

NOTES

HOW TO BE OR NOT TO BE: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, ARTICLE 6

INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (the "Convention") was adopted on April 10, 1980 and went into force on January 1, 1988.¹ The Convention applies to commercial contracts for the sale of goods extending across international borders, wherein a buyer and a seller have their place of business in different countries which are parties to the Convention.² The purpose of the Convention is not to interfere with a party's ability and freedom to contract,³ but to fill in gaps left open by framers of international sales contracts.⁴ It proposes to do so by replacing conflicting domestic contract laws with one uniform set of international rules.⁵

In a perfect world, the Convention would ameliorate virtually every problem of international sales contract formation, obligation, and (mis)interpretation. Unfortunately, due to poor drafting and human error, interpretational problems persist notwithstanding the genesis of the Convention. This Note will analyze and interpret an applicational yet imperative provision of the Convention, article 6. Article 6 allows the parties to an agreement to exclude application of the Convention.⁶ At first glance, one might overlook the article's affinity for problematic interpretation (or lack thereof). How-

¹ The United Nations Conference on Contracts for the International Sale of Goods was held at Vienna, Austria, from March 10 to April 11, 1980. *United Nations Convention on Contracts for the International Sale of Goods*, U.N. Doc. A/CN.97/18 (1980) [hereinafter CISG], reprinted in *THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS: A HANDBOOK OF BASIC MATERIALS* 28 (Reed R. Kathrein & Daniel Barstow Magraw eds., 1987) [hereinafter *INTERNATIONAL SALE OF GOODS: HANDBOOK*].

² *Id.* art. 1(1)(a).

³ JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 48 (2d ed. 1991).

⁴ *Id.*

⁵ *Id.*

⁶ Article 6 of the CISG states, "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions." CISG, *supra* note 1, art. 6.

ever, a relevant and perplexing issue surfaces: whether parties to a contract may *implicitly*, as well as explicitly, exclude the Convention from applying to their international sales transaction. Detailed scrutiny, juxtaposed with an examination of various writings lends the postulation that this provision is one which needs to be explored.⁷

Part I of this Note will recount the historic events leading up to the genesis of the 1980 Convention. Part II will discuss the Convention itself, with several subsections detailing the purpose and scope behind it, including: the need for uniformity, the purpose of the Convention, the initial reactions of various countries, and the notion of party autonomy. Part III will describe the history of article 6, while Part IV will attempt to interpret it. Part IV includes a discussion of: the drafting history of article 6, the relevant comments and criticisms of scholars, a hypothetical situation involving article 6, an analysis of U.S. Senate hearings before the Committee on Foreign Relations, and a brief look at how U.S. courts have dealt with article 6 of the Convention thus far. Finally, Part V will advise how to correctly exclude the Convention, taking into consideration the totality of the above-mentioned parts.

I. HISTORICAL BACKGROUND

The Convention is a product of more than fifty years of draft negotiations and conferences,⁸ the latest of which led to its formulation. Under the auspices of the League of Nations in the 1930s, the International Institute for the Unification of Private Law ("UNIDROIT") requested that a draft of uniform law for the in-

Furthermore, "The dominant theme of the Convention is the primacy of the contract. Of the many provisions that develop this theme, Article 6 is the most important." HONNOLD, *supra* note 3, at 125 (citation omitted).

⁷ HONNOLD, *supra* note 3, at 125-34; see also INTERNATIONAL SALE OF GOODS: HANDBOOK, *supra* note 1, at 93; Richard E. Speidel, *Reflections on the International Unification of Sales Law: Introduction*, 8 NW. J. INT'L L. & BUS. 531, 533 (1988); Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 280 (1984) [hereinafter Rosett, *Reflections*]; Peter Winship, *Reflections on the International Unification of Sales Law: Commentary on Professor Kas-tely's Rhetorical Analysis*, 8 NW. J. INT'L L. & BUS. 623, 627 (1988) [hereinafter Winship, *Reflections*]; Peter 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 at 1.02[5] (N. Galston & H. Smit eds., 1984) [hereinafter Winship, *Scope of the Vienna Convention*].

⁸ HONNOLD, *supra* note 3, at 49-51.

ternational sale of goods be prepared.⁹ A preliminary draft was issued in 1935, and work regarding the international sale of goods continued until the beginning of World War II, re-commencing shortly thereafter. In 1956 and 1963, revised drafts were circulated to governments for comments.¹⁰ Simultaneously, work was instituted regarding the formation of international sales contracts and a draft uniform law was circulated in 1958. Subsequently, in 1964, the Hague hosted a diplomatic conference which led to conventions on those topics.¹¹

In April 1964, a conference of 28 States met at the Hague to act on these two drafts. Thereafter, the conference finalized two conventions: one set forth a Uniform Law for the International Sale of Goods ("ULIS")¹² and the other a Uniform Law on the Formation of Contracts for the International Sale of Goods ("ULF").¹³ The 1964 Hague Conventions went into force in 1972. However, the United States is not a party and the conventions have not been widely adopted.

As time progressed, the need for uniform law in international transactions persisted. In 1966, the General Assembly of the United Nations passed a resolution establishing a world-wide representative body to promote "the progressive harmonization and unification of the law of international trade":¹⁴ The United Nations Commission on International Trade Law ("UNCITRAL"). To facilitate efficiency in handling technical legal questions, UNCITRAL was structured with a limited yet world-wide representation of members. The full Commission meets once a year for sessions of two to four weeks where they receive progress reports from its constituent bodies—usually working groups¹⁵—and also decide on new topics for work.

⁹ INTERNATIONAL SALE OF GOODS: HANDBOOK, *supra* note 1, at 3.

¹⁰ For a more complete discussion of the background of the ULIS, ULF, and the 1930s UNIDROIT efforts, see *Scope of the Vienna Convention*, *supra* note 7.

¹¹ INTERNATIONAL SALE OF GOODS: HANDBOOK, *supra* note 1, at 3.

¹² Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107 [hereinafter ULIS].

¹³ Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 169 [hereinafter ULF].

¹⁴ HONNOLD, *supra* note 3, at 50.

¹⁵ A working group was responsible for drafting texts which were a combination of the topics covered by the 1964 Hague Conventions. INTERNATIONAL SALE OF GOODS: HANDBOOK, *supra* note 1, at 4.

Shortly after its conception, UNCITRAL made considerable progress in preparing uniform international rules for arbitration, carriage of goods by sea, negotiable instruments, and the sale of goods.¹⁶ At UNCITRAL's first session in 1968, work on uniform law for international sales was given high priority.¹⁷ Shortly thereafter, it became evident that the 1964 Conventions would not receive adequate adherence.¹⁸ Therefore, UNCITRAL in its second session (1969), appointed a working group of fourteen states to revise the previously drafted 1964 Conventions—ULIS and ULF—in hopes of broader worldwide acceptance.¹⁹ In the 1977 and 1978 Conferences, UNCITRAL reviewed and combined the two drafts, and again circulated the documents to governments for comments. Subsequently, this 1978 Draft Convention on Contracts for the International Sale of Goods received the Commission's unanimous approval.²⁰

II. THE CONVENTION

Following approval at the 1978 Conference, the U.N. General Assembly authorized a convening of a Diplomatic Conference to act further on the UNCITRAL draft. In March 1980, representatives of sixty-two countries and eight international organizations

¹⁶ HONNOLD, *supra* note 3, at 50-51.

¹⁷ The crucial issue stressed at UNCITRAL's first session was whether it would be possible to obtain widespread adoption of the 1964 Conventions. Subsequently, the Commission transmitted the text of the two 1964 Conventions to governments asking whether they intended to adhere to these Conventions and reasons for their position.

