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United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law

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Maureen T. Murphy

Abstract

This Note argues that it is essential to the success of the Sale of Goods Convention that the current controversy regarding exclusions be resolved uniformly by all ratifying nations. Part I discusses the negotiations that led to the Sale of Goods Convention's exclusion provision. Part II identifies the Sale of Goods Convention's primary goal of uniformity and the arguments promoting implied exclusions. Part III examines the arguments favoring express exclusions. This Note concludes that a uniform resolution allowing only express exclusions would be most consistent with the overriding principles of the Sale of Goods Convention.

UNITED NATIONS CONVENTION ON CONTRACTS
FOR THE INTERNATIONAL SALE OF GOODS:
CREATING UNIFORMITY IN
INTERNATIONAL SALES LAW

INTRODUCTION

The unprecedented surge in international commerce during recent decades has furnished a need for a workable uniform law for the international sale of goods.¹ On January 1, 1988, the United Nations Convention on Contracts for the International Sale of Goods (the "Sale of Goods Convention")² entered into force by eleven of the fifteen nations that ratified it.³ It provides uniform substantive rules of law governing the formation of contracts for the international sale of goods and seller's and buyer's rights and obligations.⁴ However, a controversy exists regarding article 6 of the Sale of Goods Convention, which permits parties to exclude the application of the Sale of Goods Convention and to apply their choice of law to their international contract.⁵ It has been questioned whether parties may impliedly exclude the uniform law by trade practices and course of dealings.⁶ Divergent views revealed by nations during negotiations may result in inconsistent interpreta-

1. See Posch, *On the Law of International Sale of Goods: An Introduction*, in SURVEY OF THE INTERNATIONAL SALE OF GOODS 3 (1986).

2. S. DOC. NO. 9, 98th Cong., 1st Sess. 23 (1983), 52 Fed. Reg. 6264 (1987), 19 I.L.M. 668 (1980) [hereinafter Sale of Goods Convention].

3. U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1988, at 365 (1988). The Sale of Goods Convention was done at Vienna on April 11, 1980 and entered into force on January 1, 1988. *Id.* Parties to the Sale of Goods Convention are Argentina, Austria, China, Egypt, Finland, France, Hungary, Italy, Lesotho, Mexico, Sweden, Syria, United States, Yugoslavia, and Zambia. *Id.* The Sale of Goods Convention entered into force for Finland and Sweden on December 15, 1988, and for Austria and Mexico on December 29, 1988. *Id.*

4. See Sale of Goods Convention, *supra* note 2; Pfund, *U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods: Official English Text*, 52 Fed. Reg. 6262 (1987).

5. See Sale of Goods Convention, *supra* note 2, art. 6, S. DOC. NO. 9, at 23, 52 Fed. Reg. at 6265, 19 I.L.M. at 673.

6. See J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 106 (1982); 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); Note, *Contracts for the International Sale of Goods: Applicability of the United Nations Convention*, 69 IOWA L. REV. 209, 235-39 (1983-84).

tions of the Sale of Goods Convention,⁷ threatening the uniform law's success.⁸

This Note argues that it is essential to the success of the Sale of Goods Convention that the current controversy regarding exclusions be resolved uniformly by all ratifying nations. Part I discusses the negotiations that led to the Sale of Goods Convention's exclusion provision. Part II identifies the Sale of Goods Convention's primary goal of uniformity and the arguments promoting implied exclusions. Part III examines the arguments favoring express exclusions. This Note concludes that a uniform resolution allowing only express exclusions would be most consistent with the overriding principles of the Sale of Goods Convention.

I. *LEGISLATIVE HISTORY OF THE SALE OF GOODS CONVENTION'S EXCLUSION PROVISION*

On April 11, 1980, the United Nations Conference on Contracts for the International Sale of Goods adopted the Sale of Goods Convention.⁹ Prior to the Sale of Goods Convention, private international law groups made several unsuccessful attempts to unify international sales law.¹⁰ The primary purpose of an international sales law is to provide a uniform law to apply to the private transactions of companies with business in different nations.¹¹ The adoption of the Sale of Goods

7. See *infra* notes 14-75, 97-99, 118-22 and accompanying text.

8. See Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 VA. J. INT'L L. 729 (1987); Note, *Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods*, 97 HARV. L. REV. 1984, 1988 (1984).

9. See Sale of Goods Convention, *supra* note 2, 19 I.L.M. at 671; MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DEC. 1988, at 367, U.N. Doc. ST/LEG/SER.E/7, U.N. Sales No. E.88.V3 (1989). The Sale of Goods Convention was held open for signature at the New York United Nations Headquarters from April 11, 1980 to September 30, 1981. *Id.*

10. See Posch, *supra* note 1, at 5-8.

11. See Sale of Goods Convention, *supra* note 2, art. 1, S. Doc. No. 9, at 22, 52 Fed. Reg. at 6264, 19 I.L.M. at 672. Article 1(1)(b) also provides that the Sale of Goods Convention will apply, although neither party to the contract is a member of it, when the rules of private international law subject the contract to the application of the laws of a signatory nation. *Id.* Article 95 permits a nation to declare itself not bound by article 1(1)(b) at the time of "ratification, acceptance, accession, approval, or ratification." *Id.* art. 95, S. Doc. No. 9, at 41, 52 Fed. Reg. at 6278, 19 I.L.M. at 693. The United States made this declaration in order to delimit the sphere of the Sale of Goods Convention's application. See Pfund, *supra* note 4, at 6262.

Convention is acclaimed as the world's first potentially successful step towards uniform international trade law.¹² However, the long-standing debate over the means by which parties may exclude the uniform law and choose an alternate law to govern their contract still remains.¹³

A. *Early Attempts at Uniformity*

The controversy over implied and express exclusion has existed since the earliest efforts to draft a uniform law for the international sale of goods.¹⁴ The traditional commercial nations favored the principle of party autonomy, which grants private parties maximum freedom in negotiating their contracts.¹⁵ These nations favored a uniform law that would exist as one alternative that parties could choose to apply to their transactions.¹⁶ As a result, these nations sought a uniform law that allowed parties to vary its effect as they desired.¹⁷ In contrast, nations with less experience in commercial contract law wanted a uniform law's protection.¹⁸ Generally, these nations favored a uniform law that governed all transactions, not as one of several laws from which parties could choose.¹⁹ They feared that merchants in stronger nations would escape from the uniform law by utilizing contracts of adhesion,²⁰ as well as

12. See Posch, *supra* note 1, at 6-7.

13. See *infra* notes 55-75 and accompanying text.

14. II DIPLOMATIC CONFERENCE ON THE UNIFICATION OF LAW GOVERNING THE INTERNATIONAL SALE OF GOODS—THE HAGUE, 2-25 APRIL 1964, at 26, 46 (1966) [hereinafter II Diplomatic Conference]. For the origin of the debate, it is sufficient to recall that the International Institute for the Unification of Private Law ("UNIDROIT"), the headquarters of which are in Rome, produced a draft in 1935 referred to as the "Rome draft," which required parties expressly to decide the law that would apply to their contract in order to exclude the uniform law's application. *Id.* at 46.

15. See *infra* notes 33-34, 66 and accompanying text.

16. See *infra* notes 34-36, 66-68 and accompanying text.

17. See *id.*

18. See *infra* notes 46, 62-65, 123-30 and accompanying text.

19. See *id.*

20. A contract of adhesion is defined as a

[s]tandardized contract form offered to consumers of goods and services on essentially 'take it or leave it' basis without affording consumer[s] realistic opportunity to bargain and under such conditions that consumer[s] cannot obtain desired product or services except by acquiescing in form contract. Distinctive feature of adhesion contract is that weaker party has no realistic choice as to its terms.

