

**DISCLAIMERS OF IMPLIED WARRANTIES: THE 1980
UNITED NATIONS CONVENTION ON CONTRACTS
FOR THE INTERNATIONAL SALE OF
GOODS**

INTRODUCTION

The 1980 United Nations Convention on Contracts for the International Sale of Goods¹ (CISG or Convention) is before the Foreign Rela-

1. Final Act of the United Nations Conference on Contracts for the International Sale of Goods, Annex I, U.N. Doc. A/CONF.97/18 (1980) [hereinafter cited as CISG], reprinted in 19 I.L.M. 668 (1980). The Convention's genesis can be traced to the 1930's, when the League of Nations commissioned the Rome International Institute for the Unification of Private Law (UNIDROIT) to prepare a uniform law on international sales of goods. See Historical Introduction to the Draft Convention for the International Sale of Goods, Prepared by the Secretariat paras. 1-2, at 7, U.N. Doc. A/CONF.97/5 (1979) [hereinafter cited as Historical Introduction], reprinted in United Nations Conference on Contracts for the International Sale of Goods, Official Records paras. 1-2, at 3-4, U.N. Doc. A/CONF.97/19 (1981) [hereinafter cited as Official Records]; J. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention § 4, at 49 (1982); Farnsworth, *Formation of Contract*, in International Sales: The United Nations Convention on Contracts for the International Sale of Goods § 3.02, at 3-3 (1984) [hereinafter cited as Farnsworth I]; Farnsworth, *The Vienna Convention: History and Scope*, 18 Int'l Law. 17, 17 (1984) [hereinafter cited as Farnsworth II]; Reinhart, *Development of a Law for the International Sale of Goods*, 14 Cum. L. Rev. 89, 92-93 (1984); Sono, *UNCITRAL and the Vienna Sales Convention*, 18 Int'l Law. 7, 12 (1984); Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in International Sales: The United Nations Convention on Contracts for the International Sale of Goods § 1.01[1], at 1-4 to -5 (1984) [hereinafter cited as Winship I]; Winship, *New Rules for International Sales*, 68 A.B.A. J. 1231, 1231 (1982) [hereinafter cited as Winship II]; Note, *A Practitioner's Guide to the United Nations Convention on Contracts for the International Sale of Goods*, 16 N.Y.U. J. Int'l L. & Pol. 81, 85 (1983) [hereinafter cited as *Practitioner's Guide*]; Note, *Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions*, 24 Va. J. Int'l L. 619, 630 (1984) [hereinafter cited as *Trade Usages*]. UNIDROIT attempted to unify this area of law. The Second World War caused the project to lay dormant until 1951, when the government of the Netherlands convened a conference of twenty-one nations at the Hague to resuscitate it. Historical Introduction, *supra*, para. 3, at 7, reprinted in Official Records, *supra*, para. 3, at 4; Farnsworth II, *supra*, at 17; Reinhart, *supra*, at 93; Winship I, *supra*, § 1.01[2], at 1-7 to -8; *Practitioner's Guide*, *supra*, at 85. Committees were formed to re-examine and revise pre-existing drafts of a uniform law on international sales. These efforts culminated in the 1964 Hague Conference. Historical Introduction, *supra*, paras. 3-4, at 7, reprinted in Official Records, *supra*, paras. 3-4, at 4; J. Honnold, *supra*, § 4, at 49; Farnsworth I, *supra*, § 3.02, at 3-3; Farnsworth II, *supra*, at 17; Reinhart, *supra*, at 93; Winship I, *supra*, § 1.01[2]-[3], at 1-8 to -9; *Practitioner's Guide*, *supra*, at 85. This conference produced the Uniform Law on the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS). Historical Introduction, *supra*, paras. 5-6, at 7-8, reprinted in Official Records, *supra*, paras. 5-6, at 4; J. Honnold, *supra*, § 4, at 49; American Bar Ass'n, *Report to the House of Delegates*, 18 Int'l Law. 39, 40 (1984) [hereinafter cited as *ABA Report*]; Farnsworth I, *supra*, § 3.02, at 3-3; Farnsworth II, *supra*, at 17; Reinhart, *supra*, at 93; Winship I, *supra*, § 1.01[3], at 1-9 to -12; *Practitioner's Guide*, *supra*, at 85; *Trade Usages*, *supra*, at 620, 630. The text of the ULIS may be found in the Convention Relating to a Uniform Law on the International Sale of Goods, 834 U.N.T.S. 107 [hereinafter cited as ULIS], reprinted in 3 I.L.M. 855 (1964); that of the ULFIS may be found in the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, 834 U.N.T.S. 169, re-

tions Committee of the United States Senate awaiting consideration for

printed in 3 I.L.M. 864 (1964). These conventions entered into force in 1972 after ratification by five countries. Historical Introduction, *supra*, para. 7, at 8, reprinted in Official Records, *supra*, para. 7, at 4; J. Honnold, *supra*, § 4, at 49; *ABA Report*, *supra*, at 40-41; Winship I, *supra*, § 1.01[3], at 1-13; Winship II, *supra*, at 1231; *Practitioner's Guide*, *supra*, at 85; *Trade Usages*, *supra*, at 630. They are in effect today in Belgium, the Federal Republic of Germany, Gambia, Israel, Italy, Luxembourg, the Netherlands, San Marino and the United Kingdom. Historical Introduction, *supra*, para. 7, at 8, reprinted in Official Records, *supra*, para. 7, at 4; Farnsworth I, *supra*, § 3.02, at 3-3 & n.3; Farnsworth II, *supra*, at 17-18; Reinhart, *supra*, at 93; Winship I, *supra*, § 1.01[3], at 1-13 n.25; Winship II, *supra*, at 1231. Notwithstanding acceptance by these countries, the impact that these conventions have had on international trade has been minimal. Winship I, *supra*, § 1.01[3], at 1-13; Winship II, *supra*, at 1231; *Practitioner's Guide*, *supra*, at 85; see *ABA Report*, *supra*, at 41 (conventions not widely adopted). The 1964 Conference was dominated by the Western industrialized nations. See Sono, *supra*, at 13. Many developing nations refused to ratify the conventions because of what they perceived to be a European bias. See Reinhart, *supra*, at 94; Winship, *Formation of International Sales Contracts under the 1980 Vienna Convention*, 17 Int'l Law. 1, 3 (1983) [hereinafter cited as Winship III]; Winship II, *supra*, at 1232; cf. *Practitioner's Guide*, *supra*, at 86 (American delegates noted bias against developing nations). The United States did not ratify either convention. See *ABA Report*, *supra*, at 41; Farnsworth II, *supra*, at 17; Winship II, *supra*, at 1232. This was due mainly to a lack of American influence and participation in the drafting of these conventions. The United States at that time was more concerned with preserving the success of the Uniform Commercial Code (UCC). See Reinhart, *supra*, at 93-94. Consequently, it did not join UNIDROIT until three months before the 1964 Conference. Winship II, *supra*, at 1232; see Farnsworth II, *supra*, at 17. This general lack of support made it apparent that wide-spread adoption of the Hague conventions was unlikely. J. Honnold, *supra*, § 9, at 53; Winship I, *supra*, § 1.01[3], at 1-12 to -13; Winship II, *supra*, at 1232; *Trade Usages*, *supra*, at 620-21; see also J. Honnold, *supra*, § 5, at 49-50 (conviction that world-wide success depended on world-wide participation led to establishment of United Nations Commission on International Trade Law (UNCITRAL)); Farnsworth I, *supra*, § 3.02, at 3-3 (UNCITRAL was revising the conventions even before they came into effect); Farnsworth II, *supra*, at 18 (same). UNCITRAL was established by the General Assembly in 1966 "to take such steps as would . . . further the harmonization and unification of international trade law." Report of the United Nations Commission on International Trade Law on the Work of its Second Session to the General Assembly, 24 U.N. GAOR Supp. (No. 18) para. 16, at 7, U.N. Doc. A/7618 (1969) [hereinafter cited as Second Session Report], reprinted in [1970] 1 Y.B. UNCITRAL para. 16, at 97, U.N. Doc. A/CN.9/SER.A/1970 [hereinafter cited as Yearbook 1]. For a discussion of the structure and workings of UNCITRAL, see J. Honnold, *supra*, §§ 5-8, at 49-52. At its first session in 1968, UNCITRAL sent inquiries to various nations to determine their intentions with respect to the 1964 conventions. Historical Introduction, *supra*, para. 8, at 8, reprinted in Official Records, *supra*, para. 8, at 4; Winship I, *supra*, § 1.01[4], at 1-13. After receiving these replies, UNCITRAL, at its second session in 1969, created a working group to determine whether any adaptations or modifications of the 1964 Uniform Laws were possible, or whether a completely new text should be drafted. Historical Introduction, *supra*, para. 9, at 8-9, reprinted in Official Records, *supra*, para. 9, at 4; Winship I, *supra*, § 1.01[4], at 1-13; see J. Honnold, *supra*, § 9, at 53; *ABA Report*, *supra*, at 41; Farnsworth II, *supra*, at 18; Reinhart, *supra*, at 94. There were numerous discussions on this subject. See Historical Introduction, *supra*, para. 10, at 9, reprinted in Official Records, *supra*, para. 10, at 4; Report of the United Nations Commission on International Trade Law on the Work of its Fifth Session to the General Assembly, 27 U.N. GAOR Supp. (No. 17) para. 27, at 22, U.N. Doc. A/8717 (1972), reprinted in [1972] 3 Y.B. UNCITRAL para. 27, at 17, U.N. Doc. A/CN.9/SER.A/1972 [hereinafter cited as Yearbook 3]; Report of the Sixth Committee to the General Assembly, 26 U.N. GAOR (Agenda Item 87) para. 24, at 7, U.N. Doc. A/8506 (1972), reprinted in Yearbook 3, *supra*, para. 24, at 6; Second Session Report, *supra*,

paras. 22-25, at 8, para. 30, at 9, *reprinted in Yearbook 1, supra*, paras. 22-25, 30, at 97-98; Report of the Sixth Committee of the Trade and Development Board, United Nations Conference on Trade and Development, to the General Assembly, 24 U.N. GAOR (Agenda Item 90) paras. 17-18, at 9-10, U.N. Doc. A/7747 (1969), *reprinted in Yearbook 1, supra*, paras. 17-18, at 124. It was decided that the better choice would be to devise new texts. Winship I, *supra*, § 1.01[4], at 1-13. Several drafts were produced between 1970 and 1978. *Id.* at 1-13 to -14; Winship II, *supra*, at 1232. These drafts were the results of working group discussions. See generally Report of the United Nations Commission on International Trade Law on the Work of its Eleventh Session to the General Assembly, 33 U.N. GAOR Supp. (No. 17) Annex I paras. 44-46, at 65-66 (1978) (summary of Commission deliberations regarding article 5 of 1978 Draft Convention) [hereinafter cited as Eleventh Session Report], *reprinted in* [1978] 9 Y.B. UNCITRAL paras. 44-46, at 35, U.N. Doc. A/CN.9/SER.A/1978 [hereinafter cited as Yearbook 9]; Report of the United Nations Commission on International Trade Law on the Work of its Tenth Session to the General Assembly, 32 U.N. GAOR Supp. (No. 17) Annex I paras. 74, 76, at 54-55, paras. 138-40, at 65, paras. 145-47, at 66-67, U.N. Doc. A/32/17 (1977) (examples of Working Group deliberations and decisions on articles of the Draft Convention) [hereinafter cited as Tenth Session Report], *reprinted in* [1977] 8 Y.B. UNCITRAL paras. 74, 76, at 30, paras. 138-40, at 34, paras. 145-47, at 35, U.N. Doc. A/CN.9/SER.A/1977 [hereinafter cited as Yearbook 8]; Report of the Working Group on the International Sale of Goods on the Work of its Seventh Session to UNCITRAL, Annex II paras. 1-3, at 12, para. 1, at 27, paras. 3-9, at 28-29, U.N. Doc. A/CN.9/116 (1976) (examples of Working Group commentaries on articles of the Draft Convention) [hereinafter cited as Commentary, Working Group Seventh Session], *reprinted in* [1976] 7 Y.B. UNCITRAL paras. 1-3, at 100, paras. 1, 3-9, at 107, U.N. Doc. A/CN.9/SER.A/1976 [hereinafter cited as Yearbook 7]; Progress Report of the Working Group on the International Sale of Goods on the Work of its Fourth Session to UNCITRAL para. 39, at 9, para. 42, at 10, U.N. Doc. A/CN.9/75 (1973) (examples of discussions by Working Group regarding articles of draft of Convention) [hereinafter cited as Progress Report, Working Group Fourth Session], *reprinted in* [1973] 4 Y.B. UNCITRAL paras. 39, 42, at 64, U.N. Doc. A/CN.9/SER.A/1973 [hereinafter cited as Yearbook 4]; Report of the Working Group on the International Sale of Goods, First Session, to UNCITRAL paras. 57-60, at 14-15, paras. 63-64, 66, 68, 70, at 16-17, U.N. Doc. A/CN.9/35 (1970) (early discussions of Working Group on article 17 of ULIS) [hereinafter cited as Report, Working Group First Session], *reprinted in Yearbook 1, supra*, paras. 57-60, 63-64, 66, 68, at 182, para. 70, at 183; Report of the United Nations Commission on International Trade Law on the Work of its Third Session to the General Assembly, 25 U.N. GAOR Supp. (No. 17) paras. 53-54, at 15, paras. 60-63, at 16-17, U.N. Doc. A/8017 (1970) (same, and discussions of ULIS article 5(2)) [hereinafter cited as Third Session Report], *reprinted in Yearbook 1, supra*, paras. 53-54, at 136, paras. 60-63, at 136-37. Commentaries and recommendations from different countries and agencies were also influential in the drafting of these texts. See *ABA Report, supra*, at 41; Winship II, *supra*, at 1232. See generally Analysis of Comments and Proposals by Governments and International Organizations on the Draft Convention on Contracts for the International Sale of Goods, and on Draft Provisions Concerning Implementation, Reservations and Other Final Clauses, Prepared by the Secretary-General, U.N. Doc. A/CONF.97/9 (1980) (analysis of comments and proposals submitted to 1980 Conference on Contracts for the International Sale of Goods by different governments and international organizations) [hereinafter cited as Analysis of Comments, 1980 Conference], *reprinted in Official Records, supra*, at 71; Analysis of Comments by Governments and International Organizations on the Draft Convention on the International Sale of Goods as Adopted by the Working Group on the International Sale of Goods: Report of the Secretary-General, U.N. Doc. A/CN.9/126 (1977) (analysis of comments submitted to Working Group by different countries and international organizations) [hereinafter cited as Analysis of Comments, Working Group], *reprinted in Yearbook 8, supra*, at 142-43; Comments by Governments and International Organizations on the Draft Convention on the International Sale of Goods at 1, U.N. Docs. A/CN.9/125, A/CN.9/125/Add.1, and A/CN.9/125/Add.2 (1977) (compilation of com-