¹⁸ Due to inadequate participation by representatives of different legal backgrounds in the preparation of the 1964 Conventions, the Commission received negative replies to its "adherence" inquiry. Despite efforts by UNIDROIT to encourage wider participation, these Conventions were essentially the product of the legal scholarship of Western Europe. HONNOLD, *supra* note 3, at 53. Of the twenty-eight states at the 1964 Hague Conference, twenty-two were from Western Europe or other developed countries, three were socialist and three were from developing countries. Gyula Eörsi, Comment, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 AM. J. COMP. L. 333, 335 (1983). See also Martin L. Ziontz, Comment, *A New Uniform Law for the International Sale of Goods: Is it Compatible with American Interests*, 2 NW. J. INT'L L. & BUS. 129 (1980), for an examination of the objections to the 1964 Conventions by the U.S.

¹⁹ See INTERNATIONAL SALE OF GOODS: HANDBOOK, *supra* note 1, at 4.

The initial members of the Working Group were Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, U.S.S.R., U.K., and U.S.A. Later, new members participated, including Austria, Czechoslovakia, the Philippines, and Sierra Leone. The Working Group also incorporated input from international organizations such as UNIDROIT, the Hague Conference on Private International Law, ICC, ECE, CMEA, and OAS. HONNOLD, *supra* note 3, at 54 n.11.

²⁰ See generally, The UNCITRAL Commentary and the 1978 Draft Convention.

met in Vienna to finalize the UNCITRAL Draft Convention.²¹ The Conference elected Mr. Gyula Eorsi, from Hungary, as President as well as Vice-Presidents from representatives of twenty-two states.²² After five weeks of conferences, nearly all the provisions in the UNCITRAL Draft Convention of 1978 were approved by the Conference.²³ Twenty countries have since signed the 1980 Convention adopted by the 1980 Diplomatic Conference.²⁴

A. *The Need for Uniformity*

Peter H. Pfund²⁵ addressed the U.S Senate Committee on Foreign Relations at a hearing regarding the Convention in April, 1984. In a prepared statement to the Chairman, Pfund solicited support of the Convention.²⁶ Pfund posited that due to the inadvertent omission of choice-of-law provisions by drafters of international sales contracts many uncertainties exist regarding which

²¹ The sixty-two States represented included: Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cyprus, Czechoslovakia, Denmark, Ecuador, Egypt, Finland, France, German Democratic Republic, Federal Republic of Germany, Ghana, Greece, Hungary, India, Iran, Iraq, Ireland, Israel, Italy, Japan, Kenya, Libyan Arab Jamahiriya, Luxembourg, Mexico, Netherlands, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Singapore, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Yugoslavia, and Zaire. *Final Act of the United Nations Conference on Contracts for the International Sale of Goods*, U.N. Doc. C(8); O.R. 176-177 A/CN.97/18 (1980), reprinted in JOHN O. HONNOLD, *DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES* 764 (1989) [hereinafter *DOCUMENTARY HISTORY*].

The international organizations were World Bank, Bank for International Settlements, Central Office for International Railway Transport, Council of Europe, European Economic Community, Hague Conference on Private International Law, UNIDROIT, and ICC. *Id.*

²² The Conference elected as Vice-Presidents the representatives of the following states: Argentina, Belgium, Brazil, Bulgaria, Canada, China, Colombia, Egypt, German Democratic Republic, (Federal Republic of) Germany, Greece, Kenya, Libyan Arab Jamahiriya, Pakistan, Peru, Philippines, Republic of Korea, Romania, Spain, Sweden, Union of Soviet Socialist Republics, and Zaire. *Id.*

²³ HONNOLD, *supra* note 3, at 54.

²⁴ DR. FRITZ ENDERLEIN & DR. DIETRICH MASKOW, *INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 4 (1992). [As of 4/28/92] [hereinafter *INTERNATIONAL SALES LAW*].

²⁵ Mr. Pfund was acting in his capacity as Assistant Legal Adviser for Private International Law, Department of State.

²⁶ *International Sale of Goods, 1984: Hearings on Treaty Doc. No. 98-9 Before the Comm. on Foreign Relations*, 98th Cong., 2d Sess. at 303.05 (April 4, 1984) [hereinafter *Senate Hearings*].

state law will apply in case of a dispute.²⁷ What is certain, Pfund explained, is that at least one party to the contract will need to argue the case on the basis of law foreign to it, and before a forum for which the law may be foreign as well.²⁸ The outcome of arguments regarding which law should apply is uncertain, and the need for interpretation of foreign law involves uncertainties as well. Additionally, a considerable amount of time and money is involved in finding, translating and interpreting foreign law and court decisions. In light of these uncertainties, difficulties and expenses, what were once attractive foreign markets suddenly appear unattractive as United States firms will no longer wish to engage in trade with foreign countries.²⁹ The Convention, Pfund asserted, would serve to alleviate these uncertainties (and consequent decisions opposing foreign trade) outlined above by providing a uniform set of rules for dispute resolution that distinguished the international sales and contract law which experts agreed upon.³⁰

However, Professor E. Allan Farnsworth noted the Convention's *lack* of uniformity of interpretation. Farnsworth, who represented the United States in the United Nations Commission on International Trade Law during the drafting of the Convention and at the Vienna conference at which the final version was adopted, commented upon the Convention's provisions at a Symposium on Private Investment Abroad.³¹ While the Convention provides that in its interpretation "regard is to be had . . . to the need to promote uniformity in its application," [he] said the extent that such uniformity will be achieved is 'questionable.'³² Moreover, he stated that courts in many civil law countries do not cite prior decisions, even of the same court. Therefore, Farnsworth posited, if various countries do not follow precedents set by their *own* court's decisions, how can one realistically expect uniform worldwide interpretation of the U.N. Convention? Thus, it is clear that questions pertaining to interpretational and operational uniformity were an utmost consideration from the outset. Farnsworth ex-

²⁷ *Id.*

²⁸ *Id.* at 303.06.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Impact of Sales, Patent Conventions on U.S. Firms Discussed at Dallas Meeting*, Int'l Trade Rep. (BNA) No. 14, at 527 (July 12, 1983). The Symposium was sponsored by the Southwest Legal Foundation's International and Comparative Law Center. *Id.*

³² *Id.*

pressed the aspiration that some uniformity will later be achieved as a body of writings on the Convention develops.³³

As previously noted, Professor Farnsworth foresaw problems of the Convention's (mis)interpretation at its inception. A problem of the Convention, he later stated, that would "surely be aggravated by the briefer drafting style of CISG [the Convention], is that of achieving uniformity in its interpretation."³⁴ He further stated that it is of no use to have a uniform law where the risk of misinterpretation is great.³⁵ Professor Farnsworth *did* mention one way in which uniformity in interpretation might be achieved in all legal systems: with the provision of a commentary.³⁶ A commentary to the Convention, Farnsworth said, would provide valuable insight about the intentions, reasons and thought processes of the drafters. However, while a commentary on the UNCITRAL Draft Sales Convention was prepared,³⁷ one was not prepared to accompany the 1980 Conference in Vienna.³⁸

Is it not paradoxical that the crucial mode of achieving uniformity prescribed by Farnsworth never transpired?³⁹ This is not to say that the mere presence of a commentary to the 1980 Conven-

³³ *Id.*

³⁴ E. Allan Farnsworth, *Problems of the Unification of Sales Law from the Standpoint of the Common Law Countries*, in PROBLEMS OF UNIFICATION OF INTERNATIONAL SALES LAW 3, 9 (1980) [hereinafter Farnsworth, *Problems of Unification*].

³⁵ *Id.*

³⁶ Although the provision of a commentary is not in the common law tradition, this device is being used increasingly in the United States The commentary is not enacted into law and is not part of the statute itself, but is available as a treatise would be as an aid in the interpretation of the statute.