BLACK'S LAW DICTIONARY 38 (5th ed. 1979). An example of a contract of adhesion is

trade usages²¹ that took advantage of merchants in developing nations.²² Thus, the uniform laws attempted to balance the principle of party autonomy with the need for protection of merchants in developing nations.²³

In 1930, the International Institute for the Unification of Private Law ("UNIDROIT")²⁴ began drafting a convention to unify law on the international sale of goods regarding the rights and obligations of buyers and sellers.²⁵ In 1956, UNIDROIT issued a Draft Uniform Law on the International Sale of Goods (the "1956 Draft"), which defined such rights and obligations of buyers and sellers in the international sale of goods.²⁶

To compose the 1956 Draft, a special commission was formed (the "Special Commission"),²⁷ which wanted to give parties increased flexibility in formulating international contracts.²⁸ The Special Commission proposed an article that per-

when an individual goes to purchase a new automobile and he must sign a standard form to consummate the contract of sale. This form is prepared by the manufacturer, and the purchaser must take it or forego the sale even though he is dealing with an independent dealer. J. CALAMARI & J. PERILLO, *CONTRACTS* 6 (2d ed. 1977). "Dangers are inherent in standardization, however, for it affords a means by which one party may impose terms on another unwitting or even unwilling party." E. FARNSWORTH, *CONTRACTS* 295 (1982).

21. A usage of trade is defined as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." U.C.C. § 1-205(2) (1978).

22. See *infra* notes 46, 62-65 and accompanying text.

23. See *infra* notes 36, 73-75 and accompanying text.

24. UNIDROIT examines methods for coordinating and harmonizing private law between nations or groups of nations and prepares for various nations to progressively adopt uniform private legislation. *LAW AND LEGAL INFORMATION DIRECTORY* 55 (5th ed. 1988). UNIDROIT requested a committee of European scholars, led by Professor Ernst Rabel, to prepare a draft of unification of sales laws in the early 1930s. Posch, *supra* note 1, at 5-6. World War II impeded the committee's efforts. *Id.* At the end of hostilities, the scholars resumed their endeavors. *Id.* at 6.

25. J. HONNOLD, *supra* note 6, at 49.

26. II Diplomatic Conference, *supra* note 14, at 3.

27. Twenty-one nations convened at the Hague in 1951 where they instituted a special commission (the "Special Commission") to prepare a revision of a draft uniform sales law, which was prepared by a committee of European scholars. Honnold, *The 1964 Hague Conventions and Uniform Laws on the International Sale of Goods*, 13 *AM. J. COMP. L.* 451 (1964). The draft uniform sales law was drafted in 1935 and subsequently revised and released in 1939. *Id.*; see *supra* note 14 (discussing the 1935 draft).

28. See II Diplomatic Conference, *supra* note 14, at 46. The Special Commission did not want the Uniform Law to be obligatory on parties, because parties may want

mitted parties to exclude the convention by designating the municipal law that should apply either by express clause or "necessary implication" from the contract's terms.²⁹ Some members of the Special Commission opposed this proposal, urging that the article should permit exclusions to be determined by looking beyond the contract's terms to trade usages and parties' conduct.³⁰ The Special Commission rejected these arguments and retained the language requiring contractual language that excluded the uniform law.³¹

The Special Commission circulated the 1956 Draft to nations and the International Chamber of Commerce for comment.³² The comments on the 1956 Draft exclusion provision evidenced two divergent views regarding whether parties could exclude the uniform law's application by implication to enable them to apply their choice of law. Some nations, such as Switzerland, claimed the provision gave a trial judge too much discretion to decide when a contract excluded the uniform law.³³ Other nations, such as the Federal Republic of Germany ("West Germany"), feared the provision required

to substitute a law that they feel is better suited to their contract's circumstances. *Id.* at 30.

29. *See id.* at 7. Article 6 states, "[t]he parties may entirely exclude the application of the present law provided that they indicate the municipal law to be applied to their contract. Such indication must be an express term of the contract or arise by necessary implication from its provisions." *Id.*

30. *See id.* at 46.

31. *See id.* at 31. To further eliminate misunderstandings between parties, the Special Commission stated in its report that "[a] term merely specifying a particular jurisdiction should not alone . . . be regarded as excluding the Uniform Law." *Id.* at 46.

32. Tunc, *Commentary on the Hague Conventions of the 1st of July 1964 on International Sale of Goods and the Formation of the Contract of Sale*, in I DIPLOMATIC CONFERENCE ON THE UNIFICATION OF LAW GOVERNING THE INTERNATIONAL SALE OF GOODS—THE HAGUE, 2-25 APRIL 1964, at 359 (1966) [hereinafter I DIPLOMATIC CONFERENCE]. The International Chamber of Commerce was founded in Paris in June of 1920. *See* Y.B. INT'L ORGANIZATIONS B1490 (1985). It is an organization of world business that aims to represent all international business's economic aspects, express and ascertain decisions of those involved in international trade, promote free competition in world trade, harmonize terminology and trade practices, improve business conditions and solve international economic problems, encourage interaction and understandings among various nations, and promote world peace. *Id.*

33. II Diplomatic Conference, *supra* note 14, at 175. Switzerland proposed that article 6 should provide that "[t]he parties can totally exclude the operation of the present Law provided that they expressly determine the municipal law which will be applicable to their contract." *Id.* Switzerland found the words "or arise by necessary implication from [the] provisions [of the contract]" to be unsatisfactory due to the

that the uniform law apply even where the parties' previous trade practices and dealings indicated otherwise.³⁴ Other nations objected to an express exclusion as a prerequisite of the exclusion provision.³⁵ In 1963, the Special Commission modified the 1956 Draft to try to resolve these concerns and to develop a convention that would be ratified by nations.³⁶

This draft (the "1963 Draft")³⁷ permitted express exclusion but altered "necessary implication" to permit only those exclusions that can be definitely ascertained by the contract's provisions.³⁸ This provision enabled parties to exclude the uniform law by either an express contractual provision or a contract term that indicates their intent to exclude.³⁹ At the Hague Meetings, which were convened to debate the 1963 Draft,⁴⁰ the exclusion provision provoked further debate.⁴¹ Some nations were concerned that the language did not go far enough to grant parties freedom in negotiating their contracts.⁴² For example, the United Kingdom, Belgium, and

uncertainty it necessarily creates, because a judge will have to determine under what circumstances the parties' choice of law is clearly indicated by the contract. *Id.*

34. *See id.* at 86. West Germany argued that article 6 in its present form did not sufficiently protect the principle of freedom of contract. *Id.* West Germany feared the uniform law's provisions would be applied to a contract despite the parties' wishes. *Id.* Thus, West Germany wanted article 6 amended to further protect party autonomy. *Id.* West Germany asserted that this principle corresponds to German law, French law, and the law of many other nations. *Id.*

35. For example, Portugal asserted that "it is enough if the special rules to which the parties wish to refer clearly follow from the provisions of the contract." *Id.* at 144. Similarly, the Netherlands asserted it had no objections to the principles provided for in the language of article 6. *Id.* at 137.

36. Tunc, *supra* note 32, at 359.

37. II Diplomatic Conference, *supra* note 14, at 213.

38. *Id.* art. 6, at 213. Article 6 states that

[t]he parties may entirely exclude the application of the present law provided that they indicate the municipal law to be applied to their contract. . . . The references, declarations or indications provided in the preceding paragraphs are to be subject of an express term or to clearly follow from the provisions of the contract.

