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The Inter-American Convention on the Law Applicable to International Contracts: Another Piece of the Puzzle of the Law Applicable to International Contracts

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Abstract

This Note argues that the United States should not adopt the ICLAIC in its present form because doing so will compromise the existing U.S. framework for U.S. contract law. Part I discusses the current legal framework of contracts for the sale of goods in the United States, including: the major provisions of the United Nations Convention on Contracts for the International Sale of Goods and Article 2 of the Uniform Commercial Code. Part II discusses the three principal objectives of the ICLAIC by analyzing its Preamble and illustrating the provisions intended to accomplish these goals. Part III recognizes the theoretical benefits offered by the ICLAIC, but argues that these are outweighed by the many costs associated with U.S. adoption.

THE INTER-AMERICAN CONVENTION ON THE LAW APPLICABLE TO INTERNATIONAL CONTRACTS: ANOTHER PIECE OF THE PUZZLE OF THE LAW APPLICABLE TO INTERNATIONAL CONTRACTS

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INTRODUCTION

On March 17, 1994, the Fifth Inter-American Specialized Conference on Private International Law of the General Assembly of the Organization of American States[1] ("O.A.S.") adopted

1. *See* CHARTER OF THE ORGANIZATION OF AMERICAN STATES, Apr. 30, 1948, T.S. No. 1-D, OEA/Ser.A/2 (English) Rev. 2 [hereinafter OAS CHARTER]. Protocol to amend the OAS Charter "Protocol of Buenos Aires", February 27, 1967. *Id.* Protocol to amend OAS Charter "Protocol of Cartegena de Indias," December 5, 1985. *Id.*

> As specified in its Charter, the OAS has the following essential purposes: to strengthen the peace and security of the Hemisphere; to prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the member states; to provide for common action on the part of those states in the event of aggression; to seek the solution of political, juridical, and economic problems that may arise among them; and to promote, by cooperative action, their economic, social and cultural development.

OAS CHARTER, (editorial statement at endleaf).

The Organization of American States ("OAS") is the oldest regional organization of states in the world, dating back to the First International Conference of American States held in Washington, D.C. in 1890. *Id.* From the perspective of the United Nations, the OAS is considered a regional agency. *See* U.N. CHARTER art. 56 (providing coordination between United Nations and regional organizations); *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 692-94 (3d ed. 1979) (discussing relations between international organizations). The 32 members of the OAS are: Antigua and Barbuda, Argentina, the Bahamas, Barbados, Bolivia, Brazil, Chile, Colombia,

the Inter-American Convention on the Law Applicable to International Contracts ("ICLAIC").[2] The ICLAIC represents an effort to continue the development and codification of private international contract law.[3] The ICLAIC aims to establish uniform choice-of-law[4] rules for contractual obligations for the O.A.S.

Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, the United States, Uruguay, and Venezuela. OAS CHARTER art. A-41.

> The United States ratified the OAS Charter with the reservation
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> that none of [the Charter's] provisions shall be considered as enlarging the powers of the Federal Government of the United States or limiting the powers of the several states of the Federal Union with respect to any matters recognized under the Constitution as being within the reserved powers of the several states.

Id. at A-41/3. The United States signed the Protocol of Cartegena des Indias, amending OAS Charter on November 7, 1986. *Id.* at A-50. The Protocol establishes nonbinding goals, including the goal of reducing or eliminating tariff and nontariff barriers to exports of all member states. *Id.* at A-50/4. The Protocol is effective with respect to the United States only insofar as its provisions are interpreted and applied in a manner consistent with such actions in furtherance of democracy, social justice, human rights and assistance to the poor. *Id.* at A-50/3. Its provisions do not derogate in any way from the obligation of states to faithfully fulfill their international obligations with respect to transnational enterprises whether derived from treaties and agreements or other sources of international law. *Id.* at A-50/3-4. The Protocol does not affect the competence or scope of the General Agreement and Tariffs and Trade ("GATT"), as the principal rulemaking body for the international trading system, to address negotiable issues such as special and differential treatment for developing country exports. *Id.* at A-50/4.

2. Organization of American States Fifth Inter-American Specialized Conference on Private International Law: Inter-American Convention on the Law Applicable to International Contracts, March 17, 1994, OEA/Ser.K/XXI.5, CIDIP-V/doc.34/94 rev. 3 corr. 2, March 17, 1994, 33 I.L.M. 732 [hereinafter ICLAIC]. Four states adopted ICLAIC: Bolivia, Brazil, Uruguay, and Venezuela. *Id.*

3. The ICLAIC, *supra* note 2, pmbl., 33 I.L.M. at 732-33. "The States Parties to this Convention, [r]eaffirming their desire to continue the progressive development and codification of private international law among member States of the Organization of American States . . . [h]ave [a]greed to approve this Convention." *Id.*

> [P]rivate international law is part of the domestic law of the forum. Thus each court applies its own choice-of-law rules — the rules of private international law of the legal system of the State under whose jurisdiction the court sits. [P]rivate international law changes from State to State, from forum to forum, just as the rest of substantive law varies from State to State. That variation of substantive law is . . . itself the justification for the existence of private international law.

Aubrey L. Diamond, *Harmonization of National Law*, *in* 4 ACADEMIE DE DROIT INTERNATIONAL RECUEIL DES COURS COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 233, 241 (1986).

4. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 186-188 (Supp. 1988) (pro-

community.[5] The ICLAIC will generate a great deal of contro-

viding general approach to be followed in determining choice-of-law questions involving contracts). These sections provide:

§ 186. Applicable Law

Issues in contract are determined by the law chosen by the parties in accordance with the rule of § 187 and otherwise by the law selected in accordance with the rule of § 188.

. . . .

§ 187. Law of the State Chosen by the Parties

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provisions in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provisions in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

. . . .

§ 188. Law Governing in Absence of Effective Choice by the Parties

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles. . .

(2) In the absence of an effective choice of law by the parties (see § 187), the contracts to be taken into account in applying the principles. . .to determine the law applicable to an issue include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied. . .

RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 186-188 (Supp. 1988).

5. ICLAIC, *supra* note 2, art. 1, 33 I.L.M. at 733. "This Convention shall determine the law applicable to international contracts." *Id.* The ICLAIC, in some respects, parallels the Convention on the Law Applicable to Contractual Obligations for the European Community ("EC"), commonly known as the 1980 Rome Convention. Convention on the Law Applicable to Contractual Obligations, 19 June 1980; 1992 Gr. Brit. T.S. No. 2

versy as each of the thirty-two O.A.S. Members, including the United States,[6] determines whether to ratify the ICLAIC as adopted by the O.A.S.[7]

Debate regarding the possible U.S. adoption of an international agreement focusses on resolving four primary areas of concern:[8] the general necessity and desirability of the agreement;[9] the effect of the agreement on international[10] and U.S. domestic law;[11] the impact on the international commercial community;[12] and the effectiveness of the agreement in implementing international rules.[13] Although significant investigation has been devoted to the unification or harmonization of the choice-of-law principles applicable to contracts,[14] the success of the ICLAIC in terms of its adoption by the United States remains

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(Cm. 1794), O.J. L 266/1 (1980) [hereinafter Rome Convention]. The Rome Convention provides uniform conflict of laws rules for contractual obligations. *Id.* The Rome Convention entered into force April 1, 1991. *Id.* This Convention governs conflict of laws rules in: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, and the United Kingdom. *Id. See* H. Matthew Horlacher, *The Rome Convention and the German Paradigm: Forecasting the Demise of the European Convention on the Law Applicable to Contractual Obligations*, 27 CORNELL INT'L L.J. 173, 183-93 (1994) [hereinafter *Paradigm*] (discussing inconsistencies and deficiencies of Rome Convention).

6. OAS CHARTER, art. A-41 (indicating United States as O.A.S. member).

7. OAS CHARTER.

8. *Cf.* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 57-76 (1987) [hereinafter UNIFORM LAW] (discussing areas of concern in adoption of international agreements).

9. *Cf. id.* (discussing special significance of new convention).

10. *Cf. id.* at 57 (discussing limits of new convention and international transactions).

11. *Cf. id.* at 58-59 (discussing new convention as model for improving U.S. domestic law).

12. *Cf. id.* at 57-58 (discussing international use of legal ideas as illustrated by widespread acceptance of new convention).

13. JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS; CASES, MATERIAL AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS 252 (2d ed. 1986).

> One of the most perplexing aspects of international law, . . . is the question of "effectiveness." There is often a tendency, particularly on the part of persons (official or otherwise) who have not had direct experience with international matters, to discount the impact of international rules. This is probably at least partly because that impact sometimes differs substantially from the impact of domestic law rules, and because it is often difficult to understand the more subtle impact of international rules.

Id.

14. Peter Winship, *Private International Law and the U.N. Sales Convention*, 21 CORNELL INT'L L.J. 487, 487-88 (1988) [hereinafter *Winship I*].

in doubt.[15]

This Note argues that the United States should not adopt the ICLAIC in its present form because doing so will compromise the existing U.S. framework for U.S. contract law.[16] Part I discusses the current legal framework of contracts for the sale of goods in the United States, including: the major provisions of the United Nations Convention on Contracts for the International Sale of Goods[17] ("C.I.S.G.") and Article 2 of the Uniform

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15. Diamond, *supra* note 3, at 308.

> One stage further down the road from the unification of contract or sales law is the unification or harmonization of the principles of private international law relating to contracts. As we have seen, much work has gone into this, although the success of the various conventions in terms of adoption of conventions is still largely in doubt.

Id. Professor Diamond argues that managing private international law relating to contracts is unlikely, but there is a current trend towards similarity of results among the different jurisdictions that justifies the attempt to make uniform rules. *Id.*

16. The ICLAIC, *supra* note 2, pmbl., 33 I.L.M. at 733. The unification rational is expressly stated:

> The States Parties to [the ICLAIC] . . . [r]easser[t] the advisability of harmonizing solutions to international trade issues [and] . . . [b]ear in mind that the economic interdependence of States has fostered regional integration and that in order to stimulate the process it is necessary to facilitate international contracts by removing differences in the legal framework for them.

Id.

17. United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* April 11, 1980, U.N. Doc. A/CONF.97/18, Annex I, 19 I.L.M. 668 [hereinafter C.I.S.G.]. The C.I.S.G. is designed to establish uniform law for international sales. JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 1 (1989) [hereinafter DOCUMENTARY HISTORY]. C.I.S.G. is also known as the Vienna Convention, which is the governing law for most exports and imports of goods. E. Allan Farnsworth, *Review of Standard Forms or Terms Under the Vienna Convention*, 21 CORNELL INT'L L.J. 439, 439 (1988). C.I.S.G.'s goal is to "free international commerce from a [b]abel of diverse domestic legal systems." DOCUMENTARY HISTORY, *supra*, at 1. The C.I.S.G. is law in those jurisdictions that deposited instruments of adoption with the Secretary-General of the United Nations, subject to the waiting period specified in Art. 99 (1) and a similar period for subsequent adoptions in Article 99(2). C.I.S.G., *supra*, art. 99, 19 I.L.M. at 694. The United States is one of the initial 11 signatories to the C.I.S.G. DOCUMENTARY HISTORY, *supra*, at 1 n.1 (providing compilation of documents contributing to C.I.S.G.'s ultimate goal of uniform "application" of uniform rules).

> Through February, 1994, the C.I.S.G. has been ratified and entered into force in: Argentina, Australia, Austria, Belarus, Bosnia-Herzegovina, Bulgaria, Canada, Chile, China, Czech Republic, Denmark, Ecuador, Egypt, Finland, France, Guinea, the German Democratic Republic [sic], the Federal Republic of Germany, Hungary, Iraq, Italy, Lesotho, Mexico, Netherlands, Norway, Romania, the Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States of America, Yugoslavia, and Zambia. *See* U.N.Doc.A/CN.9/304. In the United States, the C.I.S.G. is consid-

Commercial Code ("U.C.C.").[18] Part I also introduces the provisions of the recently concluded ICLAIC. Part II discusses the three principal objectives of the ICLAIC by analyzing its Preamble and illustrating the provisions intended to accomplish these goals. Part III recognizes the theoretical benefits offered by the ICLAIC, but argues that these are outweighed by the many costs associated with U.S. adoption. This Note concludes that the ICLAIC would create numerous choice-of-law standards rather than achieve a uniform choice-of-law standard and, therefore, should not be adopted.

I. *CURRENT U.S. LEGAL FRAMEWORK ON CONTRACTS FOR THE SALE OF GOODS*

In the United States, harmonization efforts have liberalized the rules of contract formation in the commercial context through the adoption of the U.C.C.[19] specifically, Article 2 of the U.C.C., which applies to transactions in goods.[20] In 1988, the rules of international contract formation were harmonized in

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ered a self-executing treaty, so no domestic, federal legislation was enacted, or is necessary. Courts may apply the Convention directly to the issues raised by individual litigants who are parties to international sales contracts covered by Article 1.

SELECTED COMMERCIAL STATUTES 1383 (1994 West Publishing Co.).

18. UNIFORM COMMERCIAL CODE (1990 Official Text) [hereinafter U.C.C.]. Unless otherwise indicated, all references to the U.C.C. in this Note are to the 1990 Official Text. *Id.* The Uniform Commercial Code ("U.C.C.") is a commercial "[c]ode 'derive[d] from the common law' and 'assumes the continuing existence of a large body of pre-Code and non-Code law on which it rests for support.' Much of the pre-Code and non-Code law is case law from such fields as contracts, agency and property." JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 7 (2d ed. 1980); 1 U.L.A. 1 n.1 (Master ed. 1976) (listing jurisdictions and enacting dates of the U.C.C.). The U.C.C. is law in jurisdictions by virtue of local, jurisdiction by jurisdiction, enactment. *Id.* at 1. The U.S. Congress has not enacted the U.C.C. as general federal statutory law. *Id.* Federal commercial law overrides the U.C.C. *Id.* at 7; *see* SELECTIONS FOR CONTRACTS 1-6 (E. Allan Farnsworth & William F. Young eds., 1992) [hereinafter FARNSWORTH & YOUNG] (discussing background and application of U.C.C.); *see generally* WHITE & SUMMERS, *supra*, (outlining basic content of U.C.C. and analyzing growing case law); QUINN'S UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST (1991 & 1994 Cum. Supp. No. 2) [hereinafter QUINN'S DIGEST] (providing explanations of U.C.C. principles and concepts).

19. *See supra* note 18 and accompanying text (discussing U.C.C. within U.S. legal system).

20. U.C.C. § 2-102 (1990). This provision states that:

Unless the context otherwise requires, [Article 2] applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a

the United States by the C.I.S.G.[21] As a treaty ratified by the United States, the C.I.S.G. is the supreme law of the United States and prevails over conflicting state law.[22] At the time of ratification,[23] the United States declared that it would join the C.I.S.G. with reservations.[24]

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security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

Id.; *see* Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974) (discussing scope of Article 2 in terms of whether "predominant factor" of contract is goods or services).

21. *See supra* note 17 and accompanying text (discussing conclusion of C.I.S.G. and self-executing effect in United States). *See* President's Message, 22 I.L.M. 1368 (discussing similarity of C.I.S.G.'s rules, which unify law of international sales, to U.C.C., which unifies laws for domestic sales); *see generally* UNIFORM LAW, *supra* note 8, at 57-71 (introducing C.I.S.G. and its application); Peter Winship, *Congress and the 1980 International Sales Convention*, 16 GA. J. INT'L & COMP. L. 707 (1986) [hereinafter *Winship 2*] (analyzing congressional role in negotiation of C.I.S.G.); John E. Murray, Jr., *An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 11 (1988) (discussing contract formation under C.I.S.G.); Maureen T. Murphy, Note, *United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law*, 12 FORDHAM INT'L L.J. 727 (1989) (discussing unifying effects of C.I.S.G. on international contract law); Symposium, *The Codification of International Commercial Law: Toward a New Law Merchant*, 15 BROOK. J. INT'L L. 1 (1989) (discussing various aspects of application of C.I.S.G.). For a current assessment of the role of the C.I.S.G. in international commercial contract law, see generally Kenneth C. Randall & John E. Norris, *A New Paradigm for International Business Transactions*, 71 WASH. U. L.Q. 599 (1993).

22. U.S. CONST. art. II, § 2, cl. 2 ("[President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties"); *id.* art. VI, § 2, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land").

Congressional power to modify the C.I.S.G. by subsequent legislation already exists as a matter of domestic constitutional law. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 135(2) (Tentative Draft No. 1, 1980). Exercise of this power, however, would be violative of the international obligation undertaken by ratification. *Winship 2*, *supra* note 21, at 723. Subsequent domestic legislation supersedes earlier treaties when the Congressional purpose is clearly expressed or when the act and earlier provision cannot be reconciled. *Id.* at 723.

23. *See supra* note 22 and accompanying text (discussing U.S. ratification of C.I.S.G.). The C.I.S.G., adopted at a diplomatic conference convened in Vienna in 1980, was implemented with unprecedented speed. John Honnold, *Introduction to the Symposium*, 21 CORNELL INT'L L.J. 419, 419 (1988) [hereinafter *Introduction to the Symposium*]. On October 9, 1986, the U.S. Senate gave its advice and consent to the ratification of the C.I.S.G. 132 Cong. Rec. S15,773-74 (daily ed. Oct. 9, 1986). The official text of the C.I.S.G appears in Annex I of the Final Act of the 1980 conference. U.N. Doc. A/CONF.97/18 (1980). The English text is reprinted in S. TREATY DOC. No. 9, 98th Conf., 1st Sess. 22-43 (1983).

24. *See* MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL, at 384.

A. *The C.I.S.G. and the U.C.C.*

The C.I.S.G. generally applies to sales contracts between parties located in different contracting states.[25] Article 2 of the U.C.C. limits the U.C.C.'s scope to any contract for the sale of goods,[26] without any explicit reference to the location of the parties to the contract.[27] Because the C.I.S.G. applies only to international sales contracts,[28] and the U.C.C. applies domestically, these two bodies of law coexist.[29]

1. The C.I.S.G.

The C.I.S.G. and the U.C.C. are not complete and exclusive sets of rules, however,[30] and thus both provide displacement and

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25. C.I.S.G., *supra* note 17, art. 1(1)(a), 19 I.L.M at 672.

26. U.C.C. § 2-102.

27. *See id.* § 1-105(1) (discussing territorial application of U.C.C. and parties' power to choose applicable law, including conflict-of-laws rules).

28. C.I.S.G., *supra* note 17, art. 1, 19 I.L.M. at 672. Article 1 provides, in part, that:

> (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
> (a) when the States are Contracting States; or
> (b) when the rules of private international law lead to the application of the law of a Contracting State.

Id.

29. *See* Peter Winship, *Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 LOY. L. REV. 43, 43 (1991) [hereinafter *Winship 3*] (discussing spheres of application of two laws). "The two laws coexist comfortably because the Convention applies only to 'international' sales contracts and there will therefore be little overlap between the sphere of application of the two laws." *Id.* *See* Farnsworth, *supra* note 17, 439-42 (analyzing hierarchy of domestic law and the C.I.S.G.); *Winship 1*, *supra* note 14, at 518-30 (exploring interplay between C.I.S.G. and rules of private international law, "conflict of laws").

30. Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORDHAM L. REV. 281, 292 (1994). In the interpretation of contracts and statements, the C.I.S.G. and the U.C.C. take into account the parties course of dealing, course of performance, usages, and relevant circumstances. *Id.* at 295. C.I.S.G. Article 7(2) relies on general principles of international law and practices to settle issues not expressly addressed. C.I.S.G., *supra* note 17, art. 7(2), 19 I.L.M. at 673. Article 7(2) provides that:

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

Id. Similarly, U.C.C. Article 1-102 permits interpretation and continued expansion of commercial practices through custom and usage. U.C.C. § 1-102(2)(b).

Separate from the interpretation process, both the C.I.S.G. and the U.C.C. permit freedom of contract by agreement of the parties. Article 6 of the C.I.S.G. expressly permits the courts to review practices that the parties have established between them-

gap-filling of contract terms.[31] The C.I.S.G. does not, however, defer to the U.C.C. on issues of formation and the obligations and liabilities concerning the sale of goods.[32] The C.I.S.G. and

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selves. C.I.S.G., *supra* note 17, art. 6, 19 I.L.M. at 673. The parties to a contract, subject to the Convention's rules, may agree to vary any particular provision of the Convention. *Id.* "The parties may exclude the application [of the C.I.S.G. by agreement] or . . . [contracting states may make a declaration at the time of deposit of its instrument of ratification] to derogate from or vary the effect of any of [the C.I.S.G.] provisions." *Id.* Article 9 of the C.I.S.G. addresses preliminary negotiations between parties. *Id.* art. 9, 19 I.L.M. at 674. Article 9 provides:

> (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.

Id.

U.C.C. § 1-102(3) also takes into account the preliminary negotiations between parties. U.C.C. § 1-102(3). Section 1-102(3) states that the code "may be varied by agreement, except that the obligations of good faith, diligence, reasonableness and care may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable." *Id.*

31. *Winship 3*, *supra* note 29, at 50. Gap-filling and displacement is a feature of both the U.C.C. and C.I.S.G. *See id.* at 47 (reviewing relationship between U.C.C and C.I.S.G. and suggesting analysis and codification by U.C.C sponsors). Consequently, U.C.C. § 1-205 supplies terms that are not set out expressly in the contract. U.C.C. § 1-205. *See* QUINN'S DIGEST, *supra* note 18, at 81-90 (discussing usage of trade background to resolve any ambiguity in agreement). U.C.C. § 2-328, and §§ 2-304 to -320, supply general terms, quality terms, and technical terms when an open terms problems arise involving: price (§§ 2-304 to -305), quantity (§ 2-306), delivery (§§ 2-307 to -308), absence of time for payment (§ 2-309) or delivery (§ 2-310), or particulars of performance (2-311). U.C.C. §§ 2-304 to -320, § 2-328. The U.C.C. recognizes that a court may find a contract or any clause to be, as a matter of law, unconscionable. U.C.C. § 2-302. Though such a finding may restrain the freedom of contract, a court will nullify the clause or the contract. *See* QUINN'S DIGEST, *supra* note 18, at 158-71 (discussing unconscionability provision as maintaining freedom of contract and balance of power); *see supra* note 16 and accompanying text (discussing C.I.S.G.'s noncomprehensive nature, providing freedom of contract provisions and use of observed trade practices imputed in the contract). *See also*, Burt A. Leete, *Contract Formation Under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code: Pitfalls for the Unwary*, 6 TEMP. INT'L & COMP. L.J. 193, 194-95, 215 (1992) (suggesting that while C.I.S.G. and U.C.C. utilize different approaches they should be viewed as useful tools in negotiation of international contracts). *See generally Winship 1*, *supra* note 14, at 493 (discussing gap-filling role of choice-of-law rules).

32. *See* C.I.S.G., *supra* note 17, 19 I.L.M. at 674-92 (providing provisions on formation of contract and obligations of parties). The United States reservation under Article 95 does not preserve the U.C.C.'s formal requirements in domestic law. *Id.* at 385.

the U.C.C. differ as to application,[33] formation,[34] warranty,[35] and

33. *See* James C. Bruno & Jeffery M. Brinza, *CISG's New Year's Day Triumph over U.C.C.*, 66 MICH. BUS. L.J. 1206, 1206 (1987) [hereinafter *Triumph*] (discussing major differences between C.I.S.G. and U.C.C. as to application). Regarding the issue of application, Bruno and Brinza state that:

> CISG's coverage is narrower than the U.C.C.'s. The CISG does not apply to sales of goods purchased for personal, family, or household use (this excludes substantially all consumer purchases), sales by auction, sales on execution or otherwise by authority of law, or sales of ships, vessels, hovercraft, or aircraft. The U.C.C. states that, "unless the context otherwise requires, this article applies to transactions in goods. . . ." Under the U.C.C., " '[g]oods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities and things in action." The CISG's scope is further limited because it does not apply to sellers' liability for death or injury caused by goods sold. Instead, local rules governing products liability are retained.

Id. at 1206.

34. *See id.* (discussing principal differences between C.I.S.G. and U.C.C. as to formation). Regarding the issue of formation, Bruno and Brinza state that:

> Contracts formed under the CISG are governed primarily by Article 11, which stipulates, "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." The CISG essentially does away with the U.C.C. statute of frauds provision for sale of goods of $500 or more. This rejection of the formal requirements of the statute of frauds does not prevent the parties from imposing their own specific writing requirements. For example, an offeror may require a written acceptance, just as either party could require a written modification or termination. The key provision regarding the legal effect the CISG gives to practices of the parties and to commercial usage is discussed in Article 9. Like the U.C.C. course of dealing provision, Article 9 states that parties are bound by the practices established between themselves. Furthermore, "[t]he 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. . . ." Although both the U.C.C. and the CISG recognize "usage of trade," the CISG appears to give it more importance. The CISG focuses on more detailed requirements governing the formation of a contract than the U.C.C. In particular, an offer must indicate the goods and expressly or implicitly fix or make provision for determining the quantity and the price. The CISG also asserts that an offer becomes effective only when it reaches the offeree, and may be withdrawn or revoked at any time before the offeree has dispatched an acceptance unless, by its terms, it is irrevocable or the offeree has reasonably relied on the offer as being irrevocable. Furthermore, any statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. An acceptance of an offer generally becomes effective at the moment the indication of assent reaches the offeror. An important contract formation provision is CISG Article 19 which addresses the problem caused by a reply to an offer which purports to be an acceptance, but contains a modification of the offer. Under Article 19, '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." If the modifications in the reply "do not materially alter the terms of the offer, then the reply to the offer is an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches notice to that effect." Examples considered to materially alter the terms of an offer include additional or different terms relating to the price, payment, quality and quantity of goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes. The CISG's approach to the problem of contract modification differs from that of the U.C.C. The U.C.C. states that a material alteration or modification may not prevent the "altered reply" from forming a contract. It provides a definite and reasonable expression of acceptance, sent within a reasonable time, operates as an acceptance even though it contains terms additional to or different from those offered or agreed upon. Additional terms are considered proposals for addition to the contract. If both parties are merchants, then the additional terms become part of the contract, unless "the offer expressly limits acceptance to the terms of the offer," the additional terms "materially alter it," or the "notification of objection has already been given or is given within a reasonable time."

Id. at 1206-07.

35. *See id.* (discussing major differences between C.I.S.G. and U.C.C. as to warranty). Regarding the issue of warranty, Bruno and Brinza state that:

Differences between the warranty provisions in the CISG and the U.C.C. is another area of significance. Essentially, CISG Article 35, like the U.C.C., provides the buyer with his basic expectations of quality. Article 35 contends that the seller must supply goods of the quantity, quality, and description provided in the contract and that:

Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) Are fit for the purposes for which goods of the same description would ordinarily be used;

(b) Are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment;

(c) Possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) Are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

In effect, the CISG has combined the U.C.C. express warranty, implied warranty of merchantability and implied warranty of fitness for a particular purpose into one article.

Although both the CISG and U.C.C. warranty provisions are substantially the same, some differences do exist. For example, as regards the warranty of merchantability, the U.C.C. limits it to sellers who are merchants with respect to goods of that kind. Furthermore, the warranty for a particular purpose arises under the U.C.C. only where the seller has reason to know the buyer is relying on the seller's skill. The CISG, however, prohibits unreasonable reliance on an implied warranty for a particular purpose.

Unlike the U.C.C. which requires a conspicuous writing and specific reference to implied warranties of merchantability and fitness for a particular purpose for an effective waiver, the CISG has no specific requirements for an enforcea-

remedies.[36] Parties to an international contract recognize, however, the importance of familiarity with the C.I.S.G.'s existing options to select the U.C.C. as the applicable law.[37] The C.I.S.G. provides uniform rules governing questions not resolved within the contract and takes precedence over Article 2 of the U.C.C.[38] The drafting history of the C.I.S.G. provides guidance in interpreting the meaning of complex terms and their relationship to domestic law.[39]

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ble waiver of a warranty. An effective waiver of express and implied warranties can be made a part of a contract under the CISG's general rules of contract formation. Judicial interpretation will determine whether there is a distinction without a difference. This underscores the predicament of dealing with a new law without any precedent.

Id. at 1207-08.

36. *See id.* (discussing major differences between C.I.S.G. and U.C.C. as to remedies). Regarding the issue of remedies, Bruno and Brinza state that:

> In the provisions governing remedies for breach of contract by either the seller or the buyer, the non-breaching party, under the CISG, is given a general right to specific performance. Article 46 of the CISG provides that, "the buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement." Moreover, Article 62 allows a seller to require a breaching buyer to pay the price, take delivery or perform his other obligations. These provisions differ from the U.C.C. which gives buyers with a limited right where the goods are unique or otherwise unavailable in the market. Finally, the CISG does not contain any provisions for the limitation or liquidation of damages similar to those found in the U.C.C., nor does it include any specific statute of limitations.

Id. at 1208.

37. *See id.* at 1206 (discussing major differences between C.I.S.G. and U.C.C. as to application, formation, warranty and remedies, as well as necessity to alert counsel to importance of familiarity with C.I.S.G. and option to elect U.C.C. as governing law).

38. *Triumph*, *supra* note 33, at 1206.

39. UNIFORM LAW, *supra* note 8, at 5. Professor John Honnold, who participated actively in the negotiations of the C.I.S.G., describes the C.I.S.G. as a triumph of cooperative international work. *International Sale of Goods: Hearings on Treaty Doc. No. 9 Before the Senate Comm. on Foreign Relations, 98th Cong., 2d Sess. 19 (1984)* (statement of Professor John Honnold). The C.I.S.G. has prompted, nevertheless, much scholarly literature concerning its preparation and codification process as well as practical guides. *See Peter Winship, The U.N. Sales Convention: A Bibliography of English Language Publications*, 28 INT'L LAW. 401, 401 (1994) [hereinafter *Bibliography*] (providing twenty-three pages of background documents, bibliographies, books, commentary, symposia, articles and book chapters, congressional materials, and U.S. state department documents); DOCUMENTARY HISTORY, *supra* note 17 (1984); E. Allan Farnsworth, *The Vienna Convention: History and Scope*, 18 INT'L LAW. 17, 17-20, at 2-4; Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443, 443-83 (1989) (discussing need, difficulties, and willingness of compromise in securing widespread acceptance of C.I.S.G.); Peter H. Pfund, *Overview of the Codification Process*, 15 BROOK. J. INT'L LAW 7, 17 (1989) (discussing U.S. ratification of

a. The Legislative History of the C.I.S.G.

In the 1930's, an effort by the League of Nations[40] to ad-

conventions and possibility of preemption of inconsistent provisions and procedures of U.S. federal and state law); Bradley J. Richards, *Contracts for the International Sale of Goods: Applicability of the United Nations Convention*, 69 IOWA L. REV. 209, 209-40 (1983); Paul Volken, *The Vienna Convention: Scope, Interpretation, and Gap-Filling*, *in* INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 19, 19-53 (Peter Sarcevic & Paul Volken eds., 1986) [hereinafter Dubrovnik Lectures]; James E. Joseph, *Contract Formation Under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code*, 3 DICK. J. INT'L. L. 107, 195-215 (1984); Burt A. Lette, *supra* note 31, at 107-38; Christine Moccia, *The United Nations Convention on Contracts for the International Sale of Goods and the "Battle of the Forms,"* 13 FORDHAM INT'L L.J. 649, 649-79 (1989-90); Amy H. Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 63 WASH. L. REV. 607, 649-79 (1988); Peter Schlechtriem, *The Seller's Obligations Under the United Nations Convention on Contracts for the International Sale of Goods*, *in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 607-51 (Nina M. Galston & Hans Smit eds., 1984) [hereinafter INTERNATIONAL SALES]; Lief Sevon, *Obligations of the Buyer Under the UN Convention on Contracts for the International Sale of Goods*, *in* DUBROVNIK LECTURES, *supra*, at 203, at 203-38; Mitchell Stocks, *Risk of Loss Under the Uniform Commercial Code and United Nations Convention on Contracts for the International Sale of Goods: A Comparative Analysis and Proposed Revision of U.C.C. Sections 2-509 and 2-510*, 87 N.W. L. REV. 1415, 418-51 (1993); Andrew Babiak, Comment, *Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods*, 6 TEMP. INT'L. & COMP. L.J. 113, 115-43 (1992); Barry Nicholas, *Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods*, *in* INTERNATIONAL SALES, *supra*; Harry M. Flechtner, *Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.*, 8 J.L. & COM. 53, 53-108 (1988); Joseph M. Lookofsy, *Remedies for Breach Under the CISG*, *in* COMMERCIAL DAMAGES: A GUIDE TO REMEDIES IN BUSINESS LITIGATION 43-1, 43-66 (Charles L. Knapp ed., 1986).

40. JOSEPH M. SWEENEY ET AL. THE INTERNATIONAL LEGAL SYSTEM 887-88 (2d ed. 1981).

> The League of Nations was the first attempt to develop a comprehensive global international organization to preserve peace. . . . It was designed, in part, to provide the machinery for mutual aid among its members if they were victims of attack . . . [and] a much broader group of functions aimed at preventing war. It had specific responsibilities for encouraging peaceful settlement of disputes . . . [and] supervision over international agreements relating to traffic in drugs and women and children, collection of information in all matters of international interest, and direction of international bureaus. The organization, though far from a government, nevertheless had broad competence to care for the world's welfare, and it quickly came to occupy a position in international affairs. . . . It served at once as a world forum, an instrument for continuous diplomatic negotiation, an international civil service, and an organ of economic and social collaboration. The League could not fulfill its political role as custodian of international security in the face of the resurgent nationalism of the 1930's and . . . the aggressive policies of Nazi Germany, Fascist Italy, and Japan. The organization was also seriously weakened because the United States had failed to become a member . . . [T]he League's economic, financial, statistical and social services grew so significant that they were continued even during the second world war. . . . The framework of

dress the needs of the international commercial community led to the establishment of the International Institute for the Unification of Private Law ("UNIDROIT").[41] UNIDROIT's efforts resulted in two drafts on the subject of international business transactions intended to promote uniformity among trading partners in the international community.[42] Through the League of Nations, the drafts were distributed to league members for comment and, ultimately, presented to the 1964 Hague Conference.[43] These drafts, predecessors to the C.I.S.G.,[44] adopted at

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> international society was so badly shattered by the war that Britain, Russia, The United States, and China decided not to revive the League, but instead to build a new general international organization through which they could continue their wartime collaboration and attempt to assure a durable peace . . . In April 1945, 50 nations assembled at San Francisco for the United Nations Conference on International Organization . . . and finally, on June 26, signed the Charter of the United Nations.

Id.

41. John O. Honnold, *The Draft Convention on Contracts for the International Sale of Goods: An Overview*, 27 AM. J. COMP. L. 223, 223 (1979); Kasuaki Sono, *UNCITRAL and the Vienna Sales Convention*, 18 INT'L LAW. 7, 12 (1984). The International Institute for the Unification of Private Law ("UNIDROIT") was founded by the League of Nations in 1924, with the aim of examining "ways of harmonizing and coordinating the private law of states . . . and to prepare . . . for the adoption by Governments of uniform rules of private law." JACKSON & DAVEY, *supra* note 13, at 37. *See generally* FARNSWORTH & YOUNG, *supra* note 18, at 135 (discussing work of UNIDROIT).

42. DOCUMENTARY HISTORY, *supra* note 17, at 1.

> The current uniform rules [of the CISG] are rooted in two earlier Conventions sponsored by the [UNIDROIT] . . . These conventions — one dealing with formation of contracts for international sale [Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods], the other with obligations of parties to such contracts [Convention Relating to a Uniform Law on the International Sale of Goods] — were developed over the course of three decades by leading commercial law experts of Western Europe and were finalized in 1964 by a diplomatic conference at the Hague. The 1964 Hague Conventions entered into force among nine States but, . . . failed to receive substantial acceptance outside Western Europe.

Id. The Convention Relating to a Uniform Law on the International Sale of Goods ("ULIS") and the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods ("ULF") came into force in 1972, and are now the law in: Belgium, The Gambia, Federal Republic of Germany, Israel, the Netherlands, San Marino, and the United Kingdom. *Winship I*, *supra* note 14, at 490. Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S 107 [hereinafter ULIS]; 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 (1972) [hereinafter ULF].

43. *Winship I*, *supra* note 14, at 194. Negotiations were interrupted during the Second World War and its aftermath. *See generally* FARNSWORTH & YOUNG, *supra* note 18, at 135-36 (discussing 1964 Hague Conference).

44. *See* Helen E. Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Con-*

the 1964 Hague Conference,[45] included the Convention Relating to a Uniform Law on the International Sale of Goods[46] ("ULIS") and the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods ("ULF").[47]

The ULIS explicitly rejected reference to choice-of-law rules.[48] This decision came at the price of several compromise provisions allowing states to limit their adherence to both the 1964 conventions[49] and the eventual demise of the ULF and ULIS sales laws ("1964 Uniform Sales Laws").[50] Debate immediately ensued about the decision to exclude reference to rules of private international law, called the universalist approach[51] of

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vention on Contracts for the International Sale of Goods, 18 YALE J. INT'L L. 1, 5 n.13 (1993) (discussing relationship of C.I.S.G. to earlier conventions).

45. *See* FARNSWORTH & YOUNG, *supra* note 18, at 135 (discussing approval of drafts by the conference); *see also Winship 1*, *supra* note 14, at 489 (discussing start of Hague Conference).

> The Hague Conference took up this work in 1928, and its committee of experts completed a draft in 1931. The Conference itself, however, did not approve the draft until 1951. The members of the Conference signed the resulting international convention in 1955 and it came into force in 1964 upon the ratification of five states.

Id.

46. ULIS, *supra* note 42; *see Diplomatic Conference on the Unification of Law Governing the International Sale of Goods* (Hague Conference Records), The Hague, 2-25 April 1964 (1966), *cited in* Hartnell, *supra* note 44, at 5 n.13; *Bibliography: International Sale of Goods*, 27 AM. J. COMP. L. 345, 345-51 (1979) (presenting collection of ULIS literature).

47. ULF, *supra* note 42. *See Bibliography: International Sale of Goods*, *supra* note 46, at 345-51. Farnsworth and Young characterize the ULF as being "a shorter companion uniform law" to the ULIS. FARNSWORTH & YOUNG, *supra* note 18, at 135.