It is a source of particular gratification to those who are becoming accustomed to the help that a commentary can provide that the draft CISG is, *at least up to now*, provided with a commentary. Practitioners in my country are especially hopeful that the final version will also be so provided.

Id. at 10 (emphasis added) (footnote omitted).

³⁷ See generally Commentary to the UNCITRAL Convention.

³⁸ There was no formal debate on the question of a commentary, although the United States expressed its interest in the adoption of a commentary on the 1978 UNCITRAL draft. The United States government commented as follows:

The United States strongly urges that a commentary accompany the final text. The existing commentary has been prepared by the Secretariat and has thus far accompanied the draft as an explanation of its provisions. Such a commentary . . . has proved most helpful to practitioners in the United States who have studied the draft CISG Since the draft CISG contains a number of concepts that are unknown in common law systems, a commentary is of special importance to a common law country as the United States.

U.N. Doc. A/CN.97/8, at 26 (January 11, 1980).

³⁹ Farnsworth, *Problems of Unification*, *supra* note 34, at 10.

tion would have decisively clarified *all* of its ambiguities. However, the absence of a commentary frustrates, if not hinders, the search for a uniform interpretation of the Convention.

A prime example of Farnsworth's prediction is easily ascertained by scrutinizing article 6 and the myriad of discussions and criticisms therewith. Article 6, in allowing a modification or exclusion of the Convention, exemplifies the Convention's basic premise of party autonomy; however, it does not explicitly prescribe the method in which to do so. Therefore, practitioners end up with gravely different interpretations of article 6 with little, if any, uniformity.

B. *Purpose of the Convention*

In the half century leading up to the emergence of the 1980 Convention, there were numerous revisions to its terms. Nevertheless, the Convention's scope and purpose remained the same—the uniform rules would apply only to international sales. The reasoning for this particular purpose lies in the fact that states can be expected to bind themselves to the same rules only in an area of shared interest—their international trade transactions.⁴⁰

As stated earlier, the sphere of application of the Convention is controlled by article 1(1) which states, "This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State."⁴¹ Because the United States did not adopt article 1(1)(b),⁴² the Convention will not apply to American sales contracts when international private law rules lead to the application of a contracting country's own law.⁴³

The Convention does not apply to all international transactions. Articles 2 through 5 list specific exclusions from the Convention.⁴⁴ Furthermore, contracting parties may alter the effect of the

⁴⁰ HONNOLD, *supra* note 3, at 57.

⁴¹ CISG, *supra* note 1, art. 1(1).

⁴² Article 95 of the Convention states: "Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention." CISG, *supra* note 1, art. 95.

⁴³ *Status of the Conventions: Note by the Secretariat* at 5, U.N. Doc. A/CN.9/294 (1987).

⁴⁴ Article 2 of the Convention states,

This Convention does not apply to sales:

Convention or exclude its application altogether.⁴⁵ This freedom of parties to alter or omit the Convention's provisions at their own volition demonstrates the Convention's emphasis on freedom of contract and party autonomy.⁴⁶

C. *First Impressions*

In attempting to gain a comprehensive understanding of the Convention and its counterparts, it is important to observe various countries' reactions and opinions which formulated shortly following the Convention's genesis.

The United States was an initial supporter of the Convention. In September, 1983, President Ronald Reagan sent the Convention to the Senate, urging prompt action.⁴⁷ In his message accompanying the Convention, the president noted that international trade "is

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- (a) 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;
 - (b) by auction;
 - (c) on execution or otherwise by authority of law;
 - (d) of stocks, shares, investment securities, negotiable instruments or money;
 - (e) of ships, vessels, hovercraft or aircraft;
 - (f) of electricity.

Article 3 of the Convention states,

- (1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.
- (2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

Article 4 of the Convention states,

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

- (a) the validity of the contract or of any of its provisions or of any usage;
- (b) the effect which the contract may have on the property in the goods sold.

Article 5 of the Convention states,

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

CISG, *supra* note 1, arts. 2-5.

⁴⁵ *Id.* art. 6.

⁴⁶ HONNOLD, *supra* note 3, at 47; *see also infra* notes 62-68 and accompanying text.

⁴⁷ President's Message to the Senate Transmitting the United Nations Convention on Contracts for the International Sale of Goods, 1983 PUB. PAPERS 1316, 1316 (Sept. 21, 1983).

now subject to serious legal uncertainties."⁴⁸ Furthermore, he stated that:

Questions often arise as to whether our law or foreign law governs the transaction, and our traders and their counsel find it difficult to evaluate and answer claims based on one or another of the many unfamiliar foreign legal systems. The Convention's uniform rules offer effective answers to these problems.⁴⁹

To facilitate U.S. Senate ratification, numerous factors came into play. A State Department report providing a summary of the treaty was issued by the Senate Foreign Relations Committee.⁵⁰ Moreover, an Independent Lawyers Committee was established to advance the strong interest of both the legal and business community to Congress. Peter H. Kaskell, then vice-president of Olin Corporation and Independent Committee chairman stated, "No one is against it."⁵¹

Similarly, the House of Delegates of the American Bar Association ("ABA") recommended to President Reagan in 1981 that the United States ratify the Convention.⁵² The ABA further promoted the Convention by making it the subject of a "Presidential Showcase Program" presented by the ABA Section of International Law and Practice in August of 1983.⁵³ The United States was clearly a supporter of the Convention's ratification and acceptance.⁵⁴

China followed the United States in its early ratification of the Convention, but for different reasons. First, China's then-existing

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Reagan Sends Vienna Convention on Sale of Goods to Senate, Urges Prompt Action*, Int'l Trade Rep. (BNA) No.25, at 919 (Sept. 27, 1983).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ An article appearing in BUSINESS AMERICA stated, in part,

The Convention offers a better way. First, it can resolve the conflicts of law issue by itself providing uniform substantive rules that all courts and arbitrators would use to settle a dispute and to fill gaps left by the sales contract . . . [T]he Convention's rules closely follow the sales article of the Uniform Commercial Code (UCC), which is in force in 49 of the 50 states. The Convention, however, has the advantage of being specifically designed for international trade transactions; it is available in six official languages and U.S. experts on its interpretation will be as authoritative as foreign experts.

John Siegmund, *UN Convention on Contracts for International Sale of Goods Set for Senate Consideration*, BUS. AM., Jan. 23, 1984, at 18.

Foreign Economic Contracts Law⁵⁵ was less specific and comprehensive in scope than the Convention.⁵⁶ Secondly, China, in trying to develop a more sophisticated legal system for international trade and investment matters, thought ratification of the Convention would further its goal.⁵⁷

New Zealand ratified the Convention in light of the fact that more than half of its foreign trade was with thirty-four countries which had already accepted the Convention. The Minister of Justice, Mr. Douglas Graham stated, "New Zealand's foreign earnings are so largely dependent on trade in goods we must remove as many barriers to efficient trade as we can."⁵⁸ In that situation, as in China's, the Convention was ratified to facilitate international trade.

Other countries, however, were not quite as enthusiastic about the Convention's urgency as the United States. As Cally Jordan, a Professor of Law in Canada, noted:

The Convention is not comprehensive; it does not govern all aspects of the contract of sale or all sales contracts. . . . [The Convention] does not address sometimes thorny issues of capacity to contract, validity of the contract and the effect which the contract might have on legal title to the goods.⁵⁹

Moreover, Professor Jordan stated concerns about legal practitioners' proficiency to accurately exclude the Convention which would otherwise apply. "The catch, however, is knowing about the Convention The main criticism of the Convention . . . is its likely widespread *inadvertent* application."⁶⁰ Professor Jordan was hesitant to approve a convention which would *automatically* apply between two international contracting countries: "Above all," the author said, "be aware of [the Convention]."⁶¹ This concern pinpoints the issue raised in this Note: If more practitioners know *how* to utilize, interpret or otherwise exclude the Convention, there would be less apprehension toward accepting it.