ratification.² The Convention applies to international transactions³ be-

ments received by the Working Group from various governments and international organizations] [hereinafter cited as Comments by Governments], *reprinted in Yearbook 8, supra*, at 109; Analysis of Comments and Proposals Relating to Articles 1-17 of the Uniform Law on the International Sale of Goods (ULIS): Note by the Secretary-General, U.N. Doc. A/CN.9/WG.2/WP.11 (1971) (comments by countries on first 17 articles of the ULIS) [hereinafter cited as Analysis of Comments, Articles 1-17], *reprinted in Yearbook 3, supra*, at 69; Analysis of the Studies and Comments by Governments on the Hague Conventions of 1964: Report of the Secretary-General, U.N. Doc. A/CN.9/31 (1970) (analysis of first set of responses received by UNCITRAL as to the 1964 Uniform Laws) [hereinafter cited as Analysis of Studies], *reprinted in Yearbook 1, supra*, at 159. In 1978, a draft Convention was adopted by UNCITRAL, Historical Introduction, *supra*, para. 11, at 9-10, *reprinted in Official Records, supra*, para. 11, at 4-5; *see* J. Honnold, *supra*, § 9, at 53-54; *ABA Report, supra*, at 41; Winship I, *supra*, § 1.01[4], at 1-14; Winship II, *supra*, at 1232, for presentation at the 97th Diplomatic Conference of the United Nations, *see* Reinhart, *supra*, at 94-95. This conference met in Vienna from March 10 to April 11, 1980. *ABA Report, supra*, at 39. After lengthy committee discussions, *see* Summary Records of the First Committee (14th mtg.), U.N. Doc. A/CONF.97/C.1/SR.14 (1980) (example of discussions of a Convention article by the First Committee) in Official Records, *supra*, paras. 29-30, at 308; Summary Records of the First Committee (6th mtg.), U.N. Doc. A/CONF.97/C.1/SR.6 (1980) (same) in Official Records, *supra*, at 259, paras. 7, 10, at 260, paras. 33, 35, at 261; Summary Records of the First Committee (5th mtg.), U.N. Doc. A/CONF.97/C.1/SR.5 (1980) (same) [hereinafter cited as Summary Records, First Committee, Fifth Meeting], in Official Records, *supra*, at 254-59, and reports, *see* Report of the First Committee to the Plenary Conference (6th plen. mtg.), U.N. Doc. A/CONF.97/SR.6 (1980) (examples of committee reports and voting on different articles) [hereinafter cited as Report, First Committee, Sixth Plenary Meeting], in Official Records, *supra*, paras. 23-30, at 201, paras. 37-45, at 202, paras. 37, 45-46, at 207, para. 53, at 208; Report of the First Committee to the Conference on Contracts for the International Sale of Goods, at 8-10, 13-18, 63-67, U.N. Doc. A/CONF.97/11 (1980) (proposed amendments to certain articles) [hereinafter cited as Report, First Committee], *reprinted in Official Records, supra*, at 85-88, 103-05, the Convention was adopted by the 62 attending nations, Reinhart, *supra*, at 94-95; Winship I, *supra*, § 1.01[4], at 1-14; *Practitioner's Guide, supra*, at 81-82 & n.8.

2. As of August 7, 1984, the Convention had been ratified or acceded to by six countries: Argentina, Egypt, France, Hungary, Lesotho and Syria. Memorandum from Peter H. Pfund, Assistant Legal Adviser for Private International Law, U.S. Dep't of State, to Members of the Secretary of State's Advisory Committee on Private International Law and its former Study Group on International Sales, and Others at 2 (Aug. 7, 1984) (available in files of *Fordham Law Review*) [hereinafter cited as Memorandum]. Austria, Czechoslovakia, the People's Republic of China, Sierra Leone and Yugoslavia are among those countries currently considering ratification. *Id.* The Convention will become effective one year after ratification by a tenth state. CISG, *supra* note 1, art. 99(1), at 31, *reprinted in* 19 I.L.M. 668, 694 (1980); *see* Winship, *Introduction, International Sale of Goods*, 18 Int'l Law. 3, 3 (1984) [hereinafter cited as Winship IV]; *Practitioner's Guide, supra* note 1, at 81; *Trade Usages, supra* note 1, at 622 n.13. The Convention is likely to enter into force within the foreseeable future. *See* Report of the United Nations Commission on International Trade Law on the Work of its Seventeenth Session to the General Assembly, 39 U.N. GAOR Supp. (No. 17) paras. 145-46, at 33, U.N. Doc. A/39/17 (1984); Analysis of Comments, 1980 Conference, *supra* note 1, paras. 1-2, at 2-3, *reprinted in* Official Records, *supra* note 1, paras. 1-2, at 71; Sono, *supra* note 1, at 14; Winship II, *supra* note 1, at 1234. The likelihood of ratification by other states will greatly increase if the United States ratifies the Convention. *See* Pfund, *Prospects for Adoption in the United States*, in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods 10-7* (1984); Sono, *supra* note 1, at 14; Winship IV, *supra*, at 4; Memorandum, *supra*, at 2. President Reagan submitted the Convention to the Senate on September 21, 1983. Pfund, *supra*, at 10-4; Winship IV,

tween merchants⁴ for the sale of goods.⁵ Certain issues raised by such transactions, however, are specifically excluded from its scope.⁶ For ex-

supra, at 3 n.2; *Practitioner's Guide*, *supra* note 1, at 82; *Trade Usages*, *supra* note 1, at 622. The Senate Foreign Relations Committee held public hearings on April 4, 1984. See *International Sale of Goods, Proposed United Nations Convention on Contracts for the International Sale of Goods: Hearing on Treaty Doc. 9 Before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. 1 (1984) [hereinafter cited as *Senate Hearing*]. The prospects are good for eventual Senate ratification. See Pfund, *supra*, at 10-5 to -6; *Trade Usages*, *supra* note 1, at 622; see also *ABA Report*, *supra* note 1, at 40, 50-51 (noting benefits to U.S. of ratification); Winship II, *supra* note 1, at 1234 (same). Many American legal and trade organizations support ratification of the Convention. See *Senate Hearing*, *supra*, at 8 (statement of Peter H. Pfund, Assistant Legal Adviser for Private Int'l Law, Dep't of State), 15 (same), 31-32 (statement of Peter H. Kaskell, Chairman, Lawyers Comm. for the Convention on Contracts for the Int'l Sale of Goods); *ABA Report*, *supra* note 1, at 39, 51; Winship IV, *supra*, at 3-4. But see *Senate Hearing*, *supra*, at 38-40 (statement of Frank A. Orban III, International Counsel, Armstrong World Indus., Inc.) (arguments against ratification); Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 Ohio St. L.J. 265, 267, 272-73, 295, 303-05 (1984) (same). Even if the Senate does not ratify the Convention, it may still apply by virtue of article 1(1)(b) to contracts to which a United States trader is a party. See Winship III, *supra* note 1, at 2 n.3, 3 n.6. See *infra* note 36 and accompanying text.

3. An "international transaction" under the Convention is a transaction involving a sale of goods between parties whose places of business are in different countries. CISG, *supra* note 1, art. 1(1), reprinted in 19 I.L.M. 668, 672 (1980); see J. Honnold, *supra* note 1, §§ 12-13, at 57-58, § 40, at 78. See *infra* note 33 and accompanying text.

4. The Convention specifically excludes from its application any sales "of goods 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." CISG, *supra* note 1, art. 2(a), at 2, reprinted in 19 I.L.M. 668, 672 (1980). The Convention will govern only transactions between professionals. *Id.*, reprinted in 19 I.L.M. at 672. See *infra* note 39 and accompanying text.

5. The Convention does not explicitly define "goods." Rather, article 2 excludes from its coverage items which are not goods. See Winship I, *supra* note 1, § 1.02[3][c], at 1-25. A sale of goods does not include sales "of stocks, shares, investment securities, negotiable instruments or money," CISG, *supra* note 1, art. 2(d), at 2, reprinted in 19 I.L.M. 668, 672 (1980), "of ships, vessels, hovercraft or aircraft," *id.*, art. 2(e), at 2, reprinted in 19 I.L.M. at 672, or "of electricity," *id.*, art. 2(f), at 2, reprinted in 19 I.L.M. at 672. See J. Honnold, *supra* note 1, §§ 53-55, at 88-89. The Convention also excludes contracts for the manufacture and sale of goods, if "the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services." CISG, *supra* note 1, art. 3(2), at 2, reprinted in 19 I.L.M. at 672; see J. Honnold, *supra* note 1, § 60, at 92-93. Other transactions that are excluded from the Convention are auction sales, and sales on execution or otherwise by authority of law. CISG, *supra* note 1, art. 2(b), (c), at 2, reprinted in 19 I.L.M. at 672; see J. Honnold, *supra* note 1, §§ 51-52, at 87-88.

6. See Farnsworth II, *supra* note 1, at 19; *Practitioner's Guide*, *supra* note 1, at 88. The Convention excludes issues concerning the validity of the contract, its provisions, or any usages. See CISG, *supra* note 1, art. 4(a), at 2, reprinted in 19 I.L.M. 668, 673 (1980); J. Honnold, *supra* note 1, §64, at 96; *ABA Report*, *supra* note 1, at 42; Reinhart, *supra* note 1, at 96; Rosett, *supra* note 2, at 280; Samson, *La Convention des Nations Unies sur les contrats de vente internationale de marchandises: Etude comparative de dispositions de la Convention et des règles de droit québécois en la matière*, 23 Les Cahiers de Droit [C. de D.] 919, 929 (1982); Winship I, *supra* note 1, § 1.02[6], at 1-36. The Convention also excludes matters concerning the effect that the contract may have on the property rights in the goods sold, see CISG, *supra* note 1, art. 4(b), at 2, reprinted in 19 I.L.M. at 673; J. Honnold, *supra* note 1, § 70, at 99; Reinhart, *supra* note 1, at 96; see

ample, if the domestic law that would govern the contract absent the Convention places in question "the validity of the contract or of any of its provisions,"⁷ the issue of validity must be determined under that domestic law.⁸ If, however, the domestic law does not set forth requirements for validity, the Convention will not be displaced, and its General Provisions⁹ will be applied to interpret the parties' agreement.¹⁰

Disclaimers of implied warranties in contracts for the sale of goods present the issue whether a domestic law establishes requirements for validity within the meaning of the Convention.¹¹ Under article 35(2) of the Convention, goods are not conforming unless they "are fit for the purposes for which goods of the same description would ordinarily be used"¹² and "are fit for any particular purpose . . . known to the seller at the time of the conclusion of the contract."¹³ These warranties are implied in every contract to which the Convention applies unless the parties have "agreed otherwise."¹⁴ The Convention thus permits a seller to

ABA Report, supra note 1, at 42, and matters concerning liability of the seller for death or personal injury caused by the goods to any person, CISG, *supra* note 1, art. 5, at 3, *reprinted in* 19 I.L.M. at 673; J. Honnold, *supra* note 1, §§ 71-73, at 100-04; *ABA Report, supra* note 1, at 42; Reinhart, *supra* note 1, at 96; Rosett, *supra* note 2, at 280; Winship I, *supra* note 1, § 1.02[6], at 1-36.

