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The United Nations Convention on Contracts for the International Sale of Goods and the "Battle of the Forms"

Christine Moccia*

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Abstract

The Note argues that courts deciding a case involving a battle of the forms should refer to the general principles within the CISG rather than resort to domestic law. It argues that there are solutions within the CISG allowing courts to address adequately a battle of the forms case and that by looking to general principles courts will help promote the drafters' goal of uniformity.

THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND THE "BATTLE OF THE FORMS"

INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (the "CISG")[1] was formed to provide uniform rules governing the international sale of goods, thereby contributing to the furtherance of international trade.[2] The CISG governs two major aspects of the international sales contract: the formation of a contract and the obligation of the parties.[3] The provisions on formation govern many issues

1. The United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 52 Fed. Reg. 40, 6264 (1987), 19 I.L.M. 668 (1980) [hereinafter CISG]. The CISG was adopted by the United Nations Conference on Contracts for the International Sale of Goods, held at Vienna from March 10 to April 11, 1980. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, STATUS AS AT 31 DEC. 1988, at 367, U.N. Doc. ST/LEG/SER.E/7 (1988). Signatories of the CISG were Austria, Chile, China, Czechoslovakia, Denmark, Finland, France, German Democratic Republic, Federal Republic of Germany, Ghana, Hungary, Italy, Lesotho, the Netherlands, Norway, Poland, Singapore, Sweden, United States of America, Venezuela, and Yugoslavia. *Id.* at 367-68. The United States deposited its instrument of ratification of the CISG at the United Nations Headquarters in New York on December 11, 1986. 15 U.S.C.A. Annex, at 29 (Supp. 1989). As of 1988, states that have ratified the CISG are Argentina, Australia, Austria, China, Egypt, Finland, France, Hungary, Italy, Lesotho, Mexico, Norway, Sweden, Syrian Arab Republic, United States of America, Yugoslavia, and Zambia. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL STATUS AS AT 31 DEC. 1988, at 367-68, U.N. Doc. ST/LEG/SER.E/7. In the next five years, thirty to forty countries are expected to ratify the CISG, which has been favorably received by the international community. Zwart, *The New International Law of Sales: A Marriage Between Socialist, Third World, Common, and Civil Law Principles*, 13 N.C.J. INT'L L. & COM. REG. 109, 127 (1988). The CISG appears in the following languages: Arabic, Chinese, English, French, Russian, and Spanish, and all texts are equally authentic. 15 U.S.C.A. Annex, at 47.

2. CISG, *supra* note 1, preamble, 52 Fed. Reg. at 6264, 19 I.L.M. at 671. The preamble states that "[b]eing of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade." *Id.* *But see* Diamond, *Conventions and Their Revisions*, in UNIFICATION AND COMPARATIVE LAW IN THEORY AND PRACTICE CONTRIBUTIONS IN HONOUR OF JEAN GEORGES SAUVEPLANNE 45 (1984) (questioning effectiveness of conventions purporting to unify laws of separate jurisdictions that adhere to them).

3. CISG, *supra* note 1, art. 4, 52 Fed. Reg. at 6264, 19 I.L.M. at 673. Article 4 of the CISG provides that "[t]his Convention governs only the formation of the contract

concerning offer and acceptance.[4] Article 19 provides a set of rules to resolve discrepancies between the terms of the offer and the terms of the acceptance.[5] Controversy exists, however, over the correct way to interpret the CISG in situations where the purported acceptance form contains general conditions[6] that materially alter the offer, resulting in a "battle of the forms." Some commentators argue that courts should apply domestic law,[7] while others argue that the general principles of the CISG can resolve a battle of the forms without the

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. . . and the rights and obligations of the seller and the buyer arising from such contract." *Id.*

4. *See id.* arts. 14-24, pt. II, 52 Fed. Reg. at 6266-67, 19 I.L.M. at 674-77. Part II of the CISG is devoted to rules on formation, including when an offer becomes effective, revocation of offers, acceptance by conduct, and rules governing late acceptance. *Id.*

5. *Id.* art. 19, 52 Fed. Reg. at 6266, 19 I.L.M. at 675-76. Article 19 provides that

> (1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.
>
> (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
>
> (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Id.; *see* P. SCHLECHTRIEM, UNIFORM LAW: THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 55 (1986).

6. Parties to international sales contracts often use forms on which are printed pre-determined general conditions or contract terms. Drobnig, *Standard Forms and General Conditions in International Trade; Dutch, German and Uniform Law*, in HAGUE-ZAGREB ESSAYS 4 ON THE LAW OF INTERNATIONAL TRADE 117, 118-19 (1983). Similarly, printed forms known as standard contracts have also gained in importance in the area of international sales contracts. Hellner, *The Vienna Convention and Standard Form Contracts*, in INTERNATIONAL SALE OF GOODS DUBROVNIK LECTURES 335 (1986). The terms standard contracts or forms and general conditions are often used interchangeably, but they vary in that general conditions forms leave no room for additional input by the parties, whereas standard contracts leave blank spaces. Drobnig, *supra*, at 118. Reference to general conditions "forms" will be made throughout this Note and will signify forms onto which general conditions are printed. *See infra* notes 52-65 and accompanying text (discussing function of general conditions forms and standard contracts in international sales contracts).

7. *See* Huber, *Der UNCITRAL-Entwurf eines übereinkommens über Internationale Warenkaufverträge*, 43 RABELS ZETSCHRIFX FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVAVECHT 413, 445 (1979); *see also* Vergne, *The "Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 33 AM. J. COMP.

use of domestic rules.[8]

This Note argues that courts deciding a case involving a battle of the forms should refer to the general principles within the CISG rather than resort to domestic law. Part I of this Note sets forth the background of the CISG and the provisions that relate to the battle of the forms issue. Part II examines the three proposed interpretations of the CISG with regard to the battle of the forms. Part III argues that the best interpretation of the CISG with respect to the battle of the forms is to use the general principles found within the CISG. This Note concludes that there are solutions within the CISG allowing courts to address adequately a battle of the forms case and that by looking to the general principles courts will help promote the drafters' goal of uniformity.

I. *THE BACKGROUND OF THE CISG AND PROVISIONS RELEVANT TO THE BATTLE OF THE FORMS*

A. *A History of the CISG*

More than fifty years before the 1980 United Nations Conference on Contracts for the International Sale of Goods (the "Vienna Conference") took place, attempts were made to unify the substantive laws governing international sales contracts.[9] Unification efforts began in 1926 with the establishment of the International Institute for the Unification of Private Law

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L. 233, 257 (1985); *infra* notes 145-67 and accompanying text (discussing use of domestic law in a battle of the forms scenario).

8. J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 193 (1987) (using trade usage as a general principle in context of battle of the forms); Drobnig, *supra* note 6, at 126; Van der Velden, *Uniform International Sales Law and the Battle of the Forms*, in UNIFICATION AND COMPARATIVE LAW IN THEORY AND PRACTICE CONTRIBUTIONS IN HONOUR OF JEAN GEORGES SAUVEPLANNE 233, 243 (1984); *see infra* notes 118-44 and accompanying text (discussing use of general principles in the battle of the forms).

9. INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1 (Galston & Smit eds. 1984) [hereinafter INTERNATIONAL SALES]; *see* J. HONNOLD, *supra* note 8, at 49. *See generally* C.M. BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW THE 1980 VIENNA SALES CONVENTIONS 3 (1987); Posch, *On the Law of International Sale of Goods: An Introduction*, in SURVEY OF THE INTERNATIONAL SALE OF GOODS 3 (1986). Efforts in related areas of international sales began in 1928 with work toward the drafting of what later became the 1955 Convention on the Law Applicable to International Sale of Goods. Diamond, *supra* note 2, at 51.

("UNIDROIT").[10] In the 1930's, UNIDROIT drafted a uniform law to govern international sales contracts and distributed it among various governments for comment.[11] The start of World War II halted further work on the uniform law,[12] but drafting recommenced after the war.[13] Additionally, the governing body of UNIDROIT drafted a uniform law to govern the formation of international sales contracts.[14] The drafts prepared by UNIDROIT eventually formed the basis of two conventions adopted at a diplomatic conference held at the Hague in 1964.[15] Twenty-seven states signed the final act of the conference[16] producing the Uniform Law on the International Sale of Goods (the "ULIS")[17] and the Uniform Law on the Formation of Contracts for the International Sale of Goods (the "ULF").[18] Only a limited number of states adhere to the ULF and the ULIS,[19] and both have met with marginal success.[20]

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10. *Progressive Development of the Law of International Trade: Report of the Secretary-General*, 21 U.N. GAOR Annexes (agenda Item 88) 1, 5, U.N. Doc. A/6396 (1965), *reprinted in* [1968-1970] 1 Y.B. UNCITRAL 18, 23, U.N. Doc. A/CN.9/SER.A/1970 [hereinafter *Report of the Secretary-General*]; *see* Posch, *supra* note 9, at 6.

11. *United Nations Conference on Contracts for the International Sale of Goods—Official Records*, U.N. Doc. A/Conf.97/19, at 4, (1981) [hereinafter *Official Records*]. UNIDROIT commissioned a group of Western European scholars to prepare the preliminary draft of a uniform sales law. J. HONNOLD, *supra* note 8, at 49. This move was largely motivated by a report written by Professor Ernst Rabel suggesting the feasibility of a unifying law. Sono, *The Vienna Sales Convention: History and Perspective*, in INTERNATIONAL SALE OF GOODS DUBROVNIK LECTURES 2 (1986).

