of law that ‘one must provide the facts, and the judge is to provide the law’ as well as the principle that ‘the judge knows the law’. Furthermore, the CISG was not to be deemed an application of foreign law that requires proof of its existence for it to be applied. The CISG is applicable because it is an international treaty that has been incorporated into the Mexican legal system by the procedure contemplated by the Constitution.” 9 August 2007 Baja California, Acuerdo del Cuarto Tribunal Colegiado
sales contracts. The CISG represents a compromise reached in extensive negotiations by representatives of countries with very different legal systems. It has been published in six (6) official languages and ratified by over 70 countries, including the United States, much of Latin America and Europe, Australia, Canada, China (PRC), the Republic of Korea and the Russian Federation.

This article will examine unresolved issues in the interpretation of the Convention including the meaning of terms such as “place of business” and “goods,” the scope of exceptions to CISG coverage such as matters of “validity,” and the requirements for contract terms that will effectively “opt out” of the Convention. The CISG itself offers limited guidance in its proper interpretation. There is an admonition to have regard for its international character and to use it to promote uniformity and good faith in international trade.

When a question of interpretation is not settled by an express provision, courts are instructed to settle the question according to the general principles on which the Convention is based. What these general principles are is unclear. 

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4 The search for a unified sales law involved the compromise of common law, civil law, and socialist traditions.

5 Arabic, Chinese, English, French, Russian and Spanish


7 CISG art. 7(1). Neither the meaning of good faith nor a method for accomplishing the goal of uniformity is addressed. “Ultimately, one may be forced to concede that, as pointed out during the Working Group negotiations, the emphasis on observing good faith in international trade was included more out of a sense that it could do no harm rather than out of any conviction it would do specific good. Thus, one must conclude that the emphasis on good faith as a tenet of interpretation is either an empty pronouncement awaiting judicial decisions to give it content or an unfocused aspiration which cannot be effectively applied by any court. Bailey, Facing the Truth, supra note 7 at 296. See also, Kritzer, Guide, supra note 7.

8 Citations to foreign cases and arbitral awards in this article are found at the electronic library on the CISG maintained by Pace Law School at ww.cisg.law.pace.edu/cisg/text/cisg-toc.html and to the electronic database for the CISG and the UNIDROIT Principles of International Commercial Contracts maintained at UNILEX, www.unilex.info

9 “The ambivalence of the drafters toward even referring to general principles may explain why the CISG does not explicitly identify those principles.” Bailey, Facing the Truth, supra note 7, at 298-99.
Lawyers who are faced with an issue in the interpretation of the CISG will find that they must consult a daunting body of resources, including the legislative history of the Convention (travaux préparatoires),\(^{10}\) the 1964 Hague Conventions on the same subjects, Secretariat Commentaries to the 1978 draft,\(^{11}\) voluminous scholarly commentary, opinions issued by tribunals in other jurisdictions, and a text of the CISG that has been published in five official languages.\(^{12}\) Difficulties in interpreting the CISG are compounded by conflicting views concerning the value of case precedents\(^ {13}\) and the enormous practical difficulties in accessing foreign decisions,\(^ {14}\) many of which are reported results but fail to explain their conclusions. The most formidable obstacles to a uniform interpretation of the Convention are the absence of a supra-national body


\(^{11}\) Albert Kritzer’s work, supra note 7, is an indispensable resource.

\(^{12}\) “If there is a need to consult the original language versions, then as a rule it will have to be assumed that in the case of discrepancies between the various language versions the English text (and occasionally the French text) express the intention of the Conference better than the other versions. That is because the negotiations were essentially carried out in those languages and English was the language used by the drafting committee.” Peter Schlechtriem, Commentary on the UN Convention on the International Sale of Goods 101 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005).

\(^{13}\) “Although the only way the criterion of uniformity has meaning is through the use of international precedent, neither Article 7 nor its legislative history indicate the degree to which courts should defer to that precedent. Certainly there is no indication that Article 7 establishes that decisions in foreign jurisdictions are binding precedent in the sense of the common law principle of stare decisis.” Bailey, Facing the Truth, supra note 7, at 293.

\(^{14}\) The Secretariat of The United Nations Commission on International Trade Law (UNCITRAL) maintains a website that collects and disseminates information on court decisions and arbitral awards relating to the CISG and other Conventions and Model Laws: Case Law on UNCITRAL Texts (CLOUT). Article 13(3) of the ICC Rules has been invoked to apply the CISG to disputes in arbitration. UNCITRAL relies on “national correspondents” to collect court decisions and arbitral awards and to prepare abstracts that are then translated by the Secretariat into the other five United Nations languages. The abstracts are intended to provide sufficient information to enable readers to decide whether to order (for a fee) a copy of the complete decision or arbitral award. National correspondents have been instructed to inform the Secretariat concerning any restrictions on the reproduction of the full texts of court decisions or arbitral awards. http://www.uncitral.org/uncitral/en/case_law.html (then follow “A/CN.9/SER.C/GUIDE/1/Rev.1” hyperlink).
empowered to review and resolve conflicting decisions, and an ongoing, largely academic debate concerning the proper focus of such an effort.

In view of these many difficulties in securing a uniform interpretation of the CISG, it is not surprising that some decisions in the U.S. have relied on precedents interpreting UCC 2 when provisions of the CISG closely track its language. While there are critics of this approach, it is inevitable that our Uniform Commercial Code will suggest issues and answers to lawyers who draft international sales contracts and litigate disputes governed by the Convention.

This article will focus on some of the questions that must be answered to determine whether the Convention applies to a sales transaction. To the extent that the decisions of foreign courts and tribunals can be brought to bear on the answers to these questions, they will be discussed. When a CISG provision suggests a similar provision in UCC 2, interpretations of the latter in U.S. courts will be offered for comparison.

We begin with a list of the conditions that must be satisfied before the CISG will govern a sales contract:

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17 Rotorex v. Delchi Carrier, 71 F.3d 1024, 1028 (2d Cir. 1995) (“Caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code…, may also inform a court where the language of the relevant CISG provisions tracks that of the UCC.”) See also Chicago Prime Packers v. Northam Food Trading, 408 F.3d 894, 898 (7th Cir. 2005) (“A comparison with the UCC reveals that the buyer bears the burden of proving non-conformity under the CISG.”) and Raw Materials v. Manfred Forberich GmbH, No. 03 C 1154, 2004 WL 1535839 (N.D. Ill. 2004) (“In applying Article 79 of the CISG, the Court will use as a guide caselaw interpreting a similar provision of § 2-615 of the UCC.”)

18 See e.g., Schlechtriem, supra note 12, at 102 (“The CISG is a codification, in which terms borrowed from individual legal systems must primarily be interpreted with reference to the purpose of the Convention and the context in which they arise. The meaning of a term under domestic law can be claimed to be relevant only if the other negotiating parties could have recognized it as such during preliminary work on the Convention and intended it to have such a meaning; in such a case, the meaning will be apparent purely from the travaux préparatoires.”)

19 See Kritzer, Guide, supra note 7, for a “match up” of the CISG to sections of UCC 2.
1. the parties are located in different States that have ratified the CISG;\textsuperscript{20}

2. the contract is for the sale of goods;\textsuperscript{21}

3. the contract is valid under controlling law apart from the CISG;\textsuperscript{22}

4. the transaction is not expressly excluded from the CISG;\textsuperscript{23}

5. the transaction is not implicitly excluded from the CISG; and

6. neither the U.S. nor the parties elect to “opt out” of the CISG.\textsuperscript{24}

1. **The parties are located in different States that have ratified the CISG.**

   The Convention applies to commercial contracts if the parties’ places of business are in different States that have ratified the Convention if this fact was apparent when the contract was made.\textsuperscript{25} The Convention may apply to a sales contract although the goods are not delivered across a national border\textsuperscript{26} and despite the fact that both parties are incorporated in the same place.\textsuperscript{27} In the following problem, the fact that both parties are incorporated in Delaware is irrelevant in determining their places of business.

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\textsuperscript{20} CISG art. 1(a).
\textsuperscript{21} CISG arts. 1 and 3.
\textsuperscript{22} CISG art. 4.
\textsuperscript{23} CISG arts. 2 and 5.
\textsuperscript{24} CISG arts. 95 and 6.
\textsuperscript{25} CISG arts. 1(1)(a) and 1(2).
\textsuperscript{26} “When work on the CISG began, the cross-border transport of goods was still put forward as a test of the international character of a transaction. However, in order to simplify the application of the CISG, it was decided…that the international character of the contract should be determined solely by the places of business or habitual residence of the parties to the contract.” Schlechtriem, supra note 12, at 24.
\textsuperscript{27} “[T]he question whether this Convention is applicable to a contract of sale of goods is determined primarily by whether the relevant "places of business" of the parties are in different Contracting States. The relevant "place of business" of a party is determined …without reference to his nationality, place of incorporation, or place of head office.” Text of Secretariat Commentary on article 1 of the 1978 Draft, cmt 11 available at \url{http://www.cisg.law.pace.edu/cisg/text/secmm/secmm-01.html} See also, Kritzer, supra note 7 at 74 (“Thus the Convention could apply to a contract between two U.S. firms when one has his relevant place of business in a different country.”)
Problem 1A ("place of business")

Maple Leaf, Ltd., a manufacturer of electronic components, is incorporated in Delaware but has its headquarters in Canada where its sales, marketing, and public relations departments are located. Condor, Inc., a Delaware Corporation doing business in California, submitted purchase orders for Maple Leaf’s components through Distributor who is located in California. The goods were delivered to Condor when they were shipped from Canada.

While a party’s place of business is critical in deciding whether the CISG applies, “place of business” is not defined in the Convention. Commentators have suggested that the term means “a permanent and regular place for the transacting of general business.” It is not clear, however, whether it also encompasses the location of a distributor, or other agent, who participates in the negotiation and performance of the contract. In debates leading to the final draft, delegates were unable to resolve their differences in addressing place of business in the context of local agents working on behalf of foreign principals.

In Problem 1A, the buyer has its place of business in California. It is less clear whether the seller also has a place of business in the United States because it accepts orders through a distributor. The Convention does not address matters relating to agency nor does it describe the activities of an agent that will be sufficient to make the agent’s place of business that of the principal. The problem must therefore be addressed in the context of a non-uniform law of agency that covers a wide range of fact patterns given that the scope of an agent’s authority can vary greatly. A distributor may do business in the name of its supplier or in its own name; it may buy products from a seller or may have the exclusive or non-exclusive authority to solicit orders; and it may or may not

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have the power to bind the seller to contracts with the buyer. In any of these relationships, the distributor may be contractually bound to provide after-market services such repairing goods sold to the buyer.

In Asante Technologies v. PMC-Sierra, the case on which our problem is based, the court decided that the Canadian seller did not have a place of business in the U.S. although it accepted orders forwarded to it by a U.S. distributor. The court reached this conclusion on the ground that the distributor failed to qualify as the seller’s agent in the sales transaction. The analysis of the agency question was predicated on discrete facts: (1) the distributor was not exclusive; (2) the distributorship agreement did not permit the distributor to assume obligations on the seller’s behalf; and (3) there were no alleged complaints concerning representations made by the distributor on behalf of the seller. While the court offered no opinion concerning the relationship between a seller and a distributor that would give the seller a place of business in the location of the distributor, the decision suggests that an exclusive distributor with an obligation to service the seller’s warranty might warrant such a finding.