48. *Winship 1*, *supra* note 14, at 491. "The 1964 Uniform Law on the International Sale of Goods explicitly rejects reference to rules of private international law." *Id.* "In current usage, the term 'private international law' may be ambiguous. In the context of discussion of the 1964 ULIS, the reference is to choice-of-law rules." *Id.*

49. *Id.* at 493-99.

50. *Id.* at 490. "Noting the limited success of these conventions, the U.N. Commission on International Trade Law prepared a revised, consolidated treaty." *Id.* The ULIS and ULF were finalized in 1964 by a diplomatic conference at the Hague ("The 1964 Convention"). DOCUMENTARY HISTORY, *supra* note 17, at 1. *See supra* note 42 and accompanying text (discussing two conventions finalized in 1964 at Hague).

51. *Report of the Secretary-General, Pending Questions with Respect to the Revised Text of a Uniform Law on the International Sale of Goods*, para. 10, U.N. Doc. A/CN.9/100, Annex 3 (1987) (defining universalist approach as broad rule of applicability of law). The universalist approach of the 1964 Convention was summarized in a report of the U.N. Secretary General in the following terms:

> ULIS directed the *fora* of Contracting States to apply the Law to all international sales even though neither the seller nor the buyer (nor the sales transaction) had any contact with any Contracting State (ULIS article 1(1), art 2 (ex-

the 1964 Uniform Sales Laws.[52]

Ultimately, these conventions proved unsuccessful because they failed to garner acceptance outside Western Europe.[53] As a consequence of the limited acceptance of these two conventions,[54] as well as other related technical and psychological

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clusion of rules of private international law)). This broad rule of applicability of the Law (sometimes termed the 'universalist' approach) was subject to the possibility of reservations under articles III, IV and V of the Hague Sales Convention.

Id. at 1208. *See supra* notes 48-50 and accompanying text (discussing two conventions finalized in 1964 at Hague that explicitly rejected reference to private international law rules).

52. Kurt Nadelmann, *The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglio*, 74 YALE L.J. 449, 450-51 (1965). Nadelmann described the situation as "a conflict of laws imbroglio" that could lead to "shocking" results. *Id.* at 457. Nadelmann argued as follows:

> [I]f a person in Canada sells goods to a person in the United States which goods must be shipped to the United States, in any subsequent disputes between the parties respecting the transaction either party can — notwithstanding the fact that neither the United States nor Canada has adopted the Uniform Law — take advantage of the law if its relevant provisions are more favorable to that party than the otherwise applicable law. The party merely brings suit in a "contracting" state which will automatically apply the Uniform Law.

Id. *See* Kurt Nadelmann, *The Conflicts Problems of the Uniform Law on the International Sale of Goods*, 14 AM. J. COMP. L. 236, 236 (1965) (discussing forum shopping which is "a clear violation of . . . due process of law"). *See also* Harold J. Berman, *The Uniform Law on International Sale of Goods: A Constructive Critique*, 30 LAW & CONTEMP. PROBS. 354, 355 n.2 (1965) (stating that Nadelman's view "convincingly criticize[s]" ULIS "exclusion of private international law"); *Winship 1*, *supra* note 14, at 501-02 (discussing "universalist" controversy).

On the other hand, Professor Andre' Tunc noted that few courts took jurisdiction of cases that had no connection with the forum, suggesting that there would be few "shocking" cases of the kind presented by Professor Nadelman. Andŕé 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* 1 DIPLOMATIC CONFERENCE ON THE UNIFICATION OF LAW GOVERNING THE INTERNATIONAL LAW OF SALE OF GOODS — RECORDS 355, 362-63 (1966). Commentary by governments reflected divisions similar to that of the scholarly literature. *Winship 1*, *supra* note 14, at 502.

53. DOCUMENTARY HISTORY, *supra* note 17, at 1. *See supra* note 42 and accompanying text (discussing failure of 1964 Conventions to receive substantial acceptance outside Western Europe).

54. *See* United Nations Conference on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/19, U.N. Sales No. E.81.IV.3 (1981). Only the following eight states ratified or acceded to the ULF: Belgium, Gambia, Germany, Israel, Italy, the Netherlands, San Marino, and the United Kingdom. *Id.* The ULIS was ratified or acceded to by those same states, except Israel. *Id.* The United States was not a party to the drafting of these documents and did not ratify the conventions. *See id.* (stating United States not named as party to negotiations or states of ratification). *Cf.* FARNSWORTH & YOUNG, *supra* note 18, at 36 (discussing how United States "quickly put to-

problems,[55] the United Nations Commission on International Trade Law ("UNCITRAL"),[56] which was created in 1966,[57] was authorized, in 1969, to create a Working Group on the International Sale of Goods[58] ("UNCITRAL Working Group") to consider what changes to the 1964 uniform laws would make them more acceptable for adoption.[59] The UNCITRAL Working Group, consisting of representatives from fourteen member

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gether a delegation to Hague" to consider previously prepared draft). The drafting sessions of the ULF and ULIS were dominated by Western Europe and thus heavily influenced by their civil law tradition. *Id.*; Garro, *supra* note 39, at 450-51 (1989).

55. *See Introduction to the Symposium, supra* note 23, at 419 (discussing technical and psychological problems with ULIS and ULF). For further background on the 1964 Hague Sales Convention, see John Honnold, *Uniform Law for International Sales*, 107 U. PA. L. REV. 299 (1959); John Honnold, *The Uniform Law for the International Sale of Goods: The Hague Convention of 1964*, 30 LAW & CONTEMP. PROBS. 326 (1965).

56. *Establishment of the United Nations Commission on International Trade Law*, G.A. Res. 2205 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 99, U.N. Doc. A/6316 (1966). The United Nations established the United Nations Commission on International Trade Law "UNCITRAL" in 1966 for the specific purpose of promoting the unification and harmonization of international trade law. *Id.* The UNCITRAL is a law-making body with world-wide representation. *Introduction to the Symposium, supra* note 23, at 419. "The Commission's membership, limited to 36 States, includes representation of each region of the world and each major legal and economic system." *Id.* A decade of intense work produced agreement on a draft Convention that a diplomatic conference of 62 States unanimously finalized and approved in 1980. *Id.*; *see* FARNSWORTH & YOUNG, *supra* note 18, at 136 (discussing drafting and approval of C.I.S.G.). The United States participates in UNCITRAL as a U.N. member. JACKSON & DAVEY, *supra* note 13, at 37.

57. *Winship 1, supra* note 14, at 502. The creation of UNCITRAL in 1966 provided a new forum for official debate, regarding how to make the 1964 uniform laws more acceptable, and governments picked up where they left off at the 1964 conference. *Id.* The Federal Republic of Germany and others observed that the uniform laws would put an end to the uncertainties involved in the application of the rules of private international law, and, therefore, reservations should be discouraged. *See id.* (discussing Germany, Belgium, and Netherlands' opposition to reservations).

The United States and others argued that the exclusion of private international law rules was a deterrent to adoption of the laws, because they could become applicable to parties who had no expectation that the uniform laws might apply. *See id.* (discussing views of United States, Czechoslovakia, and Norway).

58. DOCUMENTARY HISTORY, *supra* note 17, at 2. The C.I.S.G. was made in three stages: "(1) The UNCITRAL Working Group (1970-1977); (2) Review by the full Commission (1977-1978); (3) The Diplomatic Conference (1980)." *Id.*

> In 1969 UNCITRAL established a 14-State Working Group on the International Sales of Goods with the mandate to prepare draft legislation that would facilitate acceptance of the uniform rules "by countries of different legal, social, and economic systems". This Working Group, under the effective chairmanship of Professor Jorge Barrera Graf of Mexico, completed this task in nine sessions (1970-1977).

Id. at 3.

59. *Report of the United Nations Commission on International Trade Law on the Work of its*

states,[60] drafted C.I.S.G.[61]

Despite their unification efforts, the states participating in the UNCITRAL negotiations could not reach agreement on several topics.[62] The UNCITRAL Working Group chose to exclude those topics from coverage under the C.I.S.G. rather than risk the failure of the entire convention.[63] Due to differences in domestic treatment of products liability,[64] for example, consumer sales were expressly excluded.[65] Likewise, liability for personal injury and death were excluded,[66] as were traditional defenses to the formation of contracts, including: fraud,[67] duress,[68] and un-

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Second Session, U.N. GAOR, 24th Sess., Supp. No. 18, ¶38, U.N. Doc. A/7618 (1969); *see* FARNSWORTH & YOUNG, *supra* note 18, at 136 (discussing UNCITRAL Working Group).

60. *Documentary History*, *supra* note 17, at 3. In contrast to the situation surrounding the drafting of the ULIS and ULF, the United States was an active participant in the UNCITRAL working group leading to the drafting and approval of the C.I.S.G. FARNSWORTH & YOUNG, *supra* note 18, at 136.

61. *See Winship 1*, *supra* note 14, at 489-91 (discussing analysis and evolution of harmonizing international law post-1964 and pre-1980). *See generally* DOCUMENTARY HISTORY, *supra* note 17 (providing documents pertaining to drafting history of C.I.S.G.).

62. *See* DOCUMENTARY HISTORY, *supra* note 17, at 31 (discussing topics omitted because of differences in domestic treatment).

63. *See id.* (discussing risk of negotiating failure and preclusion of controversial topics).

64. Sara G. 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, 111 (1988). *See* Laura E. Longobardi, Note, *Disclaimers of Implied Warranties: The 1980 United Nations Convention on Contracts for the International Sale of Goods*, 53 FORDHAM L. REV. 863, 863 n.1. (1985) (providing collective applicable U.S. law prior to C.I.S.G.'s effective date); Kastely, *supra* note 39, at 609-12 (addressing irreconcilable conceptual differences among legal cultures).

65. C.I.S.G., *supra* note 17, art. 2(a), 19 I.L.M. at 672.

> [C.I.S.G.] does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use. . . .

Id.

66. *Id.* art. 5, 19 I.L.M. at 673. The C.I.S.G. is inapplicable "to the liability of the seller for death or personal injury caused by the goods to any person." *Id.*

67. *See* UNIFORM LAW, *supra* note 8, at 96 (discussing issues excluded from Convention). "Fraud" is defined as:

> An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination, or by suppression of

conscionability.[69] Thus, unlike previous efforts to establish a uniform international contract law,[70] the C.I.S.G. is not and does not purport to be a complete and exclusive set of international rules distinct from the many bodies of domestic law, which tend to be interpreted against a background of institutions and rules well known to each forum court.[71] Nevertheless, the UNCITRAL

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truth, or suggestion of what is false, whether it be by direct falsehood or innuendo, by speech or silence, word of mouth, or look or gesture.

BLACK'S LAW DICTIONARY 455-57 (6th ed. 1991). *See* RESTATEMENT (FIRST) CONTRACTS § 471 (1982 App.) (defining fraud).

68. *See* UNIFORM LAW, *supra* note 8, at 98 (discussing issues excluded from Convention). "Duress" is defined as:

> Any unlawful threat or coercion used by a person to induce another to act (or to refrain from acting) in a manner he or she otherwise would not (or would). Subjecting person to improper pressure which overcomes his will and coerces him to comply with demand to which he would not yield if acting as free agent. Application of such pressure or constraint as compels man to go against his will, and takes away his free agency, destroying power of refusing to comply with unjust demands of another.

BLACK'S LAW DICTIONARY 348 (6th ed. 1991). *See* RESTATEMENT (FIRST) CONTRACTS § 492 (1982 App.) (defining duress).

69. *See* UNIFORM LAW, *supra* note 8, at 98 (discussing issues excluded from Convention). "Unconscionability" is defined as:

> A doctrine under which courts may deny enforcement of unfair or oppressive contracts because of procedural abuses arising out of the contract formation, or because of substantive abuses relating to terms of the contract, such as terms which violate reasonable expectations of parties or which involve gross disparities in price; either abuse can be the basis for a finding of unconscionability.
>
> Basic test of "unconscionability" of contract is whether under circumstances existing at time of making of contract and in light of general commercial background and commercial needs of particular trade or case, clauses involved are so one-sided as to oppress or unfairly surprise party.
>
> Unconscionability is generally recognized to include an absence of meaningful choice on the part of one of the parties, to a contract together with contract terms which are unreasonably favorable to the other party.

BLACK'S LAW DICTIONARY 1059 (6th ed. 1991).

> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

See RESTATEMENT (SECOND) CONTRACTS § 208 (Supp. 1989).

70. *See supra* notes 44-55 and accompanying text (discussing two conventions finalized in 1964 at Hague and their failure as result of rejecting private international law rules and applying universalist approach).

71. *See* C.I.S.G., *supra* note 17, art. 1, 19 I.L.M. at 672 (leaving open possibility of choice-of-law references to contracting state's laws). In contrast, Article 2 of ULIS virtually bans the rules of private international law from the realm of the uniform law, and Article 17 of ULIS provides that questions not expressly resolved by the ULIS are to be settled in conformity with the general principles on which the ULIS is based. CESARE

Working Group's final draft of the C.I.S.G. based upon revisions of the ULF and the ULIS,[72] was implemented with unprecedented speed.[73] On October 9, 1986, the U.S. Senate gave its advice and consent to ratification of the C.I.S.G.[74] By December 1986, the United States and ten other countries[75] deposited[76] instruments of ratification.[77] By January 1, 1988, the effective date of the C.I.S.G.,[78] six additional states had adopted the C.I.S.G.[79] By 1992, a total of thirty-two states had ratified the C.I.S.G.[80]

M. BIANCA & MICHAEL J. BONNELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 843, 864 (1987). The ultimate aim of C.I.S.G. is to achieve worldwide uniformity in the law governing contracts for international sale of goods. *Id.* at 866; *see* U.N. Special Commission, *Note of the Special Commission on the Observations Presented by Various Governments and by the I.C.C. Relating to the 1956 Draft of a Uniform Law on the International Sale of Goods*, U.N. Doc. V/Prep./3 (noting that ULIS "should as far as possible, be self-sufficient"). *See supra* notes 46-47 and accompanying text (distinguishing ULIS and ULF).

72. *See* DOCUMENTARY HISTORY, *supra* note 17, at 15-16.

73. *Introduction to the Symposium*, *supra* note 23, at 419. "[T]he 1980 Sales Convention has been implemented with unprecedented speed." *Id.* The C.I.S.G., adopted by the United States at a diplomatic conference convened in Vienna in 1980, received the requisite two-thirds advice and consent from the Senate and was subsequently ratified by President Reagan. *Id.* The aim of the C.I.S.G. is to provide unification of international trade law. *Id.* C.I.S.G. focuses on the function of the sales contract between parties. *Id.*

74. 132 Cong. Rec. S15,773-74 (daily ed. Oct. 9, 1986).

75. DOCUMENTARY HISTORY, *supra* note 17, at 1 n.1. The eleven original ratifying states of the C.I.S.G. were: Argentina, Egypt, France, Hungary, Italy, Lesotho, Peoples' Republic of China, Syria, United States of America, Yugoslavia, and Zambia. *See* Robert S. Rendell, *The New U.N. Convention on International Sales Contracts: An Overview*, 15 BROOK. J. INT'L L. 23, 43 (1989) (identifying original ratifying states).

76. C.I.S.G., *supra* note 17, art. 89, 19 I.L.M. at 692. The Secretary-General of the United Nations is the designated depositary for the Convention. *Id.*

77. *Id.* art. 99(1), 19 I.L.M. at 694. The C.I.S.G. is effective twelve months after the deposit of the tenth ratification. *Id. See supra* note 75 and accompanying text (discussing initial ratifying states to C.I.S.G.).

78. *See* MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL, *supra* note 24, at 384 (listing states that have deposited instruments of ratification, including United States).

79. C.I.S.G., *supra* note 17, art. 99(2), 19 I.L.M. at 694 (governing when Convention becomes effective for those signatory states ratifying Convention after initial ten ratifying states). The six additional ratifying states, with the respective effective dates, were: Austria, Finland, Mexico, and Sweden, effective January 1, 1989; Australia, effective April 1, 1989; and Norway effective August 1, 1989; *See* Rendell, *supra* note 75, at 43 (identifying subsequent ratifying states).

80. FARNSWORTH & YOUNG, *supra* note 18, at 136.

b. The Purpose and Provisions of the C.I.S.G.

The objectives of the C.I.S.G. are to unify the law for the international sale of goods.[81] The C.I.S.G., which is divided into four parts, aims to govern all aspects of contracts made between commercial parties in all states that have ratified, accepted, approved, or acceded to the C.I.S.G.[82] So long as differences exist between international legal systems, however, problems of conflict of laws remain.[83]

Part I of the C.I.S.G., Articles 1 through 6, provides general rules for determining whether the C.I.S.G. applies to a particular contract.[84] In general, the C.I.S.G. applies only to contracts for the sale of goods[85] between parties whose places of business are in different states,[86] which in turn are contracting states under

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81. *See* C.I.S.G., *supra* note 17, arts. 1-3, 19 I.L.M. at 672 (discussing sphere of application of C.I.S.G.). *See generally* Murphy, *supra* note 21 (discussing unifying effects of C.I.S.G.).

82. *See* C.I.S.G., *supra* note 17, art. 99(2), 19 I.L.M. at 694 (governing when Convention becomes effective for those signatory states ratifying convention after initial ten ratifying states). *See supra* note 75 and accompanying text (discussing initial ratifying states to C.I.S.G.).

83. Diamond, *supra* note 3, at 308.

84. C.I.S.G., *supra* note 17, arts. 1-6, 19 I.L.M. at 672-73 (general rules for determining applicability of C.I.S.G.). Of particular importance is Article 1(1), which provides that "[t]his Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State." *Id.* art. 1(1), 19 I.L.M. at 672. *See* UNIFORM LAW, *supra* note 8, at 77-84 (explaining application and interpretation of Article 1(1)).

85. C.I.S.G., *supra* note 17, art. 1(1), 19 I.L.M. at 672. "Sale of goods" is not defined in the C.I.S.G., but the term has been construed to refer to "assets that are corporeal and moveable." UNIFORM LAW, *supra* note 8, at 88. *Cf.* C.I.S.G., *supra* note 17, art. 3(2), 19 I.L.M. at 672 (convention not applicable to contracts where "preponderant part of the obligations of the party" supplying goods consists of supplying "labour or other services"). *See* UNIFORM LAW, *supra* note 8, at 89-90, 92-93 (discussing "mixed contracts" for goods and services under C.I.S.G.). This restriction on applicability to sales of "goods" is similar to the corresponding limitation under the U.C.C. *See supra* note 20 and accompanying text (discussing that U.C.C. is limited to sales of goods).