12. *Official Records*, *supra* note 11, at 4.

13. *Id.*

14. *Id.*

15. *Report of the Secretary-General*, *supra* note 10, 21 U.N. GAOR Annexes (Agenda Item 88) at 5, U.N. Doc. A/6396 (1965), *reprinted in* [1968-1970] 1 Y.B. UNCITRAL at 23, U.N. Doc. A/CN.9/SER.A/1970; *see* J. HONNOLD, *supra* note 8, at 49.

16. *Report of the Secretary-General*, *supra* note 10, 21 U.N. GAOR Annexes (Agenda Item 88) at 5, U.N. Doc. A/6396 (1965), *reprinted in* [1968-1970] 1 Y.B. UNCITRAL at 23, U.N. Doc. A/CN.9/SER.A/1970.

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

18. 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].

19. *Official Records*, *supra* note 11, U.N. Doc. A/Conf.97/19, at 4. Since entering into force on August 23, 1972, the ULF and the ULIS have been ratified by Belgium, the Federal Republic of Germany, Gambia, Great Britain, Israel, Italy, the Netherlands, and San Marino. *Id.* Israel has ratified the ULIS but has not ratified the ULF. *Id.*

20. Posch, *supra* note 9, at 6. For example, German parties to an international sales contract often prefer the use of domestic law over the ULIS. *Id.* at 7. Scholars

The drive for unification of the international law of sales continued[21] as the United Nations General Assembly in 1966 established the United Nations Commission on International Trade Law ("UNCITRAL").[22] The mandate of UNCITRAL was to ensure the progression of a unified international trade law.[23] The United Nations pre-determined UNCITRAL's composition in order to ensure a wide representation of the principal economic and legal systems of the world.[24]

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have attributed the limited success to the lack of participation in the drafting process by representatives of different legal backgrounds. *E.g.*, Honnold, *The Draft Convention on Contracts for the International Sale of Goods: An Overview*, 27 AM. J. COMP. L. 223, 225 (1979). *See generally* Ndulo, *The Vienna Sales Convention 1980 and the Hague Uniform Laws on International Sale of Goods 1964: A Comparative Analysis*, 38 INT'L & COMP. L. Q. 1 (1989). The legal effectiveness of the conventions in the countries that adhere to it is limited. *See* Posch, *supra* note 9, at 6.

21. P. SCHLECHTRIEM, *supra* note 5, at 18-19.

22. 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 at 65-66, U.N. Doc. A/CN.9/SER.A/1970 [hereinafter UNCITRAL]. It was noted that

> a great many international agencies have taken and are taking steps in the field of the development of the law of international trade. . . . Their work is productive, whether it takes the form of conventions, model laws, standard conditions, uniform customs and practices, definition of trade terms or other forms. Scientific writers have pointed out that this diversified activity, for all its usefulness, is lacking direction, uniform organization and synthesis. . . . [T]here must be a selection of hitherto unregulated fields where by social necessity international agreement is needed for establishing universal legal rules, and where such agreement seems both desirable and feasible. Such necessity manifests itself at present most forcefully in the field of international trade.

Steps to be taken for progressive development of private international law with a view to promoting international trade: Background paper by the delegation of Hungary, 20 U.N. GAOR Annexes (Agenda Item 92) 1, 7-8, U.N. Doc. A/C.6/L.571, *reprinted in* [1968-1970] 1 Y.B. UNCITRAL 5, 12, U.N. Doc. A/CN.9/SER.A/1970. Professor Rabel, who first suggested a unification of international sales to UNIDROIT, displayed an early optimism regarding the desirability of a uniform sales law and wrote,

> [w]e are pleased to imagine what it would mean, if over great stretches of the earth for the first time a central chapter of the law of obligations would be governed by uniform legislation. What a field for judges like Holmes and authors like Williston, what interchange of solutions, methods, systems!

Rabel, *A Draft of an International Law of Sales*, 5 U. CHI. L. REV. 543, 565 (1938).

23. 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 at 65, U.N. Doc. A/CN.9/SER.A/1970.

24. *Id.* The membership of UNCITRAL was originally set at 29 states but was enlarged in 1973 to 36 states. J. HONNOLD, *supra* note 8, at 50 n.5. UNCITRAL had the following distribution: seven delegates from Africa, five from Asia, four from Eastern Europe, five from Latin America, and eight from Western Europe and other states. G.A. Res. 2205, 21 U.N. GAOR Supp. (No. 16) at 99, U.N. Doc. A/6316 (1966), *reprinted in* [1968-1970] 1 Y.B. UNCITRAL at 66, U.N. Doc. A/CN.9/SER.A/

UNCITRAL began its unification effort by establishing a working group,[25] composed of delegates representing UNCITRAL's membership.[26] UNCITRAL directed the working group to revise the ULF and the ULIS or, in the alternative, to draft a new text.[27] The working group opted to draft a new text based on revisions of the ULF and the ULIS.[28] UNCITRAL's goal was to compose a text that would satisfy countries with different legal, social, and economic systems.[29] To effec-

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1970. With a wide representation, the group was designed to avoid the concentration of Western Europeans in the previous membership of UNIDROIT and at the 1964 Conventions. *See* Honnold, *supra* note 20, at 225-26. Representatives are chosen from leaders in the field of international trade law. G.A. Res. 2205, 21 U.N. GAOR Supp. (No. 16) at 100, U.N. Doc. A/6316 (1966), *reprinted in* [1970] 1 Y.B. UNCITRAL at 66, U.N. Doc. A/CN.9/SER.A/1970. A cross section was desired because

> [i]t would be essential to assure the most active and broadly based support of Governments, and at the same time to provide for the participation of recognized authorities in this field of law. It would therefore appear advisable to provide that the membership of such a commission should be composed of an appropriate number of States . . . .

Report of the Secretary-General, *supra* note 10, 21 U.N. GAOR Annexes (agenda Item 88) at 24, U.N. Doc. A/6396 (1965), *reprinted in* [1968-1970] 1 Y.B. UNCITRAL at 44, U.N. Doc. A/CN.9/SER.A/1970; *see* J. HONNOLD, *supra* note 8, at 51.

25. *Report of the United Nations Commission on International Trade Law on the Work of its Second Session*, 24 U.N. GAOR Supp. (No. 18) at 1, 12, U.N. Doc. A/7618 (1969), *reprinted in* [1968-1970] 1 Y.B. UNCITRAL 94, 99, U.N. Doc. A/CN.9/SER.A/1970 [hereinafter *UNCITRAL Report: Second Session*]. UNCITRAL generally meets once a year for two to four week sessions and receives reports from established working groups that concentrate on a particular topic. J. HONNOLD, *supra* note 8, at 50. At the first session of UNCITRAL, priority was given to work on the uniform law for international sales, and a working group was established. *Report of the United Nations Commission on International Trade Law on the Work of its First Session*, 23 U.N. GAOR Supp. (No. 16) at 12-14, U.N. Doc. A/7216 (1968), *reprinted in* [1968-1970] 1 Y.B. UNCITRAL 71, 77, U.N. Doc. A/CN.9/SER.A/1970.

26. *See UNCITRAL Report: Second Session*, *supra* note 25, 24 U.N. GAOR Supp. (No. 18) at 12, U.N. Doc. A/7618 (1969), *reprinted in* [1968-1970] 1 Y.B. UNCITRAL at 99, U.N. Doc. A/CN.9/SER.A/1970.

27. *UNCITRAL Report: Second Session*, *supra* note 25, 24 U.N. GAOR Supp. (No. 18) at 12, U.N. Doc. A/7618 (1969), *reprinted in* [1968-1970] 1 Y.B. UNCITRAL at 99-100, U.N. Doc. A/CN.9/SER.A/1970. The working group recommended to UNCITRAL that new texts be written. *Official Records*, *supra* note 11, at 4. The working group completed its work in nine sessions. *Id.*

28. P. SCHLECHTRIEM, *supra* note 5, at 19.

29. *UNCITRAL Report: Second Session*, *supra* note 25, 24 U.N. GAOR Supp. (No. 18) at 12, U.N. Doc. A/7618 (1969), *reprinted in* [1968-1970] 1 Y.B. UNCITRAL at 100. UNCITRAL considered replies made by various countries to a survey regarding the effectiveness of the ULF and the ULIS and to ascertain whether any would adhere to those uniform laws. *Id.* at 7, *reprinted in* [1968-1970] 1 Y.B. UNCITRAL at 97. A split emerged among the delegates revealing two separate opinions on the ULF and

tuate this goal, UNCITRAL requested that the working group consider a series of comments by a number of nations regarding the effectiveness of the ULIS and the ULF.[30] UNCITRAL directed the working group to examine the issues raised in the comments and to determine where and how the ULIS and the ULF should be revised.[31]

In June 1978, UNCITRAL combined the revisions of the ULF and the ULIS into a Draft Convention on Contracts for the International Sale of Goods (the "1978 Draft Text").[32] The 1978 Draft Text was composed of essentially two parts. The first part was devoted to contract formation and the second to the rights and obligations of the contracting parties.[33] In 1980, sixty-two states met at the Vienna Conference and revised the 1978 Draft Text.[34] The product of the Vienna Conference, the United Nations Convention on Contracts for the International Sale of Goods, entered into force in January

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the ULIS. *Id.* at 8, *reprinted in* [1968-1970] 1 Y.B. UNCITRAL at 97-98. The first group took the view that the ULF and the ULIS were a "significant contribution" to unifying the law of sales and should not be revised; instead they should be given time and "put to the test." *Id.* at 8, *reprinted in* [1968-1970] 1 Y.B. UNCITRAL at 97. The second group, however, took the position that the ULIS and the ULF "did not correspond to present needs and realities" and urged UNCITRAL to review the conventions "in the interest of unification." *Id.* at 8, *reprinted in* [1968-1970] 1 Y.B. UNCITRAL at 98. A major concern cited by the second group was the small number of representatives at the 1964 Hague Conference that adopted the ULF and the ULIS and the lack of legal input from those countries that did not attend, most notably the developing countries. *Id.* "[M]any provisions were aimed at facilitating trade between countries within the same region rather than between countries of different continents." *Id.*; *see* J. HONNOLD, *supra* note 8, at 53.