Cases like Asante will not lead to a uniform application of the CISG because they apply domestic law to determine whether an actor on behalf of the seller qualifies as an agent and whether the nature of the agency is such that the agent’s location will qualify as a seller’s place of business. Applications of U.S. law to determine the relationships that will satisfy the test for “place of business” are likely to diverge from treatment of the same question abroad. For example, commentary on German law suggests that the

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29 164 F.Supp.2d 1142 (N.D. Cal. 2001) (The decision to apply the CISG led the court to confirm its removal jurisdiction under 28 U.S.C. § 1331.)
agent’s location will be irrelevant in any case in which the agent acts in the name of its principal:

“If an agent is involved and if German law of agency governs…, the question whether his place of business or that of the principal is relevant would depend on whether he acted in his own name or that of his principal. *If the agent acts in the name of his principal and the contract concluded takes effect directly for and against the principal, it is solely the latter’s place of business which is relevant;* the principal is a party to the contract from the outset.” 30

In a case that has been criticized, a French buyer ordered electronic components from a German seller through the seller’s liaison office in France. When a dispute arose, the court rejected the seller’s argument that the CISG did not apply because both parties were doing business in France. The court applied the CISG because the seller’s office in France was not an autonomous legal entity but merely a branch office.31 The decision does not explain why the branch office could not qualify as a place of business for the German seller. One commentator has expressed his opinion that the “better view” is that a liaison or branch office can qualify as a place of business but whether the CISG governs the contract will depend on which place of business.32 Another argues that an agent’s

30 Schlectriem, *supra* note 13, at 32 [emphasis supplied].
32 Filip De Ly, *Sources of International Sales Law: An Eclectic Model*, 25 J.L. & Com. 1, 6-7 (2005). See also, Honnold, Uniform Law, *supra* note 28, at 30-31. Honnold offers an example in which a seller has places of business in State A and State B while the buyer has a place of business in State B only. “If Seller negotiated and performed the transaction from its branch office in State B, where Buyer has its sole place of business, both parties can be expected to be familiar with and follow the rules of State B. In any event, it is necessary to determine which of Seller’s two places of business should be used to determine whether the sale was international.” [emphasis supplied]
location is irrelevant “unless (arguably) the agent was actually authorized to conclude the contract on his own initiative.”

The history of negotiations that led to the Convention suggests why it is unlikely that a uniform law will develop in this context of agency arrangements, including contracts facilitated by branch offices and distributors. Delegates were apparently unable to reconcile their different definitions of “place of business” in the context of actors who were not empowered to conclude a contract. A critic of the CISG has observed that “place of business” is a “concept [that] carries with it substantial factual and definitional uncertainties, the resolution of which are likely not to be known by the parties at the time of contract formation.” One might argue that if this is the case, the parties should be able to invoke the Convention’s instruction to disregard the fact that the parties were doing business in different States if they were unaware of it at the time of contracting. The safer approach is to identify the parties’ places of business in a written agreement.

Problem 1B (“more than one place of business”)

The Canadian seller in Problem 1A also maintains an office in Oregon where it employs engineers with whom the California buyer had its primary contacts

34 Franco Ferrari, The Sphere of Application of the Vienna Sales Convention 9 (Kluwer International Law) (1995). According to the author, Belgian and Argentine delegates argued for a place with the power to conclude the contract while the Norwegians would characterize a place of business as a “stable place” with the power to bargain although without power to finally conclude the contract.
35 Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 Ohio St. L.J. 265, 269 (1984). “[O]ver the centuries a great variety of forms of intermediaries have developed to connect buyers and sellers in different countries. Some of these intermediaries deal on their own account, while others are employees or commission agents acting on behalf of their principal. In French and German law the picture is much more complex, for the codes provide a bewildering number of variations on this theme, each relationship having distinct legal consequences.” Id. at 277.
36 CISG art. 1(2).
during the development and engineering phase. The buyer’s order was ultimately processed in Canada where the parts were shipped to California.\textsuperscript{37}

In this problem, both parties have places of business in the United States: the seller in Oregon and the buyer in California. The CISG will govern the dispute only if the seller’s controlling place of business is in Canada.

When a party has more than one place of business, the controlling location is the one that “has the closest relationship to the contract and its performance.”\textsuperscript{38} If a party has more than one place of business, the relevant place will be decided “without reference to his nationality, place of incorporation, or place of head office.”\textsuperscript{39} The parties’ incorporation in Delaware is therefore irrelevant.

Whether the CISG applies to the transaction in this problem depends upon the answer to the following question. Which of the seller’s places of business has the “closest relationship” to the formation and performance of the contract: the one in Canada or the one in the United States?\textsuperscript{40} The answer to this question will require an extensive factual inquiry if negotiations, contract formation, and performance have occurred in different States. In \textit{Asante}, the court assumed that the seller had a place of business in Oregon but rejected the argument that Oregon had the closest relationship with the contract. While the buyer’s primary contact during the development and engineering phase was with the Portland facility, the court held that the closest relationship was with the Canadian office because most of the seller’s representations emanated from Canada, the buyer directly

\textsuperscript{37} This problem is again based on \textit{Asante, supra} note 29.

\textsuperscript{38} CISG art. 10(a). This determination will be made “having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.”

\textsuperscript{39} Secretariat Commentary on article 1, supra note 27 (emphasis supplied).

\textsuperscript{40} CISG art. 10(a). “For the purposes of this Convention:…if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.”
corresponded with the seller at a Canadian address, and the goods were manufactured in Canada. The court did not provide reasons for weighing these facts more heavily than the contacts with the Oregon facility.

The CISG does not suggest a test for establishing which location has the closest relationship to the contract and its performance. It is not clear whether a relationship linked to the formation of a contract is more or less important that a relationship linked to its performance.\(^{41}\) Complicating the analysis is a command to have regard “to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.”\(^{42}\) The Convention does not offer any suggestions as to the nature of these circumstances.

Without judicial interpretations of the CISG, it is not possible to reliably predict which activities at a given place of business will make the transaction “international.” Those who sell or buy through sales representatives, distributors and other dealers who maintain their own offices should consider contractual terms to clarify whether their location should be considered a “place of business” for those who employ them. In addition, the sales contract should be drafted to explicitly identify the parties’ places of business with the “closest relationship to the contract and its performance.”\(^{43}\)

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\(^{41}\) Surprising conclusions have been reached on this question. “[W]here the buyer knows that the contract is performed at a place of business different from that of the conclusion of the contract, Article 10(a) suggests that the relevant place of business be the one where the performance takes place.” Ferrari, The Sphere, supra note 34, at 11. It is not apparent what wording in Article 10(a) has led Professor Ferrari to this conclusion. Cf. Micro Data Base Systems, Inc. v. Dharma Systems, 148 F.2d 649, 653 (7th Cir. 1998) (“In a case in which the contract is made as it were nowhere, because the parties are in different states (or countries) and the contract is negotiated without a face-to-face meeting, but it is entirely performed in one state, the parties will expect the law of that state to govern any contractual dispute that arises during performance (for what other state would be a more plausible candidate?) unless they specify otherwise in the contract....”)

\(^{42}\) CISG art. 10(a).

\(^{43}\) For drafting suggestions, see Kritzer, Guide, supra note 7, at 75-76.
The potential difficulties in locating a party’s place of business and in deciding which of several locations is the relevant one are reasons to consult interpretations of parallel provisions in UCC 2 when the CISG applies to a sales contract. Using UCC 2 as a guide in the interpretation of provisions that are similar to those in the Convention would promote uniformity in the treatment of commercial transactions that are otherwise indistinguishable except on the basis of a difficult-to-predict legal conclusion that one is international.

Problem 1C ("non-merchant” transactions)

Jill Brown has relocated to the United States after spending two years in Hamburg working at a branch office of her law firm. Before departing, she put her Ferrari in storage. The car was purchased for personal use. She is under contract to sell it to a used car dealer in Germany.

Transactions between non-professional sellers and buyers may be within the scope of the CISG although its application is largely determined by the location of the parties’ places of businesses in different countries. While a sale of goods to a consumer (for personal, household use, etc.) is excluded from the scope of the Convention, the CISG applies without regard to the “civil or commercial character of the parties or of the contract.” If a party does not have a place of business, that party’s habitual residence will decide whether the CISG applies. Assuming that Ms. Brown’s habitual residence at the time of contracting was in the U.S. when the contract was made, this transaction is governed by the CISG because it is for the sale of goods, the U.S. and Germany are both

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44 Secretariat Commentary on article 1, supra note 27.
45 See CISG art. 2(a).
46 Article 1(3). See Schlechtriem, supra note 12, at p. 44.
47 CISG art. 10(b).
signatories to the Convention, and the transaction is not expressly excluded\textsuperscript{48} from its scope.

Although the transaction in Problem 1C is governed by the Convention, some have expressed concern that the provisions of the CISG may be a poor fit for sales to and by non-merchants.\textsuperscript{49} Under UCC 2, only a merchant who deals in goods of the kind involved in the transaction implicitly warrants that the goods are “fit for the ordinary purposes for which such goods are used.”\textsuperscript{50} The CISG requires all sellers to deliver goods that “are fit for the purposes for which goods of the same description would ordinarily be used” unless otherwise agreed.\textsuperscript{51} In Problem 1C, Ms Brown has given the dealership a warranty of the car’s fitness unless the parties have otherwise agreed.

2. The contract is for the sale of goods.

The CISG governs the sale of “goods,” a term not defined in the Convention.\textsuperscript{52} While scholarly commentary emphasizes that “goods are basically only moveable, tangible objects,”\textsuperscript{53} there are relatively few reported decisions in which a court had been called upon to decide the meaning of the term.\textsuperscript{54} The following problems examine the difficulties in deciding whether the Convention applies to software licensing agreements, contracts of special manufacture for which the buyer provides raw materials and other

\textsuperscript{48} The car is not consumer goods because it is not being “bought for personal, family or household use.” CISG art. 2(a).
\textsuperscript{49} Ziegel, \textit{The Scope of the Convention, supra} note 33, at 62.
\textsuperscript{50} U.C.C. § 2-314.
\textsuperscript{51} CISG art. 35(2)(a).
\textsuperscript{52} By contrast, UCC 2 defines “goods” and includes in the definition the “unborn young of animals and growing crops” and “things attached to realty” (such as structures, minerals, and timber). See U.C.C. §§ 2-105(1), 2-107. The price can be payable “in money or otherwise.” See U.C.C. § 2-304(1).
\textsuperscript{53} Schlechtriem, \textit{supra} note 12, at 28.
\textsuperscript{54} A sale of livestock is a sale of goods. Germany 19 January 2001 District Court Flensburg http://cisgw3.law.pace.edu/cases/010119g1.html. In a case involving the sale of tickets to the World Cup final, a German court ruled that the transaction was not governed by the CISG because the contract was concluded before it entered into force, and, in any event, the parties had their places of business in the same State. The court did not express an opinion as to whether tickets are “goods.” Germany 27 November 1991 Appellate Court Köln http://cisgw3.law.pace.edu/cases/911127g1.html

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assets, hybrid transactions consisting of a mixed sale of goods and services, or a sale of assets still affixed to real estate at the time of sale such as minerals and timber.

**Problem 2A (“licensed software”)**

*Software, Inc., a U.S. company, develops trading programs for distribution in Europe. Some of the programs are packaged on disks and marketed through distributors. Other software programs are delivered on-line. For some clients, Software designs programs to meet the special needs of its customers. All of these transactions are subject to “licensing” agreements. Last year, Software sold all of its right, title and interest in a commodities trading program to On-Line Broker.*

Is sales law applicable to licensed software although the dominant transfer is the right to use intellectual property? A German decision\(^{55}\) holding that an agreement to prepare a written market analysis does not qualify as a sale of goods makes a distinction between tangible goods and intellectual property, a distinction that plagues the effort to create a uniform law for software.