⁵⁵ China's Foreign Economic Contracts Law was promulgated in 1985.

⁵⁶ Robert C. Goodwin, Jr., *New International Sales Convention: How It Will Affect U.S.-China Trade*, E. ASIAN EXECUTIVE REP., Oct. 15, 1987, at 9.

⁵⁷ *Id.* at 8.

⁵⁸ *New Zealand to Join International Convention on Contracts*, N.Z. HERALD, July 1, 1992.

⁵⁹ Cally Jordan, *Importers and Exporters: 'Be aware'*, FIN. POST, Apr. 13, 1992, at S4.

⁶⁰ *Id.* (emphasis added).

⁶¹ *Id.*

D. Party Autonomy

For foreign trade purposes, all countries have accepted the legal concept of freedom of contract as the legal form of contracting parties.⁶² In light of this, a dominant theme of the Convention is the role of the contract *made by the parties*.⁶³ The Convention places as a high priority the notion of "party autonomy."⁶⁴ Its purpose is not to confine parties of international sales agreements to a uniform set of rules, but to play a supporting role, supplying answers to problems that the parties have failed to solve by contract.

Professor Aleksandar Goldstajn, in reference to the Convention's uniform legal methods for all societies, raised the issue as to whether a convention which only contains optional rules is a satisfactory way of establishing a global system of international law of contract for commercial transactions.⁶⁵ He then posited that this question implies that the issue of autonomy of the parties' will was a crucial problem which the Convention solved by making all of its provisions optional.⁶⁶

Moreover, the purpose of the Convention is not to relieve the parties of the individual formation of the contract. Because the Convention has left open a number of questions (both accidentally and deliberately) and because certain provisions call for an individual agreement, it is up to the parties themselves to make the particular arrangements of the deal.⁶⁷ In reference to party autonomy in contract formation, Peter Winship wrote, "[CISG's] rules are supplementary in nature and the parties have virtually unlimited free-

⁶² Aleksandar Goldstajn, *Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention*, in *INTERNATIONAL SALE OF GOODS DUBROVNIK LECTURES* 55, 61 (Petar Sarcevic & Paul Volken eds., 1986) [hereinafter *Autonomous Rules*].

⁶³ "Of the many provisions that develop this theme, Article 6 is the most important The breadth of the parties' freedom to contract is emphasized by the one exception stated in Article 6—the privilege of an adhering State under Articles 12 and 96 to preserve its domestic rules that require a writing." HONNOLD, *supra* note 3, at 105.

⁶⁴ Party autonomy refers to a party's freedom to contract into or out of the Convention. The Convention's purpose is to fill gaps, not to create rules which must be adhered to exclusively.

⁶⁵ *Autonomous Rules*, *supra* note 62, at 58.

⁶⁶ *Id.* "The optional character of municipal laws, with exceptional state interference by invocation of *ordre public*, is the legal expression of market economies. For this reason, the U.N. Sales Convention (1980) has only non-mandatory rules." *Id.* at 63.

⁶⁷ *INTERNATIONAL SALES LAW*, *supra* note 24, at 17.

dom to contract out of some or all of the convention's rules if they so choose."⁶⁸

Article 6, by allowing the Convention's exclusion and/or modification, epitomizes the Convention's dominant theme of autonomy of the parties.⁶⁹ The question remains, however, as to how one might exclude it.

III. HISTORY OF ARTICLE 6

The outcome of the 1980 Convention was a virtually unanimous approval of the 1978 UNCITRAL Draft Convention.⁷⁰ However, certain provisions were modified, and careful attention ought to be paid to one provision in particular.⁷¹ ULIS, article 3 (the pre-Convention equivalent to article 6) provided that, "The parties to a contract of sale shall be free to exclude the application

⁶⁸ Peter Winship, *Aircraft and International Sales Conventions*, 50 J. AIR L. & COM. 1053, 1060 (1984).

⁶⁹ See *infra* text. See also Arthur Fakes, *The Application of the United Nations Convention on Contracts for the International Sale of Goods to Computer, Software, and Database Transactions* 3 SOFTWARE L.J. 559, 574 (1990) ("The parties may agree in their contract that the Convention does not apply to the transaction and thereby nullify its operation. In fact, the parties can eliminate or alter the application of specific treaty provisions by including in the contract the altered or totally different terms. Such capabilities illustrate the *extreme flexibility* of the treaty and its gap-filler nature.") (emphasis added); see also Patrick Thieffry, *Sale of Goods Between French and U.S. Merchants: Choice of Law Considerations Under the U.N. Convention on Contracts for the International Sale of Goods*, 22 INT'L LAW. 1017, 1023 (1988) ("The Convention makes no allusion to clauses limiting or excluding warranties. This is in keeping with the *auxiliary nature* of the Convention, since article 6 permits the parties to exclude the application of one or more of its provisions.") (emphasis added); Richard D. Kearney, *Current Development: Developments in Private International Law*, 81 AM. J. INT'L L. 724, 728 (1987) ("In the drafting of the Sales Convention, one of the most important governing principles was that of the *autonomy* of the parties to the sales contracts. The freedom of the buyer and the seller to write an international sales contract . . ."); Timothy N. Tuggey, Note, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?*, 21 TEX. INT'L L.J. 540, 543 (1986) ("The CISG's Sphere of Application section concludes by recognizing the need for party autonomy.").

⁷⁰ John Feltham, *The United Nations Convention on Contracts for the International Sale of Goods*, 1981 J. BUS. L. 346, 347.

Some of the substantive changes included: Art. 7(2) (filling gaps by reference to "general principles"); Art. 55 (price not stated in contract; Art. 68 (risk of loss as to goods sold during transit); Art. 71 (suspension of performance by one party because of danger of breach by the other); Art. 78 (recovery of interest for delay in payment of sums due).

⁷¹ See *Text of Draft Convention on Contracts for the International Sale of Goods Approved by the United Nations Commission on International Trade Law Together With a Commentary Prepared by the Secretariat*, U.N. Doc. A/CN.97/5 (1979) U.N. Doc. A/CONF.97/5 (1979) [hereinafter *Draft Commentary*], reprinted in *INTERNATIONAL SALE OF GOODS: HANDBOOK*, *supra* note 1, at 101.

thereto of the present Law either entirely or partially. Such exclusion may be express or implied."⁷² In 1978, UNCITRAL deleted the reference to the "implied" exclusion. However, it declined to provide that the exclusion must be "express."⁷³ Consequently, uncertainty as to the correct method of exclusion exists,⁷⁴ creating confusing and conflicting theories of interpretation.⁷⁵

⁷² ULIS, Article 3, *supra* note 12, reprinted in HONNOLD, DOCUMENTARY HISTORY, *supra* note 21 at 48.

⁷³ The Commentary on Article 5 (The equivalent to Article 6) of the 1978 UNCITRAL Draft Convention read as follows:

1. The non-mandatory character of the Convention is explicitly stated in article 5. The parties may exclude its application entirely by choosing a law other than this Convention to govern their contract. They may also exclude its application in part or derogate from or vary the effect of any of its provisions by adopting provisions in their contract providing solutions different from those in the Convention.

2. The second sentence of ULIS, article 3, providing that "such exclusion may be express or implied" has been eliminated lest the special reference to "implied" exclusion might encourage courts to conclude, on insufficient grounds, that the Convention had been wholly excluded.