Id.

39. *Id.*

40. *See* Tunc, *supra* note 32, at 359. Through the initiative of the government of the Netherlands, meetings were held at The Hague in April 1964 to discuss the 1963 draft. *Id.* Article 6 was discussed during the second meeting, which was held on April 3, 1964. Records, Second Meeting (Apr. 3, 1964), in I Diplomatic Conference, *supra* note 32, at 24-28.

41. I Diplomatic Conference, *supra* note 32, at 25-26, 40.

42. *Id.* at 26.

Israel wanted to expand exclusions to include factors beyond the contract's language.⁴³ Other nations, UNIDROIT, and the International Chamber of Commerce stated the language went too far in permitting parties to exclude the uniform law.⁴⁴ They argued that parties should be required to state expressly what law was to apply to their contract and, if the parties failed to state an alternative law, the uniform law should apply.⁴⁵ Yugoslavia asserted that the paramount concern in drafting the exclusion provision was party equality.⁴⁶ The majority vote approved an amendment allowing exclusion by implication without requiring that such exclusion be implied only from the terms of the contract.⁴⁷

The Uniform Law on the International Sale of Goods (the "ULIS")⁴⁸ as adopted in 1964 states, "[t]he parties to a contract of sale shall be free to exclude the application thereto of the present Law either entirely or partially. Such exclusion may be express or implied."⁴⁹ Simultaneously, a separate Uniform Law on the Formation of Contracts for the International Sale of Goods (the "ULF")⁵⁰ was finalized in 1964 at the

43. *Id.* The United Kingdom stated that "there should be as much freedom as possible for derogation from the Uniform Law. The British amendment allowed derogations to be made expressly or impliedly, which seemed to be the best possible formula." *Id.* Israel emphasized the importance of giving the principle of party autonomy full effect. *Id.* Belgium proposed an amendment that "the Uniform Law should state clearly that one can exclude the application of the Law either for all of its provisions or for part of them" and that "the statement of conditions, under which the exclusion of the Uniform Law was valid, should be omitted." *Id.* at 25. The Belgian delegate stated that autonomy of intention should prevail in all cases. *Id.*

44. *Id.* at 25. Switzerland opposed the language of article 6 primarily because of the complications it may cause for a judge. *Id.* Switzerland expressed similar concerns in its comments on the 1956 draft. *See supra* note 33. UNIDROIT and the International Chamber of Commerce both rejected the idea that parties could imply a choice of law in order to exclude the uniform law. I Diplomatic Conference, *supra* note 32, at 25-26.

45. *Id.* at 25.

46. *Id.* at 28.

47. *Id.* at 276. This amendment was adopted by a nearly split vote of 11 in favor, 10 against, and three abstentions. *Id.*

48. Convention Relating to a Uniform Law on the International Sale of Goods, annex, Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107 [hereinafter ULIS]. The 1964 ULIS came into force on August 18, 1972, six months after it was ratified by five nations in accordance with article X(1). *Id.* at 109.

49. *Id.* at 123.

50. 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]. It came into force on August 23, 1972, six months after the fifth nation ratified it as

Hague Meetings.⁵¹ The ULF provides that its provisions apply unless parties expressly or impliedly agree to the application of other rules.⁵²

The 1964 ULIS and ULF are currently in force.⁵³ However, they have not been successful, because the number of member nations is very limited and most are from Western Europe.⁵⁴ Thus, neither convention has been successful in unifying international law on the sale of goods.

B. *Adoption of the Sale of Goods Convention*

Due to the continuing desire for uniformity, the United Nations established the United Nations Commission on International Trade Law ("UNCITRAL")⁵⁵ in 1965. UNCITRAL is authorized to create a new uniform law for the international

required by article VIII(1). *Id.* at 171. The ULF was the result of UNIDROIT's efforts to draft rules for the actual formation in the international sale of goods, which began in 1951. Honnold, *supra* note 27, at 451.

51. ULF, *supra* note 50, at 169; see J. HONNOLD, *supra* note 6, at 49.

52. ULF, *supra* note 50, art. 2, at 187. Article 2 states, "[t]he provisions of the following Articles shall apply except to the extent that it appears from the preliminary negotiations, the offer, the reply, the practices which the parties have established between themselves or usage, that other rules apply." *Id.*

53. See *supra* notes 49-50.

54. Only nine nations have become members of the ULIS: Belgium, the Federal Republic of Germany, Gambia, Great Britain, Israel, Italy, Luxembourg, the Netherlands, and San Marino. See Posch, *supra* note 1, at 6. The United States probably did not adopt the 1964 ULIS because it feared that if a new statute solely controlling international sale was presented at the same time as the Uniform Commercial Code, the nationwide success of the Uniform Commercial Code would be impeded. See *id.* In the United Kingdom, the ULIS was enacted as the Uniform Law on International Sales Act of 1967, which entered into force in 1972. The Uniform Laws on International Sales Act, 1967, ch. 45; see Posch, *supra* note 1, at 6. Parties must expressly adopt the law for it to apply. The Uniform Laws on International Sales Act, 1967, ch. 45; see Posch, *supra* note 1, at 6. However, no parties have adopted it. The Uniform Laws on International Sales Act, 1967, ch. 45; see Posch, *supra* note 1, at 6. Thus, it can be disregarded in the realm of British law. *Id.*

55. See *Establishment of the United Nations Commission on International Trade Law*, G.A. Res. 2205, 21 U.N. GAOR Supp. (No. 16) at 99, U.N. Doc. A/6316 (1966), reprinted in [1970] 1 Y.B. UNCITRAL 65-66, U.N. Doc. A/CN.9/SER.A/1970. The United Nations General Assembly adopted a 1965 Hungarian resolution requesting the establishment of the United Nations Commission on International Trade Law ("UNCITRAL"). *Id.* The resolution provides for the participation of twenty-nine states, elected by the General Assembly for a six-year term. *Id.* The General Assembly is required to observe a distribution of seats for participation: seven from African States, five from Asian States, four from Eastern European States, five from Latin American States, and eight from Western European and other States. *Id.*

sale of goods.⁵⁶ UNCITRAL established a working group⁵⁷ that subsequently combined revisions of the ULIS and the ULF, resulting in the Sale of Goods Convention.⁵⁸

The United Kingdom had submitted a study it prepared on the exclusion provision of the ULIS to the United Nations Secretary-General during discussions on the ULIS text in 1971.⁵⁹ The study included comments by Tunisian and Kenyan representatives, who acted as consultants to the United Kingdom in the study's preparation.⁶⁰ The study once more portrayed divergent views on whether parties should be permitted to exclude impliedly its application. These views parallel those enumerated during discussions on the 1956 and 1963 drafts.⁶¹ The representative of Tunisia proposed that the working group delete or modify the exclusion provision in the ULIS.⁶² Tunisia argued there were two dangers inherent in the retention of the provision.⁶³ First, that in its present form it permitted a strong party to "impose its will" on a weaker party.⁶⁴ Second, it defeats the goal that a uniform law have uniform application.⁶⁵

The United Kingdom responded in opposition to the representative of Tunisia's arguments by emphasizing that international trade is based upon free negotiations and the principle of freedom of contract should be retained.⁶⁶ The United

56. *Id.*; see J. HONNOLD, *supra* note 6, at 49-50.