7. CISG, *supra* note 1, art. 4(a), at 2, *reprinted in* 19 I.L.M. 668, 673 (1980).

8. Honnold, *The New Uniform Law for International Sales and the UCC: A Comparison*, 18 Int'l Law. 21, 23-24 (1984). The particular domestic law that will decide issues of validity is determined by the conflict of laws rules of private international law. See Samson, *supra* note 6, at 929. See *infra* note 124 and accompanying text.

9. CISG, *supra* note 1, arts. 7-13, at 3-4, *reprinted in* 19 I.L.M. 668, 673-74 (1980). The General Provisions address problems of interpretation of the Convention and the contracts it governs. See J. Honnold, *supra* note 1, § 38, at 76. See *infra* note 10 and accompanying text.

10. See CISG, *supra* note 1, arts. 7-13, at 3-4, *reprinted in* 19 I.L.M. 668, 673-74 (1980). The intentions of the parties are to be used to interpret their agreement. Interpretations of a party's statements and conduct are to be made first "according to his intent where the other party knew or could not have been unaware what that intent was." *Id.* art. 8(1), at 3, *reprinted in* 19 I.L.M. at 673; J. Honnold, *supra* note 1, §§ 106-07, at 137-38. When that provision is not applicable, the objective understanding of a reasonable person of the same kind as the other party under the same circumstances is to be used to interpret the agreement. CISG, *supra* note 1, art. 8(2), at 3, *reprinted in* 19 I.L.M. at 673; J. Honnold, *supra* note 1, § 107, at 138. In this situation, consideration must be given to all of the relevant circumstances of the contract, including negotiations, subsequent conduct, and usages established between the parties. See CISG, *supra* note 1, art. 8(3), at 3, *reprinted in* 19 I.L.M. at 673; J. Honnold, *supra* note 1, §§ 109-11, at 141-43. Any such usages are to be further interpreted according to the provisions of article 9. See CISG, *supra* note 1, art. 9, at 4, *reprinted in* 19 I.L.M. at 674; J. Honnold, *supra* note 1, §§ 112-22, at 144-49.

11. See J. Honnold, *supra* note 1, §§ 230-34, at 256-59; Honnold, *supra* note 8, at 23-24.

12. CISG, *supra* note 1, art. 35(2)(a), at 11, *reprinted in* 19 I.L.M. 668, 679 (1980).

13. *Id.* art. 35(2)(b), at 11, *reprinted in* 19 I.L.M. at 679.

14. *Id.* art. 35(2), at 11, *reprinted in* 19 I.L.M. at 679; see Schlechtriem, *The Seller's Obligations Under the United Nations Convention on Contracts for the International Sale of Goods*, in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* §6.03[1], at 6-20 (1984).

disclaim all implied warranties.¹⁵ Nowhere, however, does it set out requirements for how such a disclaimer is to be made.¹⁶ The inference to be drawn is that the parties are free to make their agreement in whatever manner they wish.¹⁷ This freedom conflicts with section 2-316 of the Uniform Commercial Code (UCC or Code),¹⁸ which lists specific methods for effectively disclaiming the Code's implied warranties.¹⁹ These warranties are in substance the same as those implied by the Convention.²⁰ The question raised by this conflict is whether the UCC's disclaimer provisions are requirements for "validity" within the meaning of the Convention.²¹ If the UCC's requirements are not within the Convention's concept of validity, the Convention applies to the disclaimer provision, and a seller may effectively disclaim an implied warranty by the use of general language²² that may not conform to section 2-316. If the UCC

15. Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat para. 4, at 92, U.N. Doc. A/CONF.97/5 (1979) [hereinafter cited as Commentary by Secretariat], reprinted in Official Records, *supra* note 1, para. 4, at 32. The parties can agree that the quality of the goods will meet higher standards than those set out in the Convention or that the seller makes no warranties that the goods conform to any of the Convention's stated norms. *Id.*, reprinted in Official Records, *supra* note 1, para. 4, at 32; see Feltham, *The United Nations Convention on Contracts for the International Sale of Goods*, 1981 J. Bus. L. 346, 353-54; Schlechtriem, *supra* note 14, § 6.03[1], at 6-20.

16. See Cain, *The Vienna Convention: Posing a New International Law of Sales*, 57 Conn. B.J. 327, 334 (1983).

17. Freedom of contract is a dominant theme of the Convention. J. Honnold, *supra* note 1, § 2, at 47-48; see *ABA Report*, *supra* note 1, at 39; see also J. Honnold, *supra* note 1, § 25, at 63-64, § 222, at 249 (whether goods are conforming depends on contract of the parties). The will of the parties is paramount in any agreement between them. This is evident in certain provisions of the Convention. See, e.g., CISG, *supra* note 1, art. 31, at 10 (Convention's place of delivery provisions may be varied by agreement), reprinted in 19 I.L.M. 668, 678 (1980); *id.* art. 35(2), at 11 (parties may agree otherwise as to conformity of the goods), reprinted in 19 I.L.M. at 679. Article 6 of the Convention is the most explicit of these provisions, stating that "[t]he parties may exclude the application of this Convention or . . . derogate from or vary the effect of any of its provisions." *Id.* art. 6, at 3, reprinted in 19 I.L.M. at 673. See *infra* note 38 and accompanying text.

18. U.C.C. § 2-316(2), (3) (1977).

19. *Id.* See *infra* notes 84-108 and accompanying text.

20. See Cain, *supra* note 16, at 334. Compare CISG, *supra* note 1, art. 35(2), at 11, reprinted in 19 I.L.M. 668, 679 (1980) with U.C.C. §§ 2-314(2), (3), 2-315 (1977). But see J. Honnold, *supra* note 1, § 233, at 258 (article 35(2)(a) is somewhat different from U.C.C. § 2-314). See *infra* notes 72-78, 139-44 and accompanying text.

21. See J. Honnold, *supra* note 1, §§ 232, 234, at 257-59. See *infra* notes 109-19 and accompanying text.

22. "General language" is language such as that given in U.C.C. § 2-316(2) as sufficient to disclaim an implied warranty of fitness for a particular purpose. U.C.C. § 2-316 official comment 4 (1977). It may be language stating that "[t]here are no warranties which extend beyond the description on the face hereof," U.C.C. § 2-316(2) (1977), or merely language stating that there are no warranties, express or implied. See *Construction Aggregates Corp. v. Hewitt-Robins, Inc.*, 404 F.2d 505, 510 (7th Cir. 1968) (limited express warranty was "in lieu of all other warranties expressed or implied"), *cert. denied*, 395 U.S. 921 (1969); *Rite Fabrics, Inc. v. Stafford-Higgins Co.*, 366 F. Supp. 1, 10 (S.D.N.Y. 1973) (court stated that implied warranty of fitness for a particular purpose could have been disclaimed by general language, after finding that this seller's invoice had no wording to that effect); *O'Neil v. International Harvester Co.*, 40 Colo. App. 369,

does dictate requirements of validity, however, the Convention will not apply to the attempted disclaimer, and a seller who has disclaimed a warranty by using general language may find himself liable for delivering nonconforming goods.²³

Professor John Honnold²⁴ has argued that consulting section 2-316 when interpreting contracts governed by the Convention is improper.²⁵ He asserts that section 2-316's "requirements" are mere guidelines for interpreting the parties' agreement rather than imperatives for valid disclaimers.²⁶ Furthermore, even if section 2-316's requirements must be met to create a valid disclaimer under the UCC, this type of validity does not fall within the Convention's concept of that term:²⁷ "[T]he Convention may not be read so broadly as to import domestic rules that would supplant other articles of the Convention."²⁸ This Note, however, argues that the UCC's provisions on disclaimers of warranties are in fact requirements for "validity" within the meaning of the Convention. The

372, 575 P.2d 862, 865 (1978) (court held language "as is without warranty of any character" to be sufficient under U.C.C. § 2-316(2)); *Cox Motor Car Co. v. Castle*, 402 S.W.2d 429, 430-31 (Ky. 1966) (written warranty stated to be "expressly in lieu of all other warranties, expressed or implied" was effective); *Marshall v. Murray Oldsmobile Co.*, 207 Va. 972, 974 n.1, 976-78, 154 S.E.2d 140, 142 n.1, 144 (1967) (disclaimer stating "[t]here are no warranties, expressed or implied," other than those given by dealer, and "warranty is expressly in lieu of all other warranties," was held effective); G. Wallach, *The Law of Sales Under the Uniform Commercial Code* ¶ 11.11[1][b], at 11-51 (1981) (general statement that there are no warranties suffices to disclaim implied warranty of fitness for a particular purpose); J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* § 12-5, at 439 (2d ed. 1980) (general language excludes implied warranty of fitness for a particular purpose). *But see* *Boeing Airplane Co. v. O'Malley*, 329 F.2d 585, 593 (8th Cir. 1964) (disclaimer of implied warranty must be in clear and specific language, so as to leave no doubt as to intent of parties); *Imperial Stamp & Engraving Co. v. Bailey*, 82 Ill. App. 3d 835, 836-38, 403 N.E.2d 294, 296-97 (1980) (the phrase "overall production is not guaranteed" could not be reasonably interpreted to mean there were no warranties).

23. The seller's basic contractual obligation is to provide goods that conform to the agreement. *Schlechtriem*, *supra* note 14, § 6.03[1], at 6-19. When nonconforming goods are delivered, the UCC indicates that liability of the seller will depend on whether he has effectively disclaimed in the contract any implied warranties as to the goods. *See* U.C.C. §§ 2-314 to -316 (1977); G. Wallach, *supra* note 22, ¶ 11.11, at 11-49; J. White & R. Summers, *supra* note 22, § 12-1, at 427. The seller may effectively disclaim the implied warranty of fitness for a particular purpose through general language. *See* U.C.C. § 2-316(2) (1977). If the seller seeks to disclaim the warranty of merchantability, however, the Code explicitly states that general language is not permitted. *See id.* The disclaimer is not effective to protect a seller from liability if the goods he delivers do not conform to the contract.

24. Professor Honnold served as co-chairman of the United States delegation to the 97th Diplomatic Conference, which promulgated the Convention. *Senate Hearing*, *supra* note 2, at 20 (statement of John Honnold, Schnader Professor of Commercial Law, Univ. of Pa.). He also represented the United States at the 1964 Hague Conference, and was the Secretary of UNCITRAL from 1969 to 1974. *See id.* at 18.

25. *See* J. Honnold, *supra* note 1, § 233, at 258.

26. *See id.* § 234, at 258-59.

27. *Id.*

28. *Id.* at 259.

UCC language is mandatory.²⁹ If a disclaimer clause does not meet section 2-316's prescriptions, that clause cannot be valid.³⁰ The Convention will not give effect to a contract provision if the substantive domestic law that would otherwise govern the contract would not do so.³¹

Part I of this Note discusses the scope of the Convention and the meaning of validity. Part II considers whether section 2-316 sets forth requirements for validity within the Convention's concept of that term, and concludes that it does. Part III examines the interaction of the Convention and the UCC after a disclaimer of implied warranties is found invalid under section 2-316.

I. THE SCOPE OF THE CONVENTION AND THE MEANING OF VALIDITY

Whether UCC section 2-316's disclaimer provisions set forth requirements for validity within the meaning of the Convention³² is determined by examining the concept of validity in the context of the Convention's overall scope. The Convention applies to contracts for the sale of goods between parties whose places of business are in different countries³³ if those countries are "Contracting States"—countries that have ratified the Convention³⁴—or if the rules of private international law³⁵ would lead to the application of the law of a Contracting State.³⁶ The Conven-

29. See *infra* notes 84-89 and accompanying text.

30. See *infra* notes 90-108 and accompanying text.

31. Report of the Working Group on the International Sale of Goods on the Work of its Sixth Session to UNCITRAL para. 32, at 8, U.N. Doc. A/CN.9/100 (1975) [hereinafter cited as Report, Working Group, Sixth Session], *reprinted in* [1975] 6 Y.B. UNCITRAL para. 32, at 52, U.N. Doc. A/CN.9/SER.A/1975 [hereinafter cited as Yearbook 6]. See *infra* notes 55-59 and accompanying text.

32. See *infra* notes 109-19 and accompanying text.

33. CISG, *supra* note 1, art. 1(1), at 1, *reprinted in* 19 I.L.M. 668, 672 (1980); see *ABA Report, supra* note 1, at 39, 42; Farnsworth II, *supra* note 1, at 19; Réczei, *The Area of Operation of the International Sales Conventions*, 29 Am. J. Comp. L. 513, 517 (1981); Reinhart, *supra* note 1, at 95; Rosett, *supra* note 2, at 277; Winship I, *supra* note 1, § 1.02[4], at 1-26 to -29; *Practitioner's Guide, supra* note 1, at 87. That the parties have places of business in different countries is to be disregarded if that fact has not appeared under any of the circumstances before concluding the contract. CISG, *supra* note 1, art. 1(2), at 1, *reprinted in* 19 I.L.M. at 672; Rosett, *supra* note 2, at 278. The nationality of the parties and the civil or commercial character of the parties or the contract are irrelevant in determining whether the Convention applies. CISG, *supra* note 1, art. 1(3), at 2, *reprinted in* 19 I.L.M. at 672.