86. C.I.S.G., *supra* note 17, art. 1(1), 19 I.L.M. at 672. This requirement has been characterized as a "basic criterion of internationality." UNIFORM LAW, *supra* note 8, at 78. For purposes of this criterion, "place of business" does not depend upon the "nationality" of the parties to the contract, a factor which is expressly not "to be taken into consideration in determining the application of this Convention." C.I.S.G., *supra* note 17, art. 1(3), 19 I.L.M. at 672; *See id.* art. 10, 19 I.L.M. at 674 (explaining how to determine party's "place of business"). *See also*, UNIFORM LAW, *supra* note 8, at 78-81, 150-51 (discussing "place of business" under Convention). The Convention places one major limitation on the criterion of internationality. C.I.S.G., *supra* note 17, art. 1(2), 19

the C.I.S.G.[87] Hence, if each party has its place of business in a different contracting state, the C.I.S.G. applies,[88] unless by contract the parties either exclude its application[89] or derogate from or vary the effect of any C.I.S.G. provision.[90]

I.L.M. at 672. For purposes of determining whether the Convention applies, internationality in fact is disregarded if "this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract." *Id.*

87. C.I.S.G., *supra* note 17, art. 1(1)(a), 19 I.L.M. at 672. Honnold characterizes Article 1(a) as a choice-of-law rule, directed at the fora of all contracting states, that "lays down a unified and authoritative rule of private international law on the applicability of the Convention." UNIFORM LAW, *supra* note 8, at 81. "[T]he [C.I.S.G.] refers to 'the law applicable by virtue of the rules of private international law' to fill gaps." *Winship I*, *supra* note 14, at 491.

> Choice-of-law rules do, however, have a limited role to play when filling gaps in the text. . . . In the absence of such an express reference to national law, the reader faced with gaps in the text is directed to refer to the general principles.

Id. at 493.

88. C.I.S.G., *supra* note 17, art. 1(1)(a), 19 I.L.M. at 672. The C.I.S.G. itself excludes from this general rule mixed contracts in which the preponderant part of the selling party's obligations is to supply labor or other services. *Id.* art. 3(2), 19 I.L.M. at 672; *see supra* note 85 and accompanying text (discussing "mixed contracts"). The C.I.S.G. excludes from its application the following types of contracts:

> [S]ales:
> (a) of goods bought for personal, family or household use, if before or at the time of contracting the seller knew or should have known of the use;
> (b) by auction;
> (c) on execution or under other authority of law;
> (d) of stock, shares, investment securities, negotiable instruments or money;
> (5) of ships, vessels, hovercraft and aircraft;
> (6) of electricity.

C.I.S.G., *supra* note 17, art. 2, 19 I.L.M. at 672. *See* UNIFORM LAW, *supra* note 8, at 85-90 (discussing exclusions from Convention).

In addition, the C.I.S.G. does not affect "the validity of the contract or of any of its provisions or of any usage." C.I.S.G., *supra* note 17, art. 4(a), 19 I.L.M. at 673; *see* Kastely, *supra* note 39, at 644-46 (analyzing applicability and effect of this exception). Nor does the C.I.S.G. concern "the effect which the contract may have on the property in the goods sold." C.I.S.G., *supra* note 17, art. 4(b), 19 I.L.M. at 673; *see* UNIFORM LAW, *supra* note 8, at 99 (discussing intended effect of exception). Finally, by its own terms, the C.I.S.G. "does not apply to the liability of the seller for death or personal injury caused by the goods to any person." C.I.S.G., *supra* note 17, art. 5, 19 I.L.M. at 673; *see* UNIFORM LAW, *supra* note 8, at 100-04 (discussing reasons for and effect of Article 5).

89. C.I.S.G., *supra* note 17, art. 6, 19 I.L.M. at 673. *See* UNIFORM LAW, *supra* note 8, at 105 (discussing effect of Article 6); *see also* Farnsworth, *supra* note 17, at 440-42 (discussing interrelationship of Articles 4 and 6 concerning validity of contract). *See generally* Rendell, *supra* note 75, at 25-26 (discussing Article 6 as "freedom of contract" principle).

90. C.I.S.G., *supra* note 17, art. 6, 19 I.L.M. at 673. Derogation or variance under Article 6 is subject to the parameters of Article 12, which permits contracting states to

An alternative basis for application of the C.I.S.G. exists in situations where choice-of-law principles would require the application of the law of a contracting state.[91] Under this alternative test: (1) both parties to an international sale of goods are in different states; (2) only one party is a C.I.S.G. signatory; and (3) the parties have not contracted to apply a law other than the law of the C.I.S.G. signatory state.[92] The United States submitted a declaration under Article 95[93] indicating that it would not be bound by this alternative basis for application of the C.I.S.G.[94] The result of this reservation is that a non-member cannot invoke its state's choice-of-law principles to invoke C.I.S.G. protection[95] where the United States is a party to the contract.[96]

Part I of the C.I.S.G. also includes general rules for interpreting the statements and conduct of parties in accordance with their intent.[97] C.I.S.G. Articles 7 through 13 set forth the

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preserve formal requirements in domestic law without derogation or variance by contract parties. *Id.* arts. 12, 96, 19 I.L.M. at 674, 693-94; *see* UNIFORM LAW, *supra* note 8, at 155-56 (discussing reservations under Article 96 to trigger application of Article 12).

91. C.I.S.G., *supra* note 17, art. 1(1)(b), 19 I.L.M. at 672. "This Convention applies to contracts of sale of goods between parties whose places of business are in different States . . . when the rules of private international law lead to the application of the law of a Contracting State." *Id.*; *see* UNIFORM LAW, *supra* note 8, at 82-84 (discussing Article 1(1)(b) and effect of reservations under Article 95, excluding application of Article 1(1)(b)); *see also* Randall & Norris, *supra* note 21, at 612-17 (discussing scope of C.I.S.G.); *Winship I*, *supra* note 14, at 491 (discussing effect of Article 1(1)(b)); Lisa K. Tomko, *United States Convention on the International Sale of Goods: Its Effect on United States and Canadian Sales Law*, 66 U. DET. L. REV. 73, 78-82 (1988) (discussing effect of U.S. reservation from Article 1(1)(b)).

92. C.I.S.G., *supra* note 17, art. 1, 19 I.L.M. at 672.

93. *Id.* art. 95, 19 I.L.M. at 693. "Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention." *Id.*; *see supra* note 28 (quoting text of Article 1(1)(b)).

94. *Status of the Convention: Note by the Secretariat*, at 5, U.N. Doc. A/CN.9/294 (1987). Despite this declaration, parties to an international contract may, nevertheless, choose to have their contract governed by the provisions of the C.I.S.G., since "there is no provision [in the C.I.S.G.] that addresses the question whether the parties may make the Convention applicable to transactions that fall outside the scope of Articles 1-5." UNIFORM LAW, *supra* note 8, at 107.

95. *See supra* note 93 (providing text of C.I.S.G. Article 95). *See supra* note 92 and accompanying text (providing text of discussing Article 1(1)(b)).

96. *See supra* note 94 and accompanying text (discussing U.S. refusal to apply C.I.S.G. to transactions involving C.I.S.G. non-members).

97. C.I.S.G., *supra* note 17, art. 8, 19 I.L.M. at 673. Article 8 provides that:

> (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

C.I.S.G.'s general interpretive provisions,[98] which provide that, as a general rule, the provisions be interpreted in light of the C.I.S.G's international character.[99] This basic criterion of internationality requires that the C.I.S.G. applies only between parties whose places of business are in different states.[100] Place of business does not depend upon the nationality of the parties to the contract, a factor that is expressly excluded in determining the application of the C.I.S.G.[101]

C.I.S.G's overall objective is to promote uniformity in the application of contract rules and the observance of good faith in international trade.[102] Questions of contract interpretation are to be settled by reference to any law considered applicable under international choice-of-law rules.[103] The interpretation

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(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Id.; *see* UNIFORM LAW, *supra* note 8, at 136-43 (discussing scope and application of Article 8).

98. C.I.S.G., *supra* note 17, arts. 7-13, 19 I.L.M. at 673-74.

99. *Id.* art. 7(1), 19 I.L.M. at 673. *See* UNIFORM LAW, *supra* note 8, at 113-23 (discussing Article 7(1)). *See supra* note 86 and accompanying text (discussing basic criterion of "internationality").

100. *See supra* note 88 and accompanying text (discussing application of C.I.S.G.).

101. *See supra* note 86 and accompanying text (discussing internationality).

102. C.I.S.G., *supra* note 17, art. 7(1), 19 I.L.M. at 673. *See* UNIFORM LAW, *supra* note 8, at 123-25 (explaining "good faith" provision); *see also* C.I.S.G., *supra* note 17, art. 7(2), 19 I.L.M. at 673. "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based." *Id.* "A . . . generous reading will be necessary to identify the Convention's underlying general principles and to use them to fill gaps." *Winship I*, *supra* note 14, at 520. "If the reader is generous in his approach to the convention text there should be little need to consult conflicts rules and then prove the applicable law—especially as the reader is also under the injunction in article 7(1) to promote uniformity in interpretation." *Id.* *See generally* UNIFORM LAW, *supra* note 8, at 125-33 (discussing "gap-filling" under Article 7(2)); *see supra* note 87 and accompanying text (discussing Article 1(1)(a) as choice-of-law rule and gap-filler).

103. C.I.S.G., *supra* note 17, art. 7(2), 19 I.L.M. at 673. "In the interpretation of [the C.I.S.G.], regard is to be had to its international character and to the need to promote uniformity." *Id.* art. 7(1), 19 I.L.M. at 673. In the absence of settled general principles, questions governed by the C.I.S.G. that are not expressly settled in it are to be settled in conformity with the law applicable by virtue of the rules of private international law. *Id.*

and determination of the law of the forum necessarily would fall to the judges applying the *lex fori*.[104] If a choice of law is not express, for example, Article 8 allows the applicable law to be determined by the circumstances of the case or from the contract's terms, so long as the other party knew or should have known the other party's intent with regards to which law should apply.[105] Whether a person knew or should have known the law applicable to the international contract can be based on the "reasonable person" standard.[106] The C.I.S.G. also provides that the determination of the applicable trade usage rules be based upon the rules agreed to by the parties and upon the practices established between them.[107] Furthermore, the C.I.S.G. does not require a contract to be evidenced by a writing,[108] or to com-

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104. *See Mitchell v. Mitchell*, La.App. 5 Cir., 483 So.2d 1152, 1154 (providing general rule that "substantive rights are determined by the law of the place where the action arose (lex loci); while the procedural rights are governed by the law of the place of the forum (lex fori)"). *See also* BLACK'S LAW DICTIONARY 630 (6th ed. 1993). The *lex fori* is defined as:

> The law of the forum, or court; that is, the positive law of the state, country, or jurisdiction of whose judicial system the court where the suit is brought or remedy sought is an integral part. Substantive rights are determined by the law of the place where the action arose, "lex loci," while the procedural rights are governed by the law of the place of the form, "lex fori." See Lex loci contractus.

Id.

105. C.I.S.G., *supra* note 17, art. 8., 19 I.L.M. at 673. *See supra* note 87 and accompanying text (characterizing Article 1(a) of C.I.S.G. as choice-of-law rule). *See supra* note 102 and accompanying text (discussing gap-filling in conformity with C.I.S.G.'s general principles).

106. *See supra* note 97 and accompanying text (interpreting statements and other conduct of party are according to party's intent or according to understanding that reasonable person would have).

107. C.I.S.G., *supra* note 17, art. 9, 19 I.L.M. at 674. Article 9 provides:

> 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.

Id. See UNIFORM LAW, *supra* note 8, at 144-49 (discussing role of usages and practices under C.I.S.G.)

108. C.I.S.G., *supra* note 17, art. 11, 19 I.L.M. at 674. "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." *Id. See id.* art. 13, 19 I.L.M. at 674 (discussing the meaning of "writing" under the convention). Article 13 provides "[f]or the purposes of this Convention 'writing' includes telegram and telex." *Id.*

ply with any other requirement as to form to interpret obligations under an international contract.[109] While Part I of the C.I.S.G. provides rules of interpretation and application, Part II provides rules concerning the formation of an international contract for the sale of goods in Part II.[110] Part III of the C.I.S.G. provides rules concerning the obligations of the seller[111] and the buyer under the contract;[112] general provisions on breach of contract,[113] avoidance,[114] notice,[115] specific performance,[116] and

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109. C.I.S.G., *supra* note 17, art. 11, 19 I.L.M. at 674. *But see id.* arts. 12, 96, *supra* note 17, 19 I.L.M. at 674, 693-94 (permitting contracting state to require formalities pursuant to declaration under Article 96). *But cf.* UNIFORM LAW, *supra* note 8, at 152-56 (discussing effect of Articles 11 and 12). The United States did not make a reservation under Article 96. *See* Farnsworth, *supra* note 17, at 440 n.5 (discussing effect of Article 11).

110. C.I.S.G., *supra* note 17, arts. 14-24, 19 I.L.M. at 674-77; *see* UNIFORM LAW, *supra* note 8, at 159-207 (discussing rules for contract formation).

111. C.I.S.G., *supra* note 17, arts. 30-52, 19 I.L.M. at 678-83. For a discussion of the obligations of the seller, see UNIFORM LAW, *supra* note 8, at 233-332. The seller must deliver the goods and hand over any document as required by the contract. C.I.S.G., *supra* note 17, arts. 30-34, 19 I.L.M. 678-79. The seller must deliver conforming goods as required by the contract free of third party claims. *Id.* arts. 35-44, 19 I.L.M. 679-81. If the seller is in breach of contract he is liable to the buyer for remedies. *Id.* arts. 45-52, 19 I.L.M. at 681-83. The C.I.S.G. also identifies certain obligations common to sellers and buyers. *Id.* arts. 71-88, 19 I.L.M. 687-92. These include provisions regarding anticipatory breach, installment contracts, damages, and interest payments for damages recoverable. In addition provisions exempting performance and damages, effects of avoidance, and preservation of goods. *Id.*

112. C.I.S.G., *supra* note 17, arts. 53-65, 19 I.L.M. at 683-86. *See* UNIFORM LAW, *supra* note 8 at 333-66 (discussing obligations of buyer.) The buyer must pay for the goods and take delivery as required by the contract. C.I.S.G., *supra* note 17, arts. 53-60, 19 I.L.M. at 683-85. If the buyer is in breach of contract he is liable to the seller for remedies. *Id.* arts. 61-65, 19 I.L.M. at 685-86. The C.I.S.G. also identifies certain obligations by the buyer to pay the price after the risk has passed to the buyer and the goods are lost or damaged. *Id.* arts. 66-70, 19 I.L.M. at 686-87.

113. C.I.S.G., *supra* note 17, art. 25, 19 I.L.M. at 677. *See* RESTATEMENT (FIRST) CONTRACTS § 462 (1932) (defining breach of contract).

> A breach of contract is a non-performance of any contractual duty of immediate performance. A breach may be total or partial, and may take place by failure to perform acts promised, by prevention or hinderance, or by repudiation.

Id.

114. C.I.S.G., *supra* note 16, art. 26, 19 I.L.M. at 677. "A declaration of avoidance of the contract is effective only if made by notice to the other party." *Id.*

115. *Id.* art. 27, 19 I.L.M. at 677.

> Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

modification or termination[117] and provisions on passage of risk[118] under the contract.[119] The United States has not, in accordance with the reservations provision of the C.I.S.G.,[120] reserved against the application of the C.I.S.G.[121] to the bases of U.S. contract formation (Part II)[122] and sales law (Part III).[123]

2. The U.C.C.

The U.C.C., adopted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the American Law Institute[124] ("ALI") in 1952, was comprehensively revised in 1956, 1958, 1962, and 1972, and has since been in whole, or substantially, by all States.[125] The U.C.C. aims to pro-

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Id.

116. *Id.* art. 28, 19 I.L.M. at 677.

> If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

Id.

117. *Id.* art. 29, 19 I.L.M. at 677.

> (1) A contract may be modified or terminated by the mere agreement of the parties.
>
> (2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

Id.

118. *Id.* arts. 66-70, 19 I.L.M. at 686-87. *See* QUINN'S DIGEST, *supra* note 18, at 2-171 (discussing parties are best situated to shift burden and allocate risk or burden as between parties).

119. *See* UNIFORM LAW, *supra* note 8, at 367-90 (discussing passage of risk provisions under C.I.S.G.).

120. C.I.S.G., *supra* note 17, art. 96, 19 I.L.M. 693-94.

121. *Id.* art. 1(1)(b), 19 I.L.M. at 672. *See supra* note 28 and accompanying text (providing text of C.I.S.G.).

122. C.I.S.G., *supra* note 17, 19 I.L.M. at 674-77. *See supra* note 110 and accompanying text (identifying Part II of C.I.S.G. concerning the formation of international contract for sale of goods).

123. C.I.S.G., *supra* note 17, 19 I.L.M. at 677-92. *See supra* notes 111-18 and accompanying text (identifying Part III of C.I.S.G. concerning obligations of seller and buyer under contract, as well as general provisions on breach of contract, avoidance, notice, specific performance, and modification or termination plus provisions on passage of risk under contract).

124. FARNSWORTH & YOUNG, *supra* note 18, at 2.

125. *See* QUINN'S DIGEST, *supra* note 18, at 147-48 (setting forth table of state adop-

vide uniformity of sales law among the States.[126] While the U.C.C. contains many provisions,[127] Article 2 applies directly to the contract between parties for the sale of goods.[128]

a. The Legislative History of the U.C.C.

The origins of the U.C.C. lie in the *lex mercatoria*,[129] a specialized body of custom or usage developed and overseen by merchants themselves[130] that governed contracts dealing with commercial matters until the seventeenth century.[131] The law merchant was applied by courts composed of merchants.[132]

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tion); *see generally id.* (providing state variations from official text on provision by provision basis).

126. U.C.C. § 1-102(2)(c).

127. U.C.C. Article 1, General Provisions; Article 2, Sales; Article 2A, Leases; Article 3, Commercial Paper; Article 4, Bank Deposits and Collections; Article 4A, Funds Transfers; Article 5, Letters of Credit; Article 6, Bulk Transfers; Article 7, Warehouse Receipts, Bills of Lading and Other Documents of Title; Article 8, Investment Securities; Article 9, Secured Transactions; Sales of Accounts and Chattel Paper. *See* QUINN'S DIGEST, *supra* note 18 (providing exhaustive analysis of each of Code's eleven substantive articles).

128. *See supra* note 20 and accompanying text (discussing applicability of U.C.C. to sale of goods).

129. *See* Bank of Conway v. Stary, 200 N.W. 505, 508-09 (N.D. 1924) (defining *lex mercatoria*).

> [*Lex mercatoria is*] a system of law that does not rest exclusively on the institutions and local customs of any particular country, but consists of certain principles of equity and usages of trade which general convenience and a common sense of justice have established to regulate the dealings of merchants and mariners in all commercial countries of the civilized world. . . . This common law of merchants is of more universal authority than the common law of England.

Bank of Conway, 200 N.W. at 508 (citations omitted).

130. *See* E. ALLAN FARNSWORTH, CONTRACTS 29 (2d ed. 1990) [hereinafter CONTRACTS] (discussing historical role of the law merchant).

> The law of documentary sales is a product of the custom of the international community of merchants, shipowners, marine insurance underwriters, and bankers of many countries. It has developed over many centuries as part of the international law merchant. . . . In the United States it has been restated and systematized in the Uniform Commercial Code which expressly refers to the law merchant as a supplementary source of law.

Harold J. Berman & Monica Ladd, *Risk of Loss or Damage in Documentary Transactions Under the Convention on the International Sale of Goods*, 21 CORNELL INT'L. L.J. 423, 425-26 (1988). "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant . . . shall supplement its provisions." U.C.C. § 1-103.