30. *See Report of the Working Group on the International Sale of Goods, First Session, 5-16 January 1970*, 3 U.N. Commission on International Trade Law 1, 3, U.N. Doc. A/CN.9/35 (1970), *reprinted in* [1968-1970] 1 Y.B. UNCITRAL 176, 177, U.N. Doc. A/CN.9/SER.A/1970 [hereinafter *Working Group: First Session*].

31. *See id.*

32. *Report of the United Nations Commission on International Trade Law on the Work of its Eleventh Session*, 33 U.N. GAOR Supp. (No. 17) at 1, 8, U.N. Doc. A/33/17 (1978), *reprinted in* [1978] 9 Y.B. UNCITRAL 11, 13, U.N. Doc. A/CN.9/SER.A/1978 [hereinafter *UNCITRAL Report: Eleventh Session*].

33. *See id.* The two drafts, one on sales obligations and the other on formation, were combined into a single text by UNCITRAL because it was believed that a single draft would encourage adoption by states and unification of international sales law. *See id.* at 10-30, *reprinted in* [1978] 9 Y.B. UNCITRAL at 14-21. Article 92(1) of the CISG permits states to choose between ratification of the entire instrument, or either the rules on formation or the rules on the obligations of the parties. CISG, *supra* note 1, art. 92(1), 52 Fed. Reg. at 6278, 19 I.L.M. at 692-93.

34. J. HONNOLD, *supra* note 8, at 54.

1988.[35]

B. *Provisions of the CISG Relevant to the Battle of the Forms Issue*

1. Articles 19 and 18(3)

Article 19 provides a set of rules for situations where there exists a discrepancy between the terms of one party's offer and the other party's acceptance.[36] The first subdivision of article 19, which codifies what is known as the "mirror-image rule," states that a reply that adds new or different terms to an offer is a rejection and a counter-offer.[37] The second subdivision creates an exception to this rule for terms added to the purported acceptance that do not materially alter the terms of the offer.[38] It states that if the reply contains such additional immaterial terms, the reply can still function as an acceptance unless the offeror objects.[39] The third subdivision of article 19 limits the number of terms that may be found to be immaterial by stating the terms deemed to alter materially the offer.[40] This list includes terms relating to conditions of payment, delivery, the extent of the parties' liability, and the quality and quantity of the goods.[41]

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35. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, STATUS AS AT 31 DEC. 1988, at 367, U.N. Doc. ST/LEG/SER.E/7 (1988).

36. *See* CISG, *supra* note 1, art. 19, 52 Fed. Reg. at 6266, 19 I.L.M. at 675-76; P. SCHLECHTRIEM, *supra* note 5, at 55.

37. CISG, *supra* note 1, art. 19, 52 Fed. Reg. at 6266, 19 I.L.M. at 675-76; *see* C.M. BIANCA & M.J. BONELL, *supra* note 9, at 178.

38. *See* CISG, *supra* note 1, art. 19(2), 52 Fed. Reg. at 6266, 19 I.L.M. at 676.

39. *Id.*

40. *Id.* art. 19(3), 52 Fed. Reg. at 6266, 19 I.L.M. at 676.

41. *Id.* At the Vienna Conference, the French delegation proposed a measure to weaken the mirror-image rule by limiting the amount of terms deemed material under article 19(3) to price, quality, and quantity of the goods. *Official Records*, *supra* note 11, at 96. Delegates at the Vienna Conference referred to article 17 of the 1978 Draft Text, which was the corresponding article of the current article 19 of the CISG. *Id.* at 95. Article 17 was essentially the same as the current article 19 with the exception of article 17(3), which provided that

> [a]dditional or different terms relating, *inter alia*, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially, unless the offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeror.

Id. The French proposal would limit the terms that could materially alter the offer to those that "affected the very substances of the sale." *Id.* at 287. All other terms, according to the French delegate, were secondary considerations found in the gen-

According to article 19, when a party receives a reply with added terms that materially alter its offer, the party has received a counter-offer.[42] A party may do one of two things upon receipt of the counter-offer. First, the party may reject the counter offer, and, thus, no contract is concluded.[43] Second, the party may perform its obligations under an apparent contract, for example, by accepting the other party's goods.[44]

Article 18(3) of the CISG provides that a party may accept an offer by conduct indicating assent, such as paying for the goods or, if the party is the seller, by shipping the goods.[45] Accordingly, article 18(3) is used to support the proposition that the party that receives a counter-offer under the rules of article 19 and subsequently performs has accepted the terms of the counter-offer.[46] The traditional rule of article 19, in conjunction with article 18(3), therefore, is to favor the party that

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eral conditions of sale. *Id.* The French proposal was defeated largely because delegates believed that price, quantity, and quality terms were not the only terms that parties to a contract could consider to be material. *Id.* at 287-88 (statements of Belgium and United Kingdom). A second group at the conference sought to strengthen the mirror-image rule by deleting article 17(2) and 17(3), thus requiring that the acceptance match the offer exactly according to the strict mirror-image rule of article 17(1). *Id.* at 97. The deletion was rejected, but in the alternative, the delegates agreed to eliminate the last clause of article 17(3). *Id.* at 286. The result is that most aspects of a contract are deemed material. *See* J. HONNOLD, *supra* note 8, at 193. Most cases will probably fall under the traditional mirror-image rule of article 19(1). *Id.*

42. CISG, *supra* note 1, art. 19(1), 52 Fed. Reg. at 6266, 19 I.L.M. at 675.

43. *See* C.M. BIANCA & M.J. BONELL, *supra* note 9, at 179.

44. *Id.*

45. CISG, *supra* note 1, art. 18(3), 52 Fed. Reg. at 6266, 19 I.L.M. at 675. Article 18(3) provides that

> if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Id.

46. *See* C.M. BIANCA & M.J. BONELL, *supra* note 9, at 179. Two conclusions can be reached, either the seller made a counter-offer that was accepted by the buyer when the buyer accepted the goods, or the seller accepted the terms of the original offer of the buyer by performing through shipment of the goods. J. HONNOLD, *supra* note 8, at 195. The theory of using the last shot principle has been criticized for its reliance on article 18. Van der Velden, *supra* note 8, at 241-42. In order to maintain acceptance by performance, the performance must be considered an assent to the counter-offer. *Id.* The assent will be lacking in battle of the forms cases because the offeror, in using a form listing general conditions, will often express an intention to

"fires the last shot."[47]

The rule espoused by article 18(3) received both criticism and support during the drafting process.[48] Some delegates saw the provision as respecting practices established by the parties or a trade usage to which they adhere.[49] Other delegates, however, said that the party who performs could inadvertently be bound to a contract without full knowledge of its terms.[50] When the working group adopted the rule of article 18(3), it indicated that acceptance by conduct would be triggered when practice established by the parties or a trade usage supported finding acceptance by conduct.[51]

Parties to international contracts commonly exchange preprinted general conditions forms or standard contracts during contract formation.[52] General conditions forms contain terms, often supplied by international trade organizations, to which the parties attach importance.[53] Similarly, standard contracts also refer to internationally recognized trade terms.[54] Both have achieved major importance in international trade.[55] By

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be bound only by the terms of that form. *Id.*; *see infra* notes 126-28 and accompanying text (criticizing use of articles 18(3) and 19 to conclude a contract).

47. *See* C.M. BIANCA & M.J. BONELL, *supra* note 9, at 179.

48. *See Report of the Working Group on the International Sale of Goods on the Work of its Ninth Session*, 11 U.N. Commission on International Trade Law at 44, U.N. Doc. A/CN.9/142 (1978), *reprinted in* [1978] 9 Y.B. UNCITRAL 61, 79 [hereinafter *Working Group: Ninth Session*].

49. *See id.*

50. *See id.* Some delegates expressed the same concern at the Vienna Conference about the article, which was then numbered article 16. *Official Records*, *supra* note 11, at 280. The provision was nevertheless adopted by the delegates. *Id.* at 424.

51. *Working Group: Ninth Session*, *supra* note 48, 11 U.N. Commission on International Trade Law, U.N. Doc. A/CN.9/142 (1978), *reprinted in* [1978] 9 Y.B. UNCITRAL at 79.

52. Drobnig, *supra* note 6, at 119; Van der Velden, *supra* note 8, at 233. Although the terms general conditions and standard forms are often used interchangeably, there is some difference between the two forms. Drobnig, *supra* note 6, at 118. Standard forms leave blank spaces for the inclusion of additional terms; once the spaces are filled in and the form is signed, the contract is completed. *Id.* General conditions, on the other hand, leave no spaces for individual terms. *Id.*; *see supra* note 6 (discussing general conditions).

53. *See* Van der Velden, *supra* note 8, at 235; *see also* Drobnig, *supra* note 6, at 118-19 (discussing terms found in general conditions forms).