57. See Honnold, *The Draft Convention on Contracts for the International Sale of Goods: An Overview*, 27 AM. J. COMP. L. 223, 225 (1979). The Working Group was comprised of a cross-section of the Commission's members. *Id.*

58. *Id.* at 226. This task was completed in nine annual sessions. *Id.*

59. *Analysis of Comments and Proposals Relating to Article 1-17 of the Uniform Law on International Sale of Goods (ULIS) 1964: Note by the Secretary-General*, U.N. Doc. A/CN.9/WG.2/WP.6 (1970) [hereinafter *ULIS Analysis*], reprinted in [1971] 2 Y.B. UNCITRAL 37, 43, U.N. Doc. A/CN.9/SER.A/1971.

60. *Id.*

61. See *supra* notes 27-49 and accompanying text.

62. See *ULIS Analysis*, *supra* note 59, reprinted in [1971] 2 Y.B. UNCITRAL at 43. Tunisia's representative did not want parties to be able to modify necessary elements of the contract that the Uniform Law explicitly enumerated. See *id.*

63. See *id.* at 43-44.

64. See *id.* at 44.

65. See *id.*

66. See *id.* Tunisia, on the other hand, felt the principle of party autonomy had lost its significance in recent years because all nations' economic systems intervene in individuals' relations. The individuals only freedom is to enter contracts that adhere to nation's economic and financial rules. *Id.* at 43-44.

Kingdom did not believe it would be unjust to the weaker party if the uniform law were substituted by the stronger party's law, "since every national law attempted to strike an equitable balance between the rights of the buyer and those of the seller."⁶⁷ The United Kingdom's report suggested that the present language of the ULIS exclusion provision be retained, and Kenya agreed.⁶⁸

In April 1980, sixty-two nations participated in the United Nations Conference on Contracts for the International Sale of Goods in Vienna, where the Sale of Goods Convention was adopted.⁶⁹ On January 1, 1988, it entered into force in member nations.⁷⁰ The Sale of Goods Convention contains certain provisions that are choice of law rules.⁷¹ Article 6 permits parties to exclude its application to their contract in order that they may choose the law to apply to their transactions.⁷² Despite the fact that the working group's draft convention elicited the same opposing views regarding exclusion, the committee decided to make no substantive changes in the draft.⁷³ The final language of article 6 is as follows: "[t]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."⁷⁴ By deleting references to express and implied exclusion, UNCITRAL adopted ambiguous language as a compromise to these opposing views. This language revived the long-standing debate over the means by which parties may exclude the uniform law.⁷⁵

67. *Id.* at 44.

68. *Id.*

69. See Sale of Goods Convention, *supra* note 2, 19 I.L.M. at 669.

70. See *supra* note 3.

71. See Sale of Goods Convention, *supra* note 2, arts. 1(1)(a), 6, 95, S. Doc. No. 9, at 22-23, 25, 52 Fed. Reg. at 6264-65, 6278, 19 I.L.M. at 672-73, 693; see also *Recent Developments—International Trade—Hague Convention on the Law Applicable to Contracts for the International Sale of Goods*, Dec. 22, 1986, 28 HARV. INT'L L.J. 526, 534 n.73 (1987).

72. Sale of Goods Convention, *supra* note 2, art. 6, S. Doc. No. 9, at 23, 52 Fed. Reg. at 6265, 19 I.L.M. at 673.

73. *Report of the United Nations Commission on International Trade Law on the Work of its Tenth Session*, 32 U.N. GAOR Supp. (No. 17), U.N. Doc. A/32/17 40, 50 (1977) [hereinafter *International Trade Report*] reprinted in [1977] 8 Y.B. UNCITRAL 11, 29, U.N. Doc. A/CN.9/SER.A/1977.

74. Sale of Goods Convention, *supra* note 2, art. 6, S. Doc. No. 9, at 23, 52 Fed. Reg. at 6265, 19 I.L.M. at 673.

75. See *supra* notes 14-49 and accompanying text.

II. IMPLIED EXCLUSION: A PROPOSED SOLUTION TO ACHIEVE UNIFORM APPLICATION OF THE SALE OF GOODS CONVENTION

It would be deplorable if the nations should, after protracted negotiations, reach agreement . . . and that their several courts should then disagree as to the meaning of what they appeared to agree upon.

Viscount Simonds of the British House of Lords⁷⁶

A. Certainty in Article 6 is Required

The overall purpose of the Sale of Goods Convention is to achieve its uniform application.⁷⁷ Consistent interpretations are critical to the success of all uniform laws.⁷⁸ However, courts have noted that conflicting interpretations of uniform laws exist.⁷⁹ 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.⁸⁰ The language of article 6 strikes a balance between the drafters' opposing positions.⁸¹ While the compromise language enabled parties to sign the Sale of Goods Convention, it now threatens the uniform law's ultimate success.⁸²

76. *Scruttons Ltd. v. Midland Silicones Ltd.*, 1962 App. Cas. 446, 471 (1961).

77. See Sale of Goods Convention, *supra* note 2, art. 7(1), S. Doc. No. 9, at 23, 52 Fed. Reg. at 6265, 19 I.L.M. at 673.

78. See *Sturley*, *supra* note 8, at 729; Sale of Goods Convention, *supra* note 2, art. 7(1), S. Doc. No. 9, at 23, 52 Fed. Reg. at 6265, 19 I.L.M. at 673. Article 7(1) states, "[i]n the interpretation of this Convention, regard is to be had . . . to the need to promote uniformity in its application . . ." *Id.* Article 7(1) is acclaimed as the most basic provision of the Sale of Goods Convention. J. HONNOLD, *supra* note 6, at 60.

79. See, e.g., *General Motors Overseas Operation v. S.S. Goettingen*, 225 F. Supp. 902, 904-05 (S.D.N.Y. 1964). *General Motors* involved actions for liability for cargo damage. The court acknowledged conflicts between German and U.S. interpretations of the term "peril of the sea" derived from the Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the "Hague Rules"). *Id.* at 904. Under German law, a peril of the sea does not have to be an extraordinary event. *Id.* at 905. However, American law regarding peril of the sea emphasizes unforeseeability, which would not free a carrier from liability as readily as German law. *Id.*; see also *TWA v. Franklin Mint Corp.*, 466 U.S. 243, 257-58 & n.31 (1984) (observing nations' conflicts of interpretation of the Warsaw Convention); *Chowdhury v. Mitsui O.S.K. Lines*, 1970 Pak. Legal Dec. (Sup. Ct.) 373, 392-93, [1970] 2 Lloyd's Rep. 272, 282 (Pak.) (observing conflicts of interpretation of the Hague Rules).

80. See *infra* notes 95-99, 118-22 and accompanying text.

81. See *supra* notes 59-75 and accompanying text.

82. See Rosett, *Critical Reflections on the United Nations Convention on Contracts for the*

Because of the ambiguous language of article 6, nations may interpret it in accordance with principles of their own national statutes.⁸³ This has occurred previously with ambiguous language in other international agreements.⁸⁴ For example, West Germany and the United States differ in their interpretation of protection for third parties under the Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the "Hague Rules").⁸⁵ On the one hand, West Germany has indicated it will not require a contract clause to grant third parties the Hague Rule's benefits because of its domestic law's principles.⁸⁶ On the other hand, the United States relies on its own laws to prohibit the Hague Rules from protecting third parties unless the bill of lading contains an explicit clause stating this that satisfies contract requirements.⁸⁷

International Sale of Goods, 45 OHIO ST. L.J. 265, 270-71 (1984). A problem with the Sale of Goods Convention is that the delegates did not reach agreement on its terms by consensus but rather by compromise. *See id.* at 270. Compromise merely entails the formulation of a unified statement of rules, which are subject to divergent understandings and leave the interpreter "at sea without [an] anchor." *Id.*

83. *See Sturley, supra* note 8, at 733. Permissible interpretations of a uniform law may be: totally consistent with the nation's laws, entirely inconsistent with the nation's laws, or partially inconsistent with the nation's domestic laws. *See id.* at 744. A court will generally utilize the interpretation that is consistent with their domestic rules. *See id.*

84. *See supra* note 79 and accompanying text.

85. Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, at 18, 120 L.N.T.S. 155 [hereinafter Hague Rules]. The Hague Rules sought to create a uniform law for allocating responsibilities for cargo losses. *See generally id.* Article 4(2) and 4(5) provide for limitations and exemptions from liabilities for "the carrier" and "the ship" when cargo is lost. *Id.* arts. 4(2), (5), 51 Stat. at 251-52, T.S. No. 931, at 22-24, 120 L.N.T.S. at 167-68. The Hague Rules are ambiguous as to how far a carrier's protection can be extended to protect third parties. *See Sturley, supra* note 8, at 748. They are also ambiguous as to the validity of clauses providing that the carrier's defenses apply to third parties performing the carrier's contractual obligations, which are commonly included in carriers' bills of lading. *See id.* at 748-49.

86. Judgment of July 7, 1960, Bundesgerichtshof, GRSZ, W. Ger., 14 Monatschrift für Deutsches Recht [M.D.R.] 907. This judgment held that parties to a contract could exclude a third party's future liability for negligence by implication. *Id.* This decision was based on the West German principle that an exclusion clause's purpose is material, not its terms. *Id.* at 907-08. Relying on this decision, the West German court subsequently treated the master of a vessel's entitlement to the limitation of a carrier's liability as a firmly grounded principle. *See* Judgment of Jan. 21, 1971, Bundesgerichtshof, GRSZ, W. Ger., 25 M.D.R. 462, 462-63; Sturley, *supra* note 8, at 771. In West Germany, a third party can always rely on a clause in a bill of lading due to section 328 of the German Civil Code, which permits a contract to stipulate performance for a third party's benefit, and enables the third party to demand such performance. BÜRGERLICHES GESETZBUCH [BGB] § 328(1) (W. Ger.).

87. *See Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 302 (1959).

Nations have made other interpretations of the Hague Rules based on their domestic laws.⁸⁸

Signatory nations may use their own national statutes as a guide in interpreting article 6.⁸⁹ For example, the United States has indicated that parties are bound to the Sale of Goods Convention unless they "have left their contracts silent as to applicable law."⁹⁰ Most likely, the United States will interpret article 6 in conformity with the Uniform Commercial Code, which permits implied exclusions.⁹¹ However, Yugoslavia will probably interpret article 6 to require express exclusions, because Yugoslavia's primary concern in drafting an exclusion provision is party equality.⁹² 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.⁹³

In *Krawill*, the U.S. Supreme Court strongly suggested that an agent's liability could be limited by a bill of lading relying implicitly on the recognition by the United States of the principle of third party beneficiaries. *Id.* at 303. The Court also relied on two other domestic law principles. *Id.* at 302-04. First, that an agent is liable for his negligent actions. *Id.* at 304. Second, the principle that a rule of law that derogates from the common law should be strictly construed. *Id.* The Court did this even though it recognized the Hague Rules' purpose of uniformity. *Id.* at 301.

88. See, e.g., *Miles Int'l Corp. v. Federal Commerce & Navigation Co.*, [1978] 1 Lloyd's Rep. 285 (Que. Super. Ct. 1977) (Quebec law recognizing a third party's right to assert a carrier's limitation of liability due to Article 1029 of the Quebec Civil Code, which expressly permits contracts for the benefit of third parties). The *New York Star v. Salmond & Spraggon*, [1981] 1 W.L.R. 138, 143-44 (P.C.) (English law allowing third party to receive Hague Rule's protections, but only if a clause in the bill of lading is drafted to satisfy highly technical domestic rules).

89. See *supra* note 83 and accompanying text.

90. Pfund, *supra* note 4, at 6262.

91. U.C.C. § 1-105(1) (1978). The language of section 1-105 is as follows:

(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

Id. It has been argued that section 1-105 permits implied exclusions of its terms. See *Neville Chem. Co. v. Union Carbide Corp.*, 422 F.2d 1205, 1211 (3d Cir.), *cert. denied*, 400 U.S. 826 (1970); *Dore & DeFranco*, *supra* note 6, at 53.

92. See *supra* note 46 and accompanying text.

93. Sale of Goods Convention, *supra* note 2, art. 7(1), S. Doc. No. 9, at 23, 52 Fed. Reg. at 6265, 19 I.L.M. at 673. Article 7(1) states, "[i]n the interpretation of this Convention, regard is to be had . . . to the need to promote uniformity in its application." *Id.*

B. *Arguments in Favor of Implied Exclusions*

Since the earliest efforts to draft a uniform law, nations have disagreed on whether parties should be able to opt out implicitly of the uniform law's application.⁹⁴ Article 6 of the Sale of Goods Convention is no exception. Because the Sale of Goods Convention recently entered into force, article 6 has not yet been interpreted by courts. However, some legal scholars have interpreted article 6 to permit implied exclusions based on analyses of the language of article 6, the draft commentary, and negotiations.⁹⁵

Proponent's of implied exclusion assert that the plain language of article 6 indicates that implied exclusions should be permitted, because the drafters of the Sale of Goods Convention's text would have included the word "expressed" if it was their intention to allow only for explicit exclusions.⁹⁶ They assert that the drafter's intent of deleting the word "implied" from the ULIS to the Sale of Goods Convention was to allow courts to decide clearly and carefully that an exclusion has occurred, whether such exclusion was made by explicit or implicit agreement.⁹⁷ The draft commentary provides the basis for this assertion because it states that the special "reference to 'implied' exclusion might encourage courts to conclude, on insufficient grounds, that the Convention had been wholly excluded."⁹⁸ Further, during discussions of the Sale of Goods Convention, the drafting committee rejected two proposals disallowing "mere implication" and requiring express agreements.⁹⁹

94. See *supra* note 14.

95. See Dore & DeFranco, *supra* note 6, at 53-54.

96. See J. HONNOLD, *supra* note 6, at 106; S. SCHLECTRIEM, *UNIFORM SALES LAW: THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 35 (1986); Note, *Contracts for the International Sale of Goods: Applicability of the United Nations Convention*, *supra* note 6, at 235-39.

97. See S. SCHLECTRIEM, *supra* note 96, at 35; see also Note, *supra* note 6, at 235-39.

98. *Commentary on the Draft on Contracts for the International Sale of Goods, Prepared by the Secretariat*, U.N. Doc. A/CONF. 97/15, at 44, reprinted in *Official Records of the United Nations on Contracts for the International Sale of Goods*, U.N. Doc. A/CONF. 97/19, at 17; see SCHLECTRIEM, *supra* note 96, at 35.