Draft Commentary, U.N. Doc. A/CN.97/5, at 15 (1979).

⁷⁴ Because of the ambiguous language of article 6, nations may interpret it in accordance with principles of their own national statutes. . . . For example, the United States has indicated that parties are bound to the Sale of Goods Convention unless they "have left their contract silent as to applicable law." Most likely, the United States will interpret article 6 in conformity with the Uniform Commercial Code, which permits implied exclusions. However, Yugoslavia will probably interpret article 6 to require express exclusions, because Yugoslavia's primary concern in drafting an exclusion provision is party equality. Thus, depending on the forum, the supposedly uniform law might or might not apply. This is exactly the result the Sale of Goods Convention aimed to avoid.

Maureen T. Murphy, Note, *United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law*, 12 FORDHAM INT'L L.J. 727, 738-39 (1989) (footnotes omitted).

⁷⁵ "As a consequence, normal rules of construction of the contract apply to the question of exclusion or modification of the Convention." HONNOLD, *supra* note 3, at 126. See also LEGAL ASPECTS OF INTERNATIONAL BUSINESS TRANSACTIONS 301 n.128 (D. Campbell & C. Rohwer eds., 1984) ("Article 6 CISG [the Convention] does not provide any parameters regarding the manner in which derogation must be demonstrated. May parties do so impliedly? May derogation occur unilaterally through the boiler-plate in one party's form? These are questions apparently left to domestic courts to grapple with . . .") (citation omitted); W/G 2 paras. 43-46, II Yearbook 55; UNCITRAL X Annex I, paras. 56-58, VIII Yearbook 29. At the diplomatic conference: *Com. I* Art 3, para 3(i), (v)-(viii); SR. 3, paras. 35-65; SR. 4, paras. 1-95; "The problems that had to be solved by the drafters of the Convention will emerge again in practice in connection with the interpretation of the Conventions's provisions." *Autonomous Rules*, *supra* note 62, at 76.

IV. INTERPRETING ARTICLE 6

A. *Drafting History*

The exclusion of the latter portion of ULIS article 3 evinces that the drafters of the 1978 Convention were cognizant of the provision's potential interpretational problems. What the drafters did not do, however, was answer the question they formulated: How does one accurately exclude the Convention, expressly or impliedly?⁷⁶

In reference to the drafting process of article 6, the conference at Vienna has been criticized as follows:

The language of article 6 can be inconsistently interpreted as either requiring express, written exclusion of the Sale of Goods Convention or permitting exclusions to be implied by conduct. The language of article 6 strikes a balance between the drafters' opposing positions. While the compromise language enabled parties to sign the Sale of Goods Convention, it now threatens the uniform law's ultimate success.⁷⁷

Ambiguity in interpreting article 6 can be traced back to the First Committee Deliberations of the Convention of March, 1980. In discussing the provisions of UNCITRAL, article 5,⁷⁸ Miss O'Flynn of the United Kingdom noted the text's lack of indication as to *how* the parties might exclude or derogate from the application of the Convention.⁷⁹ That statement resulted in further discussion by the committee, consisting of conflicting opinions and proposals of exclusion.⁸⁰ Somewhat ironically, Miss O'Flynn ex-

⁷⁶ See generally *First Committee Deliberations*, 4th meeting, A/CN.97/C.1/SR.4 (March 13, 1980).

⁷⁷ Murphy, *supra* note 74, at 737 (citations omitted).

⁷⁸ Article 5 of the UNCITRAL Draft Convention is the equivalent to Article 6 of the 1980 Convention.

⁷⁹ "[A]nd her delegation felt that the matter must be clarified since, in the absence of specific provisions it might be assumed that exclusion, derogation or variation must necessarily be express." Miss O'FLYNN (United Kingdom) *First Committee Deliberations*, 4th meeting, U.N. Doc. C(4); O.R. 236-433, A/CN.97/C.1/SR.1, at 249 (March 13, 1980).

⁸⁰ See "Mr. DABIN (Belgium) provided that exclusion, derogation or variation must definitely result from the circumstances of the case . . . in order that the judge or arbitrator might be precluded from attributing to the parties an intention they did not have. . . . It was not in fact possible to hold to an express exclusion because day-to-day business revealed that . . . legal clauses were often the last thing that the parties were concerned about."; see also "Mr. ROGNLIEN (Norway) said that he was in favour of retaining the existing text which, in his view, meant that derogation might be express or tacit."; "Mr. KHOO LE-ANG HUAT (Singapore) said he too was in favour of keeping the existing text." But see "Mr. INAAMULLAH (Pakistan) explained that [s]uch uncertainty could be avoided only

pressed her surprise at the amount of debate her amendment sparked.⁸¹ Subsequently, the chairman put the proposals by Pakistan, Belgium, and the United Kingdom to the vote, only to evince a rejection of all three;⁸² the text of article 5 remained unchanged (only to become article 6).

Later, at the conference's 6th plenary meeting in April 1980, article 6 was adopted by a vote of forty-two to zero, with two abstentions.⁸³ Nonetheless, Miss O'Flynn's substantial interpretation question remained unanswered.⁸⁴ Representatives at the 1980 Convention raised and debated the question of how to exclude the Convention; unfortunately, because it was left unanswered, it is up to courts, scholars, and legal practitioners to decipher the enigma of interpreting article 6.

B. *Scholars' Comments and Writings*

It appears that there is no uniform rule stating how to exclude application of the Convention. A myriad of conflicting interpretations of article 6 exist⁸⁵ and Professor Richard E. Speidel noted

by specifying that exclusion or variation should be the result of an express agreement between the parties"; "Mr. FARNSWORTH (United States of America) said that, for his part, he could see no reason why the existing text of article 5 should not be retained, although he would be able to support the United Kingdom proposal which added a useful degree of precision to the text."; "Mr. HERBER (Federal Republic of Germany) said that it should be specifically stated whether exclusion of provisions of the Convention must be express or could be implied . . . but was unable to support the proposal by the representative of Pakistan because he considered it to be too rigid. . .". *Id.*

⁸¹ *Id.* at 250 (para 23).

⁸² *Id.*

⁸³ *Decisions by Plenary Conference*, 6th plenary meeting, Doc. C(7); O.R. 199-228, A/CN.97/SR.6 at 201.

⁸⁴ See "Mr. BONNELL (Italy) reminded the Conference that his delegation had submitted a proposal to establish clearly that, although the parties would have every right to exclude the application of the Convention, they would have to say so explicitly. His delegation had nonetheless voted for the present wording of article 5. . ."; see also "Mr. MEHDI (Pakistan) felt that . . . [i]t would have been better for article 5 to stipulate that exclusion of the Convention must be expressly stated. For that reason, his delegation had abstained in the vote."; Mr. GARRIGUES (Spain) regretted that article 5 had been couched in such broad terms." *Id.* at 201.

⁸⁵ See Robert S. Rendell, *The Codification of International Commercial Law: Toward A New Law Merchant*, 15 BROOK. J. INT'L L. 23, 25 (1989) ("The Sales Convention governs a sales contract between parties with their places of business in different contracting states unless the parties opt out of the Convention by specifically excluding it . . ."). But see Joseph P. Griffin & Michael R. Calabrese, *The New Rules for International Contracts*, 74 ABA J. 62, 65 (1988) ("Under Article 6, a party may opt out expressly or by implication from express terms."); Michael Kabik, *Through the Looking-Glass: International Trade in the "Wonderland" of the United Nations Convention on Contracts for the International Sale*

that it is possible that the parties may agree to exclude the Convention and "contract into" the law of a state.⁸⁶ However, Professor Speidel did not set this method of exclusion in stone,⁸⁷ lending the assumption that there are additional theories of exclusion.