54. *See* Drobnig, *supra* note 6, at 118.

55. Hellner, *supra* note 6, at 335. The United Nations Economic Commission for Europe has prepared general conditions and standard forms. Drobnig, *supra* note 6, at 118 n.1. Because of the ease and simplicity of using standard contracts and general conditions, many international traders use the forms frequently. Drobnig,

using the pre-printed forms, the parties attempt to remove the terms of the sale from the negotiating process.[56] The parties also attempt to impose their own terms on each other while simultaneously refusing to be bound by any terms other than their own.[57]

The classic battle of the forms scenario involves the use of either general conditions forms or standard contracts exchanged in the regular course of business.[58] The forms that are exchanged by the parties often conflict with each other.[59] The most frequently conflicting terms are delivery terms, risk of loss, force majeure, choice of forum, conditions of payment, and consequences of breach.[60] Pursuant to article 19(3), when such terms on the general conditions forms or standard contracts conflict, the conflict is usually material.[61]

The last shot principle, provided by articles 18(3) and 19, may be used to resolve the battle of the forms.[62] This approach favors the party who has sent the last form, thereby imposing the terms contained in that form on the other party.[63] This theory, however, may be insufficient when parties perform while continuing to send forms back and forth, thereby making it difficult to ascertain what constitutes the final, or last, form.[64] The last shot principle, therefore, may fail to determine when the acceptance has occurred and which party's form is to prevail as the terms of the contract.[65]

The drafters of the CISG were aware of the use of general

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supra note 6, at 119. A Dutch survey on the use of general conditions, for example, found that among Dutch traders, 91% to 92% used or received such forms in the course of business. Van der Velden, *supra* note 8, at 233.

56. Drobnig, *supra* note 6, at 119.

57. *Id.* The parties use a " 'defensive' clause" that contains language excluding any terms supplied by the other party. *Id.* at 124.

58. *See* Van der Velden, *supra* note 8, at 236; *see also* Hellner, *supra* note 6, at 341 (discussing discrepencies between forms).

59. Van der Velden, *supra* note 8, at 234. A Dutch survey found that 60% of the business people surveyed encountered conflicting general conditions. *Id.*

60. *Id.* at 240.

61. C.M. BIANCA & M.J. BONELL, *supra* note 9, at 180.

62. *Id.* at 179.

63. *Id.*

64. *See* Hellner, *supra* note 6, at 341-42; Van der Velden, *supra* note 8, at 242-43. Parties under an apparent contract often perform their obligations while continuing to send back and forth forms that invariably contain terms that materially differ. *Id.* The last shot principle is also questioned for its reliance on article 18. *Id.* at 241.

65. *See* Hellner, *supra* note 6, at 342.

conditions forms and standard contracts, as well as the difficulties encountered by business people who use such forms without carefully reading the terms.[66] An early attempt to address such difficulties was made by the Secretariat.[67] The Secretariat's proposal recognized situations in which the parties agreed to the terms filled in on printed forms but failed to read and agree to the forms' printed terms.[68] If the written terms, or those negotiated by the parties, did not materially differ from each other, then a contract would exist.[69] The printed terms that conflicted with each other would be essentially disregarded in favor of terms supplied by trade usage and prac-

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66. *See Official Records*, *supra* note 11, at 288-89. UNCITRAL discussed the importance of general conditions forms and standard contracts to the promotion of uniform law at its second session. *UNCITRAL Report: Second Session*, *supra* note 25, 24 U.N. GAOR Supp. (No. 18) at 15, U.N. Doc. A/7618 (1969), *reprinted in* [1968-1970] 1 Y.B. UNCITRAL at 101, U.N. Doc. A/CN.9/SER.A/1970. *See generally General Conditions of Sale and Standard Contracts, Incoterms and Other Trade Terms; Promotion of a Wider Use of Existing General Conditions of Sale and Standard Contracts: Report of the Secretary-General*, 2 U.N. Commission on International Trade Law (Item 4(d) of the provisional agenda) at 1, U.N. Doc. A/CN.9/18 (1969), *reprinted in* [1968-1970] 1 Y.B. UNCITRAL at 207.

67. *See Report of the Secretary-General: Formation and Validity of Contracts for the International Sale of Goods*, 10 U.N. Commission on International Trade Law at 28-29, U.N. Doc. A/CN.9/128, annex II (1977), *reprinted in* [1977] 8 Y.B. UNCITRAL 90, 100 [hereinafter *Report of the Secretary-General: Formation and Validity*]. The Secretariat's proposal to UNCITRAL is summarized in the Secretary-General's report. *Id.* at 2, *reprinted in* [1977] 8 Y.B. UNCITRAL at 90. The proposed clause stated that

> [i]f the offer and a reply which purports to be an acceptance are on printed forms and the non-printed terms of the reply do not materially alter the terms of the offer, the reply constitutes an acceptance of the offer even though the printed terms of the reply materially alter the printed terms of the offer unless the offeror objects to any discrepancy without delay. If he does not so object the terms of the contract are the non-printed terms of the offer with the modifications in the non-printed terms contained in the acceptance plus the printed terms on which both forms agree.

Id. at 27, *reprinted in* [1977] 8 Y.B. UNCITRAL at 100. UNCITRAL is served by a Secretariat, which consists of the United Nations International Trade Law Branch. J. HONNOLD, *supra* note 8, at 52. The Secretariat provides UNCITRAL and the Working Groups (whose members have full-time responsibilities outside of UNCITRAL) with preparatory materials for their meetings. *Id.* The materials include studies on existing legal rules, reports on commercial practice, and other documents to help facilitate debate and decision. *Id.*

68. *Report of the Secretary-General: Formation and Validity*, *supra* note 67, 10 U.N. Commission on International Trade Law at 29, U.N. Doc. A/CN.9/128 (1977), *reprinted in* [1977] 8 Y.B. UNCITRAL at 100. It was noted that "[t]he employees of both parties will rarely, if ever, read and compare the printed terms. All that is of importance to them are the terms which have been filled in on the forms." *Id.*

69. *Id.*

tice between the parties.[70] The working group, while recognizing that the Secretariat's proposal dealt with a practical problem, nevertheless rejected it in favor of the strict mirror-image rule.[71]

At the Vienna Conference, the delegates advanced a proposal, made by the Belgian delegation, that directly addressed the battle of the forms.[72] The Belgian proposal recognized the problem that could arise when buyers and sellers, in the normal course of business, exchanged general conditions that invariably would conflict with each other.[73] The proposal would have added a fourth clause to article 19, stating that if the parties used general conditions, any conflicting terms in the forms would not become part of the contract.[74] Some delegates suggested that the issue needed further studying than it received, and that it was not ready for resolution by the Conference.[75] The delegates, while recognizing that the proposal specifically addressed the battle of the forms scenario, nevertheless rejected the Belgian proposal.[76] One delegate, however, pointed out that the text of the CISG, without a provision for the battle of the forms, "completely ignored" the matter.[77]

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70. *Id.*

71. *Report of the Working Group on the International Sale of Goods on the Work of its Eighth Session*, 10 U.N. Commission on International Trade Law at 25, U.N. Doc. A/CN.9/128 (1977), *reprinted in* [1977] 8 Y.B. UNCITRAL 73, 82.

72. *See Official Records*, *supra* note 11, at 96. The proposal called for the addition of a fourth subdivision to be added to article 19, which was then article 17: "(4) When the offeror and the offeree have expressly (or implicitly) referred in the course of negotiations to general conditions the terms of which are mutually exclusive the conflict clauses should be considered not to form an integral part of the contract." *Id.* (emphasis omitted).

73. *See Id.* at 288. The delegates believed that

> [t]he commercial staffs of buyers or sellers were not legal experts and used general conditions in a rather mechanical way. It sometimes happened that the offeror and the offeree agreed on specific points (such as the price, quality and quantity of goods or arrangements for payment) and so far as other matters were concerned simply referred to general conditions the terms of which were conflicting.

Id.

74. *Id.*

75. *Id.* at 288-89.

76. *Id.* at 288.

77. *Id.* at 289.

2. Article 7

Article 7(1) provides that the CISG should be interpreted in accordance with the international nature of the Convention and its goal of uniformity.[78] Article 7(2) directs that any questions that cannot be answered by a specific provision in the CISG must be addressed by looking to the general principles of the CISG.[79] If there are no principles on which to base a solution, article 7(2) instructs that the question be settled according to domestic law indicated by rules of private international law.[80]

The CISG's documentary history indicates that the drafters did not want to encourage the use of private international law for all issues not addressed in the CISG—"gaps" in its provisions.[81] Instead, the drafters wanted to promote a uniform law by encouraging the use of the CISG's own general principles as a gap-filling tool.[82] During the working group's deliberations, a number of delegates supported retaining the language of ULIS article 17, which called for the use of general principles alone to solve issues unsettled by the ULIS.[83] Prior experience with the ULIS, however, had shown that relying

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78. CISG, *supra* note 1, art. 7(1), 52 Fed. Reg. at 6265, 19 I.L.M. at 673. Article 7(1) provides that "[i]n 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.* The CISG seeks to prevent any one domestic law from being dominant. Zwart, *supra* note 1, at 111.