99. *International Trade Report*, *supra* note 73, at 50, reprinted in [1977] 8 Y.B. UNCTRAL at 29. A proposal was made that "mere implication" should not suffice to set aside the Convention, thus, it can only be excluded by the parties express stipulation. *Id.* Another proposal was made that the parties must expressly choose a law to sub-

Several policy arguments can be made in favor of implied exclusions. First, due to the continuing development of trade law, the drafters of the Sale of Goods Convention left gaps in the provisions to be filled in accordance with the needs and practices of trade law.¹⁰⁰ Permitting implied exclusions complies with current trends in trade law.¹⁰¹ For example, the requirement of an express clause is against current practices in the area of unprocessed products and raw materials.¹⁰² Model contracts for the sale of unprocessed products and raw materials contain a clause stating the competent jurisdiction to hear disputes arising out of the contract.¹⁰³ Under current practices, this clause implies that the parties intended to choose the law of that jurisdiction to apply to their contract.¹⁰⁴

Further, there is a trend in national and international codifications toward giving parties to a contract unlimited liberty to choose the law they wish to apply to their transactions, due in part to nation's acceptance of the principle of party autonomy.¹⁰⁵ The following is an example of a national law that follows this trend. Section 1-105 of the Uniform Commercial Code, as it is applied in most states of the United States, allows parties to make an agreement as to their choice of law, thereby excluding the Uniform Commercial Code's application.¹⁰⁶ In the United States, courts may interpret section 1-105 to permit parties to use implied agreements as to the applicable law.¹⁰⁷

stitute for the Sale of Goods Convention in order to successfully exclude it. *Id.* These proposals were opposed because "it may be perfectly clear that the parties do not wish the Convention to apply even though this intention was not stated expressly." *Id.*

100. J. HONNOLD, *supra* note 6, at 127-28.

101. See Pelichet, *Report on the Law Applicable to International Sales of Goods*, in HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTES ET DOCUMENTS 19, 59 (1987).

102. *Id.* at 65.

103. *Id.*

104. *Id.*

105. *Id.* at 59. This principle was promoted by many countries during discussions on the ULIS and the Sale of Goods Convention. See *supra* notes 34, 66-68 and accompanying text.

106. U.C.C. § 1-105 (1978).

107. Dore & DeFranco, *supra* note 6, at 53; see, e.g., *Neville Chem. Co. v. Union Carbide Corp.*, 422 F.2d 1205, 1211 (3d Cir.), *cert. denied*, 400 U.S. 826 (1970) (relying on U.C.C. 1-105 in finding no dispute that the parties contemplated that Pennsylvania law would apply); *In re Bengston*, 3 U.C.C. Rep. Serv. 283, 289 (D. Conn. 1965) (noting that "the meaning of the agreement of the parties is to be determined

The following recent international codifications also evidence a trend toward permitting implied exclusions. The 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (the "1986 Choice of Law Convention")¹⁰⁸ gives parties to an international sale of goods contract the freedom to choose the law governing their transaction if their agreement on the applicable law is "express" or "clearly demonstrated" by the contract's terms and the parties' conduct.¹⁰⁹ The Convention on the Law Applicable to Contractual Obligations (the "Rome Convention of 1980")¹¹⁰ provides that the parties' choice of law will govern as long as their choice is "expressed" or "demonstrated with reasonable certainty."¹¹¹

Proponents of implied exclusion interpret the draft commentary as requiring courts to determine with certainty that there was an exclusion.¹¹² This interpretation of article 6 allowing implied exclusions in conjunction with the draft commentary may satisfy countries, such as Tunisia, that were opposed to implied exclusions, because they feared adhesion contracts and a stronger party's domination.¹¹³ A certainty re-

by the language used by them and by their action, read and interpreted in light of commercial practices and other surrounding circumstances").

108. Draft Convention on the Law Applicable to Contracts for the International Sale of Goods, Dec. 22, 1986 [hereinafter Choice of Law Convention], *reprinted in* 24 I.L.M. 1575 (1985). This Convention provides choice of law rules for international commercial transactions. See Galliard, *Introductory Note, Hague Conference on Private International Law [Conference], Draft Convention on the Law Applicable to Contracts for the International Sale of Goods*, 24 I.L.M. 1573-74 (1985). The 1986 Choice of Law Convention was drafted as a revision of the 1955 Hague Convention on the Law Applicable to the International Sale of Goods and a supplement to the United Nations Convention on Sales. *Id.* at 1573. Delegates from all parts of the world participated in the Hague Conference on Private International Law. *Id.* at 1574. The Draft Convention will go into effect when five countries ratify it. Choice of Law Convention, *supra*, art. 27(1), *reprinted in* 24 I.L.M. at 1578.

109. Choice of Law Convention, *supra* note 108, art. 7(1), *reprinted in* 24 I.L.M. at 1575.

110. O.J. L 266 (1980) [hereinafter Rome Convention of 1980] (an agreement between the Member States of the European Economic Community).

111. *Id.* art. 3(1), at 2. Article 3(1) states:

A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

Id.

112. See *supra* notes 97-98 and accompanying text.

113. *Id.*

quirement on the arbitrator's or court's part protects a weak party from having a stronger party's will imposed upon it, because simple indications or fictitious intentions would be insufficient to satisfy such a requirement.¹¹⁴ This interpretation would require nations, such as the United Kingdom, that wanted implied exclusions without restrictions,¹¹⁵ to compromise by having to fulfill the certainty requirement.

In addition, because of potential consumer vulnerability, other conventions require an express writing requirement when contracting with consumers.¹¹⁶ This is not a concern in the Sale of Goods Convention, because consumer sales are excluded from its application.¹¹⁷ Merchants, it is argued, are deemed to be sophisticated enough and to have sufficiently equal bargaining power to be without need of the protection afforded by a requirement of express exclusion.¹¹⁸

III. EXPRESS EXCLUSIONS: THE BETTER TO PROMOTE UNIFORMITY

The Sale of Goods Convention's ultimate goal is to create a uniform law to promote and strengthen international trade.¹¹⁹ Permitting implied exclusions will result in uncertainty in the convention's application. Proponents of express exclusions assert that implied agreements are insufficient to exclude the Sale of Goods Convention, because the plain language of article 6 does not provide for implied exclusions as the ULIS did.¹²⁰ Unlike the proponents of implied exclusions, they interpret the draft commentary as the drafter's clear assertion that implied exclusions do not satisfy the Convention's requirements.¹²¹ Further, the drafting committee rejected the United Kingdom's proposal that article 6 state that such exclusion, derogation or variation may be express or implied.¹²² If

114. Pelichet, *supra* note 101, at 67.

115. See *supra* notes 66-68 and accompanying text.

116. Pelichet, *supra* note 101, at 67.

117. See Sale of Goods Convention, *supra* note 2, art. 2, S. Doc. No. 9, at 22, 52 Fed. Reg. at 6264, 19 I.L.M. at 672.

118. See Pelichet, *supra* note 101, at 67.

119. J. HONNOLD, *supra* note 6, at 47.

120. See Dore & DeFranco, *supra* note 6, at 53-54.

121. *Id.*

122. See *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*

UNCITRAL had wanted implied exclusions, it would have expressly provided for them.

Both the increase in the number of participants and the diversity of the participants involved in the drafting of the Sale of Goods Convention explain the deletion of the word "implied" from the ULIS language in the Sale of Goods Convention.¹²³ In the late 1920s, the initial participants in the unification effort were capitalist, industrialized Western European governments with common economic and cultural experiences.¹²⁴ By the early 1950s, Japan, the United States, and several Latin American nations were also participating in the efforts to draft a convention.¹²⁵ Despite the fact that the diversity increased, the resulting ULIS, which permits implied exclusions, was adopted primarily by Western European nations.¹²⁶ When UNCITRAL took over the project, the number of participants expanded from twenty to sixty-two.¹²⁷ A broad-based membership was created, which was comprised of nations with socialist as well as capitalist economies, and developing nations participated alongside industrialized nations.¹²⁸ While concerns of inequality were expressed in the earlier con-

Provisions Concerning Implementation, Reservations and Other Final Clauses Prepared by the Secretary General, U.N. Doc. A/CONF. 97/9, at 6; *International Trade Report*, *supra* note 73, at 50, reprinted in [1977] 8 Y.B. UNCITRAL at 29.