34. CISG, *supra* note 1, art. 1(1)(a), at 1, *reprinted in* 19 I.L.M. 668, 672 (1980); J. Honnold, *supra* note 1, § 45, at 81. See *supra* note 2.

35. The terms "private international law" and "conflict of laws" are synonymous. See H. Goodrich & E. Scoles, *Handbook of the Conflict of Laws* 5-6 (4th ed. 1964); P. North, Cheshire and North *Private International Law* 12-13 (10th ed. 1979); M. Wolff, *Private International Law* 10 (2d ed. 1950).

36. CISG, *supra* note 1, art. 1(1)(b), at 1, *reprinted in* 19 I.L.M. 668, 672 (1980); J. Honnold, *supra* note 1, § 46, at 82; Winship I, *supra* note 1, § 1.02[4][b], at 1-30 to -31. Article 95 of the Convention permits a Contracting State to make a declaration at the time of "ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1." CISG, *supra* note 1, art. 95, at 30, *reprinted in* 19 I.L.M. at

tion governs formation of the contract and the corresponding rights and obligations of the seller and buyer.³⁷ This broad scope is limited in several ways. Article 6 expressly permits the parties to exclude application of the Convention and to derogate from or vary the effect of any of its provisions.³⁸ The Convention also excludes certain types of transactions, most notably consumer sales,³⁹ and certain issues, such as "the validity of the contract or of any of its provisions."⁴⁰

The term validity, however, is never defined in the Convention.⁴¹

693; see J. Honnold, *supra* note 1, § 47, at 82-84; Réczei, *supra* note 33, at 521; Winship I, *supra* note 1, § 1.02[4][c], at 1-31 to -32. The Senate is likely to make such a reservation if it ratifies the Convention. See *supra* note 2.

37. See CISG, *supra* note 1, art. 4, at 2, reprinted in 19 I.L.M. 668, 673 (1980); J. Honnold, *supra* note 1, §§ 62-63, at 94-95; *ABA Report*, *supra* note 1, at 39; *Practitioner's Guide*, *supra* note 1, at 88.

38. CISG, *supra* note 1, art. 6, at 3, reprinted in 19 I.L.M. 668, 673 (1980); *ABA Report*, *supra* note 1, at 42; Rosett, *supra* note 2, at 280; *Practitioner's Guide*, *supra* note 1, at 87; see J. Honnold, *supra* note 1, § 74, at 105; Kahn, *La Convention de Vienne du 11 Avril 1980 sur les contrats de vente internationale de marchandises*, 33 *Revue Internationale de Droit Comparé* [R.I.D.C.] 951, 961 (1980); Reinhart, *supra* note 1, at 96; Winship I, *supra* note 1, § 1.02[5], at 1-32 to -33; see also Feltham, *supra* note 15, at 348 (Convention applies unless the parties exclude its application); Rosett, *supra* note 2, at 265 (Convention permits the contracting parties to exclude by agreement the application of its provisions). It is unclear whether this exclusion by the parties must be express or whether it may be implied. *Id.* at 280-81; Winship I, *supra* note 1, § 1.02[5], at 1-34 to -35. In light of the Convention's detailed rules for determining the intentions of the parties, an express declaration should not be required. Winship I, *supra* note 1, § 1.02[5], at 1-35; see CISG, *supra* note 1, arts. 8-9, at 3-4, reprinted in 19 I.L.M. at 673-74. *But see* Dore & DeFranco, *A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code*, 23 *Harv. Int'l L.J.* 49, 53-54 (1982) (allowing a finding of implied exclusions may lead to results contrary to parties' intent).

39. The Convention specifically excludes from its scope any sales "of goods 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." CISG, *supra* note 1, art. 2(a), at 2, reprinted in 19 I.L.M. 668, 672 (1980); see J. Honnold, *supra* note 1, § 50, at 85-87; *ABA Report*, *supra* note 1, at 39, 42; Farnsworth II, *supra* note 1, at 19; Reinhart, *supra* note 1, at 96; *Practitioner's Guide*, *supra* note 1, at 88.

It is conceivable that a sale governed by the Convention may fall within the provisions of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. § 2301 (1982) (the Act), which deals with consumer product warranties. A "consumer product" is defined as "any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes." *Id.* § 2301(1). Arguably, a "sale of a consumer product" is not a "sale to a consumer" within the meaning of Convention article 2(a). This presents a potential conflict between the Convention and the Act because by its terms the Act may apply to exports to foreign jurisdictions. "However, the public interest would not be served by the use of Commission resources to enforce the Act with respect to such products. . . . The Commission does not contemplate the enforcement of the Act with respect to consumer products exported to foreign jurisdictions." Interpretations of Magnuson-Moss Warranty Act, 16 C.F.R. § 700.1(i) (1984).

40. CISG, *supra* note 1, art. 4(a), at 2, reprinted in 19 I.L.M. 668, 673 (1980). See *supra* note 6 and accompanying text.

41. Samson, *supra* note 6, at 929 ("La Convention ne définit pas le terme 'validité' . . .").

Before an issue can be excluded from the Convention as a question of validity the meaning of that term must be determined. When a treaty's⁴² drafters do not directly enact definitions of statutory terms, they may do so indirectly by means of interpretational directives.⁴³ These are rules that, without reference to particular words, "specify[y] how provisions . . . are to be construed and applied, or what effects are to be given them."⁴⁴ The Convention contains such interpretational directives in its General Provisions.⁴⁵ Article 7 in particular sets out instructions for interpreting the Convention and settling questions governed by it.

Article 7(2) states that matters governed by the Convention but not expressly settled by it are to be examined under "the general principles on which [the Convention] is based."⁴⁶ Application of such principles may prove to be impossible, however, because the drafters themselves were unable to identify them.⁴⁷ When application of general principles is

42. The ordinary rules of statutory construction are relevant to the interpretation of international agreements. 1A C. Sands, *Sutherland's Statutes and Statutory Construction* § 32.09, at 381 (4th ed. 1972). Thus, they are applicable to the Convention. However, this application is conditioned on the special circumstances of such agreements. *Id.* These special circumstances include the "wider spectrum" of affected parties and interests, and the corresponding lower "homogeneity of pertinent attitudes than is usually the case with respect to domestic legislation." *Id.* at 382. They also include the "greater degree of professionalism" and care taken in formulating ideas and drafting agreements, and the "subjection of agreements to the possibility of interpretation by a wider assortment of tribunals and authorities." *Id.* The first step in construing a treaty, as with any piece of legislation, is an examination of the textual language, composition and structure. 2A N. Singer, *Sutherland's Statutes and Statutory Construction* § 47.01 (C. Sands rev. 4th ed. 1984). Other steps are a study of the legislative history and considerations of public policy. *Id.*, §§ 48.01, .03, 56.01-.02. See *infra* notes 55-70 and accompanying text.

43. 1A C. Sands, *supra* note 42, § 27.01, at 308-09.

44. *Id.* at 308.

45. See 2A N. Singer, *supra* note 42, § 47.02. See *supra* note 9. Article 7 is the most relevant of the General Provisions, because it states the manner in which the Convention is to be construed and the principles underlying this method of construction:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

CISG, *supra* note 1, art. 7, at 3, *reprinted in* 19 I.L.M. 668, 673 (1980).

46. CISG, *supra* note 1, art. 7(2), at 3, *reprinted in* 19 I.L.M. 668, 673 (1980).

47. The Convention's legislative history shows that the necessity and meaning of a provision on "general principles" were hotly debated issues. See Summary Records, First Committee, Fifth Meeting, *supra* note 1 (discussions as to desirability and wording of what would become article 7), in Official Records, *supra* note 1, paras. 6, 8, 12-14, 17, 20-21, 23-24, 26, 28, 31, 34-35, 39, 41, 43, 53, 59, at 255-59; Report, First Committee, Sixth Plenary Meeting, *supra* note 1 (discussion of proposed amendments to article 6, the immediate precursor of article 7), in Official Records, *supra* note 1, paras. 37-44, at 202; Report, First Committee, *supra* note 1, at 13-14 (proposal adopted as to article 6 for consideration at the 1980 Conference), *reprinted in* Official Records, *supra* note 1, paras. 2-3, at 87; Tenth Session Report, *supra* note 1, paras. 139-40, at 65, paras. 145-47, at 66-67 (proposed amendment to draft article 13, another ancestor of Convention article 7),

not possible,⁴⁸ questions not expressly settled in the Convention are to be settled "in conformity with the law applicable by virtue of the rules of private international law."⁴⁹ Thus, the language of the Convention points to domestic law as the source for a definition of validity.⁵⁰ It is clear from article 4(a) that because the Convention excludes all matters of validity, domestic law will govern such matters.⁵¹ Article 7(2) makes it apparent that domestic law not only governs validity, but indeed must define it as well.

Article 7(1) also sets forth interpretational directives. In construing the Convention, "regard is to be had to its international character."⁵² Professor Honnold's arguments indicate that he believes that preservation of that character requires a narrow view of what constitutes a matter

*reprinted in Yearbook 8, supra note 1, paras. 139-40, 145-47, at 34-35; Analysis of Comments, Articles 1-17, supra note 1, paras. 52-56, at 18-20 (discussion of ULIS article 17, first forerunner of Convention article 7), reprinted in Yearbook 3, supra note 1, paras. 52-60, at 76-77; Report, Working Group, First Session, supra note 1, paras. 57-60, at 14-15, paras. 63-64, 66, 68, 70, at 16-17 (same), reprinted in Yearbook 1, supra note 1, paras. 57-60, 63-64, 66, 68, 70, at 182-83; Analysis of Studies, supra note 1, paras. 95-97, at 33 (same), reprinted in Yearbook 1, supra note 1, paras. 95-97, at 170. Professor Honnold has given several examples of these "general principles." See J. Honnold, *supra* note 1, §§ 99-101, at 129-32. Such examples include the protection of reliance on the representations of the other party, a duty of the parties to communicate, and a duty to mitigate damages. Honnold's method of finding general principles would require a tribunal to decide whether the drafters of the Convention deliberately rejected a specific provision relevant to the disputed issue or whether they failed to anticipate the problem. *Id.* § 102, at 132. If the tribunal decides that the answer is a lack of foresight, it must decide whether the issue at hand is so closely analogous to other specific provisions in the Convention that application of the same provisions is justified. *Id.* at 133.*

48. See CISG, *supra* note 1, art. 7(2), at 3, *reprinted in* 19 I.L.M. 668, 673 (1980).

49. *Id.*, *reprinted in* 19 I.L.M. at 673.

50. See Kahn, *supra* note 38, at 962. When a matter is not governed by the Convention, "recourse to domestic law is necessary, because a development of the Uniform Sales Law into fields not governed by the Convention would be an infringement of the law-making powers and bodies of the countries whose domestic law should be applied instead of the Uniform Law." Schlechtriem, *From the Hague to Vienna—Progress in Unification of the Law of International Sales Contracts?*, in *The Transnational Law of International Commercial Transactions* 133 (1982).

51. By requiring reference to domestic law, the Convention conforms to the traditional rule of private international law that the validity of a contract is determined by the "proper law." A. Dicey & J. Morris, *Dicey and Morris On The Conflict of Laws* 739 (J. Morris 10th ed. 1980); J. Falconbridge, *Essays on the Conflict of Laws* § 4, at 381 (2d ed. 1954); R. Graveson, *The Conflict of Laws* 345 (5th ed. 1965); P. North, *supra* note 35, at 223. Under the rules of private international law, a court can look to its own law to determine the validity of a contract if the court decides that enforcement of the contract under the proper law would contravene the public policies of the forum. See A. Dicey & J. Morris, *supra*, at 801-02; J. Falconbridge, *supra*, § 6, at 387; A. Kuhn, *Comparative Commentaries on Private International Law or Conflict of Laws* 37 (1937); P. North, *supra* note 35, at 224. Thus, the analogy: The Convention requires reference to the domestic law that would otherwise be applicable under the rules of private international law to determine the validity of the contract; the rules of private international law permit reference to the public policies of the forum to determine the validity of the contract. See *infra* notes 60-64 and accompanying text.

52. CISG, *supra* note 1, art. 7(1), at 3, *reprinted in* 19 I.L.M. 668, 673 (1980).

of validity.⁵³ He asserts that article 4(a)'s reference to validity "may not be read so broadly as to import domestic rules that would supplant other articles of the Convention."⁵⁴ This argument, however, is not supported by the Convention's legislative history, which demonstrates that the Convention's international character requires deference to mandatory national laws founded on public policy principles.⁵⁵ Many governments feared that an international sale of goods law would supplant such laws.⁵⁶ To assuage such fears, the drafters excluded from the Convention's scope all matters concerning "the validity of the contract or of any of its provisions."⁵⁷ The drafters recognized that certain forms of mandatory national laws exist solely for public benefit—to prevent the occurrence of any event those legislatures deem to be improper.⁵⁸ Under

53. See J. Honnold, *supra* note 1, § 234, at 259.

54. *Id.*

55. One of the earliest working group discussions centered on what issues were explicitly excluded from the 1964 Uniform Laws. Article 5(2) of the ULIS preserved "any mandatory provision of national law for the protection of a party to a contract which contemplates the purchase of goods by that party by payment of the price by installments." ULIS, *supra* note 1, art. 5(2), 834 U.N.T.S. 107, 125, *reprinted in* 3 I.L.M. 855, 857 (1964). Article 8, the forerunner of Convention article 4(a), stated that the Uniform Law was not concerned "with the validity of the contract or of any of its provisions or of any usage." *Id.* art. 8, 834 U.N.T.S. 107, 125, *reprinted in* 3 I.L.M. at 857. The perceived problem was whether the specific reference to the preservation of national laws relating to installment sales implied that all other mandatory rules were superseded by the ULIS, or whether they too were preserved under article 8. See Third Session Report, *supra* note 1, paras. 60-63, at 16-17, *reprinted in* Yearbook 1, *supra* note 1, paras. 60-63, at 136-37. The predominant belief was that regulatory laws would be preserved by article 8, although any such laws which were not confined to the validity of the contract would not be protected. *Id.* para. 61, at 17, *reprinted in* Yearbook 1, *supra* note 1, para. 61, at 136-37. See *infra* note 56 and accompanying text.