79. CISG, *supra* note 1, art. 7(2), 52 Fed. Reg. at 6265, 19 I.L.M. at 673. Article 7(2) states that "[q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law." *Id.*

80. *Id.* Rules of private international law determine the application of substantive law and the municipal law that will apply to the parties absent the application of the CISG. *See* Barbić, *Uniform Law on the International Sale of Goods (1964) and United Nations Convention on Contracts for the International Sale of Goods (1980)*, in HAGUE-ZAGREB ESSAYS 4 ON THE LAW OF INTERNATIONAL SALES 3, 6 (1983).

81. *See Working Group: First Session*, *supra* note 30, 3 U.N. Commission on International Trade Law at 14-16, U.N. Doc. A/CN.9/35 (1970), *reprinted in* [1968-1970] 1 Y.B. UNCITRAL at 181-82, U.N. Doc. A/CN.9/SER.A/1970. The working group based its discussion of CISG article 7(2) on ULIS article 17, which states that "[q]uestions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based." *Id.* at 14, *reprinted in* [1968-1970] 1 Y.B. UNCITRAL at 182.

82. *Id.*; *see* P. SCHLECHTRIEM, *supra* note 5, at 37-38.

83. *See Working Group: First Session*, *supra* note 30, 3 U.N. Commission on Interna-

solely on the instrument's general principles as a gap-filling mechanism was not an adequate solution.[84]

At the Vienna Conference, a number of delegates again urged that gaps in the CISG be filled by general principles reflecting the international spirit of the CISG.[85] Their proposal, however, received strong criticism for failing to settle certain questions definitively.[86] As an alternative, other delegates proposed that domestic law determined by rules of private international law should be utilized to fill gaps in the CISG.[87] Rather than choose one proposal over the other, the delegates reached a compromise embodied in article 7(2) by combining the general principles of the CISG and rules of private international law.[88] The structure and language of article 7(2), however, directs that courts first turn to the general principles of the CISG, indicating the delegates' preference that courts use the general principles to fill gaps in the CISG whenever possible.[89]

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tional Trade Law at 14-15, U.N. Doc. A/CN.9/35 (1970), *reprinted in* [1968-1970] 1 Y.B. UNCITRAL at 182, U.N. Doc. A/CN.9/SER.A/1970.

84. *Official Records, supra* note 11, at 255. The Bulgarian delegate noted that

> [i]n the view of most specialists, the experience gained with [article 17] . . . of ULIS had shown that it was a costly illusion to imagine that all gaps in an international legal instrument could be filled solely by means of the interpretation of its own provisions and without the help of private international law and that the conflict rules were necessary for the purpose of finding alternative substantive rules.

Id. The working group had considered a proposal allowing for the recourse to private international law, without first looking into the general principles. *Working Group Report: First Session, supra* note 30, 3 U.N. Commission on International Trade Law at 16, U.N. Doc. A/CN.9/35 (1970), *reprinted in* [1968-1970] 1 Y.B. UNCITRAL at 182, U.N. Doc. A/CN.9/SER.A/1970. Delegates often expressed reluctance to refer to unstated and often vague general principles, urging instead that recourse to private international law would provide a more concrete solution. *See, e.g., Working Group on the International Sale of Goods; Report on the Work of the Second Session* 4 U.N. Commission on International Trade Law at 1, 35, U.N. Doc. A/CN.9/52 (1971), *reprinted in* [1971] 2 Y.B. UNCITRAL 50, 62, U.N. Doc. A/CN.9/SER.A/1971 [hereinafter *Working Group Report: Second Session*].

85. *See Official Records, supra* note 11, at 255.

86. *See id.*

87. *See id.*

88. *See id.* at 257; *see also* CISG, *supra* note 1, art. 7(2), 52 Fed. Reg. at 6265, 19 I.L.M. at 673.

89. CISG, *supra* note 1, art. 7(2), 52 Fed. Reg. at 6265, 19 I.L.M. at 673.

3. Article 4

Article 4 permits courts in certain instances to use their own domestic law in cases otherwise governed by the CISG.[90] Article 4 states that the CISG governs formation of and the rights and obligations arising from the contract.[91] It also states that the CISG does not provide rules concerning the validity of a contract or the effect of a contract on property rights in the goods sold.[92] Instead, domestic law will continue to regulate issues of contract validity and property rights.[93]

In determining not to provide a uniform law on contract validity, the working group looked to a study previously prepared for UNIDROIT, which identified two characteristics of the law governing contract validity.[94] First, contract validity is raised not by an event arising out of contract performance, but rather by the need to impose the court's interpretation on the parties.[95] Therefore, a rule requiring the adjudicator to interpret abstract principles, such as what conditions justify a breach or whether a condition is serious, is likely to be a rule

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90. *Id.* art. 4, 52 Fed. Reg. at 6264, 19 I.L.M. at 673. Article 4 states that

> [t]his 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.

Id.

91. *Id.*

92. *Id.*

93. *See* CISG, *supra* note 1, art. 4, 52 Fed. Reg. at 6264, 19 I.L.M. at 673.

94. *See Report of the Secretary-General: Formation and Validity*, *supra* note 67, 10 U.N. Commission on International Trade Law at 6-7, U.N. Doc. A/CN.9/128, annex II, *reprinted in* [1977] 8 Y.B. UNCITRAL at 93. In 1960, UNIDROIT asked the Max-Planck Institut für auslandisches und internationales Privatrecht to compare domestic validity rules and prepare a text for a uniform law on validity. *Id.* In 1972, UNIDROIT approved the institute's draft of the Law for the Unification of Certain Rules Relating to the Validity of Contracts of International Sale of Goods (the "LUV"). *Id.* Two years later in 1974, UNCITRAL requested that the working group consider establishing uniform rules on contract validity, using the LUV as a basis. *Id.* at 4, *reprinted in* [1977] 8 Y.B. UNCITRAL at 92.

95. *Id.* at 6, *reprinted in* [1977] 8 Y.B. UNCITRAL at 93. For example, article 11 of the LUV allows avoidance of a contract if the threat that justifies avoidance is "unjustifiable, imminent and serious." *Id.* Before the contract can be avoided, courts must interpret the wording of the rule. *Id.*

on contract validity.[96] Second, the law governing contract validity is a reflection of a society's political, social, and economic philosophies.[97] For example, the invalidation of a contract for its violation of public policy would be the reflection of a society's philosophy with respect to contracts.[98] Other examples reflecting public-policy concerns include national rules on usury, unconscionable contracts, and duress.[99]

UNCITRAL did not formulate a law to govern contract validity, mainly because drafting such rules was far too complex without a consensus first being reached on the principles affecting contract validity.[100] Issues of contract validity arose in a very limited number of cases involving the international sale of goods, because sellers and buyers are usually much more concerned with the non-performance of a contract.[101] Moreover, problems of mistake, fraud, and duress were less likely to occur between sophisticated merchants than in transactions between merchants and consumers.[102] Article 2 of the CISG expressly excludes consumer transactions from its governance.[103]

Commentators define an issue of contract validity as one where the facts of a case do not invoke any of the provisions of the CISG.[104] For example, a domestic rule declaring an unconscionable contract voidable is a validity issue because the

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96. *Id.*

97. *See id.* at 7, *reprinted in* [1977] 8 Y.B. UNCITRAL at 93.

98. *Id.*

99. *Id.* Validity issues include capacity to contract, fraud, and agency rules. J. HONNOLD, *supra* note 8, at 96-98.

100. *Report of the Secretary-General: Formation and Validity*, *supra* note 67, 10 Commission on International Trade Law at 7, U.N. Doc. A/CN.9/128, annex II, *reprinted in* [1977] 8 Y.B. UNCITRAL at 93.

101. *Id.* at 5-6, *reprinted in* [1977] 8 Y.B. UNCITRAL at 92.

102. *Id.* at 5, *reprinted in* [1977] 8 Y.B. UNCITRAL at 92-93. The delegates noted that

> [i]t is likely that the reason that the problems of validity covered by LUV rarely arise in contracts for the international sale of goods is that such contracts are concluded between merchants who are, at least as compared to the average person, relatively sophisticated in matters of contracting. The problems of mistake, fraud and duress . . . are less likely to occur between merchants than they are in transactions between merchants and consumers or between two non-merchants.

Id.

103. CISG, *supra* note 1, art. 2, 52 Fed. Reg. at 6264, 19 I.L.M. at 672.

104. *See, e.g.*, J. HONNOLD, *supra* note 8, at 97; P. SCHLECHTRIEM, *supra* note 5, at 33.

CISG does not govern unconscionability.[105] Additionally, the CISG does not address capacity to contract,[106] consequences of mistake,[107] gross unfairness,[108] agency rules,[109] and fraud.[110] On the other hand, the issue of whether there has been a proper disclaimer of the party's warranties is addressed by article 8(2), which directs courts to consider the statements and conduct of the parties.[111] Because a case involving a warranty disclaimer triggers a provision of the CISG, specifically article 8(2), the issue does not concern contract validity.[112] Accordingly, courts are not free to refer to domestic law in resolving the issue because it is governed by the CISG.[113]

II. *THREE VIEWS ON ADDRESSING THE BATTLE OF THE FORMS UNDER THE CISG*

There are three different interpretations of the CISG as applied to the battle of the forms.[114] Several commentators suggest that there are general principles within the CISG that adequately address the battle of the forms and that, therefore, courts should apply the CISG rather than turn to domestic law

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105. J. HONNOLD, *supra* note 8, at 259. Section 2-302 of the Uniform Commercial Code, for example, denies legal effect to a contract found to be unconscionable. U.C.C. § 2-302.

106. *See* P. SCHLECHTRIEM, *supra* note 5, at 32; *see also* J. HONNOLD, *supra* note 8, at 97 (discussing contract validity under CISG).