While the scientific study in the case at hand may find a final embodiment in the form of a written report, it is not a typical object of a commercial sale – at least not under the decisive prevalent view in commercial circles. The purpose of a commercial sale is first and foremost the transfer of property and possession of the good sold. In the present case, however, the right to utilize an intellectual product of work is in the foreground; the work is embodied in a written form solely to

\(^{55}\) Germany 26 August 1994 Appellate Court Köln [http://cisgw3.law.pace.edu/cases/940826g1.html](http://cisgw3.law.pace.edu/cases/940826g1.html)
make it intellectually graspable, and the form of the embodiment is of
secondary importance….  

The German opinion implicitly distinguishes between paper as a commodity (goods) and paper whose value lies in the ideas that it communicates (intellectual property). The same distinction can be made when information is stored on a computer’s hard drive or on disks. The intellectual property embodied in software may be sold, but software programs are more frequently licensed by agreements that restrict their use and resale. Whether software should be covered by either UCC 2 or the CISG has been a divisive subject in both domestic and international transactions.

In the absence of a widely-adopted uniform body to govern the transfer of information stored and read by computers, U.S. courts have filled the vacuum (with the customary “splits of authority”) by applying UCC 2 to all of the transactions in Problem 2A with the exception of Seller’s outright sale of its intellectual property in the commodities trading program. It is widely accepted that the sale of packaged software

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56 Id. Queen Mary Case Translation Programme, translation by Ruth M. Janal, translation edited by Camilla Baasch Andersen.
57 Professor Ziegel agrees that embedded software that is necessary to operate a tangible thing such as a computer or a cell phone is delivered as part of the sale of “goods.” Software embedded on a disk or transmitted electronically is intellectual property. “If it is desirable to impose a single characterization, regardless of the form in which the software is made available to the buyer, then it is probably more logical to treat it as the sale of an intangible.” Ziegel, The Scope of the Convention, supra note 33, at 61.
58 In Micro Data, supra note 43, a software developer used a licensing agreement to prevent transferees from using reverse engineering to extract non-copyrightable elements from the software. Licenses may also be used to disclaim or limit warranties, to impose notice requirements with respect to breach, to limit a purchaser’s remedies for breach, to shorten the limitations period, to select the governing law and the forum, and to otherwise set forth terms that are typically favorable to the licensor.
59 An effort to adopt a new Article 2B in the Uniform Commercial Code to deal with computer information transactions met with failure. Thereafter, a free-standing act known as the Uniform Computer Information Transactions Act (UCITA) was approved by the NCCUSL. It has been adopted by only two states and has met with substantial resistance in many others. The National Conference of Commissioners on Uniform State Laws (NCCUSL) has suspended its efforts to promote adoption of UCITA.
and software incorporated into goods\textsuperscript{61} is governed by UCC 2. Sales law has been applied to internet downloads.\textsuperscript{62} Custom software has been brought within the coverage of UCC 2 as “specially manufactured goods.”\textsuperscript{63} The application of UCC 2 to the transfer of rights in “information” recorded on a tangible medium has been justified on the policy ground that “[t]he Code offers a uniform body of law on a wide range of questions likely to arise in computer software disputes.”\textsuperscript{64}

The objections to applying the CISG to information stored in and read by computers are twofold: information stored on a disk or in a computer is intangible property, not goods,\textsuperscript{65} and the licensed use of information does not satisfy the seller’s obligation to “transfer the property in the goods.”\textsuperscript{66} The first objection has been answered by Frank Diedrich with an autonomous\textsuperscript{67} interpretation of “goods” that substantially incorporates the definition in UCC 2-105(1),\textsuperscript{68} one sufficiently broad to cover international sales contracts “whether the subject matter…is standard software or custom-

\textsuperscript{61} See Dealer Management Systems v. Design Automotive Group, 822 N.E.2d 556 (Ill. App. 2005) and cases cited therein. See also, Amended § 2-103(k), OC 7 (2003). (“[T]he sale of ‘smart goods’ such as an automobile is a transaction in goods fully within this article even though the automobile contains many computer programs.”)

\textsuperscript{62} Advent Systems, 925 F.2d at 676.

\textsuperscript{63} Id. at 675.

\textsuperscript{64} Id. at 676.

\textsuperscript{65} Information has been likened to electricity which is expressly excluded from coverage. CISG art. 2(f).

\textsuperscript{66} CISG art. 30.

\textsuperscript{67} An autonomous interpretation of the CISG avoids the use of domestic law in its interpretation except insofar as a domestic law reflects international norms.

\textsuperscript{68} The proposed definition in applying the CISG is “all movables, including things to be manufactured (‘future goods’) that can be identified as forming the object of the sale and in which personal property can be transferred.” Frank Diedrich, Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG, 8 Pace Int’l L. Rev. 303, 336 (1996).
designed software, or whether the software is transmitted electronically or by means of a tangible data carrier.” 69 The objection that licensing restrictions fail to satisfy the seller’s obligation to transfer the property in the goods is answered by Diedrich’s observation that the CISG allows the parties to derogate from or vary its provisions. 70 Although these conclusions are cogently supported, decisions based on UCC 2 suggest significant difficulties for courts that must use the vague and open-ended provisions of the Convention to answer the tough questions posed by custom and usage in the software industry.

Contract formation presents one of the more difficult challenges in assuring the uniform treatment of software in international transactions. What constitutes assent to the terms of a software license? While this issue has often arisen in the context of sales of packaged software to consumers (transactions that are explicitly excluded in the CISG), the most notorious conflicting decisions under UCC 2 have arisen in the context of licenses for commercial use. In ProCD v. Zeidenberg, 71 the Seventh Circuit upheld a shrink-wrap license that required the user to assent to its terms after the software was purchased at a retail store, while in Step-Saver Data Systems v. Wyse Technology, 72 the Third Circuit refused to enforce a warranty disclaimer on a “box-top” license for software sold over the telephone that was not disclosed at the time of the sale. 73 Both decisions relied on the authority of UCC 2. To achieve international uniformity in the application

69 Id. at 336.
70 CISG art. 6.
71 86 F.3d 1447 (7th Cir. 1996). Zeidenberg bought software, a database of telephone numbers, to resell information in the database through a company that he had organized for the purpose.
72 939 F.2d 91 (3rd Cir. 1991).
73 The court invoked U.C.C. § 2-207(1) to decide that the box-top license did not constitute a counter-offer. It concluded that the warranty disclaimer was not implicitly incorporated in the contract by the parties’ course of dealing or course of performance and constituted a material alteration of the offered terms that did not become part of the contract under the rule in U.C.C. § 2-207(2).
of the CISG to licensing agreements that accompany computer products and transactions, there must be agreement on the nature, timing, and quality of information exchanges that will constitute assent.

If the Convention applies to software licenses, immaterial alterations in the reply to an offer may become part of the contract.\(^{74}\) Unlike the parallel provision in UCC 2\(^{75}\) the CISG has a list of terms that materially alter an offer. Many of these regularly appear in software licenses.\(^{76}\) Will these terms (warranty terms and disclaimers, remedy limitations, and provisions for dispute resolution) apply if they are read after software is delivered? Will they propose a counter-offer, suggest a modification,\(^{77}\) or be incorporated as a matter of usage?\(^{78}\)

While questions relating to assent in the context of software licenses will challenge international uniformity, they are not the only difficult issues facing courts and arbitration panels. Others include questions concerning the nature and scope of warranties, how the seller’s obligation to deliver will be satisfied when information is

\(^{74}\) CISG art. 19(2).
\(^{75}\) UCC 2-207.
\(^{76}\) CISG art. 19(3) (“quality…of the goods,” “the extent of one party’s liability to the other,” “the settlement of disputes”). A material alteration is expressly a “counter-offer,” CISG art. 19(1), but “the parties are considered, unless otherwise agreed, to have implicitly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.” CISG art. 9(2). The CISG also has support for “a mechanical (i.e., “last shot”) approach.” Joseph Lookofsky, Understanding the CISG in the USA at 146 (Kluwer Law International 2004).
\(^{77}\) “A contract may be modified or terminated by the mere agreement of the parties.” CISG art. 29(1).
\(^{78}\) *Dicta* in a recent unreported federal case suggested that a consequential damage exclusion in a package opened after the buyer paid for the goods would be binding under the CISG. *See Berry v. Ken M. Spooner Farms*, 2006 WL 1009299 (W.D. Wash. 2006). The court cited a Swiss case in which the court required the defendant buyer to pay interest on the unpaid purchase price of fiber at the rate stated in the Austrian seller’s written confirmation because the court found a usage in both Austrian and Swiss law to accept the terms of a seller’s confirmation where the buyer did not object. W.T. GmbH v. P. AG, 21 December 1992 Zivilgericht [Civil Court] Basel http://cisgw3.law.pace.edu/cases/921221s1.html. A new rule effective as of January 1, 2007, commands the federal courts not to prohibit or restrict the citation of cases that have been “designated as …, ‘not for publication,’ ….or the like.” 28 U.S.C.A. FRAP Rule 32.1.
transmitted electronically, and whether a particular program falls outside the scope of the CISG because it is either predominantly intellectual property\(^79\) or because the preponderant contractual obligation consists of services.\(^80\) Lawyers who represent producers of licensed software products should consider including contractual provisions to address these questions or a provision opting out of the CISG altogether.\(^81\)

**Introduction to Problems 2B and 2C (CISG Article 3)**

Goods that are specially manufactured or produced by the seller are within the scope of the Convention *unless* the buyer “undertakes to supply a *substantial part of the materials* necessary for such manufacture or production.”\(^82\) Mixed contracts for the provision of goods and services are also covered *unless* the “*preponderant part of the obligations* of the party who furnishes the goods” will consist of services.\(^83\) These provisions in Article 3 have provoked controversy leading the CISG Advisory Council to issue an opinion\(^84\) (hereinafter, Opinion 4) listing several recurring difficulties. They include differences in meaning ascribed to key words such as “substantial,” “preponderant,” and “obligations” in languages into which the CISG has been officially translated; the scarcity of commentary and case law giving “thoughtful” analysis to issues

\(^79\) *Cf.* Archetronics, Inc. v. Control Systems, 935 F. Supp. 425 (S.D.N.Y. 1996). Whether software is included in the CISG definition of “goods” has not been finally decided. Some courts may decide to follow the view expressed in U.C.C. Article 9 that a packaged software program is a “general intangible.” *See* U.C.C. § 9-102(42), (44) (1999).

\(^80\) CISG art. 3(2). *Cf.* Pearl Investments v. Standard I/O, 257 F. Supp. 2d 326 (D. Maine 2003) (A contract to develop software to carry out automatic trading of corporate securities was primarily a contract for services to which UCC 2 does not apply.)

\(^81\) See the discussion of Problem 5B, *infra.*

\(^82\) CISG art. 3(1). (emphasis supplied)

\(^83\) CISG art. 3(2). (emphasis supplied)

\(^84\) CISG Advisory Council Opinion No. 4, Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG), 24 October 2004. To achieve uniformity in the interpretation of the CISG, the Advisory Council of the United Nations Conventions on Contracts for the International Sale of Goods (CISG-AC) was established in 2001 as a private initiative to address controversial and unresolved issues.
in the interpretation of Article 3; and widespread confusion concerning the relationship between Article 3(1) and Article 3(2).

Problem 2B (the buyer who supplies materials necessary for manufacture)

Finestra, an Italian manufacturer, contracted to provide windows for Gasthaus, a German buyer. Some parts for the windows were provided by the buyer, and the windows were to be modified according to the buyer's specifications.

Article 3 begins with a focus on the obligations of the buyer (“the party who orders the goods”). A sale of specially manufactured goods is ordinarily within the scope of the CISG, and is beyond its scope only if buyer will supply a substantial part of the materials necessary to manufacture or production of the goods. Opinion 4 explores the conflicting meanings attached to “substantial” and concludes that scholarly opinion has divided into two camps: those favoring an economic interpretation of the term based upon the relative value of the materials supplied by the buyer, and those favoring a focus on “essentiality” of the goods supplied by the buyer to the quality and functionality.