131. CONTRACTS, *supra* note 130, at 34.

132. *Id.*

Much of this merchant law made its way into the common law,[133] but the common law applicable to contracts for the sale of goods remained primarily a complex body of case decisions.[134] By 1893, this body of law had been reduced to statute in Great Britain.[135] In the United States, the NCCUSL[136] undertook a similar codification effort, which resulted, in 1906, in the drafting of the Uniform Sales Act ("USA").[137] The USA had only limited application to contracts for the sale of goods, however, which re-

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133. *Id.*

> Large amounts of this [merchant] law were carried into the English common law. . . . This was due in substantial part to Lord Mansfield, one of England's most noted judges, who became Chief Justice of the King's Bench in 1756. In controversies between merchants, he made it a point to ascertain and apply the usages of the trade, sometimes using a special jury of merchants to advise him on commercial practices. But the influence of the law merchant on the common law relating to the sale of goods was limited, and a complex body of case law developed in this field in Britain. This law was reduced to statutory form by the British Sale of Goods Act in 1893.

Id.

134. *Id.* at 29 (discussing historical role of law merchant).

> The origins of the Uniform Commercial Code lie in the law merchant, a specialized body of usages, or customs, that governed contracts dealing with commercial matters until the seventeenth century. The law merchant was applied by courts composed of merchants convened to pass on disputes that arose at the fairs that were the centers for much of early trade. Large amounts of this law were carried into the English common law of negotiable instruments and insurance. This was due in substantial part to Lord Mansfield, on of England's most noted judges, who became Chief Justice of the King's Bench in 1756. In controversies between merchants, he made it a point to ascertain and apply the usages of the trade, sometimes using a special jury of merchants to advise him on commercial practices. But the influence of the law merchant on the common law relating to the sale of goods was limited, and a complex body of case law developed in this field in Britain. This law was reduced to statutory form by the British Sale of Goods Act in 1893. The National Conference of Commissioners on Uniform State Laws entrusted to [Samuel W.] Williston the task of producing a similar statute for the American States. His draft of a Uniform Sales Act was approved by the Commissioners in 1906 and was eventually adopted by over 30 states. Like its British cousin, however, it had little to say about contractual problems arising out of the sale of goods, and these remained largely governed by case law.

Id. "At the close of the Second World War, the Commissioners joined forces with the American Law Institute in preparing a comprehensive Uniform Commercial Code." *Id.* at 29-30.

135. *See supra* note 133 and accompanying text (discussing historical development of 1986 British Sale of Goods Act).

136. *See supra* note 124 and accompanying text (discussing historical role of NCCUSL).

137. *See supra* note 134 and accompanying text (discussing historical development of British Sale of Goods Act and American Uniform Sales Act).

mained subject to the common law.[138] Attempting to develop a comprehensive statute to govern commercial contracts, the ALI and the NCCUSL produced a draft U.C.C. in 1952, replacing the USA and broadening its previous coverage to include general contracts for the sale of goods.[139] The ALI and NCCUSL produced a revised draft in 1958,[140] which, after various subsequent revisions, has been enacted into law by all U.S. States.[141] Each State, however, has a modified version of the model U.C.C.[142]

b. The Provisions of Article 2 of the U.C.C.

Article 2 of the U.C.C. provides general rules governing contracts for the sale of goods in the domestic context,[143] including: scope,[144] application,[145] and validity of contracts.[146] Article 2, which is divided into seven parts,[147] declares in Part 1 that it applies to any transaction for the sale of goods[148] that bears a reasonable relation to an individual state adopting the U.C.C.[149] Part 2 of Article 2 addresses the formal requirements of a contract for the sale of goods,[150] including the formation of the con-

138. *See supra* note 134 and accompanying text (discussing joint efforts of NCCUSL and ALI to deal with USA).

139. *See* CONTRACTS, *supra* note 130, at 42 (discussing approval of first official draft of U.C.C.). *See* U.C.C. art. 2. (1994) (setting forth rules which governing contracts for sale of goods).

140. *See* CONTRACTS, *supra* note 130, at 35.

141. *Id.* at 42. As of 1990, Louisiana had adopted only part of the U.C.C. *Id.*

142. *See* QUINN'S DIGEST, *supra* note 18, at 8 (providing state variations from official text on provision-by-provision basis).

143. *See supra* note 20 (noting U.C.C. Art. 2 application only to contracts for sale of goods).

144. U.C.C. § 2-102.

145. U.C.C. § 1-103 (providing general applicability of U.C.C.). *See also* U.C.C. § 2-102 (providing scope and application of Article 2).

146. *See* U.C.C. §§ 1-206, 2-201, 2-204, 302 (discussing validity issues including fraud (1-206 & 2-201), duress (2-204), and unconscionability (2-302)); WHITE & SUMMERS, *supra* note 18 (outlining basic content and analyzing case law.)

147. U.C.C. art. 2.

148. U.C.C. § 2-102. *See supra* note 20 and accompanying text (discussing contents of provision).

149. U.C.C. § 1-105(1). This provision states:

> [W]hen a transaction bears a reasonable relation to this state [*i.e.*, a state of the United States enacting the U.C.C.] 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* [*i.e.*, the U.C.C.] *applies to transactions bearing an appropriate relation to this state.*

Id. (emphasis added).

150. *See* U.C.C. § 2-201 (discussing formal requirement of contract to be in writ-

tract[151] and the recision[152] or modification[153] of the contract, and the rights granted under the contract.[154] Part 3 deals with the general obligations of parties[155] and the construction of contracts.[156] Part 4 of Article 2 concerns passage of title under a

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ing.) The statute of frauds encourages parties to put agreement in writing. *Id. Cf. supra* note 108 and accompanying text (explaining that contract of sale under C.I.S.G. need not be concluded in or evidenced by writing). *See supra* note 109 and accompanying text (permitting C.I.S.G. contracting state to require formalities pursuant to declaration under Article 96). The United States did not make reservation under Article 96. *Id.*

151. *See* U.C.C. § 2-202 through 2-210 (applying to formation of contract,including evidence, seals, intent to show agreement, firm offers, offer and acceptance). Parol or extrinsic evidence can be used to clarify or explain content of the agreement or the usage of trade. *Id.* Seals are inoperative. *Id.* § 2-203. A contract is formed, even when missing terms, or the moment of its making is undetermined, when it is made in any manner sufficient to show an intent to agree, whether oral, written or otherwise. *Id.* § 2-204. Firm offers require a signed writing, however, and are open for a maximum of three months if no time is stated. *Id.* § 2-205. The acceptance of an offer may be either by prompt promise or prompt performance, unless the offeror has made clear that a particular mode is preferred. *Id.* § 2-206. The offer may lapse if acceptance is not within a reasonable time. *Id.* Varying terms in offer and acceptance may still result in a contract. *Id.* § 2-207.

152. BLACK'S LAW DICTIONARY 905 (6th ed. 1991). Recission of Contract is defined as:

> To abrogate, annul, avoid, or cancel a contract; particularly, nullifying a contract by the act of a party. The right of rescission is the right to cancel (rescind) a contract upon the occurrence of certain kinds of default by the other contracting party. To declare a contract void in its inception and to put an end to it as though it never were. A "rescission" amounts to the unmaking of a contract, or an undoing of it from the beginning, and not merely a termination, and it may be effected by mutual agreement of parties, or by one of the parties declaring rescission of contract without consent of other if a legally sufficient ground therefor exists, or by applying to courts for a decree of rescission. It necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by it. Nonetheless, not every default in a contract will give rise to a right of rescission. . . .

Id.

153. BLACK'S LAW DICTIONARY 695 (6th ed. 1991). Modification is defined as:

> A change; an alteration or amendment which introduces new elements into the details, or conceals some of them, but leaves the general purpose and effect of the subject-matter intact.

Id.

154. *See* U.C.C. § 2-209 (governing rescission and modification of contract). The obligations of the contract are assignable by each party unless such assignment would materially alter the duty of the other party. *Id.* § 2-210.

155. *See* U.C.C. § 2-301 (providing that general obligation of seller is to transfer and deliver and that of buyer is to accept and pay in accordance with contract.) *See supra* notes 111-12 and accompanying text (identifying obligations of buyer and seller under C.I.S.G.).

156. *See id.* §§ 2-304 - 2-328 (providing terms of contract.) Sections 2-304 through

contract for the sale of goods,[157] the rights of the seller's creditors,[158] and the rights of good faith purchasers.[159] Part 5 deals with the rights and obligations of parties in the performance of a contract for the sale of goods.[160] Part 6 governs the complex issues of: breach,[161] repudiation,[162] and excuse,[163] while Part 7

2-310 supply general terms to a contract such as price, delivery and payment. *Id.* §§ 2-304 - 2-310. Sections 2-312 through 2-318 supply terms concerning the quality of the merchandise and express and implied warranties. *Id.* §§ 2-312 - 2-318. Sections 2-319 through 2-325 provide clarification of terms such as F.O.B. (freight on board), C.I.F. (cost insurance freight). *Id.* §§ 2-319 - 2-325. Sections 2-326 through 2-328 address special sale terms including: consignment sales, sale on approval and sale on return, and sale by auction. *Id.* §§ 2-236 - 2-328.

157. *Id.* § 2-401. "This provision deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract and not in terms of whether or not 'title' to the goods has passed." *Id.* O.C. 1 (1994).

158. *Id.* § 2-402. Generally, buyer has the right to recover goods under Section 2-402, as against the rights of unsecured creditors of the seller, with respect to goods which have been identified to a contract for sale. *Id.* The creditor of the seller may treat a sale or an identification of goods as void if seller is fraudulent under any rule of law of the state where the goods are situated. *Id.* However, nothing in this section is deemed to impair the rights of creditors of the seller. *Id.*

159. *See id.* § 2-403 (discussing power to transfer good title and interests transferred). This provision further concerns bailments and entrustment of possession of goods with power to transfer all rights of the entruster to a buyer in the ordinary course of business. *Id.*

160. *Id.* §§ 2-501 - 2-515. Provisions 2-501 through 2-510 define the performance required by the seller such as identification of goods, tender of delivery, cure by seller for improper tender of delivery, risk of loss and the effect of breach on risk of loss. *Id.* §§ 2-501 - 2-510. Sections 2-511 through 2-513 concern the performance tasks of the buyer such as tender of payment, payment by buyer before inspection and buyer's right to inspection of goods. *Id.* §§ 2-511 - 2-513. General performance obligations of buyer and seller are found in sections 2-514, 2-515. *Id.* §§ 2-514, 2-515. Section 2-514 covers document sales and states when documents are deliverable on acceptance and when on payment. *Id.* § 2-514. Section 2-515 discusses preserving evidence of goods in dispute. *Id.* § 2-515.

161. BLACK'S LEGAL DICTIONARY 130 (6th ed. 1991). Breach is defined as:

> The breaking or violating of a law, right, obligation, engagement, or duty, either by commission or omission. Exists where one party to contract fails to carry out term, promise, or condition of the contract.

Id. at 130.

162. *Id.* at 903. Repudiation is defined as:

> A rejection, disclaimer, or renunciation of a contract before performance is due that does not operate as an anticipatory breach unless the promisee elects to treat the rejection as a breach and brings a suit for damages. The rejection or refusal of an offered or available right or privilege, or of a duty or relation. The act of a buyer or seller in rejecting a contract of sale either partially or totally. U.C.C. §§ 2-610, 2-703, 2-708, 2-711.
>
> Repudiation of a contract means refusal to perform duty or obligation owed to other party. Such consists in such words or actions by contracting party as indicate that he is not going to perform his contract in the future.

covers the related questions of buyers'[164] and sellers'[165] reme-

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> Repudiation of contract is in nature of anticipatory breach before performance is due, but does not operate as anticipatory breach unless promisee elects to treat repudiation as breach, and brings suit for damages. Such repudiation is but act or declaration in advance of any actual breach and consists usually of absolute and unequivocal declaration or act amounting to declaration on part of promisor to promisee that he will not make performance on future day at which contract calls for performance.

Id. *See also* RESTATEMENT (FIRST) CONTRACTS §§ 318-321 (1932) (discussing repudiation).

163. U.C.C. §§ 2-601 - 2-616. Section 2-601 discusses buyer's rights on improper delivery. *Id.* § 2-601. Sections 2-602 through 2-604 discuss rightfully rejected goods. *Id.* §§ 2-602 - 2-604. The buyer's right to object to goods may be waived for failure to particularize. *Id.* § 2-605. Sections 2-606 and 2-607 cover what constitutes acceptance of goods and the effect of acceptance. *Id.* §§ 2-602, 2-607. The buyer is entitled to revoke acceptance of goods in whole or in part. *Id.* § 2-608. Each party has a right to adequate assurance of the other party's performance. *Id.* at § 2-609. Of course, there may be anticipatory repudiation, *id.* at § 2-610, and retraction of anticipatory repudiation, *id.* § 2-611. In an installment contract, one which requires or authorizes the delivery of goods in separate lots to be separately accepted, the buyer may reject any installment which is non-conforming, but if the non-conformity does not substantially impair the value of the whole contract, the seller may give adequate assurance of its cure, thus the buyer must accept that installment. *Id.* § 2-612. Several provisions take into account that there may be no fault on the part of either party. *Id.* §§ 2-613, 2-614. Other provisions allow excuse. *Id.* §§ 2-615, 2-616. BLACK'S LAW DICTIONARY 393 (6th ed. 1991). Excuse is defined as:

> A reason alleged for doing or not doing a thing. A matter alleged as a reason for relief or exemption from some duty or obligation. That which is offered as a reason for being excused, or a plea offered in extenuation of a fault or irregular deportment. It is that plea or statement made by the accused which arises out of the state of facts constituting and relied on as the cause.
>
> . . .

Id.

164. U.C.C. §§ 2-711 - 2-717. Certain remedy provisions are applicable to the buyer. *See id.* §§ 2-711 - 2-717 (discussing remedies in general, security interest in rejected goods, right to procure substitute goods). The buyer's damages may be for non-delivery or repudiation or breach in regard to accepted good. *Id.* §§ 2-713, 2-714. Remedies may include incidental and consequential damages. *Id.* § 2-715. Buyer may also have a right to specific performance and deduction of damages from the price. *Id.* §§ 2-716, 2-717. Certain provisions concerning remedies are applicable to both the seller and the buyer. *Id.* §§ 2-718 - 2-725. The valuation provisions requiring proof of market price, and admissibility of market quotations are located in U.C.C. §§ 2-723, 2-724.

165. U.C.C. §§ 2-702 - 2-710. Certain remedy provisions are applicable to the seller. *See id.* §§ 2-702 - 2-710 (discussing seller's remedies in general, right to salvage unfinished goods, right to stop delivery in transit, right to resell, damages, non-acceptance or repudiation). The seller's remedies may include action for the price and incidental damages. *Id.* §§ 2-709, 2-710. Certain provisions concerning remedies are applicable to both the seller and the buyer. *See id.* §§ 2-718 - 2-725 (discussing liquidation of damages, contractual modification or limitation of remedy, effect of cancellation or rescission on claims for antecedent breach, remedies for fraud, suit of third parties for

dies.[166]

B. *The ICLAIC and the O.A.S.*

The ICLAIC resulted from the Fifth Inter-American Specialized Conference of the O.A.S.[167] Throughout the 1970's and

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injuries to goods.) The valuation provisions requiring proof of market price, and admissibility of market quotations are located in U.C.C. §§ 2-723, 2-724. The statute of limitations in contracts for sale is four years after the cause of action has accrued. *Id.* § 2-725.

166. *See id.* § 2-701 (providing remedies with respect to obligations "collateral or ancillary" to contract not impaired by specific provisions of U.C.C.). BLACK'S LAW DICTIONARY 896 (6th ed. 1991). Remedy is defined as:

> The means by which a right is enforced or the violation of a right is prevented, redressed, or compensated. The means employed to enforce a right or redress an injury, as distinguished from right, which is a well founded or acknowledged claim.
>
> The rights given to a party by law or by contract which that party may exercise upon a default by the other contracting party, or upon the commission of a wrong (a tort) by another party.
>
> Remedy means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal. "Rights" includes remedies. U.C.C. § 1-201.

Id.

167. Interview with Jeannette Trambel, Organization of American States Legal Officer, Department of Development and Codification of International Law, Secretariat for Legal Affairs, in Washington, D.C. (Oct. 28, 1995) [hereinafter Interview]. Proceedings for the first four "CIDIP" (which stands for Conferencia Especializada Interamericana Sobre Derecho Internacional Privado), have been published in Spanish only, and may be referenced by the following citations:

CIDIP-I:	Actas Y Documentos:
- Volume I:	Antecedentes, actas de las sesiones plenarias, informes de los relatores, acta final y convenciones aprobads por la CIDIP. OEA/Ser.K/XXX1.1, CIDIP/64 (22 mayo 1975)
- Volume II:	Actas de las sesiones de las Comisiones I y II y proyectos presentados a esa comisiones. OEA/Ser.K/XX1.1, CIDIP/64 (22 mayo 1975)
CIDIP-II:	Actas Y Documentos:
- Volume I:	Antecedentes, actas de las sesiones plenarias, informes des los relatores, acta final y convenciones aprobads por la CIDIP-II y lista de participantes. OEA/Ser.K/XX1.2, CIDIP-II/103 (22 enero 1980)
- Volume II:	Actas de la Comision I OEA/Ser.K/XX1.2, CIDIP-II/103 (22 enero 1980)
- Volume III:	Actas de la Comision II OEA/Ser.K/XX1.2, CIDIP-II/103 (22 enero 1980)
CIDIP-III:	Actas Y Documentos:
- Volume I:	Antecedentes, actas de las sesiones plenarias, informes des los relatores y otros documentos. OEA/Ser.K/XX1.3, CIDIP-III/69 (30 marzo 1989)
- Volume II:	Actas de la Comision I

1980's, O.A.S. Members made numerous legislative attempts to harmonize choice-of-law rules within the O.A.S. community.[168] These efforts led to the development of the ICLAIC,[169] which addresses choice-of-law problems in relation to international contracts.[170] The ICLAIC, adopted at a diplomatic conference convened in Mexico City in 1994,[171] was signed by four O.A.S. Member States: Bolivia, Brazil, Uruguay, and Venezuela.[172] The ICLAIC's provisions aim to unify private international law.[173]

1. Legislative History of the ICLAIC

In the years 1975, 1979, 1984, and 1989, respectively, the General Assembly of the O.A.S. convoked the first,[174] second,[175]

OEA/Ser.K/XX1.3, CIDIP-III/69 (30 marzo 1989)
- Volume III: Actas de la Comision II
OEA/Ser.K/XX1.3, CIDIP-III/69 (30 marzo 1989)
CIDIP-IV: Actas Y Documentos:
- Volume I: Antecedentes, actas de las sesiones plenarias, informes des los relatores y otros documentos.
OEA/Ser.K/XX1.4, CIDIP-IV/103 (28 febrero 1991)
- Volume II: Actas de la Comision I
OEA/Ser.K/XX1.4, CIDIP-IV/103 (28 febrero 1991)

In respect of the proceedings for CIDIP-V, these are presently in progress.
Id.