56. Early comments on the ULIS by various countries indicated that governments felt very strongly about their mandatory national rules. Norway, for example, wanted article 5(2) of the ULIS deleted or amended to extend it to all mandatory rules relating to public policy. Analysis of Studies, *supra* note 1, para. 72, at 28, *reprinted in* Yearbook 1, *supra* note 1, para. 72, at 168. It argued that whether a national mandatory rule should be regarded as an imperative for an international transaction should be governed by national law. *Id.*, *reprinted in* Yearbook 1, *supra* note 1, para. 72, at 168. The government of Hungary also thought that rules of public policy should prevail over the Uniform Law. *Id.* para. 74, at 28, *reprinted in* Yearbook 1, *supra* note 1, para. 74, at 168.

57. CISG, *supra* note 1, art. 4(a), at 2, *reprinted in* 19 I.L.M. 668, 673 (1980).

58. See Honnold, *supra* note 8, at 23-24. Mandatory national laws of public policy relating to the validity of a contract were left solely to the relevant domestic law. See *Senate Hearing*, *supra* note 2, at 26 (statement of Mark R. Joelson, Chairman, Section of Int'l Law and Practice, Am. Bar Ass'n); see also Naón, *The UN Convention on Contracts for the International Sale of Goods*, in *The Transnational Law on International Commercial Transactions* 101 (1982) ("validity of usages will depend on the mandatory provisions of the internal law indicated by national conflicts rules"). It was clear that matters such as capacity to make a contract, see J. Honnold, *supra* note 1, § 66, at 97, error, mistake, fraud, duress and illegality were also excluded from the Convention through article 4(a). *Winship I*, *supra* note 1, § 1.02[6], at 1-37; see Reinhart, *supra* note 1, at 96. The Convention does not overrule domestic laws relating to the validity of a contract. See Tenth Session Report, *supra* note 1, paras. 74, 76, at 54-55, *reprinted in* Yearbook 8, *supra* note 1, paras. 74, 76, at 30. It does not confer validity on a contractual provision if that provision would not be valid under the applicable domestic law. See Commentary,

the Convention, a contractual provision is invalid if enforcing it will produce an effect proscribed by national law.⁵⁹ This definition of validity comports with that recognized by the traditional rules of private international law. Generally, the validity of the contract is determined under the proper law—the law of the country with the most substantial connection to the contract.⁶⁰ However, this is subject to a well-known exception: The court need not apply the proper law to a contract if it finds that such application will contravene an important public policy of the forum.⁶¹ A court may find a contract invalid, and thus refuse to enforce it, for reasons of justice and morality,⁶² as well as for less emotional public policy reasons such as negligence and risk of loss,⁶³ and formal requirements for validity.⁶⁴

Article 7(1) also states that uniformity of application is to be consid-

Working Group Seventh Session, *supra* note 1, para. 3, at 12 (article 7 of the 1976 draft became article 4 of the 1980 Convention), *reprinted in* Yearbook 7, *supra* note 1, para. 3, at 100; Report, Working Group Sixth Session, *supra* note 31, para. 32, at 8 (article 8 became article 7, later article 4), *reprinted in* Yearbook 6, *supra* note 31, para. 32, at 52.

59. Schlechtriem, *supra* note 14, § 6.01, at 6-3.

60. See A. Dicey & J. Morris, *supra* note 51, at 739; J. Falconbridge, *supra* note 51, § 4, at 381; R. Graveson, *supra* note 51, at 345; P. North, *supra* note 35, at 223.

61. See A. Dicey & J. Morris, *supra* note 51, at 801-02; A. Kuhn, *supra* note 51, at 37; P. North, *supra* note 35, at 146; A. Scott, *Private International Law* 220 (2d ed. 1979).

62. See *Oscanyan v. Arms Co.*, 103 U.S. 261, 277-78 (1880) (contract for commissions by corrupt Turkish official); *Roth v. Patino*, 185 Misc. 235, 236-37, 56 N.Y.S.2d 853, 854-55 (Sup. Ct. 1945) (contract putting a wife at "beck and call" of another man valid in France, held to be "inconsistent with, and destructive of, [wife's] marriage" and in direct contravention with the policies of New York), *aff'd mem.*, 270 A.D. 927, 62 N.Y.S.2d 820 (1946), *rev'd mem. on other grounds*, 298 N.Y. 543, 80 N.E.2d 673 (1948); see also *Holzer v. Deutsche Reichsbahn Gesellschaft*, 159 Misc. 830, 837-44, 290 N.Y.S. 181, 189-96 (Sup. Ct. 1930) (defense that the laws of Germany at that time mandated a breach of company's employment contract with Jewish plaintiff held to be invalid because recognition of defense would outrage the conscience of the court); *cf.* *Grosman v. Union Transit Co.*, 228 F. 610, 612, 615-16 (5th Cir. 1916) (protection of married woman's property on a surety contract; conflict between laws of Texas and Illinois), *aff'd*, 245 U.S. 412 (1918); *International Hotel Corp. v. Golden*, 15 N.Y.2d 9, 13-14, 203 N.E.2d 210, 211-13, 254 N.Y.S.2d 527, 529-31 (1964) (contract for payment of gambling losses; conflict between laws of New York and Puerto Rico).

63. See *The Kensington*, 183 U.S. 263, 268-70 (1902) (negligence resulting in property loss); *Oceanic Steam Nav. Co. v. Corcoran*, 9 F.2d 724, 727, 731-33 (2d Cir. 1925) (negligence resulting in personal injury); *Straus & Co. v. Canadian Pac. Ry.*, 254 N.Y. 407, 410-11, 414-15, 173 N.E. 564, 565-67 (1930) (negligence resulting in theft); *cf.* *Fox v. Postal Tel.-Cable Co.*, 138 Wis. 648, 649, 651-53, 120 N.W. 399, 399-401 (1909) (clause seeking to relieve telegraph company of liability for negligence valid under New York law, held void and therefore unenforceable under Wisconsin law).

64. See *Roth v. Patino*, 185 Misc. 235, 237, 56 N.Y.S.2d 853, 855 (Sup. Ct. 1945) (oral agreement made in France not to be completed before the end of a lifetime, and violated Statute of Frauds), *aff'd mem.*, 270 A.D. 927, 62 N.Y.S.2d 820 (1946), *rev'd mem. on other grounds*, 298 N.Y. 543, 80 N.E.2d 673 (1948); *Royal Exch. Assurance Corp. v. Sjorforsakrings Aktiebolaget Vega*, [1901] 2 K.B. 567, 573-75, *aff'd*, [1902] 2 K.B. 384 (C.A.) (lack of formal stamp rendered insurance policy invalid under English law, even if valid under Swedish law); *Leroux v. Brown*, 12 C.B. 801-03, 824, 826-27, 138 Eng. Rep. 1119, 1120-21, 1129-30 (C.P. 1852) (oral employment contract valid in France held unenforceable in England for violation of Statute of Frauds).

ered when construing the Convention.⁶⁵ It may be argued that such application could be hindered by a broad view of validity. A contractual provision could be valid under one domestic law, yet invalid under another. This argument fails to recognize, however, that article 7(1) discusses uniform application, not uniform results.⁶⁶ Although a broad view of validity—one which recognizes national mandatory laws—may lead to different results in different contracts,⁶⁷ it would not prevent uniform application of the Convention if employed consistently.

The drafters' respect for national laws is apparent from other parts of the Convention's legislative history. Although article 6 grants the parties freedom to alter the Convention by agreement,⁶⁸ the drafters never intended such freedom to allow the parties to circumvent national mandatory laws by agreeing to exclude article 4(a).⁶⁹ In all cases, the national law indicated by the rules of private international law will govern the validity of the contract.⁷⁰ Thus, the drafters intended validity under article 4(a) to include matters of public policy as defined by the laws of individual Contracting States. It is necessary, therefore, to consider whether section 2-316's exclusion of warranty provisions are within that concept of validity.⁷¹

65. See CISG, *supra* note 1, art. 7(1), at 3, reprinted in 19 I.L.M. 668, 673 (1980).

66. "In the interpretation of this Convention, regard is to be had . . . to the need to promote uniformity in its application . . ." *Id.*, reprinted in 19 I.L.M. at 673. This provision calls for uniform application of the Convention, but not necessarily for uniform results. See Barbić, *Uniform Law on the International Sale of Goods, Uniform Law on the Formation of Contracts for the International Sale of Goods (1964) and United Nations Convention on Contracts for the International Sale of Goods (1980)*, in Hague-Zagreb Essays 4 on the Law of International Trade 9 (1983).

67. For example, the law of the country in which Seller X has his place of business forbids for reasons of public policy the making of a contract on a Sunday, whereas the law of the country in which Seller Y does business has no such interdiction. Buyer Z makes a contract of sale on a Sunday with both of them. A uniform application of article 4(a) of the Convention would cause the exclusion from the Convention's scope of the contract that contravenes a domestic public policy (X-Z contract), and the inclusion of the contract that does not (Y-Z contract). Article 4(a) would have been applied to both contracts in the same way, yet the results would differ. The need for a broad view of validity becomes apparent when the wide range of domestic rules relating to validity of a contract is considered. Samson, *supra* note 6, at 929 ("L'impossibilité d'obtenir un consensus au niveau international sur un ensemble de règles concernant la validité du contrat, rend cependant inévitable l'exclusion du champ d'application de la Convention de toute question concernant la validité du contrat.").

68. See CISG, *supra* note 1, art. 6, at 3, reprinted in 19 I.L.M. 668, 673 (1980).

69. See *Winship I*, *supra* note 1, § 1.02[5], at 1-34. The Convention's exclusion of issues of validity was intended to preserve what domestic law characterizes as matters of public policy. Therefore the parties should not be permitted to agree to exclude article 4(a) from their contract. To do so would violate that same public policy. Cf. Analysis of Comments, Working Group, *supra* note 1, art. 4, para. 1, at 10 (countries feared that parties to a contract would mistakenly believe they could agree to exclude any mandatory provisions of national law), reprinted in *Yearbook* 8, *supra* note 1, art. 4, para. 1, at 146; J. Honnold, *supra* note 1, § 84, at 112 (mandatory rules of domestic law are not disturbed when parties agree to apply the Convention).

70. See *supra* notes 40-41, 48-50 and accompanying text.

71. See *infra* notes 109-19 and accompanying text.

II. DISCLAIMERS OF IMPLIED WARRANTIES UNDER THE UCC

Under the UCC, there are two types of implied warranties relating to the quality of the goods: fitness for a particular purpose⁷² and merchantability.⁷³ The warranty of merchantability arises by operation of law⁷⁴ in a sale of goods transaction⁷⁵ in which the seller is a merchant with respect to the goods sold.⁷⁶ The seller warrants that the goods "are fit for the ordinary purposes for which such goods are used."⁷⁷ The warranty of fitness for a particular purpose arises by operation of law when the seller has reason to know that the buyer has a particular purpose in purchasing goods and that the buyer is relying on the seller's skill or judgment in selecting goods suitable for that purpose.⁷⁸ The seller can disclaim either or both warranties by following the methods provided in section 2-316.⁷⁹ An examination of that section's language,⁸⁰ legislative history⁸¹ and public policy purposes⁸² demonstrates that its provisions set forth requirements for validity within the Convention's concept of that term.⁸³

A. *The Language of Section 2-316*

Section 2-316(2) states that "to exclude . . . the implied warranty of

72. See U.C.C. § 2-315 (1977).

73. See *id.* § 2-314. Section 2-312 implies a warranty of title in contracts for the sales of goods. See *id.* § 2-312. The issue whether § 2-312 sets forth requirements of validity is beyond the scope of this Note.

74. 3 R. Anderson, Uniform Commercial Code § 2-314:25, at 133 (3d ed. 1983). Unless effectively disclaimed, the warranty is implied in every sale of goods by a merchant with respect to those goods, even if the seller has in fact made no warranties. The seller's intention is irrelevant. See *Custom Automated Mach. v. Penda Corp.*, 537 F. Supp. 77, 83 (N.D. Ill. 1982); *Chaq Oil Co. v. Gardner Mach. Corp.*, 500 S.W.2d 877, 878 (Tex. Civ. App. 1973); T. Quinn, Uniform Commercial Code Commentary and Law Digest ¶ 2-314[A][2], at S2-124 (Supp. 1984).