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85 While UNICTRAL emphasizes the importance of including the reasons for applying or interpreting a provision, published abstracts rarely focus on anything other than the provision in question. A German case that concludes without standards or fact analysis that the CISG applies to a contract to produce machinery according to the design and specifications because the materials supplied by the buyer were not “substantial” (Article 3(1)) and the services rendered by the seller were not the “preponderant part” of its obligation (Article 3(2)). Germany 3 December 1999 Appellate Court München (Window production plant case) [translation available] http://cisgw3.law.pace.edu/cases/991203g1.html
86 Id. at 1.7.
87 The problem is based on a German case that found no exception to the application of the CISG on these facts. Germany 3 December 1999 Appellate Court München (Window production plant case) [translation available] http://cisgw3.law.pace.edu/cases/991203g1.html
88 The U.C.C. also covers specially manufactured goods without any explicit exception. See U.C.C. 2-105(1). However, when the raw materials are supplied by the buyer, the courts have used the predominant purpose test to exclude some of these transactions as contracts for services. See e.g., OMAC v. Southwestern Mach. & Tool Works, 189 Ga.App. 42, 374 S.E.2d 829 (Ga.App., 1988).
89 “[T]he materials provided by the buyer ought to be higher in value (price) as compared to those provided by the seller in order to exclude the CISG.” CISG-AC 4, supra note 84, at 2.3.
of the finished goods.\textsuperscript{90} Opinion 4 comes down firmly in the camp of those favoring the “economic value” approach\textsuperscript{91} while at the same time rejecting fixed percentages in determining whether materials supplied by the buyer form a “substantial part” of the finished product. “Even if one were to use a percentage,” the Advisory Council advises that a buyer who supplies as much as 50\% of the value of the materials would still fail the test of substantiability because Article 3 states a “pro Convention principle.”\textsuperscript{92}

Opinion 4 explores another controversial issue: the meaning of \textit{materials necessary} in the production of the final product. Here the Opinion draws a distinction between raw materials that are necessary to produce the goods and those that are needed to package, transport, or test the goods prior to acceptance. Courts should consider the value of the former but not the latter. When the buyer supplies “technology, technical specifications, drawings, formulas [or] designs … for the production of the goods,” case law and legal authorities have had more difficulty deciding whether these are materials necessary in their production.\textsuperscript{93} Opinion 4 rejects a French case excluding a contract for the production of electronic components pursuant to the buyer’s specifications and design from the scope of the CISG.\textsuperscript{94} It concludes that designs or drawings are included in the concept of necessary materials only if they “contribute originality, speciality or exclusivity to the goods” as in the case of patent or other industrial property rights.\textsuperscript{95}

\textsuperscript{90} Id. at 2.4.
\textsuperscript{91} Id. at 2.7. ("An ‘essential’ criterion should only be considered where the ‘economic value’is impossible or inappropriate to apply, i.e., when the comparison of the materials provided for by both parties amounts to nearly the same value.")
\textsuperscript{92} Id. at 2.10.
\textsuperscript{93} Id. at 2.12.
\textsuperscript{94} France 25 May 1993 Appellate Court Chambéry (\textit{A.M.D. Electronique v. Rosenberger} (Adapters case)) http://cisgw3.law.pace.edu/cases/930525f1.html
\textsuperscript{95} CISG-AC 4, \textit{supra} note 84, at 2.15. “This will usually imply that where the buyer or the seller contributes material that embodies industrial or intellectual property rights (e.g., a patent or other industrial
Problem 2C (the seller who furnishes goods and other services)

*Finestra’s contract in Problem 2B also required the seller to assemble the windows and install them.*

Contracts to sell goods generally include the rendition of services (e.g., harvesting, fabricating, processing, packaging, shipping, etc.). The different laws governing the sale of goods and contracts for services has led to the creation of tests to determine the applicable law when both goods and services feature prominently in a transaction. If the “preponderant part” of the seller’s obligations will be “labour or other services,” the Convention does not apply.\(^{96}\)

As with “substantial” in the analysis of Article 3(1), Opinion 4 favors an economic value approach in defining “preponderant” that “should *not* be quantified by predetermined percentages of values.”\(^{97}\) The relative values of goods and services is to be determined at the time of contracting\(^{98}\) and the relevant factors include “the denomination and entire content of the contract, the structure of the price, and the weight given by the parties to the different obligations under the contract.”\(^{99}\) If percentages are considered, however, even services valued at “slightly above 50% would not be generally decisive to exclude the CISG.”\(^{100}\)

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\(^{96}\) When a sale of goods otherwise governed by the UCC is accompanied by a sale of non-goods, including services, property rights, and real estate, the “predominant purpose” test addresses whether in these hybrid or mixed transactions the “predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved…or is a transaction of sale, with labor incidentally involved.” *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974). If the sale of goods predominates, UCC 2 applies.

\(^{97}\) CISG-AC 4, *supra* note 84, at 3.3-3.4. [emphasis supplied]

\(^{98}\) *Id*. at 3.3.

\(^{99}\) *Id*. at 3.4.

\(^{100}\) *Id*. Here again, the Advisory Council rejects a fixed percentage in determining “preponderant part” and suggests resorting to a test of essentiality only if it is “impossible or inappropriate to apply” the test of economic value. *Id*. at 3.3.
Even with Opinion 4, there is room for disagreement. It is unlikely that the “preponderant part” analysis under the CISG will produce any greater certainty than the “predominant purpose” test in U.S. sales law. If the buyer will supply a substantial part of the materials necessary to produce the goods or the seller will perform substantial services but the contracting parties nevertheless want the CISG to apply to their transaction, they should select it as the governing law but exclude the application of Article 3. A second choice of law should be made in the event that the tribunal hearing the case refuses to enforce the election because such as sale is excluded from the scope of the CISG.

**Problem 2E ("things affixed to real estate")**

*u.s. construction has contracted to buy all of the lumber on land owned by madera de la frontera, a business concern in northern argentina. madera has agreed to cut the timber and deliver it in argentina.*

There is no provision in the CISG that would either include or exclude the contract described in Problem 2E from its scope. By comparison, UCC 2 may cover a contract to sell crops, structures, timber or minerals although the contract predates their severance from the related real estate. UCC 2 covers a sale of minerals (including oil and gas), only if they will be severed by the seller. A contract to sell crops, timber, and other things that can be removed without material harm to the real estate is covered whether the goods will be severed by the seller or the buyer. In these transactions, issues relating to the statute of frauds, risk of loss, remedies for breach, and the protection of other

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102 U.C.C. § 2-107.
purchasers (including lenders)\textsuperscript{103} are found in UCC 2, not in the law governing real property. Given the different consequences that can flow from applying real estate law to a contract to sell property affixed or appurtenant to real estate, does the CISG also cover their sale?

John Honnold has argued that “[c]ontracts requiring the seller\textsuperscript{104} to extract or sever corporeal objects from land and make them available to the buyer seem to be covered by Article 3(1),” as the supply of goods to be manufactured or produced.\textsuperscript{105} In spite of the opinion of this noted authority on the CISG, there are reasons to think that U.S. courts may be reluctant to enforce a contract to sell timber, minerals, and the like while they are still attached to real estate. There is no provision in the CISG that expressly brings “goods to be severed from realty” within its scope, and the CISG does not address the potential for conflict between buyers of goods still attached to realty and purchasers of the real estate prior to their severance.\textsuperscript{106}

The drafting history of the CISG does not support the conclusion that the failure to include the sale of minerals, timber, crops and like property prior to severance was a drafting oversight. While the drafters rejected proposed amendments to add “oil” and “gas” to the list of excluded transactions, these amendments were defeated without discussion of the Convention’s possible application to contracts to sell these commodities

\textsuperscript{103} “[T]he contract for sale may be executed and recorded in the same manner as a document transferring an interest in land and shall then constitute notice to third parties of the buyer’s rights under the contract for sale. U.C.C. § 2-107(3).

\textsuperscript{104} Professor Honnold does not suggest that these items would be covered by the CISG if severance were the obligation of the buyer.

\textsuperscript{105} Honnold, \textit{supra} note 28, at 52.

\textsuperscript{106} U.C.C. § 2-107 has specific protections for purchasers against competing and undisclosed interests in real estate. \textit{See supra}, note 87. There are no similar protections in the CISG as it “is not concerned with…the effect which the contract may have on the property in the goods sold.” CISG art. 4(b).
prior to extraction. In many developing countries, real estate and things associated with
real estate are still the most important sources of the wealth of its people and are
protected by formal requirements governing contracts to sell them. Although the
United States did not opt out of Article 11, a provision that validates contracts without
requiring written proof of their making, courts in the U.S. may decide that writing
requirements for real estate transactions are too important to abandon in the absence of an
express provision that applies the CISG to a sale of real-estate related goods prior to
severance. Until questions concerning the application of the CISG to these transactions
are settled, lawyers should play it safe and comply with local provisions that govern the
sale of real property if the contract of sale predates severance.

There should be no objection to applying the CISG after severance. A statute of
frauds offers protection against unfounded liens against real estate. Once the goods have
been severed, this protection is no longer needed. If there is a third-party claim based on
an interest in the real estate, the CISG will not apply to that dispute in any event.

3. The contract is “valid” under controlling law apart from the CISG.

Validity is another undefined term in the Convention with the result that there is
considerable debate concerning its meaning. This debate has not been resolved by the
drafting history as it documents conflicting goals that the participants were unable to
reconcile: the desire for a uniform international sales law and a proper regard for

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107 UNCITRAL: Preparation of the 1977 UNCITRAL “Sales” Draft, reprinted in Honnold, Documentary
History, supra note 2, at 320.
108 See e.g., Argentina Civil Code, Articles 1183 and 1184. Contracts to transfer interests in real estate are
invalid unless notarized documents evidence the sale.
109 The author has found no case to apply the CISG to property attached to real estate prior to severance.
110 CISG art. 4(b).
111 For a comprehensive treatment of the various approaches to the interpretation of Article 4(a), see Helen
E. Hartnell, Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the
domestic public policy. It is generally agreed that the validity exception to the scope of the Convention covers subject matter widely-regarded as within the scope of domestic policy concerns: *e.g.*, lack of capacity, duress, fraud, and illegality. Judicial decisions support the conclusion that the CISG will not determine the validity of forum selection clauses, penalty or liquidated damage clauses, or settlement agreements. The relevance of the law of consideration to contracts governed by the CISG is less certain.

**Problem 3A (“consideration”)**

*During the past seven years, Sohnenschein has been the German distributor for Software U.S.A. The German company is in need of in-house software to facilitate credit card billings. Software has agreed to provide software for this purpose “in consideration of our long and profitable relationship.”*

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112 “The drafting history undeniably suggests that the drafters intended article 4(a) to serve as a loophole which could stretch to fit the needs of each domestic legal system.” Id. at p. 21. The validity exception to the regulation of international sales contracts was “to be sure that the Convention neither disturbed deeply ingrained notions of public policy,… , nor tried to legislate what public policy should be for all nations. Neither approach would have succeeded; the Convention would simply not have been adopted.” B. Blair Crawford, *Drafting Considerations under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 8 J. L. & Comm. 187, 191 (1988).

113 As of September 2007, all of the cases in the UNILEX database purporting to address the capacity of the parties raise questions of agency.