168. *See* Inter-American Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes and Invoices *reprinted in* 14 I.L.M. at 332; Inter-American Convention on Conflict of Laws Concerning Checks, *reprinted in* 14 I.L.M. at 334; Inter-American Convention on Conflict of Laws Concerning Checks, *reprinted in* 18 I.L.M. 1212; Inter-American Convention on Conflict of Laws Concerning Commercial Companies, *reprinted in* 18 I.L.M. 1222. Inter-American Convention on Conflict of Laws concerning the Adoption of Minors, *reprinted in* 24 I.L.M. 460.

169. The ICLAIC, *supra* note 2, pmbl., at 733.

170. *Cf.* UNIFORM LAW, *supra* note 8, at 47-48 (discussing C.I.S.G.'s basic rules on applicability, internationality and transaction's relation to contracting state.)

171. *See supra* note 2 and accompanying text (discussing efforts at specialized conference to develop uniform choice-of-law rules).

172. *See supra* note 2 and accompanying text (introducing ICLAIC and indicating its adoption by Bolivia, Brazil, Uruguay, and Venezuela).

173. *Cf.* UNIFORM LAW, *supra* note 8, at 47 (providing brief introduction to C.I.S.G.'s uniform principle).

174. *See* First Inter-American Specialized Conference on Private International Law, *reprinted in* 14 I.L.M. 325 (1975) (Introductory Note and Conference Text) [hereinafter CIDIP-I]; Peter H. Pfund, *United States Participation in International Unification of Private Law*, 19 INT'L LAW. 505, 506-07, 511 (1985) [hereinafter Pfund I] (discussing U.S. participation in First Inter-American Specialized Conference on Private International Law); Lucinda A. Low, *International Judicial Assistance Among the American States: The Inter-American Conventions*, 18 INT'L LAW. 705 705-14 (1984).

175. *See* Second Inter-American Specialized Conference on Private International Law, *reprinted in* 18 I.L.M. 1211 (1979) (Introductory Note and Conference Text) [here-

third,[176] and fourth[177] Inter-American Conferences on Private International Law.[178] The first Inter-American Conference on Private International Law produced a set of conventions regarding: the use of powers of attorney extraterritorially,[179] the taking of evidence abroad,[180] and conflict of laws principles governing bills of exchange,[181] promissory notes,[182] and invoices.[183] This conference also discussed conflict of laws provisions governing

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inafter CIDIP-II]; Pfund I, *supra* note 174, at 506-07 (discussing U.S. participation in Second Inter-American Specialized Conference on Private International Law).

176. *See* Third Inter-American Specialized Conference on Private International Law, *reprinted in* 24 I.L.M. 459 (1985) (Introductory Note and Conference Text) [hereinafter CIDIP-III]; Pfund I, *supra* note 174, at 506-14 (discussing U.S. participation in Third Inter-American Specialized Conference on Private International Law).

177. *See* Fourth Inter-American Specialized Conference on Private International Law, *reprinted in* 29 I.L.M. 62 (1990) (Introductory Note and Conference Text) [hereinafter CIDIP-IV]; Pfund I, *supra* note 174.

178. Interview, *supra* note 167 (discussing telephone conversation with O.A.S. Legal Office).

179. Inter-American Convention on the Legal Regime of Powers of Attorney to be Used Abroad, *reprinted in* 14 I.L.M. at 326.

180. Inter-American Convention on Taking Evidence Abroad, *reprinted in* 14 I.L.M. at 328.

181. BLACK'S LAW DICTIONARY 113 (6th ed. 1991). Bills of Exchange are defined as:

> An unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money. A three party instrument in which first party draws an order for the payment of a sum certain on a second party for payment to a third party at a definite future time. Same as "draft" under U.C.C. A check is a demand bill of exchange.

Id.

182. *Id.* at 113. A promissory note is:

> A promise or engagement, in writing, to pay a specified sum at a time therein stated, or on demand, or at sight, to a person therein named, or to his order, or bearer. An unconditional written promise, signed by the maker, to pay absolutely and at all events a sum certain in money, either to the bearer or to a person therein designated or his order, at a time specified therein, or at a time which must certainly arrive.
>
> A signed paper promising to pay another a certain sum of money. An unconditional written promise to pay a specified sum of money on demand or at a specified date. Such a note is negotiable if signed by the maker and containing an unconditional promise to pay a sum certain in money either on demand or at a definite time and payable to order or bearer. U.C.C. § 3-104.

Id.

183. Inter-American Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes and Invoices *reprinted in* 14 I.L.M. at 332.

checks,[184] international commercial arbitration,[185] and letters rogatory.[186] Twelve countries, excluding the United States, signed each of the conventions in January 1975.[187] The United States has begun the process of reviewing[188] and ratifying[189] these O.A.S. conventions on a selective basis.[190]

The second conference, which took place in 1979, concerned such matters as: conflict-of-law principles governing checks,[191] conflict of laws principles governing commercial companies,[192] the extraterritorial validity of foreign judgment and arbitral awards,[193] execution of preventive measures,[194] the use of foreign law in litigation,[195] and the rules governing domicile of natural persons in private international law.[196] This second set of conventions also included a convention identifying general rules

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184. Inter-American Convention on Conflict of Laws Concerning Checks, *reprinted in* 14 I.L.M. at 334.

185. Inter-American Convention Concerning International Commercial Arbitration, *reprinted in* 14 I.L.M. at 336. This convention has since been ratified by the United States. *See* Peter H. Pfund, *Overview of the Codification Process*, 15 BROOKLYN J. INT'L L. 7, 18 (1989) [hereinafter Pfund II] (discussing the Inter-American Convention Concerning International Commercial Arbitration ("CICA")).

186. Inter-American Convention on Letters Rogatory, *reprinted in* 14 I.L.M. at 339. This convention has since been ratified by the United States. *See* Peter H. Pfund, *International Unification of Private Law: A Report on U.S. Participation — 1987-88*, 22 INT'L LAW. 1157, 1160 (1988) [hereinafter Pfund III] (discussing the Inter-American Convention on Letters Rogatory ("CLR")).

187. CIDIP-I, *supra* note 174, at 325. The countries signing each of the conventions are: Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Uruguay, and Venezuela. *Id.* Peru signed all conventions except the International Commercial Arbitration. *Id.*

188. *See id.* at 511 (discussing pending action on CIDIP-I conventions).

189. *See Pfund II*, *supra* note 185, at 18 (noting ratification of CIDIP-I arbitration convention); *Pfund III*, *supra* note 186, at 1160 (noting ratification of CIDIP-I letters rogatory convention).

190. *See* Interview, *supra* note 167 (discussing telephone conversation with OAS Legal Department).

191. Inter-American Convention on Conflict of Laws Concerning Checks, *reprinted in* 18 I.L.M. 1220.

192. Inter-American Convention on Conflict of Laws Concerning Commercial Companies, *reprinted in* 18 I.L.M. 1222.

193. Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, *reprinted in* 18 I.L.M. 1224.

194. Inter-American Convention on Execution of Preventive Measures, *reprinted in* 18 I.L.M. 1227.

195. Inter-American Convention on Proof of and Information on Foreign Law, *reprinted in* 18 I.L.M. 1231.

196. Inter-American Convention on Domicile of Natural Persons in Private International Law, *reprinted in* 18 I.L.M. 1234.

of private international law[197] and produced an additional protocol to the 1975 convention on letters rogatory.[198]

The third Inter-American Conference on Private International Law, held in 1984,[199] resulted in three conventions,[200] as well as an additional protocol to the 1975 convention on the taking of evidence abroad.[201] Eighteen Member States of the O.A.S. were represented, including the United States.[202] Eleven of these Member State delegates had full powers to sign conventions adopted by the conference.[203]

The fourth conference,[204] held in 1989, like the third, resulted in the approval of three more conventions.[205] These conventions included: the Inter-American Convention on the International Return of Children,[206] the Inter-American Convention on Support Obligations,[207] and the Inter-American Convention on Contracts for the International Carriage of Goods by Road.[208]

The ICLAIC resulted from the Fifth Inter-American Conference on Private International Law, held in Mexico City in March

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197. Inter-American Convention on General Rules of Private International Law, *reprinted in* 18 I.L.M. 1236.

198. Additional Protocol to the Inter-American Convention on Letters Rogatory, *reprinted in* 18 I.L.M. 1238. The protocol has been ratified by the United States. *See Pfund III*, *supra* note 186, at 1160 (noting ratification of the protocol).

199. CIDIP-III, *supra* note 176, 24 I.L.M. at 171.

200. *See* Inter-American Convention on Conflict of Laws concerning the Adoption of Minors, *reprinted in* 24 I.L.M. 460; Inter-American Convention on Personality and Capacity of Juridical Persons in Private International Law, *reprinted in* 24 I.L.M. 465; Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, *reprinted in* 24 I.L.M. 468.

201. *See* Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad, *reprinted in* 24 I.L.M. 472.

202. *See* CIDIP-III, *supra* note 176, intro., 24 I.L.M. at 459.

203. *Id.* Eleven member states signed three specialized conventions from the third conference. *Id.* They are: Bolivia, Brazil, Chile, Colombia, the Dominican Republic, Ecuador, Haiti, Nicaragua, Peru, Uruguay and Venezuela. *Id.* These states each signed all of the CIDIP-III conventions, with certain exceptions. *Id.* Nicaragua and Peru did not sign the Convention on the Adoption of Minors. *Id.* The Dominican Republic and Peru did not sign the Convention on Personality and Capacity. *Id.* Haiti did not sign the Additional Protocol. *Id.*

204. CIDIP-IV, *supra* note 177, 29 I.L.M. 62.

205. *Id.*

206. Inter-American Convention on the International Return of Children, *reprinted in* 29 I.L.M. 63.

207. Inter-American Convention on Support Obligations, *reprinted in* 29 I.L.M. 73.

208. Inter-American Convention on Contracts for the International Carriage of Goods by Road, *reprinted in* 29 I.L.M. 81.

1994.[209] The conference produced two conventions: the ICLAIC and a convention on international traffic in minors.[210] The ICLAIC represented an international initiative to unify and harmonize international contract law.[211]

The ICLAIC addresses three situations that may necessitate the application of choice-of-law rules to contracts.[212] The first situation involves "international" contracts[213] where the intro-

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209. The ICLAIC, *supra* note 2, 33 I.L.M. 732.

210. Inter-American Convention on International Traffic in Minors, *reprinted in* 33 I.L.M. 721 (1994).

211. The ICLAIC, *supra* note 2, pmbl., 33 I.L.M. at 732.

212. Diamond, *supra* note 3, at 249.

213. *Id.* The word "international" is in quotation marks because it lacks precise meaning. *Id.* Diamond gives several examples where the term is deliberate but not defined. *Id.*

> First, the *1955 Sales Convention* Article 1, Paragraph 1 states that 'This Convention applies to international sales of goods.' The convention contains no definition of 'international.' The 1955 Sales Convention Paragraph 4 of Article 1 does state that 'The mere declaration of the parties relating to the applicability of a law or to the jurisdiction of a judge or arbitrator is not sufficient to give a sale the international character provided for in the first paragraph of this Article.'

Id. at 248.

> Second, the *1978 Agency Convention* Article 1, Paragraph 1 provides that 'The present Convention determines the law applicable to relationships of an international character arising where a person, the agent, has the authority to act, acts or purports to act on behalf of another person, the principal, in dealing with a third party.'

Id. at 248-49. Here also the word "international" is not defined. *Id.*

> Third, the *1985 Sales Convention* entitled 'Convention on the Law Applicable to Contracts for the International Sale of Goods.' The word 'international' is not used in the text of the convention itself. Article 1 reads as follows:
> 'This Convention determines the law applicable to contracts of sale of goods -
> (a) between parties having their places of business in different States;
> (b) in all other cases involving a choice between the laws of different States, unless such a choice arises solely from a stipulation by the parties as to the applicable law, even if accompanies by a choice of court or arbitration.'

Id. at 249.

> Fourth, the *1980 Vienna Convention on Contracts for the International Sale of Goods* (CISG) which provides that 'This Convention applies to contracts of sale of goods between parties whose place of business are in different States.' Article 1 goes on to say in paragraph (3) that 'Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.'

Id. Here again, international is not defined. *Id.*

> If the parties to a contract are domiciled in a different country from that in which it is made, or if it is to be performed in a different country from that in which the parties reside or carry on business, or if the subject-matter of the contract is to move from country to country, as where goods in one country

duction of a foreign element may give rise to a question of choice of law.[214] The second situation involves litigation taking place in a foreign court.[215] The third situation concerns contracting parties who have included a choice-of-law clause in their contract[216] that may or may not be valid.[217]

The ICLAIC addresses these problems through three basic features that are typical in conventions dealing with matters of private international law in relation to contracts.[218] First, the convention provides choice-of-law rules in the absence of choice by the parties themselves.[219] Second, the convention provides for the application of the suitable law to particular types of contracts, followed by rules of a general nature applicable to most types of contracts.[220] Third, the convention expressly provides parties the freedom to choose the law that is to govern their contractual relationship.[221]

2. Provisions of the ICLAIC

The ICLAIC determines the applicable law[222] governing

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are to be delivered in another, one make by lead to the conclusion that we are dealing with an international contract rather than a contract related solely to one country, which we may regard as a 'domestic' contract.

Id. at 252.

Fifth, the *Rome Convention*, which in Article 1(1) states that '[t]he rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.'

Id. at 249.

This broad approach taken by the Rome Convention is not limited to international situations states A.L. Diamond in his article. The reference to 'a choice' is clearly intended to be to a choice by a court rather than by the parties, because one could perhaps argue that every contract involves the possibility of incorporating a choice of law clause so that the non-incorporation of such a clause is itself a choice; the actual incorporation of a choice of law clause will attract the Conventions's rules and, no doubt, a choice made by the parties after the contract has been made.

Id. at 250.

214. *Id.* at 248.

215. *Id.* at 250.

216. *Id.* at 253. The contract may contain a choice-of-law clause such as "This contract shall be governed by the law of [the United States]." *Id.*

217. *Id.* at 251.

218. *Id.* at 253.

219. *Id.*

220. *Id.*

221. *Id.*

222. ICLAIC, *supra* note 2, art. 1, 33 I.L.M. at 733. The applicable law under the convention may be the law of a nonparty state. *Id.* art. 2, 33 I.L.M. at 733. For purposes

parties[223] to international[224] commercial[225] contracts in general.[226] The ICLAIC conferees intended the provisions of the

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of the ICLAIC, "law" is defined to mean "the law current in a State, excluding rules concerning conflict of laws." *Id.* art. 17, 33 I.L.M. at 736. *See id.* arts. 22-24, 33 I.L.M. at 737-38 (discussing ICLAIC rules with respect to states with more than one system of law applicable in different territorial units).

> Generally, the term "applicable law" denotes the law which controls or governs the contract, the law under which the contract has legal effect (or does not have legal effect, as the case may be). Often it will govern questions such as the interpretation of the contract and performance of the contract, though often a convention or legislation will specifically state exactly what it is that the applicable law governs. That is to say the scope of the convention.

Diamond, *supra* note 3, at 254.

223. *See* ICLAIC, *supra* note 2, art. 1, 33 I.L.M. 733 (concerning scope of application between parties). The convention would be applicable to contracts with "States or State agencies or entities." *Id.* It is also applicable to "persons." *Id.* art. 13, 33 I.L.M. at 736 (referring to "persons" in different states). At the time of signing, ratification, or accession, a State party to the ICLAIC may declare that the convention does not apply to any or certain categories of contracts with the state or its agencies and entities. *Id.* art. 1, 33 I.L.M. at 733. *See id.* arts. 21, 24, 26-28, 33 I.L.M. at 737-38 (concerning signing, ratification, and accession rules.)

224. *Id.* art. 1, 33 I.L.M. at 733. Article 1 provides that "a contract is international if the parties thereto have their habitual residence or establishments in different States Parties *or if the contract has objective ties with more than one State Party.*" *Id.* (emphasis added); *cf. id.* art. 13, 33 I.L.M. at 736 (providing for validity of contracts between parties in same state under specified circumstances). Thus, unlike the situation under the C.I.S.G., under the ICLAIC parties can be located in the same state without defeating the "internationality" of their contract. *Id.* art. 1, 33 I.L.M. at 733. Jurisdictional applicability of the ICLAIC in this regard is similar to that found in the U.C.C. *Compare id.* (discussing ICLAIC applicability where there are "objective ties with [a] State Party") *with* U.C.C. § 1-105(1) (determining U.C.C. applicability where there is "reasonable relation" or "appropriate relation" with U.C.C. state). *See supra* note 149 and accompanying text (discussing U.C.C. § 1-105(1)).

225. *See* ICLAIC, *supra* note 2, art. 5, 33 I.L.M. at 734 (stating expressly that ICLAIC does not determine law applicable to marital status or capacity of parties). The ICLAIC does not determine the law applicable to successional or testamentary questions, marital arrangements or family arrangements. *Id.* It does not determine the law applicable to obligations deriving from securities or securities transactions. *Id.* It does not determine the law applicable to agreements of parties concerning arbitration or selection of a forum. *Id.* It does not determine the law applicable to questions of company law and juridical persons in general. *Id.* Furthermore, the convention does not apply to contracts that have autonomous regulations in international conventional law in force among the State Parties to the convention. *Id.* art. 6, 33 I.L.M. at 734.

226. *Id.* art. 1, 33 I.L.M. at 733. As to any state party, the provisions of the ICLAIC only apply prospectively, to contracts concluded after the convention enters into force in that state. *Id.* art. 19, 33 I.L.M. at 737. At ratification or accession, a State Party may declare that the convention does not apply to certain categories of contract. *Id.* art. 1, 33 I.L.M. at 733. The ICLAIC also permits reservations with respect to specific provisions of the convention "not incompatible with the effect and purpose of this Convention." *Id.* art. 21, 33 I.L.M. at 737.

convention to apply to new modalities of contracts[227] that arose as a consequence of the development of international trade.[228] Signatories interpret and apply the ICLAIC in a manner that takes into account: (1) its international character,[229] and (2) the need to promote uniformity.[230] A contract under the ICLAIC is deemed international if the parties reside in or are organized under the laws of different States, or if the contract has objective ties with more than one State Party.[231]

The provisions of Chapter Two of the ICLAIC, which determine the applicable law governing a contract subject to the ICLAIC,[232] expressly provide freedom for the parties to choose the law that is to govern their contractual relationship.[233] The

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227. *Id.* art. 3, 33 I.L.M. at 734. Article 3 provides that the convention applies the term "to new modalities of contract." *Id. But cf.* Babbit Electronics, Inc. v. Dynascan Corp., 38 F.3d. 1161, 1169-70 (11th Cir. 1994) (discussing effects of Venezuelan regulation of intellectual property contracts "whatever the modalities").

228. ICLAIC, *supra* note 2, art. 3, 33 I.L.M. at 734. The ICLAIC's explicit insistence that the "modality" or form of a contract does not affect the applicability of the convention is the functional equivalent of the U.C.C. provision ensuring that "[a] contract may be made in any manner sufficient to show agreement." U.C.C. § 2-204(1); *cf.* U.C.C. § 2-201, O.C. 1 (discussing writing requirement for certain contracts does not entail any particular formality to be valid). This approach is significant in the international business context, where informalities and trade practices which are subject to rapid change and evolution are far more common. QUINN'S DIGEST, *supra* note 18, at 79. In this regard, commentators have noted:

> The law must meet the particular needs of parties that deal with each other at a distance, often without an ongoing relationship that might provide a history of cooperation and a stake in the future. At the same time, the law must cope with the information-based culture that is reshaping the world economy. [I]nternational sales of goods tend to have distinctive aspects: because the law of more than one country might apply, the fact of commitment and the meaning of the agreed terms have to be especially free of ambiguity.