123. See *infra* notes 124-31 and accompanying text.

124. Rosett, *supra* note 82, at 267-68. The original committee was comprised of Mr. H. Capitant (France), Dr. E. Rabel (Germany), Sir Cecil J.B. Hurst (Great Britain), President, Judge A. Bagge (Sweden), Mr. M. Fehr (Sweden). Honnold, *A Uniform Law for International Sales*, 107 U. PA. L. REV. 299, 302 n.5 (1959).

125. See Rabel, *The Hague Conference on the Unification of Sales Law*, 1 AM. J. COMP. L. 58 (1952). The following countries sent delegations or observers to an international conference convened at the Hague to discuss the draft: Austria, Belgium, Bolivia, Chile, Cuba, Denmark, Finland, France, Germany, Great Britain, Greece, Ireland, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, the United States, Vatican City and Yugoslavia. *Id.* The United States and five other countries were represented by observers. *Id.*

126. Posch, *supra* note 1, at 6. The following nations have become members of the ULIS: Belgium, the Federal Republic of Germany, Gambia, Great Britain, Israel, Italy, Luxembourg, the Netherlands, and San Marino. *Id.*

127. See Sale of Goods Convention, *supra* note 2, 19 I.L.M. at 669 (listing the sixty-two nations that participated in the Conference on the Sale of Goods Convention); see also Rosett, *supra* note 82, at 268.

128. See Rosett, *supra* note 82, at 268. "The broader membership now includes states with socialist, centrally planned economies, as well as capitalistic, free market economies; representatives of less developed nations from the 'southern' half of the world participate alongside representatives of the industrialized 'North.'" *Id.*

ventions,¹²⁹ the Western European governments with common trade experiences and little fear of inequality dominated the legal thought. However, the need for equality was more apparent in the drafting of the Sale of Goods Convention, because the influence of the developing nations increased.¹³⁰ Thus, the language permitting implied exclusions was deleted,¹³¹ further evidencing that the convention wished to require express exclusions.

Although there is merit to the policy arguments for implied exclusions, the policy arguments for express exclusions are stronger. First, article 7(1) of the Sale of Goods Convention states that "the observance of good faith in international trade" is an indispensable tool in interpreting its provisions.¹³² Although the Sale of Goods Convention does not define good faith, the term has elsewhere been interpreted to mean "honesty in fact" and "observance of reasonable commercial standards of fair dealing in the trade."¹³³ Fair dealing in trade requires article 6 to be interpreted as mandating express exclusion of its terms, because otherwise a more sophisticated party can take advantage of an unsophisticated party that is unaware of current trade practices.¹³⁴

Second, the argument that merchants under the Sale of Goods Convention do not need an express writing requirement's protection because such a writing requirement should only be imposed in conventions pertaining to consumers¹³⁵ is not persuasive. The Convention on the Law Applicable to

129. See *supra* note 46 and accompanying text.

130. See Rosett, *supra* note 82, at 268.

131. Sale of Goods Convention, *supra* note 2, art. 6, S. Doc. No. 9, at 23, 52 Fed. Reg. at 6265, 19 I.L.M. at 673.

132. Sale of Goods Convention, *supra* note 2, art. 7(1), S. Doc. No. 9, at 23, 52 Fed. Reg. at 6265, 19 I.L.M. at 673. Article 7(1) states: "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." *Id.*

133. See U.C.C. § 2-103 (1978). The Uniform Commercial Code's requirement of good faith is broader than the Sale of Goods Convention's requirement, because it applies to parties' performance. J. HONNOLD, *supra* note 6, at 123-24. Section 1-203 of the Uniform Commercial Code provides that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." U.C.C. § 1-203 (1978).

134. See *ULIS Analysis*, *supra* note 59, reprinted in [1971] 2 Y.B. UNCITRAL at 43-44.

135. See Pelichet, *supra* note 101, at 67.

Certain Consumer Sales¹³⁶ provides that a parties' choice of law "must be express and in writing."¹³⁷ The prohibition of implied choices of law was due to the fear of the "economically stronger and more ingenious seller" controlling the contract.¹³⁸ Similarly, a less sophisticated merchant should be afforded the same protection as the economically weaker and less ingenious consumer because their plight is synonymous.¹³⁹ Further, consumer contracts were excluded from the Sale of Goods Convention's application for two reasons.¹⁴⁰ First, international consumer purchases are not common and mostly concern mail order businesses and tourists.¹⁴¹ Second, the drafters wanted to ensure that domestic consumer-protection laws were not minimized by the Sale of Goods Convention.¹⁴² In excluding consumer contracts, the drafters aimed to afford consumers more protection than the Sale of Goods Convention offered. Thus, the drafters were not asserting that merchants did not need any protection.

Article 7(2) states that questions on matters governed by the Sale of Goods Convention that are not expressly determined by it should be determined in acquiescence with general

136. 19 I.L.M. 1516 (1980) [hereinafter Consumer Sales Convention].

137. Consumer Sales Convention, *supra* note 136, art. 6, at 1516. Article 6 provides:

The internal law chosen by the parties shall govern a contract to which the Convention applies. However, a choice of law made by the parties shall in no case deprive the consumer the protection afforded by the mandatory rules of the internal law of the country in which he had his habitual residence at the time the order was given. The choice of law must be express and in writing.

Id.

138. See Matic, *Law Applicable to International Sales Hague Conventions and Yugoslav Private International Law*, in HAGUE-ZAGREB ESSAYS 4, at 26 (1983).

Instead of the implied choice of law by the parties, which has "unambiguously" . . . resulted from the terms and provisions of the contract, the choice of law for consumer sales must be *express and in writing*. The fear of the superior legal skill of the economically stronger and more ingenious seller has undoubtedly influenced the experts to adopt that attitude

Id. (emphasis in original).

139. See *ULIS Analysis*, *supra* note 59, reprinted in [1971] 2 Y.B. UNCITRAL at 43-44.

140. Sale of Goods Convention, *supra* note 2, art. 2, S. Doc. No. 9, at 22, 52 Fed. Reg. at 6264, 19 I.L.M. at 672; see also S. SCHLECTRIEM, *supra* note 96, at 28.