114 Kritzer, *supra* note 7, at p. 86. Laws controlling interest rates, market regulatory rules, import-export restrictions, and foreign exchange control laws are matters governed by domestic law. Hartnell, *Rousing*, *supra* note 111, at p. 80. Objections that contract terms fail to satisfy domestic law because they are unreasonable, unconscionable or against public policy, or fail to satisfy requirements as to substance or form, or are the result of excusable mistake call for more controversial applications of the validity exclusion. See *e.g.*, Switzerland 24 August 1995 Commercial Court St. Gallen, [http://cisgw3.law.pace.edu/cases/950824s1.html](http://cisgw3.law.pace.edu/cases/950824s1.html) (A Swiss court accepted a buyer’s argument, based on mistake, that a contract was invalid under Swiss law because the buyer concluded the contract without reading it in reliance on the seller’s conduct.)

115 Argentina 14 October 1993 Appellate Court (*Inta v. Officina Meccanica*), [http://cisgw3.law.pace.edu/cases/931014a1.html](http://cisgw3.law.pace.edu/cases/931014a1.html)

116 Belgium 21 January 1997 District Court Hasselt (*Epsilon v. Interneon*), [http://cisgw3.law.pace.edu/cases/970121b1.html](http://cisgw3.law.pace.edu/cases/970121b1.html); Austria 7 September 2000 Supreme Court, [http://cisgw3.law.pace.edu/cases/000907a3.html](http://cisgw3.law.pace.edu/cases/000907a3.html)

117 Germany 14 May 1993 District Court Aachen, [http://cisgw3.law.pace.edu/cases/930514g1.html](http://cisgw3.law.pace.edu/cases/930514g1.html)
Lawyers trained in the common law will immediately see a lack of consideration for Software’s promise in Problem 3A. Consideration is lacking when a promise or performance has no value, the promisor asks for nothing in exchange for the promise, or, as in this problem, the purported consideration consists of a benefit conferred in the past that is not otherwise binding as a “moral obligation.”

A CISG buyer is obligated to pay the “price” of goods sold. There is no “consideration” requirement in the Convention. In the common law, however, consideration is characterized as the price of a bargain and required for valid contracts governed by the common law and UCC 2. Matters of validity are outside the scope of the Convention.

While consideration is typically present in commercial contracts, Problem C1 presents an unusual but not improbable fact pattern. It has been argued that an international sales contract should not be invalid on grounds that it lacks consideration because there is no such requirement in much of the world and “subjecting some international sales governed by the Convention to this arcane doctrine would be inconsistent with the mandate of Article 7(1)…to interpret the Convention with regard ‘to

118 For example, when the purported consideration is a “sham” or consists of an unenforceable promise. Lawrence v. Ingham County Health Department, 408 N.W.2d 461 (Mich. App. 1987).
119 Although gratuitous promises lack consideration, they may be enforceable to avoid injustice if there has been reliance on a promise. Restatement (Second) of Contracts § 90 (1981).
120 Past acts are not consideration because they cannot be the subject of a bargain. A promise to pay for past benefits may be enforceable under several exceptions loosely referred to as “moral” obligations. See Restatement (Second) of Contracts §§ 82-86 (1981).
121 CISG art. 53. “Price” is not defined. Money, other goods, real estate, and other property are included in the meaning of price under UCC 2. U.C.C. § 2-304
122 In the case of irrevocable offers and contract modifications, both the CISG and UCC 2 dispense with any consideration requirement. See CISG arts. 16(2) and 29(1) and UCC 2-204 and 2-209.
123 The CISG was “not designed to ‘police’ sales agreements.” Lookovsky, Understanding, supra note 76, at 24. Unless otherwise expressly provided, matters regarding the “validity of the contract or of any of its provisions or of any usage” will be decided according to local law. See CISG art. 4(a).
its international character and the need to promote uniformity in its application.”¹²⁴

Others have argued that consideration is a matter of validity that is excluded from the
scope of the CISG.¹²⁵ Case law in the United States has not clearly settled the question.¹²⁶

Even if the law of consideration does not invalidate the contract in Problem C1, there is a question as to whether the transaction is a contract of sale within the meaning of the Convention. While contract of sale is not defined, its meaning can be inferred from the seller’s obligation to deliver goods that are required by the contract¹²⁷ and the buyer’s obligation to pay the price.¹²⁸ These obligations suggest that the seller’s promise to deliver or delivery of the goods must be in exchange for a contemporaneous promise to pay or payment of an agreed price. If this is the proper interpretation of the CISG, the transaction in Problem 3A is excluded from the scope of the Convention without regard to its validity under domestic law.

**Problem 3B (warranty disclaimers)**

*Retail Giant, U.S.A., contracted to buy software from the French firm, Parler Electronique, after extensive negotiations in New York during which Retail’s purchasing agent told Parler’s sales representative that it needed a program that would be compatible with other software that it was using. Parler recommended a program that it had tested but not yet marketed. Parler obtained the buyer’s signature on a purchase agreement that “disclaimed all implied obligations.” The*

¹²⁴ Honnold, supra note 28, at 284 (emphasis in original).
¹²⁵ E. Allan Farnsworth, Contracts (4th ed. 2004) § 2.2 at 47, fn 1 citing Geneval Pharms. Tech. v. Barr Labs, 201 F. Supp. 2d 236 (S.D.N.Y. 2002). Because the court in Barr Labs found sufficient allegations of consideration to survive a motion for summary judgment, its suggestion that consideration is a matter of validity under the CISG was unnecessary to the decision.
¹²⁶ Although an international sales contract may be “invalid” for purposes of applying the CISG, there is authority that the Convention will not preempt a state law claim based on promissory estoppel. See Caterpillar v. Unisor Indussteel, 393 F.Supp.2d 659, 672-76 (N.D.Ill. 2005).
¹²⁷ CISG art. 35(1).
¹²⁸ CISG art. 53.
disclaimer was in the typeface of the same size and font that was used for other terms and conditions. The parties also agreed that the CISG and supplementing U.S. law would apply to resolve disputes between them.

The validity of a contract under local law is beyond the scope of the CISG as are questions addressed to the validity of contract provisions and usages. The latter presents a challenge for lawyers who draft warranty disclaimers in contracts governed by the Convention.

In Problem 3B, Retail Giant requested software compatible with its existing programs. A CISG seller is obligated to deliver goods required by their description in the contract, and the goods must also satisfy any “particular purpose made known to the seller” unless the buyer did not rely on the seller’s judgment or reliance was unreasonable. Parler’s program does not satisfy the buyer’s description of the goods. Parler also knew Retail Giant’s particular need for the software when the contract was concluded. Nothing suggests that the store did not reasonably rely on Parler’s judgment in selecting the software.

The CISG does not use “warranty” or “guarantee” to describe the seller’s obligations, but anyone familiar with sales law will immediately recognize them as rough equivalents of UCC 2’s implied warranties of merchantability and fitness for a particular purpose. These warranties can be disclaimed only by complying with UCC

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129 CISG art. 4(a).
130 CISG art. 35(1). They must also be fit for the ordinary purposes for which such goods are used. CISG art. 35(2)(a).
131 CISG art. 35(2)(b). The seller’s obligations under Article 35(2) are expressly subject to contrary agreement of the parties.
132 U.C.C. § 2-314.
133 U.C.C. § 2-315.
The CISG, on the other hand, dispenses with any requirement as to the "form" of a contract of sale and states no exception for disclaimers of the seller’s obligation to deliver goods of the "quantity, quality and description required by the contract." Assuming that the seller can disclaim its obligation to deliver goods of the quality and description required by the contract, is the disclaimer invalid because it fails to satisfy the formal requirements for disclaimers under UCC 2 because it does not mention merchantability and is inconspicuous? John Honnold has argued that domestic requirements for valid warranty disclaimers, such as the use of the term "merchantability," should be inapplicable to transactions subject to the Convention because the CISG does not itself use this term. Instead, disclaimers should be governed by principles that govern the interpretation of the parties’ statements. “Under Article 8(2), the statements of a party (including contract terms he has drafted) ‘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…”

With Honnold’s interpretation of the CISG, Parler’s disclaimer is effective if it would be reasonably understood to exclude the seller’s obligations to supply the buyer.

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134 U.C.C. § 2-316. Subject to few exceptions, a written disclaimer of the implied warranty of merchantability is effective only if it is conspicuous and mentions “merchantability.” The implied warranty of fitness for a particular purpose must be disclaimed in a conspicuous writing. Notwithstanding these requirements, implied warranties are disclaimed in an “as is” sale. U.C.C. § 2-316(3)(a).
135 CISG art. 11 (“A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.”).
136 CISG art. 35(1).
137 Article 6 allows the parties to modify the application of the Convention to the contract. Nevertheless, it is an open question whether this provision validates a disclaimer that is otherwise at odds with local law. See e.g., Germany 21 May 1996 Appellate Court Köln, http://cisgw3.law.pace.edu/cases/960521g1.html (Exclusion of warranty is invalid under German law because the seller fraudulently sold the car knowing that the documents showing the age of the car were false).
139 Id. (emphasis in original). Professor Honnold argues that Article 8(2) “is addressed to the same basic issue as the provision in UCC 2-316(3) giving effect to language which in ‘common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty.’” (emphasis in original).
with compatible software. Any such understanding may depend on evolving usages. Lawyers specializing in international commercial law may be forewarned that Parler has disclaimed all implied warranties, but U.S. buyers and lawyers who are still not familiar with the Convention may be less likely to share this understanding.

Alan Farnsworth has offered contradictory advice on the subject of warranty disclaimers. On the one hand, he has argued that because the CISG does not use the term warranty to describe the quality of the goods that the seller is obligated to deliver, contractual disclaimers of the implied warranty of merchantability should be revised to reflect the sense of the CISG; i.e., “there is no obligation of the seller as to conformity of the goods.” On the other hand, he concludes that continuing compliance with the Code may be the wiser course.

Farnsworth’s caution that UCC 2 may determine the validity of warranty disclaimers is supported by a federal case holding that the validity of a clause disclaiming liability for consequential damages in the sale of nursery stock by a U.S. seller to a Mexican buyer was governed by UCC 2, not the CISG. Until there is a sufficient body of precedent on matters related the duration and disclaimer of warranties and associated remedy limitations, the parties should comply with the requirements of UCC 2.

140 Cf. U.C.C. § 2-316(3)(c) (Exclusions and modifications of implied warranties may be established by course of dealing or course of performance or usage of trade.)
141 E. Allan Farnsworth, Review of Standard Forms or Terms Under the Vienna Convention, 21 Cornell Int’l L. J. 439, 443 (emphasis supplied).
143 Berry, supra note 78.
4. The transaction is not expressly excluded by the CISG.\footnote{Also expressly excluded from the scope of the Convention are sales conducted by auctions, on execution or otherwise by authority of law. \textit{See} CISG art. 2(b).}

While all of the following may satisfy the definition of goods in UCC 2, their sale is expressly excluded from coverage in the CISG: ships, vessels, hovercraft, aircraft;\footnote{CISG art. 2(e). The exclusion of aircraft does not extend to the sale of components according to a Hungarian case. \textit{MALEV Hungarian Airlines v. United Technologies International Inc. Pratt & Whitney Commercial Engine Business, Metropolitan Court of Budapest, 10 January 1992 in UNILEX}} electricity,\footnote{CISG art. 2(f). The text of the Secretariat Commentary explains the exclusion of electricity on “the ground that in many legal systems electricity is not considered to be goods and, in any case, international sales of electricity present unique problems that are different from those presented by the usual international sales of goods.” \textit{Kritzer, Guide, supra} note 7, at 65. U.S. courts have declined to apply UCC 2 to resolve disputes over loss caused by electricity before it has been “metered.” The cases are discussed in \textit{G & K Dairy v. Princeton Elec. Plant Bd.,} 781 F.Supp. 485 (W.D.Ky. 1991). Courts have refused to apply UCC 2 to the kind of transaction most likely to arise internationally: sales between power companies. \textit{See} \textit{U.S. v. Consolidated Edison of New York,} 590 F.Supp. 266 (D.C.N.Y. 1984).} and money.\footnote{CISG art. 2(d). Article 2(d) also excludes the sale of “stocks, shares, investment securities, and negotiable instruments.”} Even so, some of these exclusions also raise issues in interpreting the scope of the Convention.