Professor Peter Winship, for example, stated that express exclusion should not be required.⁸⁸ However, he did not dismiss the explicit exclusion requirement altogether, signifying that an exclusion *may* have to be expressly stated, and not implied.⁸⁹ The question of whether the exclusion ought to be implied or express has remained unanswered. However, Professor Herbert M. Sampson III stated that departure from the Convention *must be expressed*; he argued that no implied exclusion from the Convention was contemplated.⁹⁰

Professor Arthur Rossett contributes to the mystery of exclusionary methods.⁹¹ He stated that the most common instance of implied exclusion would be a choice of law clause. However, because it is not well settled whether an exclusion may be implied, a mere choice-of-law clause may not be sufficient.⁹² Does that mean exclusion must be express? Professor Isaak Dore posited that the

of Goods, 9 INT'L TAX & BUS. LAW. 408, 414 (1992) ("Given that different states have different rules in this regard, the safest course of action for parties exercising their rights under Article 6 is to expressly opt out in writing.") (footnote omitted); Laura E. Longobardi, Note, *Disclaimers of Implied Warranties: The 1980 United Nations Convention on Contracts for the International Sale of Goods*, 53 FORDHAM L. REV. 863, 872 n.38 (1985) ("It is unclear whether this exclusion by the parties must be express or whether it may be implied. In light of the Convention's detailed rules for determining the intentions of the parties, an express declaration should not be required.") (citations omitted).

⁸⁶ *Speidel*, *supra* note 7, at 532, 533.

Care must be taken to provide that the parties' rights and obligations shall be governed by the local law (this should contract out of the conflicts rules), and domestic law (this should contract out of federal conflict rules) and domestic law (this should contract out of federal law) of the state, including its provisions of the U.C.C.

Id. at 533.

⁸⁷ "Warning: Ignoring this advice can be hazardous to your economic health. Taking this advice without further study and thought is equally dangerous." *Id.*

⁸⁸ See Winship, *Reflections*, *supra* note 7 at 627.

⁸⁹ "When analyzing this question, however, some attention must be paid to explaining the omission of the clause in the 1964 text." Winship, *Reflections*, *supra* note 7, at 627.

⁹⁰ Herbert M. Sampson III, *The Title-Passage Rule: Applicable Law Under the CISG*, 16 INT'L TAX J. 137, 143 (1990).

⁹¹ Rossett, *Reflections*, *supra* note 7, at 280-81.

⁹² "Whether the parties' statement . . . that their contract is to be governed by the law of New York impliedly excludes the Convention would appear to be a question of interpretation on which article 8(1) directs an investigation of the parties' subjective intent, while article 8(2) specifies an objective view." *Id.*

Convention must be excluded by express agreement,⁹³ taking into consideration the omission of the second part of ULIS, article 3.⁹⁴ For similar reasons, Professor Dore and James E. DeFranco interpret article 6 to proscribe implied exclusion as well.⁹⁵

However, a commentary by Bradley J. Richards entails strong arguments for allowing implied exclusions.⁹⁶ First, he argues, if the drafters of the Convention had intended express exclusions only, they could have included the word "expressly" in the text. Second, the Draft Commentary does not obliterate the possibility of implied exclusion, it merely expresses the need to control the court's discretion in interpreting international contracts.⁹⁷ Third, he argues, comments made throughout the course of the Vienna Convention more accurately portray the intent of the drafters.⁹⁸ Further, the proposals for express exclusion were opposed generally because "it may be perfectly clear that the parties do not wish the Convention to apply even though this intention was not stated expressly."⁹⁹ No changes were made in the substance of the rule by the Committee and the draft was voted in as the final text of the Convention.¹⁰⁰ Therefore, it is presumable that the Committee did not rule out exclusion by implication.¹⁰¹

Moreover, Patrick Thieffry stated that

The application of the Convention does not render choice-of-law clauses useless. It must be stressed that such clauses do not

See also Courtney Parrish Smart, *Formation of Contracts in Louisiana Under the United Nations Convention for the International Sale of Goods*, 53 LA. L. REV. 1339, 1345 (1993) ("[P]arties should expressly negate the application of the Convention if that is their intent.").

⁹³ "Express agreement is required only to exclude the Convention (or any part thereof) under Article 6." Isaak I. Dore, *Choice of Law Under the International Sales Convention: A U.S. Perspective*, 77 AM. J. INT'L. L. 521, 532 (1983).

⁹⁴ "The drafters of the present Convention decided not to provide for exclusion by implication The policy of the drafters of the Convention therefore appears to be to ensure as wide an application of the Convention as possible" *Id.* at 532 n.62.

⁹⁵ Isaak I. Dore & James E. DeFranco, *A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code*, 23 HARV. INT'L L.J. 49, 53 (1982).

⁹⁶ Bradley J. Richards, *Contracts for the International Sale of Goods: Applicability of the United Nations Convention*, 69 IOWA L. REV. 209, 237 (1983).

⁹⁷ *Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat*, U.N. Doc. A/CN.9/71/5 (March 14, 1979).

⁹⁸ See *supra* notes 75-83 and accompanying text.

⁹⁹ [1977] 8 Y.B. UNCITRAL 11, 29, U.N. Doc. A/CN.9/SER.A/1977 reprinted in HONOLD, *DOCUMENTARY HISTORY*, *supra* note 21, at 322.

¹⁰⁰ *Id.*; see article 6, *supra* note 6.

¹⁰¹ Richards, *supra* note 96, at 238.

necessarily result in the exclusion of the Convention's provisions. Choice-of-law clauses are expressly allowed by Article 6. Differences in interpretation, however, might arise in this respect."¹⁰²

Thus, on one hand, such clauses provide for the application of a "municipal law" on the other hand, it could be argued that such a convention is generally regarded as integrated with a municipal law, and therefore the Convention *is* municipal law.¹⁰³ Thus, Thieffry argued, as a choice-of-law clause may be viewed as including or excluding the Convention, the parties to an international sales contract should be explicit as to their common intent regarding the exclusion of the treaty law.¹⁰⁴

Bradley J. Richards maintains that in light of existing ambiguities, the decision of how to exclude the Convention must rest on an interpretation of the agreement between the parties and upon public policy concerns.¹⁰⁵ Unfortunately, however, these considerations also warrant opposing arguments.¹⁰⁶

C. *A Hypothetical Situation*

For example, seller (A) has its place of business in Italy (a contracting state), and buyer (B) has its place of business in California (also a contracting state). A and B agree on the sale of 2,000 widgets, and subsequently B's invoice incorporates a California choice-of-law provision. A later refuses to sell B the widgets, thereby breaching the contract. According to article 1(1)(a),¹⁰⁷ the Convention would apply to this breach of contract action (notwithstanding exclusions listed in articles 2-5).¹⁰⁸ Once in force, the Convention will have in the United States the force of preemptory federal law. Therefore, according to supremacy principles, a federal or state court would be bound to apply the Convention to the cause of action described above.

As the parties are free to exclude or modify the terms of the Convention, however, a seminal issue would arise: whether the

¹⁰² Thieffry, *supra* note 69, at 1019.

¹⁰³ *Id.* at 1019 n.11.

¹⁰⁴ *Id.*

¹⁰⁵ Richards, *supra* note 96, at 239.

¹⁰⁶ Public policy arguments can usually be argued both ways. Therefore, without explicit directions governing methods of Convention exclusion, parties and interpreters are left to fend for themselves in hopes of avoiding uncertainty.

¹⁰⁷ CISG, *supra* note 1, art. 1(1)(a).