107. *See* P. SCHLECHTRIEM, *supra* note 5, at 32.

108. *See id.* at 32.

109. *See* J. HONNOLD, *supra* note 8, at 97.

110. *See id.* at 96; P. SCHLECHTRIEM, *supra* note 5, at 32.

111. *See* J. HONNOLD, *supra* note 8, at 259. Professor Honnold explains that

> [t]he point is not . . . that Article 8 of the Convention and UCC 2-316 are identical but rather that *both address the same issue.* It follows that the reference to "validity" in Article 4(a) of the Convention may not be read so broadly as to import domestic rules that would supplant other articles of the Convention.

Id. (emphasis added). *But see* Note, *Disclaimers of Implied Warranties: The 1980 United Nations Convention on Contracts for the International Sale of Goods*, 53 FORDHAM L. REV. 863 (1985) (arguing that disclaimer of warranty is issue of contract validity excluded from governance of CISG).

112. J. HONNOLD, *supra* note 8, at 259.

113. *See* CISG, *supra* note 1, art. 4, 52 Fed. Reg. at 6264, 19 I.L.M. at 673.

114. *See* Huber, *supra* note 7, at 445 (battle of the forms is an issue of contract validity and not governed by CISG); Vergne, *supra* note 7, at 256-57 (CISG provides no solution for battle of the forms and courts must apply domestic law); Van der Velden, *supra* note 8, at 243 (general principles of CISG should be applied to battle of the forms).

for a solution.[115] Another view, however, states that courts will have no alternative but to rely on domestic law because the CISG fails to provide an adequate solution.[116] A third view states that the battle of the forms issue involves contract validity and, pursuant to article 4, should be resolved by domestic law.[117]

A. *Use of the General Principles of the CISG*

The application of the general principles of the CISG is predicated on the finding of a gap—the absence of a provision directly addressing an issue.[118] Those who argue in favor of applying the general principles to resolve cases involving the battle of the forms find the existence of such a gap.[119] There are three theories for finding a gap in the CISG with regard to the battle of the forms.

First, commentators argue that the last shot principle, which combines CISG articles 18(3) and 19, fails to provide a means for determining contract terms.[120] When the parties have continued to send forms back and forth to each other and have performed under the contract, the identification of a counter-offer and an acceptance is difficult if not impossible.[121] Second, the use of article 18(3) to conclude that one of the parties accepted the terms of the other by performing may not provide a means for defining the contract's terms.[122] One commentator has suggested that the use of article 18(3) is not an adequate solution because each party's subsequent per-

115. *E.g.*, Van der Velden, *supra* note 8, at 243; *see infra* notes 118-44 and accompanying text (discussing use of general principles in battle of the forms situations).

116. Vergne, *supra* note 7, at 257. Because the CISG provides no adequate solution, courts will have no alternative but to rely on their own laws. *Id.* Under article 7(2) courts could apply rules of private international law, which would lead to the application of the domestic law chosen by the parties or determined according to conflict of law rules. CISG, *supra* note 1, art. 7(2), 52 Fed. Reg. at 6265, 19 I.L.M. at 673.

117. Huber, *supra* note 7, at 445; *see infra* notes 145-67 and accompanying text (discussing application of domestic law).

118. CISG, *supra* note 1, art. 7(2), 52 Fed. Reg. at 6265, 19 I.L.M. at 673.

119. *E.g.*, Van der Velden, *supra* note 8, at 243.

120. *See* Hellner, *supra* note 6, at 341-42; *see also* Van der Velden, *supra* note 8, at 242; *supra* notes 62-65 and accompanying text (discussing last shot principle).

121. *See* Van der Velden, *supra* note 8, at 242.

122. *See id.*

formance can indicate acceptance to the other party's terms.[123]

The third theory for finding the existence of a gap in the CISG with regard to the battle of the forms suggests that when the terms of the purported acceptance materially alter the offer, there is no contract under the CISG even when the parties perform.[124] The gap, therefore, is not in failing to define the contract terms, but in failing to recognize the existence of a contract concluded by conduct.[125] According to one commentator, the conclusion of a contract by performance under article 18(3) requires the performing party's assent.[126] In the context of the battle of the forms, this assent is lacking because the party who included its own general conditions invariably indicates, either impliedly or expressly, that it will be bound only by its own terms.[127] It is impossible, therefore, to interpret subsequent performance as an acceptance to the other party's general conditions.[128]

Regardless of the theory for finding the existence of a gap in the CISG, this view consistently argues that the general principles of the CISG should be used to resolve a battle of the forms dispute.[129] The general principles can be found in article 7(1), which directs courts to interpret the CISG with regard to its goal of promoting uniformity and good faith.[130] Additionally, general principles can be derived from specific provisions of the CISG, such as those concerning trade usages and course of dealing.[131]

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123. J. HONNOLD, *supra* note 8, at 195.

124. Van der Velden, *supra* note 8, at 242.

125. *Id.* at 243.

126. *Id.* at 241.

127. *Id.* at 241-42. It is common for parties to use defensive clauses in their general conditions forms, refusing to be bound by any terms but those found in their own forms. *E.g.*, Drobnig, *supra* note 6, at 124.

128. Van der Velden, *supra* note 8, at 241-42.

129. *See, e.g.*, Van der Velden, *supra* note 8, at 243; Drobnig, *supra* note 6, at 127. The use of good faith as a general principle is a likely solution for questions arising out of article 19(2). P. SCHLECHTRIEM, *supra* note 5, at 39. General principles can be inferred from the individual provisions of the CISG. J. HONNOLD, *supra* note 8, at 132.

130. CISG, *supra* note 1, art. 7(1), 52 Fed. Reg. at 6265, 19 I.L.M. at 673; *see* P. SCHLECHTRIEM, *supra* note 5, at 38.

131. CISG, *supra* note 1, arts. 8-9, 52 Fed. Reg. at 6265, 19 I.L.M. at 673-74; Article 7(2), by referring to the principles on which the CISG is based, requires that the general principles used to settle new situations be "moored" to specific provisions in the CISG. J. HONNOLD, *supra* note 8, at 132.

According to one commentator, courts resolving the battle of the forms issue might fulfill the requirement of good faith by focusing on the material points to which the parties agreed and then supplying additional terms that will reasonably fill the remaining areas.[132] By supplying the missing terms, courts attempt to protect the interests of both parties.[133] All of the circumstances of the case are considered: the two sets of general conditions, the mutually agreed upon terms, the interests of the parties, and the manner of communication.[134] Such a method is in accordance with the good faith requirement.[135]

It is argued that article 9, which provides that parties are bound by usages of trade and course of dealing, should be used in the battle of the forms.[136] Applicable usages are limited to those that are known to the parties and regularly observed.[137] Regularity of observance of a trade usage is indica-

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132. Van der Velden, *supra* note 8, at 247. The CISG does not require that the parties act in good faith, but it imposes the good faith principle on courts interpreting the provisions of the CISG. *See* J. HONNOLD, *supra* note 8, at 123-24. In the United States, the Uniform Commercial Code imposes a good faith requirement on the parties to a contract. U.C.C. § 1-203 (1987). The Uniform Commercial Code states that "[e]very contract or duty within this Act imposes a duty of good faith in its performance or enforcement." *Id.* U.S. courts have interpreted the good faith definition of the Uniform Commercial Code. *See* Empire Gas Corp. v. American Bakeries Co., 840 F.2d 1333 (7th Cir. 1988) (buyer acted in bad faith in reducing purchases pursuant to requirements contract).

133. Van der Velden, *supra* note 8, at 247.

134. *Id.*

135. *Id.* One commentator writes that

> these methods of supplying the terms missing in the contract concluded by the agreement the parties have reached as to its material points, but incomplete as a result of the conflicting sets of general conditions, accord very well with the requirements of good faith and fair dealing in commercial trade, because they attempt to protect, albeit in slightly different ways, the interests of *both* parties as well as possible.

Id. (emphasis in original).

136. *See* J. HONNOLD, *supra* note 8, at 193-94. Article 9 directs

> (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
>
> (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

CISG, *supra* note 1, art. 9, 52 Fed. Reg. at 6265, 19 I.L.M. at 674.

137. J. HONNOLD, *supra* note 8, at 148.

tive of the parties' implied or actual knowledge of the usage.[138] In addition to trade usage, a pattern of practices between the buyer and seller in their commercial relationship can also bind the parties.[139] In fact, course of dealing may have a more concrete meaning than the actual words found in the contract terms.[140]

In the context of the battle of the forms, the issue becomes whether applicable trade usages and practices between the buyer and seller entailed the scrutiny of the general conditions used by the parties regularly.[141] In a large transaction that is not handled routinely, one could argue that the parties might pay closer attention to the general conditions.[142] Conversely, a routine order might not include an examination of the general conditions, unless, for example, the seller brings to the buyer's attention one of the conditions viewed as particularly important.[143] A court, with a battle of the forms scenario before it, would consider the usages and practices relevant to the parties in determining what terms should be included in their contract.[144]

B. *The CISG Fails to Define Contract Terms when the Terms in the Offer and Acceptance Conflict*

One view advanced for the application of domestic law in the battle of the forms scenario argues that the general principles of the CISG provide no means for defining the terms of the contract when the general conditions of the offer and the

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138. 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, 57 (1982).