75. A sale of goods transaction under the Code is a transaction that consists of the "passing of title from the seller to the buyer for a price," U.C.C. § 2-106(1) (1977), and of anything which is "moveable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action," *id.* § 2-105(1).

76. "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Id. § 2-104(1).

77. *Id.* § 2-314(2)(c).

78. *Id.* § 2-315; see *Ambassador Steel Co. v. Ewald Steel Co.*, 33 Mich. App. 495, 501, 190 N.W.2d 275, 279 (1971); 3 R. Anderson, *supra* note 74, § 2-315:29, at 302; T. Quinn, *supra* note 74, ¶ 2-315[A][2], at 2-161; G. Wallach, *supra* note 22, ¶ 11.09, at 11-43; J. White & R. Summers, *supra* note 22, § 9-9, at 358.

79. See *infra* notes 84-105 and accompanying text.

80. See *infra* notes 84-108 and accompanying text.

81. See *infra* notes 109-19 and accompanying text.

82. See *infra* notes 109-19 and accompanying text.

83. See *infra* notes 109-19 and accompanying text.

merchantability . . . the language must mention merchantability and in case of a writing must be conspicuous."⁸⁴ The implied warranty of fitness for a particular purpose may be disclaimed by general language,⁸⁵ but such a disclaimer "must be by a writing and conspicuous."⁸⁶ Such repeated use of the auxiliary verb "must"⁸⁷ is a primary indication of section 2-316(2)'s mandatory character.⁸⁸ "The effect of holding a statute mandatory is to require strict compliance with its letter in order . . . to enable persons to acquire rights under it."⁸⁹ Section 2-316(2)'s mandatory nature indicates that its requirements are those of validity.

These requirements are, however, "subject to"⁹⁰ section 2-316(3).⁹¹ A seller who has failed to comply with section 2-316(2) may still have made a valid disclaimer under section 2-316(3).⁹² Whereas section 2-316(2)'s requirements are quite specific,⁹³ section 2-316(3) allows for generali-

84. U.C.C. § 2-316(2) (1977); see *Walker Ford Sales v. Gaither*, 265 Ark. 275, 277-78, 578 S.W.2d 23, 24 (1979); *Pennsylvania Gas Co. v. Secord Bros.*, 73 Misc. 2d 1031, 1034-35, 343 N.Y.S.2d 256, 260-61 (Sup. Ct. 1973), *aff'd mem.*, 44 A.D.2d 906, 357 N.Y.S.2d 702 (1974); *Bakal v. Burroughs Corp.*, 74 Misc. 2d 202, 204-05, 343 N.Y.S.2d 541, 543-44 (Sup. Ct. 1972); *Architectural Aluminum Corp. v. Macarr, Inc.*, 70 Misc. 2d 495, 498-99, 333 N.Y.S.2d 818, 822-23 (Sup. Ct. 1972); *Angola Farm Supply & Equip. Co. v. FMC Corp.*, 59 N.C. App. 272, 277, 296 S.E.2d 503, 506-07 (1982).

85. See *supra* note 22 and accompanying text.

86. U.C.C. § 2-316(2) (1977); see *Eaton Corp. v. Magnavox Co.*, 581 F. Supp. 1514, 1533 (E.D. Mich. 1984); *Hi Neighbor Enters. v. Burroughs Corp.*, 492 F. Supp. 823, 826 (N.D. Fla. 1980); *Quality Acceptance Corp. v. Million & Albers, Inc.*, 367 F. Supp. 771, 773 (D. Wyo. 1973); *Rite Fabrics, Inc. v. Stafford-Higgins Co.*, 366 F. Supp. 1, 10 (S.D.N.Y. 1973).

87. *Webster's New International Dictionary of the English Language* 1616 (2d ed. 1936).

88. 2A N. Singer, *supra* note 42, § 57.03; see *Huff v. Bruce*, 261 Ark. 498, 502, 549 S.W.2d 282, 283-84 (1977); *Hopkins v. Maryland Inmate Grievance Comm'n*, 40 Md. App. 329, 334, 391 A.2d 1213, 1216 (1978); *Burnell v. Smith*, 122 Misc. 2d 342, 345, 471 N.Y.S.2d 493, 496 (Sup. Ct. 1984); *Black's Law Dictionary* 919 (5th ed. 1979); cf. *Williams v. Kaestner*, 332 S.W.2d 21, 27 (Mo. 1960) ("should" means "to be obliged" or "must"); *487 Clinton Ave. Corp. v. Chase Manhattan Bank*, 63 Misc. 2d 715, 717-18, 313 N.Y.S.2d 445, 447-48 (Sup. Ct. 1970) ("shall" means "must" and is generally mandatory).

89. 2A N. Singer, *supra* note 42, § 57.12 at 667.

90. U.C.C. § 2-316(2) (1977).

91. *Id.* § 2-316(3).

92. *Id.*; see *Agricultural Servs. Ass'n v. Ferry-Morse Seed Co.*, 551 F.2d 1057, 1066 (6th Cir. 1977); *Country Clubs, Inc. v. Allis-Chalmers Mfg. Co.*, 430 F.2d 1394, 1396-97 (6th Cir. 1970); *Eaton Corp. v. Magnavox Co.*, 581 F. Supp. 1514, 1533 (E.D. Mich. 1984); 3 R. Anderson, *supra* note 74, §§ 2-316:26, :28, at 343; J. White & R. Summers, *supra* note 22, § 12-6, at 447; Lord, *Some Thoughts About Warranty Law: Express and Implied Warranties*, 56 N.D.L. Rev. 509, 680 (1980); Special Project, *Article Two Warranties in Commercial Transactions*, 64 Cornell L. Rev. 30, 191-92 (1978) [hereinafter cited as *Article Two Warranties*].

93. See 2 W. Hawkland, *Uniform Commercial Code Series* § 2-316:03, at 381-82 (1984). Section 2-316(2) requires that a disclaimer of the implied warranty of merchantability mention merchantability, and, if in writing, be conspicuous. It also requires that a disclaimer of the implied warranty of fitness for a particular purpose be in writing and conspicuous. See *supra* notes 84-86 and accompanying text.

ties.⁹⁴ The existence of such generalities may compel the conclusion that section 2-316 sets forth mere guidelines for interpretation of the parties' agreement rather than requirements for valid disclaimers.⁹⁵ This argument is unpersuasive, however, because a disclaimer that fails to meet the requirements of either subdivision will be held to be invalid.⁹⁶ Section 2-316(3)(a) enables a seller to exclude an implied warranty by using expressions such as "with all faults," "as is," "or other language which in the common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty."⁹⁷ This is not an automatic disclaimer; the circumstances must be such as to give the buyer reason to know that there is no implied warranty.⁹⁸

Section 2-316(3)(b) authorizes disclaimers by examination. For such a disclaimer to be effective, the buyer must have either examined the goods before the contract was made or refused to examine them.⁹⁹ It follows that the seller must demand that the buyer examine the goods, not merely make them available for inspection, in order for the buyer's re-

94. See 2 W. Hawkland, *supra* note 93, § 2-316:03, at 383. See *infra* notes 97-106 and accompanying text.

95. Cf. J. Honnold, *supra* note 1, § 234, at 259 (U.C.C. § 2-316(3) provides a rule of interpretation because it allows language which in the "common understanding" of the parties alerts the buyer to the exclusion of warranties and "makes plain" that there is no implied warranty).

96. See *Neville Chem. Co. v. Union Carbide Corp.*, 294 F. Supp. 649, 654-56 (W.D. Pa. 1968), *modified on other grounds*, 422 F.2d 1205 (3d Cir.), *cert. denied*, 400 U.S. 826 (1970); *Zicari v. Harris Co.*, 33 A.D.2d 17, 22-23, 304 N.Y.S.2d 918, 923-25 (1969); *Discount Drug Corp. v. Honeywell Protection Servs.*, 303 Pa. Super. 522, 525-26, 450 A.2d 49, 50-51 (1982); *SFC Acceptance Corp. v. Ferree*, 39 Pa. D. & C.2d 225, 228-29 (1966); *Pearson v. Franklin Laboratories, Inc.*, 254 N.W.2d 133, 141 (S.D. 1977); *Cooper Paintings & Coatings, Inc. v. SCM Corp.*, 62 Tenn. App. 13, 19-20, 457 S.W.2d 864, 867 (1970); *Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.*, 28 Wash. App. 539, 542, 545-47, 625 P.2d 171, 173-76 (1981); U.C.C. § 2-316 official comment 1 (1977); 3 R. Anderson, *supra* note 74, § 2-316:35 to :36, at 349, § 2-316:42 to :43, at 353-54, § 2-316:66 to :69, at 367-69; T. Quinn, *supra* note 74, ¶ 2-316[A][9][b], at 2-175 to -176; J. White & R. Summers, *supra* note 22, § 12-5, at 437-38; Moye, *Exclusion and Modification of Warranty Under the UCC—How to Succeed in Business Without Being Liable for Not Really Trying*, 46 Den. L.J. 579, 605, 612 (1969).

97. U.C.C. § 2-316(3)(a) (1977).

98. See *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 111 N.J. Super. 383, 393, 395, 397, 268 A.2d 345, 351-53 (Law Div. 1970), *overruled on other grounds*, *Ramirez v. Autosport Corp.*, 88 N.J. 277, 287, 440 A.2d 1345, 1350 (1982); 3 R. Anderson, *supra* note 74, § 2-316:72, at 371; T. Quinn, *supra* note 74, ¶ 2-316[A][10][a], at 2-176 to -177 (1978); J. White & R. Summers, *supra* note 22, § 12-6, at 447-49; Lord, *supra* note 92, at 681; Weintraub, *Disclaimer of Warranties and Limitation of Damages for Breach of Warranty Under the UCC*, 53 Tex. L. Rev. 60, 66 (1975); see also *Admiral Oasis Hotel Corp. v. Home Gas Indus., Inc.*, 68 Ill. App. 2d 297, 306, 216 N.E.2d 282, 286-87 (1965) (disclaimer not effective unless buyer "fully aware that he takes product subject to such conditions"); G. Wallach, *supra* note 22, ¶ 11.11[1][b][i], at 11-54 (can use language such as "as is," which is commonly understood to exclude warranties).

99. *Blockhead, Inc. v. Plastic Forming Co.*, 402 F. Supp. 1017, 1025 (D. Conn. 1975); see U.C.C. § 2-316 official comment 8 (1977); 3 R. Anderson, *supra* note 74, § 2-316:88 to :91, at 382-85; T. Quinn, *supra* note 74, ¶ 2-316[A][10][e], at 2-178 to -179 (1978); G. Wallach, *supra* note 22, ¶ 11.11[1][d], at 11-57; J. White & R. Summers, *supra* note 22, § 12-6, at 450; Lord, *supra* note 92, at 684-87.

fusal to examine to constitute a disclaimer.¹⁰⁰

Under section 2-316(3)(c), a course of dealing,¹⁰¹ course of performance¹⁰² or trade usage¹⁰³ can also exclude an implied warranty.¹⁰⁴ That section cannot be used, however, unless the facts indicate that such a practice was part of the parties' agreement.¹⁰⁵

It has been argued that section 2-316(3) does not set forth requirements for validity because it requires interpretation of circumstances.¹⁰⁶ For example, "common understanding" under section 2-316(3)(a) seems to refer to a standard of a reasonable person under the circumstances. Similarly, section 2-316(3)(c) shows that a course of dealing, course of performance or usage of the trade can guide the interpretation of the parties' agreement. Merely because section 2-316 permits an interpretation of the disclaimer clause, however, does not give rise to an inference that the entire section is not language of validity.¹⁰⁷ Interpretation is necessary only to determine whether the attempted disclaimer is valid.¹⁰⁸ If the circumstances as contemplated in section 2-316(3) do not allow effect to be given to a disclaimer that has no effect under section 2-316(2), the disclaimer is invalid.

100. 3 R. Anderson, *supra* note 74, § 2-316:92, :94, :98, at 384-85, 387; T. Quinn, *supra* note 74, ¶ 2-316[A][14][a] to [c], at S2-165 to -169 (Supp. 1984); G. Wallach, *supra* note 22, ¶ 11.11[1][d], at 11-57; J. White & R. Summers, *supra* note 22, § 12-6, at 450-51; Moye, *supra* note 96, at 611-12.

101. See U.C.C. § 1-205(1) (1977).

102. *Id.* § 2-208(1).

103. See *id.* § 1-205(2).

104. *Id.* § 2-316(3)(c); see *Agricultural Servs. Ass'n v. Ferry-Morse Seed Co.*, 551 F.2d 1057, 1066 (6th Cir. 1977); *Schroeder v. Fageol Motors, Inc.*, 86 Wash. 2d 256, 260-61, 544 P.2d 20, 23-24 (1975); *Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.*, 28 Wash. App. 539, 547, 625 P.2d 171, 176 (1981); T. Quinn, *supra* note 74, ¶ 2-316[A][11], at 2-179 (1978), S2-161 to -162 (Supp. 1984); J. White & R. Summers, *supra* note 22, § 12-6, at 454-57; Lord, *supra* note 92, at 583-84; Weintraub, *supra* note 98, at 68-69; *Article Two Warranties*, *supra* note 92, at 202-06.