¹⁰⁸ See *supra* note 44 and accompanying text.

parties had excluded the Convention by virtue of B's choice-of-California-law provision contained in the invoice. Under these facts, the court would thus be faced with a pronounced conflicts problem. Which law, California (UCC) or the Convention, should be applied to determine whether the parties have excluded application of the Convention via B's invoice?

If B's choice-of-law provision *did* exclude the Convention—if the court were now to apply UCC § 2-207¹⁰⁹—it would have to consider the potential for a different outcome under the two treatments of variant forms. The court, in applying § 2-207, would likely conclude that a California choice-of-law clause constitutes a material alteration of the bargain within the meaning of § 2-207(2). As a mere proposal for modifying the bargain, such a clause would not be effective, therefore, in derogating from the Convention and applying California law.¹¹⁰ Having implicitly excluded the Convention, the contract between A and B would endure and the Convention's provisions would then be applied to the breach of contract action.

On the other hand, if the California choice-of-law provision did *not* effectively exclude the Convention, a different result would occur. Under article 19 of the Convention, the choice of California

¹⁰⁹ UCC § 2-207 provides:

- (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
- (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
 - (a) The offer expressly limits acceptance to the terms of the offer;
 - (b) they materially alter it; or
 - (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
- (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provision of this Act.

U.C.C. § 2-207 (1978).

¹¹⁰ See generally *Coastal Industries, Inc. v. Automatic Steam Products, Corp.*, 654 F.2d 375 (5th Cir. 1981).

law would probably be considered a material provision,¹¹¹ and therefore a rejection by B, to the contract for widgets with A. Consequently, no contract would have existed and B would have no cause of action against A.

According to the hypothetical, B would argue that the California choice-of-law provision implicitly excluded the Convention (to determine whether, due to the additional choice-of-law provision, there was a contract) and that therefore the court ought to apply § 2-207. If B's argument was successful, the contract would be upheld, therefore allowing the breach of contract action to commence. On the other hand, A would argue the opposite—B's choice of law provision *did not* explicitly exclude the Convention—thus, according to Article 19, the provision in actuality nullified the contract. Therefore, if A were successful, no breach of contract action could possibly arise.

When compared to § 2-207, the rule of article 19 is readily distinguishable in several respects. Like § 2-207, article 19 contemplates that a varying response can form a contract thus modifying the mirror image rule. A significant difference emerges, however, when the two formulations are applied to situations in which the offeror objects to the modified term or in which the modified term constitutes a material alteration. In such cases, the UCC preserves the contract omitting the offensive term.¹¹² The Convention, in contrast, precludes formation under such circumstances, characterizing materially variant replies as counter-offers. Additionally, it appears to allow offerors the opportunity to prevent formation by objecting to even non-material discrepancies.¹¹³ Further because article 19(3)'s non-exhaustive list of terms presumed material includes those most typically found in sale of goods contracts, the exception to the non-formation counter-offer principle of article 19(1) appears very narrow. Also, article 19 treats less vaguely than § 2-207 certain aspects of the modified response situation that have engendered much debate in American courts.

It is evident that the UCC-Convention choice-of-law issue determines the outcome. In this example under the UCC, the B's in-

¹¹¹ Either because it relates to "the settlement of disputes" within the meaning of 19(3) or because it in fact alters significantly the rights and duties of the parties.

¹¹² See *supra* note 109 and accompanying text.

¹¹³ See J. Clark Kelso, Note, *The United Nations Convention on Contracts for the International Sale of Goods: Contract Formation and the Battle of the Forms*, 21 COLUM. J. TRANSNAT'L L. 528, 545-48 (1982).

voice would "operate as an acceptance" irrespective of the proposed choice-of-law clause, while under the Convention, no contract would form, the invoice being a counter-offer.¹¹⁴ This is a clear case of rights and duties being affected by the application of one law to the exclusion of another. The problem is, however, how would a court in this example decipher whether there *was* an exclusion of the Convention?

Does B's insertion of a California choice-of-law provision into its invoice necessarily result in the Convention's exclusion? Article 6, in all of its ambiguity, states that the parties *may* exclude or derogate from the Convention. How ought one exclude it? The history of the UNCITRAL conferences reveals that the drafters purposely omitted the second sentence of ULIS article 3.¹¹⁵ This sentence was eliminated due to the concern by some representatives that special reference to an "implied" exclusion might encourage courts to prematurely conclude, on insufficient grounds, that the Convention had been wholly excluded.¹¹⁶ Reading this alone, a judge presiding over the case would arguably find that the Convention must therefore be excluded *explicitly*. Thus, as the Convention was *not* explicitly excluded in the above contract between A and B, the Convention would preside; this would result in said contract's dissolution (luckily for A).

On the other hand, transcripts from later UNCITRAL conferences reveal that a proposal had been made to the effect that the Convention, in order to be excluded, must be done explicitly.¹¹⁷ However, members of the conference in support of *implicit* exclusion dismissed this proposal, stating, in part that "it may be perfectly clear that the parties do not wish the Convention to apply even though this intention was not stated expressly."¹¹⁸ Thus, as we are left with no answer to our interpretative question of article 6, we find that the legislative history of the Vienna Convention is

¹¹⁴ Article 19 of the Convention does not apply to confirmatory memoranda but only to replies to offers which purport to be acceptances. See generally CISG, *supra* note 1, art. 19.

¹¹⁵ See W/G 2 paras. 43-46, II Yearbook 55, reprinted in HONNOLD, DOCUMENTARY HISTORY, *supra* note 21, at 61. See also *supra* notes 70-72 and accompanying text.

¹¹⁶ *Id.*

¹¹⁷ UNCITRAL X Annex I, paras. 56-58, VIII Yearbook 29. At the diplomatic conference: Com. I Art. 5, para. 3(i), (v)-(vii); SR. 3, paras. 35-65; SR. 4, paras. 1-95. HONNOLD, DOCUMENTARY HISTORY, *supra* note 21, at 322.

¹¹⁸ *Id.*

not a useful tool in deciding whether the Convention had been excluded from the contract between A and B.¹¹⁹

Moreover, another argument against *explicit* exclusion is that the Convention itself envisaged exclusion or modification of its provisions by other than express means, as in article 8, on usages.¹²⁰ In the above example, however, because this was the first contract between A and B, there are no prior usages/dealings which may aid in the interpretation of this contract. Moreover, A, the breacher, would clearly prefer that the contract be declared void and would therefore argue that B's mere choice-of-law provision did not exclude the Convention. Thus, in the interests of justice, it would be inherently unfair to require B (the victim of this breach of contract action) to exclude the Convention *explicitly*.

D. Senate Hearings

The Senate, while conducting hearings on the ratification of the Convention, also addressed the question of exclusion.¹²¹ Unfortunately, however, it remained largely unanswered. At a hearing on exclusion of the Convention, they raised the question as to whether parties can 'opt out' of the Convention's application. The answer stated that there are three ways of doing so:

¹¹⁹ See generally Murphy, *supra* note 74, at 736 ("By deleting references to express and implied exclusion [which had been a part of analogous provisions in ULIS and ULF], UNCITRAL adopted ambiguous language as a compromise to these opposing views. This language revived a longstanding debate over the means by which parties may exclude the uniform law.") (footnote omitted).

¹²⁰ Article 8 of the Convention states:

- (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
- (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
- (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

CISG, *supra* note 1, art. 8.

¹²¹ See *Senate Hearings*, *supra* note 26; see also INTERNATIONAL SALE OF GOODS: HANDBOOK, *supra* note 1, at 93-94 ("Agreements to exclude application of the CISG should, of course, be carefully worded.").

(1) They could make no mention of the Convention in the contract. In this case, the provisions of the Convention would be applicable *only* in the circumstances set forth in Article 1.