139. J. HONNOLD, *supra* note 8, at 146.

140. *Id.* Professor Honnold writes that "[a] contract provision (like a fish out of water) loses its life when it is removed from its setting." *Id.* at 148. Professor Honnold argues that courts should construe the contract based on applicable usage and any prior dealings between the parties. *Id.* An expansive reading of the trade usage provision would interpret the term "trade" to include trade in a region or among certain trading partners, rather than require that a majority of parties who commonly engaged in similar transactions followed the usage. Dore & Defranco, *supra* note 138, at 58.

141. J. HONNOLD, *supra* note 8, at 193-94.

142. *Id.*

143. *Id.* at 194.

144. *Id.* at 193-94.

purported acceptance conflict.[145] Therefore, according to article 7(2), courts will have to apply domestic law as determined by rules of private international law.[146]

According to one commentator, while article 19 together with article 18(3) provides a basis for the existence of a contract, the CISG fails to define the contract's terms.[147] There are two possible results when the general conditions in the purported acceptance materially alter the terms of the offer and when both parties have performed under the contract:[148] first, the original offeree accepted the original offer by performance, or second, the purported acceptance was a counter-offer that was accepted by the offeror's performance.[149] The two theories yield two different results and fail to guide courts in determining which party's terms are to prevail.[150] By relying on the gap-filling mechanism of article 7(2), one may find that the CISG fails to define contract terms. Consequently, courts will have no alternative but to use domestic law as determined by rules of private international law.[151]

Domestic law, as it pertains to the issue of the battle of the forms, varies from state to state. In England, the case of *Butler Machine Tool Co. Ltd. v. Ex-Cell O Corp.*[152] demonstrates the recent approach to solving the battle of the forms without necessarily resorting to strict rules of offer and counter-offer.[153] The court in *Butler Machine Tool Co. Ltd.* recognized an alternative way to solve the battle of the forms by comparing the par-

145. Vergne, *supra* note 7, at 256.

146. CISG, *supra* note 1, art. 7(2), 52 Fed. Reg. at 6265, 19 I.L.M. at 673.

147. *See* Vergne, *supra* note 7, at 256-57.

148. *Id.* at 256; J. HONNOLD, *supra* note 8, at 195.

149. Vergne, *supra* note 7, at 256; *see* J. HONNOLD, *supra* note 8, at 195. The two theories are grounded in the last shot principle, which states that in battle of the form cases, the terms of the contract become those in the last form sent. C.M. BIANCA & M.J. BONELL, *supra* note 9, at 179. The terms become "accepted" when the first party to perform starts performing under the "contract." *Id.*

150. Vergne, *supra* note 7, at 256; *see* J. HONNOLD, *supra* note 8, at 195. Professor Honnold writes that "[i]t is difficult to come to grips with these arguments for both have little contact with reality." *Id.*

151. Vergne, *supra* note 7, at 257.

152. [1979] 1 All E.R. 965 (C.A.).

153. *Id.* Under the English common law, the strict mirror-image rule precluded the finding of a contract when the acceptance did not exactly match the offer. Vergne, *supra* note 7, at 239. The reply instead was a counter-offer, subject to acceptance by the other party, and the terms of the contract would be those contained in the last form sent. *Id.* at 240.

ties' conflicting terms.[154] The terms may become part of the contract if they can coexist, but they will not become part of the contract if they are contradictory.[155]

The Uniform Commercial Code, as applied in most states in the United States, provides a means for defining contract terms when the parties have concluded a contract but failed to agree to the same terms.[156] If the reply does not constitute an

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154. *See Butler Machine Tool Co.*, [1979] 1 All E.R. at 966-67; *see also* Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd., [1988] 2 W.L.R. 615 (discussing whether printed clauses should be incorporated into contract); Pagnan S.p.A. v. Feed Prod. Ltd., [1987] 2 Lloyd's Rep. 601 (discussing whether terms never agreed to become part of contract); Pagnan S.p.A. v. Granaria B.V. and Others, [1986] 2 Lloyd's Rep. 547 (discussing whether valid contract concluded).

155. *Butler Machine Tool Co.*, [1979] 1 All E.R. at 969. A commentator has noted that

> Lord Denning's alternative to the classical rule compliments the theory of formation with the notions of substantial and ancillary terms of the contract . . . . This approach purports to give a wide power of discretion to the courts which will to a certain extent be able to take the place of the parties in their contractual relationship.

Vergne, *supra* note 7, at 243.

156. *See* U.C.C. § 2-207 (1987). Section 2-207 states that

> (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 provisions of this Act.

Id. U.S. state courts addressing the battle of the forms have relied on the Uniform Commercial Code. *See, e.g.*, Marlene Indus. Corp. v. Carnac Textiles, Inc., 45 N.Y.2d 327, 408 N.Y.S.2d 410, 380 N.E.2d 239 (1978) (arbitration clause in seller's acknowledgement form does not become part of contract when buyer limited terms to its own order form); National Agric. Commodities, Inc. v. International Commodities Export Co., 108 A.D.2d 735, 484 N.Y.S.2d 902 (N.Y. App. Div. 1985) (reference by plaintiff to arbitration clause in plaintiff's form evidence of clause as term of contract); Lory Fabrics, Inc. v. Dress Rehearsal, Inc., 78 A.D.2d 262, 434 N.Y.S.2d 359 1st Dep't 1980) (arbitration clause part of contract when both sides expressly agreed

acceptance, but the parties have performed under the apparent contract, then the terms of the contract are those on which the parties' writings agree, plus "supplementary terms" supplied by the Uniform Commercial Code.[157]

The approach of the French civil law system to battle of the forms cases looks to the "nature of the discrepancy" between the parties' general conditions.[158] There will be no contract concluded if the discrepancy relates to an essential contract term, but if the less crucial terms conflict then a contract will have been formed.[159]

C. *Battle of the Forms as a Problem of Contract Validity*

It is argued that the battle of the forms dispute is a contract validity issue concerning the determination of which party's general conditions should be incorporated into the contract.[160] Proponents of this view argue that because the issue is contract validity, article 4(a) should apply.[161] Article 4 provides that the CISG governs rules on formation of the contract and the rights and obligations of the party.[162] It also states that the CISG does not govern contract validity, leaving courts free to resort to domestic law.[163]

According to this argument, the difficulty arises when the parties use general conditions forms that invariably contain terms deemed material under CISG article 19(3).[164] If the offeror uses a general conditons form, and the terms of the offer are modified by the terms in the other party's acceptance, the

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to arbitration but never signed each other's forms). Courts address "many conflicts which arise as a result of the all too common business practice of blithely drafting, sending, receiving, and filing unread numerous purchase orders, acknowledgements and other diverse forms containing a myriad of discrepant terms." *Marlene*, 45 N.Y.2d at 329-30, 408 N.Y.S.2d at 412, 380 N.E.2d at 239.

157. *See* U.C.C. § 2-207(3) (1987).

158. *See* Vergne, *supra* note 7, at 249.

159. *Id.*

160. Huber, *supra* note 7, at 444-45. Article 4(a) excludes validity issues from the scope of the CISG. CISG, *supra* note 1, art. 4(a), 52 Fed. Reg. at 6264, 19 I.L.M. at 673. Domestic law, therefore, still regulates issues of contract validity. P. SCHLECHTRIEM, *supra* note 5, at 32.

161. Huber, *supra* note 7, at 444.

162. CISG, *supra* note 1, art. 4, 52 Fed. Reg. at 6264, 19 I.L.M. at 673.

163. *See id.*

164. Huber, *supra* note 7, at 444-45. In his discussion, Huber refers to article 17 of the 1978 Draft Text, which became article 19 at the Vienna Conference.

alteration will likely be material.[165] This view disagrees with the use of article 18(3) to conclude that the subsequent performance by the original offeror indicates that party's acceptance of the altered terms, nor can the offeror's silence following receipt of the alterations conclude a contract.[166] In fact, this view sees such a result as impractical.[167] Accordingly, neither CISG article 19 nor CISG article 18(3) will resolve the battle of the forms dispute.[168] The correct conclusion, this argument suggests, is that the issue is contract validity, resolved according to domestic law.[169]

III. *IN SUPPORT OF THE APPLICATION OF THE GENERAL PRINCIPLES OF THE CISG IN BATTLE OF THE FORMS CASES*

The use of general principles to resolve battle of the forms cases is consistent with the intent of the CISG drafters. In discussing article 19 at the Vienna Conference, the delegates recognized that the provision did not specifically address cases involving the battle of the forms.[170] Many commentators have agreed that the battle of the forms is an issue that remains unsettled by the CISG.[171] The history of article 7(2), the gap-filling provision, indicates that the drafters sought to encourage the use of general principles rather than the recourse to domestic law.[172] Indeed, the structure of article 7(2), which instructs courts to look to the general principles first, is also indicative of this preference.[173] The legislative history of the

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165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Official Records*, *supra* note 11, at 288-89.

171. *See supra* notes 119-28 and accompanying text (discussing gap with regard to battle of the forms).

172. *E.g.*, *Working Group Report: First Session*, *supra* note 30, 3 U.N. Commission on International Trade Law at 15, U.N. Doc. A/CN.9/35 (1970), *reprinted in* [1968-1970] 1 Y.B. UNCITRAL at 182, U.N. Doc. A/CN.9/SER.A/1970.

173. *See* CISG, *supra* note 1, art. 7, 52 Fed. Reg. at 6265, 19 I.L.M. at 673. Recognizing the ability of article 7 to deal with unsettled issues, commentators write that

> [a]rticle 7(1) provides several general principles of the Convention that may be invoked in the first step of this procedure. Other principles can be derived from specific provisions in the Convention. Moreover, since the Con-

two articles, when read together, indicates that the drafters left a gap in the CISG to be filled by general principles.