105. See *Country Clubs, Inc. v. Allis-Chalmers Mfg. Co.*, 430 F.2d 1394, 1396-97 (6th Cir. 1970); *Eaton Corp. v. Magnavox Co.*, 581 F. Supp. 1514, 1533 (E.D. Mich. 1984); *Zicari v. Joseph Harris Co.*, 33 A.D.2d 17, 22, 304 N.Y.S.2d 918, 923-24 (1969); *United States Leasing Corp. v. Comerald Assocs.*, 101 Misc. 2d 773, 776, 421 N.Y.S.2d 1003, 1005 (Civ. Ct. 1979); *Architectural Aluminum Corp. v. Macarr, Inc.*, 70 Misc. 2d 495, 500, 333 N.Y.S.2d 818, 823-24 (Sup. Ct. 1972); *Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.*, 28 Wash. App. 539, 546-47, 625 P.2d 171, 175-76 (1981).

106. See J. Honnold, *supra* note 1, § 234, at 259.

107. See *supra* notes 89-96 and accompanying text.

108. See, e.g., *Agricultural Servs. Ass'n v. Ferry-Morse Seed Co.*, 551 F.2d 1057, 1066 (6th Cir. 1977); *Country Clubs, Inc. v. Allis-Chalmers Mfg. Co.*, 430 F.2d 1394, 1396-97 (6th Cir. 1970); *Blockhead, Inc. v. Plastic Forming Co.*, 402 F. Supp. 1017, 1025 (D. Conn. 1975); *Ambassador Steel Co. v. Ewald Steel Co.*, 33 Mich. App. 495, 502-04, 190 N.W.2d 275, 279-80 (1971); *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 111 N.J. Super. 383, 390-92, 397-99, 268 A.2d 345, 352, 354 (Law Div. 1970), *overruled on other grounds*, *Ramirez v. Autosport Corp.*, 88 N.J. 277, 287, 440 A.2d 1345, 1350 (1982); *Zicari v. Joseph Harris Co.*, 33 A.D.2d 17, 22-23, 304 N.Y.S.2d 918, 923-25 (1969); *United States Leasing Corp. v. Comerald Assocs.*, 101 Misc. 2d 773, 776, 421 N.Y.S.2d 1003, 1005 (Civ. Ct. 1979); *Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.*, 28 Wash. App. 539, 544-47, 625 P.2d 171, 174-76 (1981).

B. Legislative History and Policy Considerations

The official comments to section 2-316 state that it was designed "to protect a buyer from unexpected and unbargained language of disclaimer by . . . permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise."¹⁰⁹ A disclaimer that does not meet section 2-316's requirements is contrary to the public policies expressed by the drafters: to prevent unfair surprise and harsh workings of a contract.¹¹⁰ The argument may be made, however, that if the drafters had intended section 2-316 primarily to protect consumers, less concern need be given to transactions between merchants.¹¹¹ Relative bargaining capacity suggests that merchants are in less need of protection from unbargained language of disclaimers and harsh results than are consumers.¹¹² This argument would conclude that because the Convention's scope includes transactions only between merchants, section 2-316 does not define requirements for validity as to them. The language of section 2-316, however, makes no distinction between consumers or merchants: Both are shielded from unexpected or harsh results. Furthermore, it is not always true that a merchant-buyer is in less need of protection than a consumer.¹¹³ Some

109. U.C.C. § 2-316 official comment 1 (1977).

110. See *id.*; see also *Tareyton Elec. Composition, Inc. v. Eltra Corp.*, 21 U.C.C. Rep. Serv. (Callaghan) 1064, 1072-73 (M.D.N.C. 1977) (Code's drafters wished to provide certainty by setting out requirements for disclaimers in § 2-316); *Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.*, 28 Wash. App. 539, 545, 625 P.2d 171, 174 (1981) (purpose of § 2-316 is to protect buyers from clauses seeking to exclude all warranties); U.C.C. § 1-102 official comment 1 (1977) (Code should be read in the light of the purpose underlying the relevant section); cf. *Stanley A. Klopp, Inc. v. John Deere Co.*, 510 F. Supp. 807, 810 (E.D. Pa. 1981) (avoidance of unfair surprise requires clear and precise language), *aff'd mem.*, 676 F.2d 688 (3d Cir. 1982); *Moye, supra* note 96, at 614 (purpose of § 2-302 on unconscionable clauses is to prevent oppression and unfair surprise). Implied warranties arise by operation of law, as a matter of public policy, to protect the buyer. *Chandler v. Anchor Serum Co.*, 198 Kan. 571, 579, 426 P.2d 82, 89 (1967). The same public policies that create implied warranties will work to invalidate a disclaimer that does not comply with § 2-316.

111. See *County Asphalt, Inc. v. Lewis Welding & Eng'g Corp.*, 323 F. Supp. 1300, 1308 (S.D.N.Y. 1970), *aff'd*, 444 F.2d 372 (2d Cir.), *cert. denied*, 404 U.S. 939 (1971); *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 489, 186 Cal. Rptr. 114, 124 (1982); *Monsanto Co. v. Alden Leeds, Inc.*, 130 N.J. Super. 245, 261, 326 A.2d 90, 98-99 (Law Div. 1974); see also Carrington, *Sales, Bulk Sales, and Documents of Title*, in *The Uniform Commercial Code*, Wyoming Legislative Research Committee, Research Publication No. 1, at 30, 31 (July 1960) (concern between merchants is trade convenience; concern with consumers is fairness).

112. Parties with approximately equal bargaining power can efficiently allocate the risks involved in the sale. See *FMC Fin. Corp. v. Murphree*, 632 F.2d 413, 419-20 (5th Cir. 1980); *Jig the Third Corp. v. Puritan Marine Ins. Underwriters Corp.*, 519 F.2d 171, 176 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1976); *United States Fibres, Inc. v. Proctor & Schwartz, Inc.*, 358 F. Supp. 449, 459-60 (E.D. Mich. 1972), *aff'd*, 509 F.2d 1043 (6th Cir. 1975); *Fraass Surgical Mfg. Co. v. United States*, 571 F.2d 34, 40 (Ct. Cl. 1978); *Monsanto Co. v. Alden Leeds, Inc.*, 130 N.J. Super. 245, 260, 326 A.2d 90, 98 (Law Div. 1974); *Moye, supra* note 96, at 597.

113. Section 2-316 refers only to "a buyer." See U.C.C. § 2-316 (1977). The only differentiation contained in the section is found in official comment 8, which speaks of "pro-

merchants have less negotiating ability than others, and their bargaining power may not be great.¹¹⁴ Although they are not consumers, merchant-buyers ought still to be protected from unbargained language of disclaimers.

There is a further argument that because transactions between merchants allow for more interpretation than transactions involving a consumer,¹¹⁵ merchant-buyers should not be granted full protection under the Code.¹¹⁶ It is true that different standards exist in a transaction for a sale of goods between merchants. A merchant may be held to a higher duty to read,¹¹⁷ for example, and may be deemed to have noticed the term "merchantability" in a clause that would be held to be inconspicuous if sought to be enforced against a consumer.¹¹⁸ Yet it has already been shown that it is not the degree of interpretation permitted in a statute that determines whether that statute sets out requirements for effectiveness or mere guidelines for interpretation.¹¹⁹ In spite of the higher standards applicable to merchants, section 2-316 continues to set forth absolute mandates for valid disclaimers of implied warranties.

The public policy requirement of strict compliance with the language of section 2-316 effectively to disclaim implied warranties comports with the Convention's concept of validity as set out in Part I of this Note. Only those disclaimers that fulfill the requirements of section 2-316 are valid. "Public policy is necessarily variable [and] is evidenced by the expression of the will of the Legislature contained in statutory enactments. . . . [W]hen [the Legislature] has expressed its will and estab-

fessional" and "non-professional" buyers. *Id.* § 2-316 official comment 8. The distinction refers to the standards to which such a buyer will be held in making an examination of the goods before the time of sale, for the purposes of a § 2-316(3)(b) disclaimer. *Id.* The Code contains no indication that a merchant-buyer should not be protected by § 2-316. See 2 R. Anderson, *supra* note 74, § 2-302:8, at 420.

114. See *A & M Produce Co. v. FMC Fin. Corp.*, 135 Cal. App. 3d 473, 489, 186 Cal. Rptr. 114, 124 (1982); *W.L. May Co. v. Philco-Ford Corp.*, 273 Or. 701, 707-09, 543 P.2d 283, 286-87 (1975); Lando, *Contracts of Adhesion and the Protection of the Weaker Party in International Trade Relations*, in 2 *New Directions in International Trade Law: Written Communications and Oral Interventions* 591-92 (1977).

115. See *infra* notes 117-19 and accompanying text.

116. Cf. U.C.C. § 2-104 official comments 1-2 (1977) (discussing transactions between "professionals" and "non-professionals"); T. Quinn, *supra* note 74, ¶ 2-104[A][1][b], at 2-15 (Code indicates that the rules that apply to merchants differ from those that apply to consumers). Under this argument, the ability of the parties to negotiate is usually thought to afford them sufficient protection. See *supra* notes 111-14 and accompanying text.

117. See *FMC Fin. Corp. v. Murphree*, 632 F.2d 413, 419 (5th Cir. 1980); *Soo Line R.R. v. Fruehauf Corp.*, 547 F.2d 1365, 1373 n.13 (8th Cir. 1977); *Fargo Mach. & Tool Co. v. Kearney & Trecker Corp.*, 428 F. Supp. 364, 372 (E.D. Mich. 1977); *Article Two Warranties*, *supra* note 92, at 184-85.

118. See *FMC Fin. Corp. v. Murphree*, 632 F.2d 413, 419-20 (5th Cir. 1980); *Soo Line R.R. v. Fruehauf Corp.*, 547 F.2d 1365, 1373 n.13 (8th Cir. 1977); *Fargo Mach. & Tool Co. v. Kearney & Trecker Corp.*, 428 F. Supp. 364, 372 (E.D. Mich. 1977); *Tennessee Carolina Transp., Inc. v. Strick Corp.*, 283 N.C. 423, 434, 196 S.E.2d 711, 718 (1973).

119. See *supra* notes 106-08 and accompanying text.

lished a new policy, courts are required to give effect to such policy."¹²⁰ It is well recognized in private international law that certain contractual matters, such as risk of loss clauses¹²¹ and Statute of Frauds,¹²² are sufficient public policy grounds for refusing to enforce a contract. A logical extension of this reasoning would include among such grounds disclaimers of implied warranties.

III. THE INTERACTION OF THE UCC AND THE CONVENTION: POLICY CONSIDERATIONS AND EFFECT

This section considers the consequences of finding a disclaimer invalid under the Code. An invalid disclaimer must be removed from the contract.¹²³ This result may lead to the argument that it is unreasonable to require a foreign seller to include the word "merchantability" in a disclaimer of implied warranties because such a seller is not likely to have a working knowledge of the Code. The rules of private international law, however, typically will indicate that it is the law of the seller that will control the validity of the contract.¹²⁴ The validity of a foreign seller's

120. *Straus & Co. v. Canadian Pac. Ry.*, 254 N.Y. 407, 413-14, 173 N.E. 564, 566-67 (1930).

121. *See The Kensington*, 183 U.S. 263, 265, 268-70 (1902); *Oceanic Steam Nav. Co. v. Corcoran*, 9 F.2d 724, 727, 731-33 (2d Cir. 1925); *Straus & Co. v. Canadian Pac. Ry.*, 254 N.Y. 407, 410-11, 413-15, 173 N.E. 564, 565-67 (1930).

122. *Roth v. Patino*, 185 Misc. 235, 237, 56 N.Y.S.2d 853, 855 (Sup. Ct. 1945), *aff'd mem.*, 270 A.D. 927, 62 N.Y.S.2d 820 (1946), *rev'd mem. on other grounds*, 298 N.Y. 543, 80 N.E.2d 673 (1948); *Leroux v. Brown*, 12 C.B. 801, 801-03, 824, 826-27, 138 Eng. Rep. 1119, 1120-21, 1129-30 (1852).

123. *See Hoffman Motors, Inc. v. Enockson*, 240 N.W.2d 353, 355 (N.D. 1976); U.C.C. § 2-302 & official comments 1-2 (1977); 3 R. Anderson, *supra* note 74, § 2-316:41, at 353; *cf. Mailand v. Burckle*, 20 Cal. 3d 367, 384, 572 P.2d 1142, 1152, 143 Cal. Rptr. 1, 11 (1978) (invalid provision of franchise agreement excised); *Ai v. Frank Huff Agency, Ltd.*, 61 Hawaii 607, 619, 607 P.2d 1304, 1312-13 (1980) (invalid provision for attorney fees severed); *Corti v. Fleisher*, 93 Ill. App. 3d 517, 533-34, 417 N.E.2d 764, 777 (1981) (invalid fee-sharing provision severed). *See infra* notes 125-35 and accompanying text.