141. See S. SCHLECTRIEM, *supra* note 96, at 28.

142. *Id.*

principles underlying the convention.¹⁴³ Freedom of contract is an underlying principle.¹⁴⁴ This theme is exemplified by article 6, which allows parties not only to exclude the Convention but also "vary the effect" of its provisions.¹⁴⁵ Article 6 enables parties to shape their own agreements.¹⁴⁶ Requiring an express writing to exclude the Sale of Goods Convention is consistent with this principle, because the parties are still free to opt out of the convention's application completely and vary the effect of its provisions as they desire.¹⁴⁷ By requiring an express decision to exclude part or all of the Sale of Goods Convention, parties to a contract will be in control of the terms of that contract, unfettered by the possibility of subsequent interpretations of a court.¹⁴⁸ Additionally, express exclusions, because of their characteristic clarity, are consistent with another overriding principle, that of fairness.¹⁴⁹ Thus, requiring an express writing promotes two general principles of the Sale of Goods Convention mandated by article 7(2).¹⁵⁰

The drafters of the Sale of Goods Convention left gaps in the provisions to be filled in accordance with the needs and practices of trade law.¹⁵¹ Although, the current trend in relation to the international uniform laws on sales appears to be toward party autonomy, it is, in reality, a trend in form rather than in substance.¹⁵² The ULIS expressly states that the parties' exclusion of its terms may be express or implied.¹⁵³ How-

143. Sale of Goods Convention, *supra* note 2, art. 7(2), S. Doc. No. 9, at 23, 52 Fed. Reg. at 6265, 19 I.L.M. at 673.

144. See Posch, *supra* note 1, at 9. The Sale of Goods Convention "fully recognizes the principle of freedom of contract. The parties to an international contract for the sale of goods may reject the application of the Convention and agree on the applicability of a national substantive law of sales, or of some general conditions and trade usages." *Id.*

145. See Sale of Goods Convention, *supra* note 2, S. Doc. No. 9, at 23, 52 Fed. Reg. at 6265, 19 I.L.M. at 673.

146. *Id.*

147. Sale of Goods Convention, *supra* note 2, art. 6, S. Doc. No. 9, at 23, 52 Fed. Reg. at 6265, 19 I.L.M. at 673.

148. See *supra* notes 113-15 and accompanying text.

149. Sale of Goods Convention, *supra* note 2, art. 7(1), S. Doc. No. 9, at 23, 52 Fed. Reg. at 6265, 19 I.L.M. at 673.

150. See Sale of Goods Convention, *supra* note 2, art. 7(2), S. Doc. No. 9, at 23-24, 52 Fed. Reg. at 6265, 19 I.L.M. at 673.

151. See J. HONNOLD, *supra* note 6, at 70-71, 127-28.

152. See *infra* notes 153-56 and accompanying text.

153. ULIS, *supra* note 48, 834 U.N.T.S. at 123. The ULIS states, "[t]he parties

ever, in *Landgericht Landshut*,¹⁵⁴ the court decided that the ULIS applied to a Dutch-German international sale contract even though the contract stated that German law applied.¹⁵⁵ This court required that when an international sale contract contains a choice of law clause declaring that a nation's law governs, and that nation is a party to the ULIS, the contract must not only state the choice of law expressly but also state that the ULIS does not apply expressly.¹⁵⁶ Furthermore, this trend exists in international conventions promulgated and ratified in developed nations.¹⁵⁷ For example, both the ULIS and the Rome Convention of 1980 permit implied exclusions.¹⁵⁸ However, neither convention has been ratified by the diverse group of nations that have ratified the Sale of Goods Convention.¹⁵⁹

to a contract of sale shall be free to exclude the application thereto of the present [l]aw either entirely or partially. Such exclusion may be express or implied." *Id.*

154. *Landgericht Landshut*, 144 NJW 2032, 2033 (1976).

155. *Id.*

156. *Id.*

157. See *infra* notes 163-66 and accompanying text.

158. ULIS, *supra* note 48, 834 U.N.T.S. at 123; Rome Convention of 1980, *supra* note 110, art. 3(1), at 2.

159. See Rome Convention of 1980, *supra* note 110 (an agreement between the Member States of the European Economic Community); Rosett, *supra* note 82, at 268. The Rome Convention of 1980 cannot be adequately compared to the Sale of Goods Convention for three reasons. First, the Rome Convention of 1980 is an agreement between members of the European Economic Community, which are more on par with each other than the signatories of the Sale of Goods Convention. See Rome Convention of 1980, *supra* note 110. The basic purpose of the European Community

is to bring about the merging of the essential economic interests of the member countries through the gradual establishment and maintenance of common markets involving the elimination of all barriers to the free movement of goods, persons, services and capital and the adoption of common policies; beyond the attainment of economic and social objectives, [the ultimate goal is] political integration.

SCHIAVONE, *INTERNATIONAL ORGANIZATIONS* 91 (1983). 12 Member States currently comprise the EEC: Belgium, Denmark, the Federal Republic of Germany, France, Great Britain, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal and Spain. Treaty Between the Member States of the European Communities and the Kingdom of Spain and the Portuguese Republic to the European Economic Community and to the European Atomic Energy Community, O.J. L 302/9 (1985). Second, the drafters of the Rome Convention of 1980 unambiguously provided for implied exclusions. Rome Convention of 1980, *supra* note 110, art. 3(1), at 2. Third, although article 3(1) of the Rome Convention of 1980 allows parties' choice of law to be "expressed" or "demonstrated with reasonable certainty," this must be read with articles 3(3) and 7(2), which provide that the parties' choice may be disregarded completely. Rome Convention of 1980, *supra* note 110, art. 3(3), at 2. Article 3(3) states:

The fact that the parties have chosen a foreign law, whether or not accompa-

Similarly, trends in national laws are not significant because, unlike the Sale of Goods Convention, they do not address the concerns of the developing nations.

The desire for simplicity and certainty induced the movement toward legal unification.¹⁶⁰ Allowing implied exclusions creates uncertainty in the Sale of Goods Convention's application, because the judge is given unlimited discretion to decide on a case-by-case basis whether an exclusion occurred.¹⁶¹ This defeats the desire for certainty because parties will be unsure of whether they adequately excluded the Sale of Goods Convention until a judge makes a determination. Requiring an express exclusion does not hinder the need for simplicity, because parties can exclude the Sale of Goods Convention's application by simply stating that it does not apply. Model contracts currently used can expressly exclude the Sale of Goods Convention by using a stamp or annexed rider.¹⁶²

Uniform rules require nations of the world to compromise. An interpretation requiring express exclusions is a compromise between the two opposing extremes of having no uni-

nied by the choice of a foreign tribunal, shall not, where all other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules".

Id. Article 7(2) provides "[n]othing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract." *Id.* art. 7(2), at 3-4.

160. See Posch, *supra* note 1, at 5; see also Ronald Reagan's Letter of Transmittal, II PUB. PAPERS 1316, 1317 (1983). President Reagan stated:

International trade now is subject to serious legal uncertainties. 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.

Enhancing legal certainty for international sales contracts will serve the interests of all parties engaged in commerce by facilitating international trade.

Id.

161. II Diplomatic Conference, *supra* note 14, at 175. Switzerland felt that permitting implied exclusions gave a trial judge too much discretion to decide on a case by case basis when a contract excluded the uniform law. *Id.*

162. A rider is defined as "[a]ny kind of a schedule or writing annexed to a document which cannot well be incorporated in the body of such document. Such are deemed to be incorporated into the terms of the document. . . . With the use of the rider the entire document does not have to be rewritten or redrafted again." BLACK'S LAW DICTIONARY 687 (5th ed. 1979).

form law and having the uniform laws apply to all international sales of goods regardless of the parties' desires.¹⁶³

CONCLUSION

The unification of international trade law has been a goal for decades and is almost a reality. The Sale of Goods Convention is the world's first potentially successful attempt at such unification. It will provide an environment that promotes and strengthens international trade. However, universal interpretation is essential to the unification of trade law. An interpretation of article 6 to require express exclusions best complies with the convention's principles of freedom of contract, good faith, and fairness. Indeed, such a resolution is in accordance with the convention's overriding principle of uniformity, while at the same time balancing two fundamental elements of a contract, party autonomy and party protection.

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163. The drafting committee rejected the option of having the uniform law apply regardless of the parties' desires. See S. SCHLECTRIEM, *supra* note 96, at 23.

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