PAUL B. STEPHAN ET. AL, INTERNATIONAL BUSINESS AND ECONOMICS 609 (1993).

229. ICLAIC, *supra* note 2, art. 4, 33 I.L.M. at 734. *See supra* note 86 and accompanying text (discussing international character of the C.I.S.G. as principle of interpretation.) *See also supra* note 224 (discussing "internationality" under ICLAIC.)

230. ICLAIC, *supra* note 2, art. 4, 33 I.L.M. at 734. *See supra* note 87 and accompanying text (discussing uniformity as principle of interpretation under C.I.S.G.).

231. *See* ICLAIC *supra* note 2, art. 1, 33 I.L.M. at 733. "It shall be understood that a contract is international if the parties thereto have their habitual residence or establishments in different States Parties or if the contract has objective ties with more than one State Party." *Id.*

232. ICLAIC, *supra* note 2, arts. 7-11, 33 I.L.M. at 734-35.

233. *Id.* art. 7, 33 I.L.M. at 734. The parties' agreement in this regard must be express or evident from their behavior and the provisions of the contract considered as a whole. *Id.* The ICLAIC specifically provides that a choice-of-forum clause "does not necessarily entail" choice of law. *Id.*; *see* George Kahale, III, *Does a Choice-of-Law Clause Waive Immunity?*, INT'L FIN. L. REV., July 1988, at 28 (discussing interrelationship of

parties are permitted to modify their choice of law, in whole or in part, at any time.[234] This provision, however, is contrary to the C.I.S.G., which precludes post-contractual modification.[235]

In the ICLAIC, if the parties do not select the law applicable to the contract, the law of the state with which the contract has the closest ties will govern.[236] The ICLAIC provides connecting

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choice-of-law and choice-of-forum clauses). Diamond, *supra* note 3, at 254 (noting freedom to choose applicable law as remarkably unanimous among international conventions); C.I.S.G., *supra* note 17, art. 6, 33 I.L.M. at 673 (providing freedom to derogate from or vary effect of any of C.I.S.G. provisions).

> Since the law of contract is the medium which in every legal system enables parties to determine the nature of the legal relationship between them, delimit the obligations, to impose obligations, to say what those obligations are, in what circumstances they should operate, in what circumstances there should be relief from those obligations, and since the law of contract rests on agreement, it is not surprising that the freedom to make your own contract, which exists in a greater or lesser extent in every legal system, should include the freedom to determine the law applicable to the contract.

Diamond, *supra* note 3, at 256.

234. ICLAIC, *supra* note 2, art. 8, 33 I.L.M. at 735. Modification of the choice of law can be made at any time but such modification will not affect the formal validity of the original contract or third-party rights. *Id.*; *see id.* art. 12-13, 33 I.L.M. at 735-736 (discussing ICLAIC rules for validity of contract.) C.I.S.G., *supra* note 17, art. 9, 19 I.L.M. at 674 (discussing flexibility of parties to allow trade practices and usage to apply to their contract which the parties knew or should have known during formation of contract). Article 9 provides:

> (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 agree, 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.

Id.

235. *See supra* notes 111-19 and accompanying text (discussing Part III of C.I.S.G. which includes modification or termination provisions under contract). *See supra* note 154 and accompanying text (discussing U.C.C. protection of modifications after contract has been formed).

236. ICLAIC, *supra* note 2, art. 9, 33 I.L.M. at 735. In determining which state has the closest ties with the contract, the ICLAIC requires a court to "take into account all objective and subjective elements of the contract." *Id.* Separable parts of a contract may have closer ties to different states, so that the law of those states would apply respectively to the different parts of the contract. *Id.* The court must also take into account "the general principles of international commercial law recognized by international organizations." *Id.*; *see id.* art. 10, 33 I.L.M. at 735 (guidelines, customs, principles of international commercial law and generally accepted commercial usage and practice to be applied to contract); C.I.S.G., *supra* note 17, arts. 1(1), art 10, 19 I.L.M. at 672, 674 (determining C.I.S.G. applies to contracts of sale of goods between parties whose places of business are in different States). If a party has more than one place of business, the place of business is that which has closest relationship to the contract and its perform-

factors and general principles as formulae for the determination of the closest tie inquiry.[237] In the interests of justice and equity, the guidelines, customs, principles of international commercial law and generally accepted commercial usage and practice may be applicable to the contract.[238] Mandatory requirements[239] of

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ance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract; if a party does not have a place of business, reference is to be made to his habitual residence. *Id.*; *see supra* note 149 and accompanying text (discussing that U.C.C. applies to any transaction if it "bears a reasonable relationship" to contracting state).

237. ICLAIC, *supra* note 2, art. 9, 33 I.L.M. at 735.

238. *Id.* art. 10, 33 I.L.M. at 735. C.I.S.G., *supra* note 17, art. 7(2), 19 I.L.M. at 673 (discussing generally accepted practices of C.I.S.G.); U.C.C. § 1-102 (discussing generally accepted practices under U.C.C.).

239. ICLAIC, *supra* note 2, art. 11, 33 I.L.M. at 735. Diamond, *supra* note 3, at 288-91.

> What is meant by the term mandatory rules may range over a very wide area. Some mandatory rules relate to contracts generally such as formal requirements for the making or evidencing of contracts. Another class of mandatory rules may be found in rules that are imposed as part of the criminal law such as where the contracts performance would involve the commission of a criminal offense. Additionally, there are mandatory rules of public order which whether they are regarded as rules of constitutional law, administrative law, or other rules of a regulatory nature, they cannot be varied by contract. Finally, there are rules of the law of tort or delict which may be of a mandatory nature, but they are not necessarily so.

Id.

See U.C.C. § 2-302 (setting forth U.C.C. rules on unconscionability). This provision states:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Id. § 2-302(1); *see, e.g.*, 28 U.S.C. § 1330 (1988 & Supp. V 1995) (providing mandatory rules governing U.S. district court jurisdiction over actions against public policy). Examples of such "mandatory requirements" might include forum state provisions concerning public policy principles directed to the forum court itself, such as unconscionability or jurisdictional rules, such as those governing foreign sovereign immunity; *see* Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992) (upholding application of exception to state's immunity from suit under 28 U.S.C. § 1330, 1605(a)(2) in action concerning contract for sale of bonds); De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385 (5th Cir. 1985) (holding central bank immune from suit under 28 U.S.C. § 1330 in action concerning deposit contract); Callejo v. Bacomer, S.A., 764 F.2d 1101 (5th Cir. 1985) (holding state to be subject to suit under 28 U.S.C. § 1330, 1605(a)(2) in action involving deposit contract). *See* ALAN C. SWAN & JOHN F. MURPHY, CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS 865-66, 882-87 (1991) (discussing history of foreign sovereign immunity under U.S. law); Avi Lew, Note, *Republic of Argentina v. Weltover, Inc.: Interpreting the Foreign Sovereign Immunity Act's Commercial Activity Exception to Jurisdiction Immunity*, 17 FORDHAM INT'L L.J.

forum state law nevertheless apply to the contract.[240] The ICLAIC allows the forum court to decide which nation's rules to apply, and whether to apply mandatory provisions of the law of another state or the forum state with which the contract has close ties.[241]

In contrast to the C.I.S.G., which expressly indicates that it is not concerned with the validity of an international contract subject to its provisions,[242] chapter three of the ICLAIC provides validity provisions.[243] The ICLAIC provisions concerning exist-

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726 (1994) (discussing Republic of Argentina). *See, e.g.*, U.C.C. § 2-725(1) (concerning statutes of limitation for actions involving contracts of sale). *But see* ICLAIC, *supra* note 2, art. 14, 33 I.L.M. at 736 (providing applicable law under convention governs "prescription and lapsing of actions").

240. ICLAIC, *supra* note 2, art. 11, 33 I.L.M. at 735.

241. *Id.*; *see supra* note 231 and accompanying text (discussing concept of "close ties" for purposes of applicable law).

242. C.I.S.G., *supra* note 17, art. 4(a), 19 I.L.M. at 673.

243. ICLAIC, *supra* note 2, arts. 12-13, 33 I.L.M. at 735-36. Several problems arise in international conventions regarding the "existence and validity" of a contract. Diamond, *supra* note 3, at 305-08. Validity itself may involve either "material validity" or "formal validity." *Id.*

> On the point of material validity, the issue is which law is to determine whether a contract is, apart from requirements of form, a valid contract. The answer is that this is usually regarded as a matter to be determined by the applicable law. But there may be a problem in determining the applicable law where there is a choice of law clause. If the applicable law arises from the rules to be applied in the absence of a choice of law by the parties, it will normally be possible to decide on the law without worrying whether the contract is valid or invalid. But where there is a choice of law clause, questions may arise as to the validity of the choice itself. Has there been true consent? Was the contract entered into as a result of fraud or misrepresentation? Was the contract entered into as a result of a mistake, in which case under some legal systems one must conclude that there was no contract at all. What law decides whether there was consent to a choice of law? Can one refer this to the applicable law, since there would be no applicable law if the choice was not valid? There are those conventions that deal with this classic conundrum of private international law do so by cutting the [Gordian] knot. Thus Article 8 (1) of the Rome Convention provides that: "The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid." The words "any term of a contract" would of course include a choice of law clause. . . The Rome solution has the advantage that if the "chosen" law finds that the choice is valid one cannot then have the embarrassment of a conflict as to the validity of the choice; if one decided the validity of the choice by another law, such as the law of the forum, and concluded that the choice was valid, one would then be led on to apply the chosen law, and might find that the law took the view that the choice was invalid.

Id. at 305-08. On the issue of formal validity,

> The trend in modern times is to try to prevent the striking down of contracts

ence and validity require adherence to the appropriate rules in accordance with Chapter Two of the ICLAIC,[244] which indicates whose law will govern the contract.[245] In essence, the ICLAIC provisions governing the validity of a contract are choice-of-law rules, rather than substantive rules concerning the legality of contract provisions.[246]

Chapter Four of the ICLAIC identifies the substantive law issues that are governed by the law determined to be applicable to the contract.[247] As a general matter, the law[248] of the forum court is deemed to govern the interpretation of the contract,[249]

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for lack of formal requirements by offering alternative laws where possible; this copes with parties who were ill-advised or made a mistake as to the law which specifies formal needs. Thus under Article 9 (2) of the Rome Convention, a contract made between persons in different countries is formally valid if it complies with the requirements of form of the applicable law or of anyone of the countries where the parties are. If the parties are in the same country, it may by Article 9(1) meet the requirements of the applicable law or of the country where the parties are.

Id. at 308. ICLAIC, *supra* note 2, art. 12, 33 I.L.M. at 735.

Article 12 of the ICLAIC on "existence and validity" of the contract looks to "applicable law". *Id.* The article states that such concerns shall be governed by the appropriate rules in accordance with Chapter 2 of the ICLAIC, which provides that the contract shall be governed by the law agreed to by the parties. *Id.* In the absence of choice, or if the selection proves ineffective, the contract is governed by the law of the State with which it has the closest ties. *Id.* In addition general guidelines, customs, and principles of international commercial usage and practices shall apply in order to discharge the requirements of justice and equity in the particular case. *Id.* The parties may at any time be subject to a law other than that to which it was previously subject. *Id.* That modification shall not affect the formal validity of the original contract. *See supra* note 220 and accompanying text (discussing applicable law). Article 12 allows great deference to the judge who determines the applicable law, taking into account the habitual residence or principal place of business. ICLAIC, *supra* note 2, art. 12, 33 I.L.M. at 735. The convention does not provide guidance as to whose habitual residence or principal place of business, buyer or seller, and in what cases. *Id.* This appears to be a wide escape clause, giving a judge an almost unfettered discretion. *See supra* note 236 and accompanying text (discussing closest ties).

244. ICLAIC, *supra* note 2, art 12, 33 I.L.M. at 735.

245. *Id.* art. 13, 33 I.L.M. at 736.

246. *See id.* art. 17, 33 I.L.M. at 736 (providing that substantive "law" applied under convention is current law of state, except for conflict of laws principles).

247. *Id.* arts. 14-18, 33 I.L.M. at 736-37.

248. *See id.* art. 17, 33 I.L.M. at 736 (defining "law" to mean current law of state, "excluding rules concerning conflict of laws"). *See supra* note 220 and accompanying text (discussing applicable law).

249. *Id.* art. 14, 33 I.L.M. at 736. The ICLAIC follows the text of the Rome Convention Article 14 which reads:

1) The law applicable to the contract in virtue of Articles of this Convention shall govern in particular:

a) interpretation;

the rights and obligations of the parties,[250] the prescription,[251]

b) performance;

c) within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law;

d) the various ways of extinguishing obligations, and prescriptions and limitation of actions;

e) the consequences of nullity of the contract.

2) In relation to the manner of performance and the steps to be taken in event of defective performance regard shall be had to the law of the country in which performance takes place.

Rome Convention, supra note 5, 1992 Gr. Brit. T.S. No. 2, O.J. L 266/1 (1980).

Since the Rome Convention is not officially subordinate to the E.C. Treaty, the European Court of Justice is not automatically empowered with jurisdiction to interpret its provisions, as is the case under the 1968 Brussels Convention. Thus, instead of a unified body giving a single interpretation, Member States are able to construe the Convention as their judges see fit. This poses great problem for the Convention because '[i]f cross-fertilization of judicial decision does not happen in the Community. . . the hope for unification of law suggested by the attempt to write a conflict of laws convention will be unfulfilled.

Paradigm, *supra* note 5, at 190.

Article 18 attempts to confront and remedy this situation. It states: 'In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application.' Article 18 acknowledges the Conventions's inability to attain uniformity without an autonomous E.C.J. jurisdiction. Without a single judicial body to interpret its provisions, the Convention must appeal to Member States to achieve a uniform interpretation on their own. The implication, or perhaps hope, embedded in article 18 is that Community courts will manifest greater deference to fellow Member State decisions than they previously have. This view however, is unrealistic given the immense discretion granted to forum judges.

Id.

A number of high ranking judicial officials have already stated their opposition to the Rome Convention. It has been criticized as 'unfortunate and unnecessary.' It does not maintain the status quo but virtually invites such manipulation with its discretionary and indeterminate provisions.

Id. In this regard, reference to the international character of the ICLAIC as a principle of interpretation of its provisions is similar to the principle under Rome Convention and the C.I.S.G. *See supra* note 86 and accompanying text (discussing international character of C.I.S.G. as principle of interpretation). *See also* note 224 and accompanying text (discussing international character of ICLAIC as principle of interpretation.)

The European Community has attempted to rectify this situation through a series of protocols which take years to complete and though it is assumed they will eventually be implemented they may not necessarily solve the jurisdictional problem. *See generally Paradigm*, supra note 5 (discussing demise of Rome Convention).

250. ICLAIC, *supra* note 2, art. 14, 33 I.L.M. at 736. *See supra* notes 248-49 and accompanying text (discussing law applicable to contract that governs interpretation, performance, consequences of breach, damages, prescription, and consequences of nullity of contract).

and the lapsing of actions.[252] As to obligations, the applicable law determines performance of obligations[253] and the consequences of nonperformance.[254]

Chapter Four also includes certain specialized rules with respect to the scope of the applicable law.[255] The ICLAIC requires that international commercial law and generally accepted principles[256] be taken into account in determining the authority of an agent[257] to bind a principal.[258] In addition, in situations where a state requires that international contracts be registered or pub-

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251. ICLAIC, *supra* note 2, art. 14, 33 I.L.M. at 736. In this context, "prescription" means "a peremptory and perpetual bar to every species of action, real or personal, when [a] creditor has been silent for a certain time without urging his claim." *Id.*

252. *Id.* art. 14, 33 I.L.M. at 736; *see supra* note 220 and accompanying text (discussing term "applicable law"). *See supra* note 165 and accompanying text (discussing U.C.C. statute of limitations in contracts for sale as four years after cause of action has accrued).

253. ICLAIC, *supra* note 2, art 14, 33 I.L.M. at 736. In this regard, the applicable law governs "the various ways in which the obligation can be performed." *Id.* art 14, 33 I.L.M. at 736. *See supra* note 247 and accompanying text (discussing law governing performance); *see supra* note 220 and accompanying text (discussing applicable law).

254. ICLAIC, *supra* note 2, art. 14, 33 I.L.M. at 736. For these purposes, "consequences of nonperformance" includes the "assessment of injury to the extent that this may determine payment of compensation." *Id.*

255. *Id.* arts. 14-18, 33 I.L.M. at 736-37.

256. *See id.* art. 10, 33 I.L.M. at 735 (providing application of commercial law, usage and practice); *see also supra* note 238 and accompanying text (discussing Article 10).

257. *Id.* BLACK'S LAW DICTIONARY 41 (6th ed. 1991). Agent is defined as:

> A person authorized by another (principal) to act for or in place of him; one intrusted with another's business. One who represents and acts for another under the contract or relation of agency (q.v.). A business representative, whose function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between principal and third persons. One who undertakes to transact some business, or to manage some affair, for another, by the authority and on account of the latter, and to render an account of it. One who acts for or in place of another by authority from him; a substitute, a deputy, appointed by principal with power to do the things which principal may do. One who deals not only with things, as does a servant, but with persons, using his own discretion as to means, and frequently establishing contractual relations between his principal and third persons.
>
> One authorized to transact all business of principal, or all of principal's business of some particular kind, or all business at some particular place. . . .

Id. RESTATEMENT (SECOND) OF AGENCY § 1 (1957 Main Vol.). An agent is defined as:

> (1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.
>
> (2) The one for whom action is to be taken is the principal.
>
> (3) The one who is to act is the agent.

258. RESTATEMENT (SECOND) OF AGENCY § 1 (1957 Main Vol.)

lished, the ICLAIC provides that the law of that state governs all matters concerning publicity.[259] Finally, the ICLAIC provides that a forum may exclude application of the law designated by the parties only if that law is manifestly contrary to the public policy of the forum.[260]

II. *THE ICLAIC'S OBJECTIVES AS SPECIFIED IN ITS PREAMBLE AND PROVISIONS*

The overall success of the ICLAIC depends on whether or not it achieves its three principal objectives.[261] First, the ICLAIC seeks to facilitate international contracts by developing and codifying existing private international law principles.[262] The ICLAIC thus embodies elements of the U.C.C., C.I.S.G., and the law merchant.[263] Second, the ICLAIC aims to foster harmoniza-

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259. *Id.* art. 16, 33 I.L.M. at 736.