**Problem 4A (“vessels”)**

\textit{Captain Cook, a U.S. citizen residing in New York, has contracted to sell his 35-foot sailboat to Plus de Poissons, a Canadian sport-fishing enterprise.}

The authorities are divided on the question whether the sale of smaller pleasure craft is excluded by the reference to ships and vessels in the CISG. Peter Schlechtriem has suggested defining “vessel” to include “motor yachts” and “a dinghy with 20 square metre sail area,” but not “small rowing boats, sailing boats, paddle boats, and inflatables.”\footnote{Netherlands 31 August 2005 Appellate Court Leeuwarden (\textit{Auto-Moto Styl S.R.O. v. Pedro Boat B.V.}) [translation available] \textit{http://cisgw3.law.pace.edu/cases/050831n1.html} \textit{See also, Schlechtriem, supra} note 13, at p. 51.} A case from the Netherland has applied the CISG to the sale of six boats for a price ranging from 350,000.00 to 355,000 EURO per boat.\footnote{Netherlands 31 August 2005 Appellate Court Leeuwarden (\textit{Auto-Moto Styl S.R.O. v. Pedro Boat B.V.}) [translation available] \textit{http://cisgw3.law.pace.edu/cases/050831n1.html}} Given the ongoing controversy concerning the weight of foreign precedents and commentary in the
interpretation of the CISG, it is not to be expected that U.S. courts will readily accept Schlectriem’s technical definitional distinctions that are not expressly included in the Convention. Whether the contract in Problem 4A is outside the scope of the CISG can only be decided in the context of an adjudicated or arbitrated dispute.

**Problem 4B (money)**

*Sean Numismatist, a resident of Boston, inherited a collection of rare coins. He has contracted to sell them to Sr. Moneda of Barcelona, a dealer in rare coins.*

The CISG excludes the sale of “money.” The exclusion of money and investments such as stocks and bonds is said to have been motivated by a desire to “avoid conflict with mandatory rules of domestic law applicable to international securities and currency transactions.” These concerns are not present in the sale of a coin collection in which money is treated not as a medium of exchange but as a commodity. Without decided cases, however, it is not possible to reliably predict whether the CISG will be interpreted to recognize this distinction.

**Problem 4C (personal injury and property damages)**

*Sally Cooke owns a small restaurant in Boston. This month she ordered beef from Carne Argentina for the restaurant and for a family Bar-B-Q. When it arrived, the steak was contaminated with E. coli. Sally, her customers, and members of her family were hospitalized. Prior to the sale, Carne Argentina told Sally that the beef had been irradiated and was free of disease.*

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151 See Bailey, *Facing the Truth*, supra note 7.


153 UCC 2 has been held to cover the sale of a coin collection. See *Oswald v. Allen*, 417 F.2d 43 (NYCA 1969).
From the point of view of a U.S. lawyer, the potential claims in Problem 4C include economic and personal injury losses based on breaches of warranty, strict liability, negligence, and misrepresentation. Most of these claims fall outside the scope of the CISG. If personal injury claims are asserted by Cooke’s customers and family, they are objectionable because the Convention does not apply to the sale of goods for personal consumption unless the seller was unaware that the goods were bought for such use when the contract was made. Although the sale of beef to Cooke for the family barbeque would be covered if Carne Argentina had no reason to know that it was destined for personal or family consumption, the family’s personal injury claims as well as those of Cooke’s customers are barred by a separate exclusion for claims based on death or personal injury arising from the sale or use of the goods.

While personal injury claims are outside the scope of the Convention, property loss is not. If the restaurant fed the tainted meat to its guard dog, injury to the dog would be a recoverable loss assuming that it was foreseeable at the time of contracting. On the other hand, if a customer took a doggy bag from Cooke’s restaurant whose contents fatally poisoning a champion poodle, the customer’s claim against Carne Argentina is outside of the scope of the CISG because the customer was not a party to the sales.

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154 It is generally agreed that claims based on fraud are excluded from the scope of the Convention as a matter relating to validity of the contract or because “the Convention does not address factual situations involving fraud and should not be construed as wiping out this important field of law by implication.” Honnold, Uniform Law, supra, note 28, at 67.

155 CISG art. 2(a) (“This Convention does not apply to sales:...of good bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;...”) “The seller must know or have reason to know of the intended personal use when the contract was made; the seller’s subsequent awareness that the goods are for personal use...is irrelevant.” Schlechtriem Commentary, supra, note 12, at p. 45. But cf. Germany 11 October 1995 District Court Düsseldorf, http://cisgw3.law.pace.edu/cases/951011g1.html (“Disregarding the fact that the purchase of the generator by the buyer was clearly intended for personal use and therefore should not fall within the scope of application of CISG ..., the Court held that the contract was governed by CISG.”) (abstract)

156 CISG art. 5.

157 CISG art. 74.
This limitation poses difficulties for plaintiffs seeking economic losses from a manufacturer, retailer or other distributor who offered express or implied warranties.

While enforcement of a warranty given by a remote seller (such as the manufacturer) is apparently beyond the scope of the CISG, John Honnold has suggested that case law may eventually lead to enforcement if the manufacturer participates in sales consummated by dealers by offering written warranties of quality to the ultimate purchaser or by promoting the sale with personal contacts with the ultimate purchaser. Even so, other exclusions from the scope of the CISG will raise substantial hurdles for the plaintiff. The parties will have to have their places of business (or residence) in different contracting States; the purchase will have to have been for reasons other than personal, family or household use; and the claim will have to be for economic losses such as property damage, repair and replacement costs, or lost profits.

The facts of our problem suggest that the family and Cooke’s customers could successfully sue the restaurant under U.S. tort law to recover for their personal injuries. Does the CISG cover Cooke’s lawsuit to recover these losses from Carne Argentina? Damages for breach of a contract governed by the CISG “consist of a sum equal to the loss, including loss of profit, suffered by the other party as consequence of the breach” but recovery is limited to losses that the breaching party “foresaw or ought to have

158 CISG art. 4 (“This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract.”) See also, Honnold, Uniform Law, supra note 28, at 71-72 (The employee of a purchaser of industrial equipment could not sue the seller for personal injuries because the employee’s claim “would not be based on the ‘obligation of the seller and the buyer arising from’ the contract of sale.”)

159 “[I]t is unlikely that the Convention in the foreseeable future will play a large role in claims by buyers against manufacturers and similar remote suppliers. On the other hand, it seems hasty to conclude that the ‘buyer-seller’ language of Article 4 will be an impassable barrier in cases where the supplier has participated substantially (although not formally) in the sale to the buyer. Domestic experience suggests that legal relations with foreign suppliers may be a field for gradual development.” Honnold, Uniform Law, supra note 28, at p. 66.
foreseen at the time of the conclusion of the contract…“ According to commentary on Article 74, “[t]he loss suffered by the buyer as a result of his being held liable to a third party” should be treated like lost profit on a resale. A reported German case applies the CISG to the claim of the buyer of a knife-cutting machine seeking indemnity for personal injury damages asserted by a sub-purchaser.

7. The transaction is not implicitly excluded by the CISG.

There are many implicit exclusions from the scope of the Convention that have been recognized in an accumulating body of authorities: matters respecting agency relationships, counterclaims and set-offs not arising out of the sale, the validity of assignments of receivables, third-party beneficiary claims, contract novation, the applicable statute of limitation, the effect of a seller’s retention of title in the goods,

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160 CISG art. 74.
161 Hans Stoll and Georg Gruber, Commentary, supra note 12, at 769. “Where tradable goods are sold to a commercial business the seller must reckon with the possibility that a delivery of defective goods may cause the buyer to incur liability to his customers or at least cause him to incur the cost of taking the goods back.”
162 Germany 2 July 1993 Appellate Court Düsseldorf (Veneer cutting machine case) [translation available] http://cisgw3.law.pace.edu/cases/930702g1.html (Albert H. Kritzer’s editorial notes offer the following observation: “The obligation to the third party was to satisfy an injury claim that stemmed from defects in the goods sold. The court ruled that indemnification of such an obligation is an allowable element of damages under the CISG. The court so held without reference to the rule under Article 5 that the CISG “does not apply to the liability of the seller for . . . personal injury caused by the goods to any person.”)
163 See e.g., Germany 28 May 2001 Appellate Court Köln (Motorcycle clothing and accessories case) [translation available] http://cisgw3.law.pace.edu/cases/010528g1.html (In a seller’s action for the purchase price of leather goods sold to the buyer, the buyer’s claim to a lost commission on sales by the to another company in violation of a distributorship agreement was beyond the scope of the CISG.)
164 Oberlandesgericht Stuttgart, 20 December 2004, http://cisgw3.law.pace.edu/cases/041220gl.html (Seller sought payment for paper sold to the buyer pursuant to a distribution agreement and the buyer sought to off-set commissions allegedly due to it under the distribution agreement.)
and claims based on unjust enrichment. It is less clear whether and to what extent the CISG excludes franchises and distributorships, transactions of barter, and consignments.

**Problem 5A (franchises)**

*U.S. Dealer is the exclusive distributor of industrial equipment for Maquina de Mexico. Pursuant to the distributorship agreement, the parties entered into individual sales contracts. When the Mexican manufacturer terminated the distributorship, U.S. Dealer refused to pay for some of the delivered equipment. When Maquina filed for arbitration of its demand for payment, Dealer counterclaimed for damages for breach of the distributorship agreement and for various breaches of warranty with respect to the delivered goods.*

In the United States, UCC 2 has been applied, either directly or by analogy, to franchise, dealerships, and distributorship agreements. Issues related to all of the following have been resolved by resorting to UCC 2: the satisfaction of the statute of frauds, the parol evidence rule, contract termination, the obligation to perform in

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169 See Avv. Carlo H. Mastellone, Sales-Related Issues Not Covered by the CISG: Assignment, Set-off, Statute of Limitations, etc., under Italian Law, reprinted with permission at http://www.cisg.law.pace.edu/cisg/biblio/mastellone.html#8 and cases cited therein. See also Usinor Industeel v. Leeco Steel Products, 209 F.Supp.2d 880, 886 (N.D. Ill. 2002) (“The remedy of avoidance under the CISG is not available to (a French seller of steel) if (the U.S. buyer’s lender) has a right to the Steel Shipments under domestic law.”)


171 U.C.C. § 2-306 applies to exclusive dealing arrangements including output and requirements contracts. For contrary authority, see e.g., Lorenz Supply v. American Standard, 100 Mich. App. 600, 300 N.W.2d 335 (1980) (“Preferred distributor” agreement that did not require the distributor to purchase a certain quantity of goods not governed by UCC: Disputes not addressed by UCC 2 may be covered by other law. See e.g., Town & Country Equipment v. Massey-Ferguson, 808 F. Supp. 779 (D. Kan. 1992) (Kansas statute requiring the franchisor to repurchase parts on termination of the franchise pre-empts the obligation to mitigate damages under Article 2).


173 Intercorp, Inc. v. Pennzoil, 877 F.2d 1524 (11th Cir. 1989) (U.C.C. § 2-202 governed admissibility of extrinsic evidence that the defendant had promised an exclusive distributorship in spite of a written agreement that the distributorship was “non-exclusive.”)