124. *Senate Hearing, supra* note 2, at 67 (responses of Mr. Orban submitted for the record); *see* 3 A. Ehrenzweig & E. Jayme, *Private International Law* §§ 369-371, at 35-37 (1977); *Reinhart, supra* note 1, at 90. There are situations involving an American buyer and a foreign seller, however, in which the rules of private international law would point to the UCC as the applicable law. The most widely recognized rule for determining a choice of law is to decide which of several jurisdictions has the "most significant relationship to," Restatement (Second) of Conflict of Laws § 188(1) (1969), or is the "center of gravity" of, H. Goodrich & E. Scoles, *supra* note 35, at 202, the contract. The factors that are to be considered include the places of contracting, negotiating and performing the contract, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation and place of business of the parties. Restatement (Second) of Conflict of Laws § 188(2) (1969); *see Whiteside v. New Castle Mut. Ins. Co.*, 595 F. Supp. 1096, 1098 (D. Del. 1984); *Phoenix Can. Oil Co. v. Texaco Inc.*, 560 F. Supp. 1372, 1379 (D. Del. 1983); *Rototron Corp. v. Lake Shore Burial Vault Co.*, 553 F. Supp. 691, 695-96 (E.D. Wis. 1982), *aff'd*, 712 F.2d 1214 (7th Cir. 1983); *Carriage Bags, Ltd. v. Aerolinas Argentinas*, 521 F. Supp. 1363, 1367 (D. Colo. 1981); *Adams Laboratories, Inc. v. Jacobs Eng'g Co.*, 486 F. Supp. 383, 389 (N.D. Ill. 1980); *Bunge Corp. v. Biglane*, 418 F. Supp. 1159, 1164 (S.D. Miss. 1976). United States courts have applied this rule in conflicts between the laws of two states, *see, e.g., Whiteside v. New Castle*

disclaimer clause will most often be subject to scrutiny only under that seller's domestic law. If the seller is American, requiring adherence to section 2-316 is not burdensome because such a seller presumably will be familiar with Code provisions. Thus, the initial effect of a determination that a clause is invalid under the UCC is not unreasonable.

A finding of invalidity then requires an analysis of whether the clause is severable.¹²⁵ The Convention contains no provision on the severability of a contract. Under the General Provisions,¹²⁶ therefore, the relevant domestic law must be consulted to determine whether an invalid disclaimer clause is severable.¹²⁷ Although the UCC does not address this issue,¹²⁸ section 1-103 allows for the application of common law principles to issues on which the UCC is silent.¹²⁹ Thus, the determination of

Mut. Ins. Co., 595 F. Supp. 1096, 1098 (D. Del. 1984); Johnston Assocs. v. Rohm & Haas Co., 560 F. Supp. 916, 917 (D. Del. 1983); Rototron Corp. v. Lake Shore Burial Vault Co., 553 F. Supp. 691, 695-96 (E.D. Wis. 1982), *aff'd*, 712 F.2d 1214 (7th Cir. 1983), as well as in conflicts between the laws of a state and a foreign nation, *see* Gulf Trading & Transp. Co. v. The Vessel Hoegh Shield, 658 F.2d 363, 366-67 (5th Cir. 1981), *cert. denied*, 457 U.S. 1119 (1982); Phoenix Can. Oil Co. v. Texaco Inc., 560 F. Supp. 1372, 1379 (D. Del. 1983); Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1113, 1122 (S.D.N.Y. 1982); Carriage Bags, Ltd. v. Aerolinas Argentinas, 521 F. Supp. 1363, 1366-67 (D. Colo. 1981); Edinburgh Assurance Co. v. R.L. Burns Corp., 479 F. Supp. 138, 150, 152-54 (C.D. Cal. 1979), *aff'd in part, rev'd and remanded in part on other grounds*, 669 F.2d 1259 (9th Cir. 1982). If a foreign seller is bound by the UCC, it is because a tribunal has declared that under the rules of private international law, the UCC is the law with the most significant relationship to the transaction. In such a situation, the foreign seller has a sufficient relationship to the United States to justify his being bound by American law. The parties are always free to include a choice of law clause in their contract. *See supra* note 17 and accompanying text. It is unclear whether a clause stating that the law of a particular country applies to a contract is an implied exclusion of the Convention under article 6, or even whether such an exclusion would be effective. *See supra* note 38 and accompanying text. If the choice of law clause operates as an exclusion of the Convention, there is no difficulty in deciding the validity of the disclaimer clause: Such a determination is made according to the chosen law. *See supra* note 17 and accompanying text. If the choice of law clause does not effectively exclude the Convention, however, that law will still be applicable to those areas of the contract to which the Convention does not apply. *See generally* Dore, *Choice of Law Under the International Sales Convention: A U.S. Perspective*, 77 Am. J. Int'l L. 521, 525-39 (1983) (discussing jurisdictions of Code and Convention in different choice of law situations). Thus, the validity of the disclaimer clause will still be made according to the domestic law chosen by the parties.

125. *See* J. Calamari & J. Perillo, *The Law of Contracts* § 11-27, at 430 (2d ed. 1977). If an invalid contract clause is not severable, the entire contract must fall. *See infra* notes 128-35 and accompanying text.

126. CISG, *supra* note 1, art. 7(2), at 3, *reprinted in* 19 I.L.M. 668, 673 (1980).

127. Because there is no Convention provision on severability, such questions must be answered first "in conformity with the general principles on which [the Convention] is based." *Id.*, *reprinted in* 19 I.L.M. at 673. A determination of these general principles has proved unworkable. *See supra* notes 46-50 and accompanying text. In the absence of general principles, matters are to be settled "in conformity with the law applicable by virtue of the rules of private international law." *Id.*, *reprinted in* 19 I.L.M. at 673. Thus, the applicable domestic law governs the severability of an invalid disclaimer clause.

128. Section 1-108 pertains to the severability of the UCC itself, not of any contract governed by the Code. *See* U.C.C. § 1-108 (1977).

129. *See id.* § 1-103.

severability must be made under the common law.

The general rule is that the severability of a contract containing an unenforceable clause depends first on whether the remaining contract may be apportioned into corresponding, equivalent pairs of part performances, at least one pair of which does not contravene public policy.¹³⁰ If this is so, the invalid clause is usually severable.¹³¹ The remainder of the contract will be enforced unless it is further determined that the parties would not have made the contract without the offending provision.¹³² Although it is unlikely that a contract without a warranty disclaimer would contravene public policy,¹³³ whether the parties would have entered into the agreement without the disclaimer must be determined on the facts of each case.¹³⁴

If the contract is enforceable without the invalid disclaimer, the question becomes whether the UCC or the Convention should be applied to fill the gap created by the severance.¹³⁵ The argument can be made that because the Convention has no application to matters of validity, the domestic law under which the invalid provision was stricken should provide the gap filler. Once the offending clause is excised from the contract, however, there is no longer any issue of validity from which the Convention is excluded; therefore, it is natural that the Convention should fill

130. Restatement (Second) of Contracts §§ 183, 240 (1979); see E. Farnsworth, Contracts § 5.1, at 327, § 5.8, at 359-61, § 8.13, at 596-99 (1982); Restatement of Contracts §§ 266(3), 599-607 (1932); see, e.g., *Reilly v. Korholz*, 137 Colo. 20, 27, 320 P.2d 756, 760 (1958); *Carter v. Thompkins*, 133 Colo. 279, 282-84, 294 P.2d 265, 267 (1956); *Vaughn v. Vaughn*, 91 Idaho 544, 547, 428 P.2d 50, 53 (1967).

131. See *Kerr-McGee Corp. v. Northern Utils., Inc.*, 500 F. Supp. 624, 634-36 (D. Wyo. 1980), *rev'd on other grounds*, 673 F.2d 323, 324 (10th Cir.), *cert. denied*, 459 U.S. 989 (1982); *Mailand v. Burckle*, 20 Cal. 3d 367, 384, 572 P.2d 1142, 1152, 143 Cal. Rptr. 1, 11 (1978); *Beynon v. Garden Grove Medical Group*, 100 Cal. App. 3d 698, 705, 712-14, 161 Cal. Rptr. 146, 149-50, 155 (1980); *Corti v. Fleisher*, 93 Ill. App. 3d 517, 533-34, 417 N.E.2d 764, 777 (1981); *Morse v. J. Ray McDermott & Co.*, 344 So. 2d 1353, 1370-71 (La. 1977); *Peeples v. City of Detroit*, 99 Mich. App. 285, 295-96, 297 N.W.2d 839, 843 (1980); *Durham v. Ciba-Geigy Corp.*, 315 N.W.2d 696, 701 (S.D. 1982); *Williams v. Williams*, 569 S.W.2d 867, 871 (Tex. 1978); *Tate v. Mountain States Tel. & Tel. Co.*, 647 P.2d 58, 61-62 (Wyo. 1982).

132. See *LeBouef v. Liner*, 396 So. 2d 376, 378 (La. Ct. App. 1981); *Peeples v. City of Detroit*, 99 Mich. App. 285, 296, 297 N.W.2d 839, 843 (1980); *Williams v. Williams*, 569 S.W.2d 867, 871 (Tex. 1978); *McFarland v. Haby*, 589 S.W.2d 521, 524 (Tex. Civ. App. 1979).

133. Courts typically find invalid disclaimer clauses to be severable, and enforce the agreement as if the attempts to disclaim had not been made. See, e.g., *Entron, Inc. v. General Cablevision*, 435 F.2d 995, 1000-01 (5th Cir. 1970); *Jameson Chem. Co. v. Love*, 401 N.E.2d 41, 47-48 (Ind. Ct. App.), *modified on other grounds*, 403 N.E.2d 928 (Ind. Ct. App. 1980); *Discount Drug Corp. v. Honeywell Protection Servs.*, 303 Pa. Super. 522, 525-26, 450 A.2d 49, 50-51 (1982); *Durham v. Ciba-Geigy Corp.*, 315 N.W.2d 696, 701 (S.D. 1982).

134. See, e.g., *LeBouef v. Liner*, 396 So. 2d 376, 378 (La. Ct. App. 1981); *Williams v. Williams*, 569 S.W.2d 867, 871 (Tex. 1978); *McFarland v. Haby*, 589 S.W.2d 521, 524 (Tex. Civ. App. 1979).

135. See *Schlechtriem*, *supra* note 14, § 6.01, at 6-4. A body of law is needed to fill the void. The choice is between the domestic law that invalidated the provision and the Convention. *Kahn*, *supra* note 38, at 956.

the gap caused by severance.¹³⁶ Additionally, because national laws are considered to be weaker than international norms,¹³⁷ the UCC should go no further than determining the validity of the disclaimer clause.¹³⁸ The gap that application of section 2-316 has created should therefore be filled with the Convention provisions governing the issue of conformity of the goods.

The pertinent provision is article 35, which states that "[e]xcept where the parties have agreed otherwise,"¹³⁹ goods are nonconforming unless they "are fit for the purposes for which goods of the same description would ordinarily be used,"¹⁴⁰ "are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract,"¹⁴¹ "possess the qualities of goods which the seller has held out to the buyer as a sample or model,"¹⁴² and "are contained or packaged in the manner usual for such goods or . . . in a manner adequate to preserve and protect the goods."¹⁴³ Because there is no longer an "agreement otherwise" after the invalid disclaimer has been removed, these implied warranties should fill the gap created by application of section 2-316. If the goods do not meet these requirements, they are nonconforming.¹⁴⁴ The seller will be liable for any nonconforming goods because he has made no effective disclaimer of liability.¹⁴⁵

CONCLUSION

The Convention does not apply to any issues of validity of the contract or its terms. Validity under the Convention includes matters of public policy as defined by mandatory rules of domestic laws. The Convention leaves these matters to the applicable domestic law. The UCC's disclaimer of warranty provisions set forth requirements for validity within the Convention's concept of that term. Section 2-316's mandatory language and public policy purposes compel this conclusion. Finding a disclaimer invalid under the Code leads to severance of that clause under the common law. The resulting gap in the contract should be filled by the pertinent provisions of the Convention.

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136. See Schlechtriem, *supra* note 14, § 6.01, at 6-4. Quality standards of the goods and liability for nonconformity are issues squarely within the Convention's scope. See J. Honnold, *supra* note 1, § 73, at 102, §§ 222-229, at 249-56, §§ 241-243, at 267-68.

137. Schlechtriem, *supra* note 14, § 6.01, at 6-4.

138. See J. Honnold, *supra* note 1, § 233, at 258; Schlechtriem, *supra* note 14, § 6.01, at 6-4.

139. CISG, *supra* note 1, art. 35(2), at 11, reprinted in 19 I.L.M. 668, 679 (1980).

140. *Id.* art. 35(2)(a), at 11, reprinted in 19 I.L.M. at 679.

141. *Id.* art. 35(2)(b), at 11, reprinted in 19 I.L.M. at 679.

142. *Id.* art. 35(2)(c), at 11, reprinted in 19 I.L.M. at 679.

143. *Id.* art. 35(2)(d), at 11, reprinted in 19 I.L.M. at 679.

144. See *supra* notes 140-43 and accompanying text.

145. The seller will be liable under article 36 of the Convention. See CISG, *supra* note 1, art. 36, at 11, reprinted in 19 I.L.M. 668, 679 (1980).