Because there are ample solutions to the battle of the forms issue within the CISG, arguments that domestic law should apply are unpersuasive.[174] The good faith requirement of article 7(1) provides courts with a means to resolve battle of the forms cases in a manner that is equitable to both parties.[175] A court using the good faith principle might use the terms to which both parties have agreed and supply other terms that will protect the interests of both parties.[176] Although the CISG fails to define good faith, courts will likely give the principle a uniform interpretation because the principle has certain requirements that are commonly recognized in the international arena.[177] The success of the CISG depends on its uniform interpretation as well as respect for comity by foreign courts interpreting its provisions.[178] A court resolving the issue of the battle of the forms according to good faith principles, therefore, may help other courts in deciding issues according to a good faith principle.[179]

General principles may also be derived from specific provisions of the CISG. The provisions on trade usages and the prior relationship between the parties may serve to guide courts in resolving the battle of the forms without resorting to

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vention is more comprehensive than ULIS, it should be easier for courts to discern general principles.

Dore & Defranco, *supra* note 138, at 65-66.

174. *See* CISG, *supra* note 1, art. 7, 52 Fed. Reg. at 6265, 19 I.L.M. at 673. Article 7 directs courts to look to general principles before resorting to domestic law chosen through rules of private international law. *Id.*

175. *See supra* notes 129-44 and accompanying text (discussing good faith principle as gap filler).

176. Van der Velden, *supra* note 8, at 247.

177. Dore & Defranco, *supra* note 138, at 63. Common and civil law systems recognize good faith as "fair dealing, affirmative disclosure of material facts and assistance to others in achieving the free benefit of contractual relationships." *Id.* (footnote omitted).

178. *See, e.g.*, J. HONNOLD, *supra* note 8, at 120; Note, *The Need for a Uniform Interpretation of the United Nations Convention on Contracts for the International Sale of Goods*, 50 U. PITT. L. REV. 197, 198 (1989) (arguing U.S. courts, when deciding cases based on CISG rules, should look to decisions of foreign tribunals interpreting CISG provisions).

179. Dore & Defranco, *supra* note 138, at 63. In the United States, the good faith principle of the Uniform Commercial Code has reached a level of uniform interpretation by the courts even though the definition provided by the instrument is limited. *Id.*

domestic law.[180] Trade usages to which the parties regularly adhere may form terms of the contract when the parties have failed to agree to their own terms on their own forms.[181] Additionally, article 8(2) allows courts to look to the intent of the parties.[182] Statements are to be interpreted according to what a reasonable person would have understood them to mean.[183] Article 8(3) instructs that when courts interpret the intent of the parties they should consider all relevant circumstances.[184]

Admittedly, domestic law could in some cases lead to a concrete resolution. Section 2-207(3) of the Uniform Commercial Code, for example, if applied to a battle of the forms case, could resolve the issue by finding that the parties concluded a contract by conduct and by filling the gaps with terms found in the Uniform Commercial Code.[185] Consequently, one could argue that leaving courts to decide battle of the forms cases according to the CISG's general principles would be less certain and predictable to the international trader. Indeed, the legislative history reveals that the drafters were concerned with a provision allowing courts the leeway to rely on the unstated general principles of the CISG.[186]

The drafters, however, recognized that applying domestic law, while sometimes an easier solution, does not ultimately contribute to the uniformity of the CISG.[187] For example, in

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180. *See supra* notes 136-44 and accompanying text (discussing trade usage as gap filler).

181. *See supra* notes 136-40 and accompanying text (discussing article 9).

182. CISG, *supra* note 1, art. 8(2), 52 Fed. Reg. at 6265, 19 I.L.M. at 673. Article 8(2) states that "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." *Id.*

183. *Id.*

184. *Id.* art. 8(3), 52 Fed. Reg. at 6265, 19 I.L.M. at 673. Article 8(3) states that "[i]n 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." *Id.*

185. *See supra* notes 155-56 and accompanying text (discussing § 2-207 of Uniform Commercial Code).

186. *See supra* notes 81-90 and accompanying text (discussing history of article 7).

187. *Official Records*, *supra* note 11, at 255-57. Commentators have stated that

> [t]he [CISG's] method of dealing with omissions resembles that of the U.C.C. Under both codes, the courts look first to the code itself and then to a set of external norms. In the case of the U.C.C. the external norms are provided by the common law; the [CISG] directs courts to the law of a par-

England, a court following the rationale in *Butler Machine Tool Co. Ltd.* may include in the contract the terms of the two parties that can coexist,[188] whereas a U.S. court may use the gap-filling provision of § 2-207(3) of the Uniform Commercial Code.[189] French courts, which view the issue as a question of fact to be decided on a case-by-case basis, look to the nature of the discrepancy between the two parties' forms.[190] The French system will not find the existence of a contract when any essential terms conflict.[191] Because most general conditions are considered material, a court using the domestic law of France may be less likely to find that a contract even exists between the parties when the general conditions conflict.[192] These three examples of domestic law with regard to the battle of the forms demonstrates the inconsistency that may follow when courts fail to look to the general principles of the CISG. The goal of a uniform law for international sales contracts will not be furthered if courts readily resort to domestic law in battle of the forms cases.

The argument that a conflict between general conditions of the buyer and seller is an issue of contract validity, to be settled according to domestic law, is not supported by the history of article 4.[193] Article 4(a) excludes issues of contract validity from the reach of the CISG.[194] The delegates initially considered including in the CISG a draft of a uniform law governing contract validity issues.[195] It was determined, however,

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ticular state. Consequently, when courts are forced to look beyond the general principles of the [CISG], the results are likely to be more diverse than under the U.C.C. . . .

The [CISG's] reliance upon a diverse body of national laws to deal with omissions when internal analogy fails threatens to produce some uncertainty for those operating under the new international code.

Dore & Defranco, *supra* note 138, at 66.

188. *See* Butler Mach. Tool Co. v. Ex-Cell O. Corp., [1979] 1 All E.R. 965 (C.A.).

189. U.C.C. § 2-207(3) (1987).

190. *See supra* notes 157-58 and accompanying text (discussing recent French approach to battle of the forms).

191. Vergne, *supra* note 7, at 249.

192. *E.g.*, Van der Velden, *supra* note 8, at 240. It is likely that the elements that are considered essential under French law are those that are found in general conditions forms. *See* Vergne, *supra* note 7, at 249-50.

193. *See supra* notes 92-113 and accompanying text (discussing article 4).

194. CISG, *supra* note 1, art. 4(a), 52 Fed. Reg. at 6264, 19 I.L.M. at 673.

195. *Report of the Secretary-General: Formation and Validity*, *supra* note 67, 10 U.N.

that contract validity was an issue that seldom arose among international merchants and was more likely to arise in the context of consumer protection.[196] The drafters viewed domestic laws on contract validity as vehicles for a society's political, social, and economic philosophies.[197] The drafters would not have considered rules on offer and acceptance to rise to a level of contract validity.

Moreover, if a provision of the CISG is invoked by the facts of a case, the issue is deemed to fall within the contours of the CISG. In such a situation, courts are therefore precluded from finding that the issue is one of contract validity, governed by domestic law.[198] In the context of the battle of the forms, the issue to be determined by courts is whether a contract has been concluded, and, if so, how the court should determine the terms of that contract.[199] Both of these issues can be decided according to rules within the CISG.[200] Articles 18(3) and 19, together forming the last shot principle, as well as articles 8 and 9, may be applied to the battle of the forms. The presence of these rules within the CISG, therefore, preclude the finding that courts should invoke domestic rules on contract validity.[201]

CONCLUSION

The success of the CISG depends on uniform interpretation of its provisions. Its success also depends on uniform interpretation of the matters that are not expressly settled by the

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Commission on International Trade Law at 4, U.N. Doc. A/CN.9/128, annex II, *reprinted in* [1977] 8 Y.B. UNCITRAL at 92-93.

196. *Id.* at 6, *reprinted in* [1977] 8 Y.B. UNCITRAL at 92-93. Consumer protection laws would fall under validity and would not be governed by the uniform law. *Report of the United Nations Commission on International Trade Law on the work of its Third session*, 35 U.N. GAOR Supp. (No.17) at 1, 16-17, UN Doc. A/8017 (1970), *reprinted in* [1968-1970] 1 Y.B. UNCITRAL 129, 136-37, U.N. Doc. A/CN.9/SER.A/1970.

197. *See supra* notes 95-104 and accompanying text (discussing history of article 4).

198. J. HONNOLD, *supra* note 8, at 97; *see supra* notes 93-94, 105-13 and accompanying text (discussing article 4(a)).

199. *See supra* notes 58-65 and accompanying text (discussing battle of the forms scenario).

200. *See supra* notes 136-44, 178-82 and accompanying text (discussing application of articles 9 and 8 in battle of the forms).

201. *See supra* notes 163-67 and accompanying text (discussing use of domestic law in absence of specific rules in CISG to be applied to set of facts).

CISG. Uniformity will not be reached in cases of the battle of the forms if courts resort to domestic law, either through the gap-filling provision of article 7(2) or the validity exclusion of article 4, because member states do not resolve the issue in a uniform manner. Consequently, courts should look to the CISG and apply its general principles in cases of the battle of the forms. There are ample solutions within the CISG to address adequately the issue and help to promote the drafters' goal of uniformity.

*Christine Moccia**

* J.D. Candidate, 1991, Fordham University.