174 Cherick Distributors v. Polar, 669 N.E.2d 218 (Mass. App. 1996). (Whether a four-day termination notice was satisfied commercial standards of good faith and fair dealing under pre-revision UCC § 2-103 presented jury question.”)
good faith\textsuperscript{175}, commercial usages available to interpret the contract,\textsuperscript{176} the implied obligations imposed by exclusive dealing arrangements,\textsuperscript{177} the statute of limitations,\textsuperscript{178} and the remedial rights of the parties.\textsuperscript{179}

Franchises and distributorships are not covered by specific provisions of the CISG. This has led commentators and European courts to conclude that the “framework” contracts for these relationships are not governed by the Convention and should be distinguished from supply contracts that are.\textsuperscript{180} Whether this distinction will be approved in the United States remains to be seen. Two unreported federal cases offer conflicting indications. In one, the court was asked to enforce an arbitral award in favor of a Louisiana corporation that was a party to a “Business Licensing Agreement” that gave it

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\item Blalock Mach. & Equip. Co. v. Iowa Mfg., 576 F.Supp. 774 (D.C. Ga. 1983) (“[T]he good faith obligation of the UCC has been adopted by Iowa, ..., and is applicable to distributorship contracts.”)
\item Ralph’s Distributing Co. v. AMF, 667 F.2d 670 (8th Cir. 1981) (Franchisee’s course of performance and usage of trade evidence to explain and supplement the meaning of the territorial designations in the franchise agreements did not violate parol evidence rule under UCC § 2-202 in effect in Iowa.)
\item Stone v. Caroselli, 653 P.2d 754 (Colo.App. 1982) (UCC § 2-306 required distributor to use best efforts to market ski trail signs although the written agreement provided that the number and location of outlets was to be within the sole discretion of the distributor.)
\item Stutz v. Minnesota Mining Mfg., 947 F. Supp. 399, 402 (S.D. Ind. 1996) (“[S]ales distribution agreement...have the ‘predominate thrust’ of accomplishing the ‘sale of goods,’ and are therefore governed by the UCC’s four-year statute of limitations.”)
\item WICO v. Willis Industries, 567 F. Supp. 352 (N.D. Ill. 1983). The court was applied UCC 2 although services played a relatively large role in the obligations assumed by a distributor of silk-screen graphics. WICO acquired the exclusive right to use Willis’s trademarks and logos, committed itself to extensive advertising and marketing campaigns, agreed not to sell competitive products, and further agreed to hire and train a sales staff. Rejecting WICO’s argument that the contract was predominantly for services, the court applied Article 2 because a “sale of goods [was] nevertheless the raison d'etre of the Agreements.” 567 F. Supp. at 354.
\item Schlechtriem, Commentary, supra note 12, at 27. Professor Honnold has used an example close to the facts of WICO to illustrate a framework contract to which the CISG does not apply: “A supplier (S) and a distributor (D) make a ‘framework’ agreement that will govern any orders and deliveries by S to D but does not require D to order or S to deliver any specified quantity of goods.” Honnold, supra note 28, at 54 (Example 2B). The arbitration decision on which the problem is based made this distinction. It applied the CISG to the seller’s claim to payment and to the buyer’s claim that the equipment was defective. With respect to claimed breaches of the distributorship agreement, the arbitrator ruled that the CISG was not applicable. ICC Arbitration Case No. 8611 of 23 January 1997 (Industrial equipment case) [translation available] http://cisgw3.law.pace.edu/cases/978611i1.html.
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the exclusive right to sell equipment manufactured by an Italian company.\textsuperscript{181} Neither party contested the application of the CISG to a dispute over the Italian company’s liability for the failure to satisfy FDA requirements for proof of its compliance with safety regulations. In the other, the court held that the CISG would not apply to distributorship contracts that “do not cover the sale of specific goods and contain definite terms regarding quantity and price.”\textsuperscript{182}

In spite of authorities that disapprove the application of the CISG to the so-called “framework” distribution agreement, a number of commentators have suggested that it may be governed by the CISG if the parties choose to apply it to all of the obligations created by the contract.\textsuperscript{183} If the CISG can govern distributorships through an express choice-of-law provision,\textsuperscript{184} it may also be possible to show that the Convention was the implicit choice in the surrounding circumstances based on a course of dealing or trade usage.\textsuperscript{185} To resolve any doubt concerning the law governing a distributorship or

\textsuperscript{181} Medical Marketing International v. Internazionale Medico Scientifica, 1999 WL 311945 (E.D. La.) The federal rules of appellate procedure provide that “[a] court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:…designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like; and… issued on or after January 1, 2007. FRAP 32.1.


\textsuperscript{183} These may include “service obligations of the supplier to provide advertising and merchandising, to abstain from direct sales in the distributor’s country…. and the distributors’ obligations to stock spare parts, to promote the goods and the seller’s brand name, to abstain from importing into the seller’s country, etc.” P. Schlechtriem, Commentary, supra note 12, at 28.

\textsuperscript{184} Whether the Convention can be the choice-of-law for transactions that are not otherwise within its scope is beyond the scope of this article. “The Convention is silent about whether parties may choose to have the Convention apply to transactions that do not fall within its sphere of application. The Convention might not apply because the transaction is not ‘international’ within the scope of article (1)(1) or because the transaction or the property involved are expressly excluded from the convention’s coverage. Unless contrary to public policy, courts should enforce the parties’ choice.” Peter Winship, Changing Contract Practices in Light of the United Nations Sales Convention: A Guide for Practitioners, 29 Int’l Law., 525, 539 (Fall 1995). See also Sarah H. Jenkins, Contracting Out of Article 2: Minimizing the Obligation of Performance & Liability for Breach, 40 Loy. L.A. L. Rev. 401 (2006).

\textsuperscript{185} See CISG art. 8(3). (“In determining the intent of a party or the understanding a reasonable person would have had, 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.”)
franchise, the parties should choose the law governing both the framework agreement and any resulting supply contracts. The choice should be clearly expressed in a written agreement.

**Problem 5B (barter)**

*Carne Argentina has contracted to deliver beef to U.S. Carnivore, a processing plant in North Carolina, in exchange for equipment located in Ohio.*

Commentary and case law are again divided on the question whether a contract to exchange goods is governed by the CISG. The usual pattern for a sales contract is a promise to deliver goods in exchange for the payment of money. UCC 2 applies whether the price is to be paid in money or otherwise. If the price is payable in goods, both parties are sellers of goods.

The CISG refers to the buyer’s obligation to “pay the price for the goods and take delivery of them as required by the contract and this Convention.” While “price” is not defined in the CISG, at least one commentator has stated unequivocally that “[b]arter contracts are not covered.” Others conclude that an exchange of goods is not excluded from the Convention unless the parties make an Article 6 election to do so or the

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186 Federal Arbitration Court for the Moscow Region, 26 May 2003, [http://cisgw3.law.pace.edu/cases/030526rl.html](http://cisgw3.law.pace.edu/cases/030526rl.html) (The CISG is inapplicable to barter contracts.) *Cf.* Tribunal of International Commercial Arbitration at the Ukrainian Chamber of Commerce and Trade, 15 April 2004, [http://cisgw3.law.pace.edu/cases/040415u5.html](http://cisgw3.law.pace.edu/cases/040415u5.html) (CISG is part of the substantive law of Ukraine and applied to a contract in which the seller agreed to deliver goods in exchange for goods to be delivered by the buyer.)

187 UCC 2 covers sales if the consideration is payable in other goods, real estate or intangibles. *See* U.C.C. § 2-304.

188 U.C.C. § 2-304(1).

189 CISG art. 53.

190 *See e.g.*, Schlechtriem, Commentary, *supra* note 12, at p. 28.
transaction is implicitly excluded as a matter of the parties’ intentions.  Secretariat Commentary offers some support for the latter position.

To resolve any doubt when goods are exchanged for other goods, real estate, or intangible personal property, the parties should choose the law that governs their contract. If the CISG is chosen, the parties should provide an alternative source of law in the event that the sale is found to be outside the scope of the Convention.

**Problem 5C (consignments)**

*Shanghai Sales agreed to delivery furniture to U.S. Interiors “on consignment.”*

*U.S. Interiors now insists that it is not obligated to pay for goods because it was unable to resell them.*

The CISG “applies to contracts of sale.”  UCC 2 applies to “transactions in goods” and covers a contract to deliver goods to a buyer who may return conforming goods without liability for the price if the goods cannot be resold. A “sale or return” transaction “is so definitely at odds with any ordinary contract for sale of goods” that UCC 2 treats it as a separate contract for sale with consequences for the application of the statute of frauds and the parol evidence rule.

Is a sale or return transaction governed by the CISG? Unlike the CISG, which imposes no writing requirement for contracts within its scope, a contract governed by

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191 See Honnold, *supra* note 28, at p. 53. (“The Convention does not state any restrictions as to the price.”)

192 “Since…article 6 of the Convention permits the parties to exclude its application or to derogate from or vary the effect of any of its provisions, it follows that in cases of conflict between the contract and the Convention the buyer must fulfill his obligations as required by the contract.” Text of Secretariat Commentary on article 53 of the 1978 Draft available at [http://www.cisg.law.pace.edu/cisg/text/seccomm/seccomm-01.html](http://www.cisg.law.pace.edu/cisg/text/seccomm/seccomm-01.html). See also, Kritzer, *supra* note 7, at 70-71.

193 CISG art. 1(emphasis supplied).

194 U.C.C. § 2-102 (emphasis supplied).

195 U.C.C. § 2-326(1)(b). The same section covers a “sale on approval.” Unlike a sale or return contract, goods in the buyer’s possession pending approval are not subject to the claims of the buyer’s creditors until the buyer accepts them.

196 U.C.C. § 2-326 and OC 3.
UCC 2 must satisfy the statute of frauds in larger transactions as a bulwark against fraud. The concern with fraud and “secret liens” is reinforced by the treatment of consignments in UCC 9 where they include any delivery of goods for resale valued in excess of $1,000 if the buyer is doing business under a name other than that the seller and its creditors do not know that it is substantially engaged in selling the goods of others.\(^{197}\) A seller who wants the buyer to return unsold goods will lose out to judicial lienors and certain secured creditors unless the seller’s reservation of title is perfected as a security interest under UCC 9,\(^{198}\) and an offer to prove that a written sales contract permits the buyer to return the goods without liability to the seller may violate the parol evidence rule.\(^{199}\)

The CISG rejects any writing requirement for contracts within its scope and does not expressly incorporate a parol evidence rule.\(^{200}\) It does, however, list the buyer’s liability for the price as a critical obligation. The buyer in a “sale or return” transaction will not have this obligation if the buyer fails to resell the goods.

There is a federal decision applying the CISG to a contract that the buyer of hard metal powder who argued that it was a “consignment” and that the buyer had no liability for the price because it had not used the powder.\(^{201}\) The buyer offered to prove that in

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\(^{197}\) U.C.C. § 9-102(a)(20).

\(^{198}\) U.C.C. § 9-319.

\(^{199}\) U.C.C. § 2-326(3) and OC 3.

\(^{200}\) The CISG does not impose any writing requirements for contracts within its scope. See CISG art. 11. The Advisory Council has issued its opinion that the CISG does not incorporate a parol evidence rule or plain meaning rule. A merger clause may bar evidence of statements and other evidence not included in the writing, including trade usages if the parties so intend. “However, in determining the effect of such a Merger Clause, the parties’ statements and negotiations, as well as all other relevant circumstances shall be taken into account.” CISG-AC Opinion no 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, 23 October 2004. U.S. authorities have split on the question with the majority concluding that the CISG does not embody a parol evidence rule. See e.g., MCC-Marble Ceramic Center v. Ceramica Nuova d’Agostino, 144 F.3d 1384 (11th Cir. 1998) cert. denied, 526 U.S. 1087 (1999). Contra Beijing Metals & Minerals Import/Export v. American Business, 993 F.2d 1178 (5th Cir. 1993). (The court applied the parol evidence rule under Texas law, concluding that it was applicable whether or not the CISG governed the transaction.)