(2) They could insert a provision in the contract which would provide simply that the Convention does not apply. In this case, the forum would not apply the Convention and would apply its own choice of law rules in selecting the applicable law. If the state whose law was selected had adopted the Convention, the forum would not apply the provisions of the Convention and would presumably apply the pertinent provisions of that state's sales law.

(3) They could provide that the Convention should not be applicable and go on to designate the applicable law. This could be done in a number of different ways. Set forth below are three specimen provisions and notes on them that U.S. legal experts whom the Department of State has consulted believe would adequately serve this purpose, at least in U.S. forums. They are intended to serve only as illustrations. Other suitable provisions could be devised.¹²²

The first suggestion provides for implicit exclusion, while the second and third prescribe explicit exclusion. As such, none of the above suggestions provide a clear answer to a situation as described above between A and B.¹²³

Subsequently, the Senate listed three possible provisions with which to exclude the Convention.¹²⁴ However, a note to provision

¹²² See *Senate Hearings*, *supra* note 26 at 303.61.

¹²³ These propositions suggest that the Convention may be excluded by either making no mention thereof, or by specifically excluding it. However, this is contrary to positions taken by both the framers of the Convention and academic critics. See *generally* notes 75-106 and accompanying text.

¹²⁴

A. The rights and obligations of the parties under this agreement shall not be governed by the provisions of the 1980 U.N. Convention on Contracts for the International Sale of Goods; rather, these rights and obligations shall be governed by the law of the State of New York, including its provisions of the Uniform Commercial Code.

....

B. The rights and obligations of the parties under this agreement shall not be governed by the provisions of the 1980 U.N. Convention on Contracts for the International Sale of Goods; rather, these rights and obligations shall be governed by the law of the State of New York.

C. The rights and obligations of the parties under this agreement shall be governed by the law of the State of New York, including its provisions of the Uniform Commercial Code.

Senate Hearings, *supra* note 26 at 303.61.

C was added by the Senate, contemplating the presence of ambiguities.¹²⁵ However, what the Senate did not contemplate was a situation where the parties *mention* the law of a specific state, but *not* the U.C.C. What would be done in *that* situation? Moreover, the Senate conceded to the fact that another country may *not* apply uniform standards, thus subjecting article 6 to more misinterpretations.

What would a court of law do if a provision of an international sales contract did not *make clear* its intention to exclude the Convention? Apparently, excerpts from Senate hearings do not provide the solution to our query.

E. Cases

Due to the Convention's virtual infancy in the international arena, there is little case law available on the subject.¹²⁶ Therefore, court decrees are only a minor aid in the interpretation of article 6.

Some court cases which discussed the Convention are, however, notable. The court in *Orbisphere Corp. v. United States* held that exclusion of the Convention must be done *explicitly*.¹²⁷

On the other hand, in *Filanto, S.p.A. v. Chilewich International Corp.* the court stated that a choice-of-law provision would effectively exclude the Convention.¹²⁸ This holding is inconsistent with

¹²⁵ *Note to provision C*: There is a possibility that someone might argue that the word "law" in this provision would include the CISG, as the CISG would be a part of Federal law.

Such an interpretation would not be adopted by a court in the United States. The provision as drafted would *make clear* the intention to avoid the application of the CISG. This interpretation would almost certainly follow from the fact that reference is made to the provisions of the UCC. There is always the possibility, however, that the courts of some foreign country might take a different view and determine that the provision, as drafted, would not exclude application of the CISG.

Id. (emphasis added).

¹²⁶ The court in *Filanto, S.p.A. v. Chilewich International Corp.*, stated, "there is as yet virtually no U.S. case law interpreting the Sale of Goods Convention . . ." 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992).

¹²⁷ *Orbisphere Corp. v. United States*, 726 F. Supp. 1344 (Ct. Int'l Trade 1989). [F]or international contracts for the sale of goods between U.S. parties and foreign parties . . . concluded on or after 1 January 1989, the applicable commercial law is not the U.C.C., but rather, the United Nations Convention on Contracts for the International Sale of Goods unless the parties *expressly* contract out of the Convention's coverage.

Id. at 1355 n.7 (emphasis added) (citation omitted).

¹²⁸ 789 F.Supp. 1229 (S.D.N.Y. 1992). "[A]bsent a choice-of-law provision, and with certain exclusions not here relevant, the Convention governs all contracts between parties

that of *Orbisphere*. For example, if a provision in an international sales contract specified that California choice-of-law would apply, the Convention would not necessarily be excluded.¹²⁹ Moreover, as the mere reference to California choice-of-law is not an *explicit* exclusion, the Convention would still apply according to a court following the *Orbisphere* decision. It is evident that American case law is unsettled in this area. The court in *Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.* declined to address the issue of application of the Convention.¹³⁰ However, looking ahead, it did note that the district court might have to address it on remand.¹³¹

Although new and virtually unchartered, the Convention, specifically article 6, is already a source of confusion and misinterpretation in U.S. courts. The issue of proper exclusion will not "go away." As time passes, it will frequently reappear. To avoid this perplexing trend, the question of exclusion must be answered carefully and followed uniformly.

V. CONCLUSION: HOW TO BE OR NOT TO BE!

As time continues and the Convention becomes more universally accepted, parties to international sales contracts, and ultimately courts, will have no choice but to use the Convention. The Convention applies automatically to all sales contracts between parties of different states. Therefore, if a party desires to exclude the Convention, they will have to do so *correctly* in order to avoid its application. Thus, in light of scholarly analysis, Senate hearings, court decisions, and the legislative history of the Draft Convention, the proper method of exclusion can be accomplished by one of two methods: (1) *explicitly* exclude the Convention and specify a choice-of-law clause to govern in the Convention's absence or (2)

with places of business in different nations, so long as both nations are signatories to the Convention." *Id.* at 1237.

¹²⁹ See generally *supra* note 99 and accompanying text.

¹³⁰ *Beijing Metals & Mineral Import/Export Corp. v. American Business Center*, 993 F.2d 1198 (5th Cir. 1993).

We apply Texas law in this diversity action . . . ABC maintains, instead, that MMB's claim is governed by the United Nations Convention on Contracts for the International Sale of Goods As noted in *Filanto S.p.A. v. Chlewich International Corp.*, "there is as yet virtually no U.S. case law interpreting the Sale of Goods Convention."

Id. at 1183 n.9 (citations omitted).

¹³¹ *Id.*

manifestly *imply*, through the nature of the contract or the intentions of the parties, that the Convention is to be excluded from application.¹³²

These two methods would appease the Convention's drafters, users and commentators. Exclusion could be accomplished by explicit *or* implicit means, using a "reasonable person" test. On the one hand, for explicit exclusion, the parties must include a choice-of-law clause to govern in the Convention's absence. On the other hand, for an implicit exclusion to occur, a reasonably prudent party to a contract would conclude, either based upon the other party's manifested intention or basic contract interpretation,¹³³ that the Convention has been excluded. Thus, in the absence of the first or second method of exclusion, a party to a contract would *correctly* infer that the Convention has not been *excluded*. There is vast potential for the Convention's broad use and acceptance; all that must be accomplished is uniform interpretation of its provisions.

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¹³² Here, a "reasonably prudent person" would view the party or contract as having consciously excluded the Convention.

¹³³ See HONNOLD, *supra* note 3 at 106.

While parties of Contracting States are left to decide whether they may impliedly opt-out of the Convention, they should be able to prove their choice using available means of contract interpretation. These means coupled with the legislative history of Article 6 should provide a strong basis for implied exclusion.

Dennis J. Rhodes, Comment, *The United Nations Convention on Contracts for the International Law of Goods: Encouraging the Use of Uniform International Law*, 5 TRANSNAT'L LAW. 387, 402 (1992) (footnote omitted).