\(^{201}\) Treibacher Industrie, A.G. v. Allegheny Technologies, 464 F.3d 1235 (11th Cir. 2006).
trade usage, consignment meant that there was no sale until the buyer used the goods. The court applied the CISG on the ground that the evidence of a course of dealing between the parties that required the buyer to accept and pay for delivered goods trumped the trade usage. The case turned on the admissibility and weight of the evidence and leaves open the question whether an implicit sale and return agreement removes the transaction from the scope of the CISG because the buyer is not obligated to pay the price of goods prior to a resale.

Lawyers who draft contracts that do not obligate the buyer to pay the price unless the goods are used or resold should include a definition of consignment or any other term used to indicate such as sale. The agreement should clearly indicate the parties’ choice of law, and the parties should be advised that the failure to satisfy the applicable provisions of UCC 2 and 9 may place the agreement outside of the CISG as a matter of validity that it is beyond its scope.202

6. **Neither the U.S. nor the parties elect to “opt out” of the CISG.**

There are two provisions of the Convention that may exclude its application based upon contract. The first is the formal contract of ratifying States that elect not to be bound when one of the parties has its relevant place of business in a State that has not ratified the CISG. The other is the informal contractual choice of the parties.

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202 U.C.C. § 2-326, OC 2. (“Pursuant to the general policies of this Act which require good faith not only between the parties to the sales contract, but as against interested third parties, subsection (3) resolves all reasonable doubts as to the nature of the transaction in favor of the general creditors of the buyer. As against such creditors words such as "on consignment" or "on memorandum", with or without words of reservation of title in the seller, are disregarded when the buyer has a place of business at which he deals in goods of the kind involved. A necessary exception is made where the buyer is known to be engaged primarily in selling the goods of others or is selling under a relevant sign law, or the seller complies with the filing provisions of Article 9 as if his interest were a security interest. However, there is no intent in this Section to narrow the protection afforded to third parties in any jurisdiction which has a selling Factors Act. The purpose of the exception is merely to limit the effect of the present subsection itself, in the absence of any such Factors Act, to cases in which creditors of the buyer may reasonably be deemed to have been misled by the secret reservation.”)
Problem 6A (the Article 95 Reservation)

Eli Whitney has contracted to sell cotton to Bedpost, Ltd. When Bedpost repudiated the contract, Whitney brought a lawsuit in Alabama, the state with the closest relationship to the contract and its performance. International choice of law rules point to the application of U.S. law to the transaction.

The uniform rule of the CISG is that the Convention will apply to a sales contract although only one of the parties has its place of business in a State that has ratified it if the rules of private international law point to the law of that State. The United States has elected not to be bound by this provision. Great Britain has not ratified the Convention.

The local law of Alabama, including its version of the UCC, will govern the dispute in Problem 6A. The ratified version of the CISG in the U.S. would apply only if both the U.S. and Great Britain were Contracting Parties to the Convention.

Problem 6B (the parties’ election to “opt out”)

Tin Can, Inc., a U.S. company, received a purchase order for canning goods from Beluga, a Russian cannery. Tin Can’s confirmation of sale provided that disputes between the parties were to be settled “in accordance with the commercial and civil law of the State of California.”

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203 CISG art. 1(1)(b).
204 The declaration is authorized in Article 95. Similar reservations have been made by the People’s Republic of China, Singapore, the Czech Republic and Slovakia.
Because the United States and Russia have ratified the CISG, the Convention will govern the contract unless the parties have opted out of it. While the Convention does not require any particular form or phrasing to express the decision to exclude it, the weight of academic and case authority in the United States and abroad is that the parties can successfully opt out of the CISG only if their choice of local, domestic law is clearly expressed. UCC 2 and the CISG are both part of the domestic law of the U.S. Therefore, the contract should clearly identify the domestic law that will govern the transaction and explicitly exclude the Convention. The following language should ensure that UCC 2 will apply to the sale: “The California Commercial Code will govern disputes arising under this contract. The CISG shall not govern any aspect of this sale.”

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205 CISG art. 6. “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.”

206 BP Oil Intern. v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333 (5th Cir. 2003) (The court assumed arguendo that a reference to “Jurisdiction: Laws of the Republic of Ecuador” in a contract between a U.S seller and an Ecuadoran buyer of gasoline unambiguously expressed the parties’ intention to apply Ecuadorian law but held the CISG governed the dispute because the Convention was part of the law of both countries.) See also, Asante, supra note 29, at 1150. (Although the seller’s form chose the laws of British Columbia and the buyer’s form referred to the law of California, the CISG governed as the law of both the U.S. and Canada in the absence of “a clear intent to opt out of the CISG.”); American Mint v. GOSoftware, Not Reported in F.Supp.2d, 2005 WL 201248 (D.C.Md. 2005) (Choice of “Georgia law” will not exclude the CISG in the absence of “language which affirmatively states it does not apply.”); Ajax Tool Works v. Can-Eng Mfg., Not Reported in F.Supp.2d, 2003 WL 223187 (N.D.Ill. 2003) (“Although the parties have designated Ontario law as controlling, it is not the provincial law of Ontario that applies; rather, because the CISG is the law of Ontario, the CISG governs the parties’ agreement.”); Travelers Property Cas. v. Saint-Gobain Technical, 474 F.Supp.2d 1075, 1082 (D.Minn. 2007) (“Absent an express statement that the CISG does not apply, merely referring to a particular state's law does not opt out of the CISG.”) See also TeeVee Toons v. Gerhard Schubert/GmbH, Not Reported in F.Supp.2d, 2006 WL 2463537 (S.D.N.Y. 2006)

207 Germany 25 June 1997 Appellate Court Karlsruhe, http://cisgw3.law.pace.edu/cases/970625g1.html (The choice of German law required application of the CISG as part of the domestic law of Germany.); Italy 12 July 2000 District Court Vigevano (Rheinland Versicherungen v. Atlarex) [translation available], http://cisgw3.law.pace.edu/cases/000712i3.html (abstract) (“The mere reference to domestic law in the parties’ pleadings is not in itself sufficient to exclude CISG. To this effect parties must first of all be aware that the CISG would be applicable and moreover intend to exclude it.”); Belgium 27 January 2004 Appellate Court Liège (Reinfrenrath GmbH v. SA Herelixha) http://cisgw3.law.pace.edu/cases/040127b1.html (Seller’s standard terms referring to Belgian law required application of the CISG to the dispute.)

208 A lonely hold-out is a federal case from Rhode Island finding that the CISG was excluded by a contract that stated it would “be construed and enforced in accordance with the laws of the state of Rhode Island.” American Biophysics v. Dubois Marine Specialties, 411 F.Supp.2d 61, 63 (D. R.I. 2006). For further
In spite of numerous authorities that require a clearly expressed intention to exclude the Convention, there is an ongoing debate as to whether the parties’ intention to opt out can be inferred from their conduct and the surrounding circumstances. The drafting history is conflicting and inconclusive, as is commentary on the subject.

John Honnold would permit exclusion of the Convention by an agreement that is clearly implied in fact. The Convention offers support for an “implied in fact” choice of law based on a party’s statements and conduct. They are to be “interpreted according to his intent where the other party knew or could not have been unaware what that intent was.” To decide what a reasonable person would have thought in the same circumstances, a court should consider “all relevant circumstances… including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.”

suggestions, see “Article 6 - Suggestions regarding Excluding the Convention or Parts of it” in Guide for Managers and Counsel, supra note 101.

209 See Peter Winship, The Scope of the Vienna Convention on International Sales Contracts, published in Galston & Smit ed., International Sales: The United Nations Convention on Contracts for the International Sale of Goods (1984) 1, 34 (“The 1980 conference,... rejected not only amendments which would have required express exclusions but also amendments which stated that the convention could be excluded by implication.”) The Uniform Law on the International Sale of Goods (ULIS) expressly provides that the parties can exclude it by an agreement “express or implied.” ULIS art. 3. The ULIS and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF)) were adopted at a conference at The Hague in 1964. Under the leadership of UNCITRAL, these conventions and were later consolidated into a single text with substantial changes and additions to become the CISG.


211 J. Honnold, Uniform Law, supra note 28, at 81. Cf., B. Crawford, Draftings, supra note 112, at 193 (“Given the general lack of awareness of the Convention, it is doubtful that very many people really expect that the Convention will govern their international sales…. It is thus not difficult to imagine a judge finding that the parties did not in fact intend to invoke the Convention, and ruling that it is not applicable.”) See e.g., Australia 13 October 2006 Supreme Court of New South Wales [Appellate Court] (Italian Imported Foods Pty Ltd v Pucci S.r.l.) http://cisgw3.law.pace.edu/cases/061013a2.html (“[T]he plaintiff should not now be allowed to depart from the case that it elected to run at trial and present a case which relies, inter alia, on the Sale of Goods (Vienna Convention) Act.”)

212 CISG art. 8(1).

213 CISG art. 8(2).

214 CISG art. 8(3).
An implicit choice of law based on the parties’ probable intentions may lie behind a recent federal case that has parted company with the many cases requiring explicit reference to local law or express exclusion of the CISG to opt out of the Convention. In American Biophysics v. Dubois Marine Specialties, the sales agreement selected the federal courts of Rhode Island as the forum and provided that the parties’ agreement would be “construed and enforced in accordance with the laws of the state of Rhode Island.” This language was held sufficient to exclude the application of the CISG.

It is likely that in the absence of widespread knowledge of the CISG, trial courts are still applying local domestic law to a sales contract covered by the Convention. In GPL Treatment v. Louisiana-Pacific, plaintiffs were Canadian companies who sued a Delaware Corporation doing business in Oregon for breach of a contract to buy shakes. The trial court applied UCC 2 to conclude that the seller’s order confirmations satisfied the statute of frauds. The decision was affirmed on appeal over a dissent that, *inter alia*, objected to the trial court’s failure to apply the CISG to the dispute. The trial court had ruled that the attempt to raise the CISG was untimely; therefore, the plaintiff’s had waived the right to rely on its provisions. The Oregon decisions are among several reported cases that have refused to overturn a judgment based on a waiver of the right to rely on the CISG.

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216 Id. at 63.
218 Article 11 dispenses with any formal or written requirements in the formation of a contract and would have rendered moot the question addressed by the court.
219 133 Or. App. 633, 646, 894 P.2d 470, 477, *supra* note 232, at fn 4. When the case arrived at the Oregon Supreme Court, the intermediate appellate decision was affirmed without mentioning the possible application of the CISG.
220 See *e.g.*, Australia 13 October 2006 Supreme Court of New South Wales [Appellate Court] (*Italian Imported Foods Pty Ltd v Pucci S.r.l.*) [http://cisgw3.law.pace.edu/cases/061013a2.html] (“[T]he plaintiff should not now be allowed to depart from the case that it elected to run at trial and present a case which
Final Thoughts

In the coming years, U.S. courts and commercial lawyers will be asked to address difficult questions in the interpretation of the CISG. Given the difficulties in determining the scope of the Convention, it is to be expected that many litigants will argue that the CISG does not apply to their dispute. This article has addressed the fertile ground for such arguments.

Carefully drafted choice-of-law provisions that anticipate and address potential problems in the interpretation of the CISG are the best protection for clients who engage in international transactions. Before effective contracts can be drafted, commercial lawyers must have a better understanding of the debates surrounding the meaning of “international sale of goods.”

relies, inter alia, on the Sale of Goods (Vienna Convention) Act.”). See also, France 26 June 2001 Supreme Court (Muller Ecole v. Fedeal Trait) http://cisgw3.law.pace.edu/cases/010626f2.html (An abstract of the case in UNILEX reports that the court “interpreted Art. 6 CISG as to allow the parties to implicitly exclude the application of CISG by not invoking it before the Court,...”)

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