260. *Id.* art. 18, 33 I.L.M. at 737. This provision of the ICLAIC reads: "Application of the law designated by this Convention may only be excluded when it is manifestly contrary to the public order of the forum." *Id.*

The Rome Convention has a similar public policy provision. Rome Convention, *supra* note 5, art. 16, 1992 Gr. Brit. T.S. No. 2, O.J. L 266/1 (1980). Article 16 provides that "[t]he application of a rule of the law of any country specified by this convention may be refused only if such application is manifestly incompatible with the public policy ("ordre public") or the forum." *Id.* Included in the European Community policy considerations is "Community public policy." *Paradigm*, *supra* note 5, at 5. What constitutes this public policy is a matter of discretion. *Id.* Some academics contend that the words "manifestly incompatible" indicate that the rule is only applicable in unique circumstances. *Id.* The Convention fails to make this distinction, however, leaving the determination to forum judges. *Id.* Article 16 may undermine the certainty of other Convention articles. *Id.* at 10. For example, a country may use Article 16 to justify its refusal to apply Article 7 to compel Member States to place Community interest ahead of their own short-term interests. *Id.*

Public policy of course does shape choice-of-law rules. Peter Hay, *Flexibility versus Predictability and Uniformity in Choice of Law; Reflections on Current European and United States Conflicts Law*, *in* 6 ACADEMIE DE DROIT INTERNATIONAL RECUEIL DES COURS COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 258-391, 380 (1992).

261. *See* Diamond *supra* note 3, at 248-53 (discussing introduction of new conventions and importance of determining whether or not legislation achieves its ultimate objective).

262. ICLAIC, *supra* note 2, pmbl., 33 I.L.M. at 733.

263. *See, e.g.*, ICLAIC, arts. 4, 10, 33 I.L.M. at 734, 735 (applying international commercial law.) *See* QUINN'S DIGEST *supra* note 18, at 1-11 (discussing incorporation of law merchant in U.C.C. § 1-103). Professor Quinn explains:

> Section 1-103, one of the most important sections of the Code, provides that the "principles of law and equity" have continued applicability except insofar as they are expressly "displaced" by the particular provisions of the Code. These supplemental bodies of law include the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, bankruptcy, and

tion of results in international trade transactions.[264] By establishing standard choice-of-law principles, the ICLAIC attempts to remove the differences that arise between contracting parties who reside in different countries.[265] Third, the ICLAIC supports the notion of equal bargaining power between contracting parties by advancing both the freedom of contract principle between contracting parties.[266] By simultaneously setting out choice-of-law standards[267] the ICLAIC increases the likelihood that the law of the weaker party's home state may apply to the transaction.[268]

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so on. The Code by no means covers all aspect of commercial transactions but, rather, assumes the continuing existence of a larger body of pre-Code and non-Code law on which it rests for support. It should also be noted that federal commercial and regulatory law override the Code."

Id. at 1-12. *See also* Symposium, *The Codification of International Commercial Law: Toward a New Law Merchant*, 15 BROOK. J. INT'L L. 1 (1989) (discussing supplemental support of general principles in application of C.I.S.G.). *See generally supra* notes 129-34 and accompanying text (defining and discussing law merchant).

264. ICLAIC, *supra* note 2, pmbl., 33 I.L.M. at 733; *id.* art. 4, 33 I.L.M. at 734 (examining need to promote uniformity). *See, e.g.*, U.C.C. § 1-102(2)(c) (providing uniformity of law as objective of U.C.C.); C.I.S.G., *supra* note 17, art. 7(1), 19 I.L.M. at 673 (discussing uniformity in application).

265. *See, e.g.*, ICLAIC, *supra* note 2, arts. 8, 12, 13, 33 I.L.M. 735, 735-36 (validating contracts across multi-state boundaries); *id.* art. 11, 33 I.L.M. 736 (enforcing mandatory rules of another State with which contract has close ties).

266. *Id.* art. 7, 33 I.L.M. at 734.

267. *Id.* arts. 7, 9, 33 I.L.M. at 734, 735.

268. *See* Hartnell, *supra* note 44, at 5 (discussing the need for uniform law for international sales to replace obsolete domestic rules). The unification of the law of sale is especially "important for economically weaker traders who can not manage the risks and expenses of doing business under a foreign law as well as larger companies who had access to legal advice." *Id.* The risks and problems involved in international transactions which are not commonly found in domestic transactions exists because of the diversity of legal rules that may be applicable to such transactions. *Cf. supra* note 17 and accompanying text (providing the seller's place of business as functional guide to the court's determination of applicable law).

The additional risks and problems involved in an international transactions stem from a number of factors: (1) a seller may hesitate to ship goods to a distant buyer without assurance of payment; a buyer may hesitate to pay a distant seller before he has inspected the goods or at least knows that the goods have been shipped; (2) at least one of the parties will have to deal in a foreign currency; (3) often the parties will not share a common native language, increasing the risk of misunderstanding over the basic terms of the transaction; (4) the transaction will typically be subject to more government regulation than a domestic transaction and in addition will be subject to the regulation of more than one government; (5) more than one legal system and one set of business customs will be involved, which may also give rise to misunderstandings and which raises the difficult questions of which law and which customs are to be applied in the even of a dispute; and (6) if a dispute arises or a contract is breached, the determination and enforcement of contract ob-

The primary goal of the ICLAIC, to develop a uniform law for international sales contracts, promotes fairness between parties in the international commercial context and guides the drafting of standard contracts.[269]

A. *Codification of Existing Private International Law*

In addition to establishing uniform choice-of-law rules,[270] the ICLAIC follows established principles of commercial law applicable to international contracts.[271] The ICLAIC requires that contracts be interpreted and enforced in light of generally accepted principles of international commercial law and practice.[272] Accordingly, the ICLAIC applies a body of contemporary *lex mercatoria* to international contracts.[273] Further, this forms the basis upon which the system of laws is adopted and codified by all commercial nations.[274]

1. Article 10

Article 10 states that in order to discharge the requirements of justice and equity in any case before a court, the judge must apply principles of international commercial law[275] as well as commercial usage[276] and practices.[277] The approach used in the

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ligations will be more difficult since foreign courts and foreign legal rules may be involved.

JACKSON & DAVEY, *supra* note 13, at 36. Some of these problems, or so-called transaction costs, of doing business on an international level, could be "minimized or eliminated if customs and practices could be standardized and made uniform throughout the world." *Id.*

269. JACKSON & DAVEY, *supra* note 13, at 36.

270. *See* ICLAIC, *supra* note 2, art. 9, 33 I.L.M. at 735 (providing uniform choice-of-law rules).

271. *Id.* arts. 4, 10, 33 I.L.M. at 734, 735.

272. *Id.* art. 10, 33 I.L.M. at 735.

273. F.K. Juenger, *General Course on Private International Law*, *in* 4 ACADEMIE DE DROIT INTERNATIONAL RECUEIL DES COURS COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 131, 169 (1985) [hereinafter Juenger] (discussing *lex mercatoria* as "supranational" body of law to resolve multi-state transactions).

274. *See supra* notes 129-34 and accompanying text (discussing *lex mercatoria* as basis for codification and development of U.C.C.).

275. *See* ICLAIC, *supra* note 2, art. 10, 33 I.L.M. at 735 (applying "the guidelines, customs, and principles of international commercial law").

276. *Id.* (applying commercial usage). *Cf.* U.C.C. § 1-205 (recognizing "trade usage" as applicable to parties to contract).

277. ICLAIC, *supra* note 2, art. 10, 33 I.L.M. at 735.

ICLAIC parallels the "closest connection" test[278] in the Rome Convention,[279] as well as the "proper law"[280] of the contract test in English law.[281] The ICLAIC, in the absence of a choice-of-law provision by the parties,[282] requires a forum court to take into

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278. *See* Háy, *supra* note 261, at 382 (discussing closest connection test under article 7(1) of Rome Convention).

279. Rome Convention, *supra* note 5, art. 4, 1992 Gr. Brit. T.S. No. 2, O.J. L 266/1 (1980). The Rome Convention is a choice-of-law convention which applies to contractual obligations in any situation involving different countries. *Id.* art. 1. The Rome Convention establishes uniform rules concerning the law applicable to contractual obligations within the "European Economic Community" *Id.* pmbl., 1992 Gr. Brit. T.S. No. 2, O.J. L 266/1 (1980). Similarly, the ICLAIC establishes uniform rules concerning the law applicable to contractual obligations within the O.A.S. community. ICLAIC, *supra* note 2, art. 9, 33 I.L.M. at 735. Any reference herewithin to the Rome Convention's choice-of-law provisions or terms are used for interpretive purposes only in order to provide interpretive guidance to terms and provisions within the ICLAIC which are not defined or explained. *Compare* Rome Convention, *supra* note 5, arts. 3-4, 7-8, 1992 Gr. Brit. T.S. No. 2, O.J. L 266/1 (1980) (choice-of-law provisions) *with* ICLAIC, *supra* note 2, arts. 7-9, 11-12, 33 I.L.M. at 734-35 (parallel choice-of-law provisions).

The ICLAIC differs from the Rome Convention, insofar as the Rome Convention presumes that the contract has the closest connection to the state of the habitual residence of the party (or principal place of business of the company). Rome Convention, *supra* note 5, art. 4, 1992 Gr. Brit. T.S. No. 2, O.J. L 266/1 (1980). The ICLAIC does not use a mechanical test, such as the principal place of business test of the Rome Convention, to determine the applicable law. ICLAIC, arts. 9, 10, 33 I.L.M. at 735.

Rome Convention, *supra* note 5, art. 4(2) provides several factors to guide the judge in determining the closest connection test.

> [I]t shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

Id. *See* Hay, *supra* note 261, at 360 (discussing closest connection factor of a "functional conflicts rule" in which abstract policy factors rather than geographical data are used to predetermine applicable law). " '[F]unctional allocation . . . only "works" if the law to be applied reflects the same or a similar policy as our own' " and that the starting point tends to be the policy of the forum.' " *Id.* at 360 n.338. *See supra* note 237 and accompanying text (discussing functional factors in ICLAIC to determine closest tie test).

280. Hay, *supra* note 261, at 359. "Under English law, there was doubt whether the "proper law" determination sought to identify the closest connection to a State ("Jurisdiction") or to a legal system." *Id.* at 360 n.338.

281. *Id.*

282. ICLAIC, *supra* note 2, art. 7, 33 I.L.M. at 734. The ICLAIC provides the parties to the contract and the court of the forum several options in determining applicable law. *Id.* arts. 7-11, 33 I.L.M. at 734-35. In regard to the discretion of the contracting

account all objective and subjective elements of the contract to decide the forum to which the contract has the closest connection.[283] Although the ICLAIC does not define the objective and subjective elements to be weighed,[284] the ICLAIC's Article 10 provides for the codification of existing law by providing the judges with authority to apply generally accepted principles of international commercial law and practice to contracts, regardless of the law of the contract chosen by the parties.[285]

2. The Emerging Law Merchant

Recently, some legal writers have begun to explore the possibility of an emerging *lex mercatoria*, or law merchant,[286] as a source of uniform choice-of-law rules for international contracts.[287] Historically, commentators have suggested that legisla-

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parties, Article 7 allows applicable law to be chosen by the parties. *Id.* at 734. Article 8 allows modifications of that choice by agreement of the parties at any time. *Id.* at 735. Regarding discretionary provisions of the court, Article 9 provides relief in the absence of choice by the parties. *Id.* It states the contract shall be governed by the law of the State which it has the closest ties. *Id.* The Court will take into account objective and subjective elements of the contract to make their determination. *Id.* The Court may sever parts of the contract if that part which is separable has a closer tie with another State. *Id.* The parties and the courts may also look to guidelines, customs, and principles of international commercial law, commercial usage and practices generally accepted, in order to discharge the requirements of justice and equity in the particular case. *Id.* art 10, 33 I.L.M. at 735. Notwithstanding these provisions, the forum decides whether mandatory requirements of another State with which the contract has close ties are applicable. *Id.* art. 11, 33 I.L.M. at 735.

283. *Id.* art. 9, 33 I.L.M. at 735.

284. *See id.* (pointing out that elements to be weighed shall apply as justice and equity dictate).

285. *Id.* art. 10, 33 I.L.M. at 735 (applying generally accepted principles of international commercial law "[i]n addition to [choice-of-law] provisions").

286. *See supra* note 129 and accompanying text (discussing the concept of "law merchant"). *See also Introduction to the Symposium, supra* note 23, at 419 (describing newly introduced C.I.S.G. as the emerging *lex mercatoria* of international contract law).

287. Juenger, *supra* note 273, at 167-169.

> [H]istory allows us . . . to identify the approaches that have been tried . . . and to assess their strengths and weaknesses. There are only three basic methods:
>
> (1) The creation of multistate rules of decision (the substantive law approach);
>
> (2) A choice from among the potentially applicable local rules of decision premised on ascertaining their personal and territorial reach (the unilateral approach);
>
> (3) The interposition of choice-of-law rules (the multilateral approach).
>
> All of these approaches have coexisted since the Middle Ages. But while the "pluralism of methods" is not a new phenomenon, it has assumed consid-

tion and regulations pertaining to sales contracts should recognize the advantages of a competitive marketplace.[288] Such treatment would require that the customary practices of participants, rather than complicated rules and unequal regulatory treatment, would set the rules for contract performance.[289] Because the danger of transacting a non-enforceable contract is greater without unification of either choice-of-law rules or substantive legal rules,[290] the ICLAIC, in mandating the application of principles and practices developed in the international trade market,[291] provides a harmonizing contract rule that, according to some commentators, would reduce costs associated with the nonenforceability of an international contract.[292]

> erable importance in our days. In recent times, both in the United States and in Europe, there are trends away from rigid multilateral choice-of-law rules and towards a revival of unilateralism. At the same time, some legal writers have begun to explore the possibility of once again resolving multistate problems in a supranational fashion, and there is talk about an emerging new *lex mercatoria.*

Id.

288. Lee E. Gunderson, Statement before the Senate Banking, Housing, and Urban Affairs Committee, May 6, 1981, *reprinted in* George Roche, *Government Involvement Is Harmful to the Economy, in* ECONOMICS IN AMERICA OPPOSING VIEWPOINTS 25, 25 (Greenhaven Press 1986).

289. *Id.*

290. Winship 1, *supra* note 14, at 532-33. The analysis of enforceability of a contract with a foreign trading partner is difficult and proposes a greater risk of error without unification of either choice-of-law rules or the substantive legal rules. *Id.*

291. ICLAIC, *supra* note 2, art. 10, 33 I.L.M. at 735 (applying "commercial usage and practices generally accepted").

292. *See* Juenger, *supra* note 273, 167-69 (discussing new *lex mercatoria* approach to choice-of-law rules). *See* Hartnell, *supra* note 44 (discussing the disparate treatment of contracting parties and need for equal treatment); Jackson & Davey, *supra* note 13 (discussing risks associated with international contract). *See* Cheryl W. Gray & William W. Jarosz, *Law and the Regulation of Foreign Direct Investment: The Experience From Central and Eastern Europe*, 33 COLUM. J. TRANSNAT'L L. 1, 13 (1995) (discussing transaction costs of doing business as-yet-unidentified liability). Legal regimes can impede foreign investment by creating different rules for foreign investors and different rules for domestic investors. *Id.* at 17. Such behavior by the legal regimes results in an "enclave of special legislation." *Id.*

> The enclave typically serves at least three purposes. First, it provides an important information — or "signaling" —function to potential investors by showing that the government is serious in its efforts to create a market based economy. Second, it provides a limited sphere in which legal development can proceed more rapidly, and thus bypass many of the hurdles to legal and institutional development in the economy at large. Third, in recognition of the costs the present institutional structure may impose on foreign investors, an enclave allows for incentives targeted at foreign investors to offset such

B. *Harmonization of Results in Multi-State Transactions*

International trade transactions may be facilitated either by the creation of uniform contract law[293] or by the creation of uniform choice-of-law rules.[294] The ICLAIC facilitates international trade transactions by establishing uniform choice-of-law rules for multi-state contracts.[295] In addition, the ICLAIC allows the forum court to apply mandatory rules of public policy[296] notwithstanding the choice-of-law rules established by the Convention.[297]

1. Validating Contracts Across Multi-State Boundaries

To determine the applicable law to an international transaction the ICLAIC poses several questions concerning the validity and existence of the international contract.[298] First, whether or not the parties have made a valid choice.[299] Second, whether or not the parties have a valid consent to the choice of law.[300] Third, whether or not the parties choice-of-law provision is valid in form.[301] If the ICLAIC's approach of deciding separately the valid choice of law, the valid consent of the parties and the valid form proves effective, parties would be able to pre-determine what law will govern their contract thus promoting harmoniza-

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> costs. . . . [W]hile these purposes may be valid, the enclave approach entails major costs for the host country . . . . that must be weighed against its benefits.

Id.

293. Diamond, *supra* note 3, at 242 (discussing necessity and benefit of harmonizing substantive rules). *See e.g.*, International Institute for the Unification of Private Law (UNIDROIT): Principles of International Commercial Contracts (1994); 34 I.L.M. 1067 (1995). (providing express and implied substantive law for international commercial contracts). *See also* William A. Andres, Speech delivered to the American Association of Exporters and Importers (May 23, 1985), *reprinted in* ECONOMICS IN AMERICA OPPOSING VIEWPOINTS 15 (1986) (referring to problems resulting from "myriad local laws").

294. Juenger, *supra* note 273, at 241 (discussing effect of choice-of-law rules).

295. ICLAIC, *supra* note 2, arts. 7-11, 33 I.L.M. at 734-35 (setting forth rules for determinations of law applicable to multi-state contracts).

296. *See supra* note 239 and accompanying text (explaining term "mandatory rules").

297. ICLAIC, *supra* note 2, art. 11, 33 I.L.M. at 735.

298. *Id.* arts. 12, 13, 33 I.L.M. at 735-36.

299. *Id.* art. 9, 33 I.L.M. at 735.

300. *Id.* art. 12, 33 I.L.M. at 735.

301. *Id.* art. 13, 33 I.L.M. at 736.

tion in their international transactions.[302]

First, where parties select the applicable law of their contract and it proves effective under the ICLAIC,[303] the same law may be applied to resolve the second question concerning the validity of a party's consent to that selection.[304] In such cases, however, the ICLAIC determines as a separate question whether or not the choice of law governing the contract should apply to determining the validity of the party's consent to the choice.[305] The ICLAIC requires the court to take into account the habitual residence or principal place of business of the party in making its determination.[306]

Separate from the questions on the selection of the applicable law and valid consent of the parties, the third question is whether the contract is valid as to form.[307] The ICLAIC provides that if the contract complies with the law governing the substance of the contract,[308] which would be the body of state law selected by the parties in the contract itself,[309] the contract would be valid as to form.[310] In the absence of choice, however, the contract will be valid as to form if it meets the requirements of the law of one of the states in which it was concluded.[311] Alternatively, it will be valid as to form if it complies with the law of

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302. *See id.* pmbl., arts. 12-13, 33 I.L.M. at 733, 735-36, (harmonization goal and validation provisions).

303. *See id.* art. 7, 33 I.L.M. at 734 (providing rules that govern selection of applicable law by parties). *See supra* note 243 and accompanying text (discussing guidelines provided by ICLAIC for courts to determine applicable law).

304. *Id.* art. 12, 33 I.L.M. at 735. In such cases, the court has the authority to determine applicable law governing the validity of consent, "taking into account the habitual residence or principal place of business" of the party. *Id.*

305. *Id.*

306. *Id.*

307. *Cf. supra* note 150 and accompanying text (discussing formal requirements for contracts under U.C.C.). Formal validity concerns the compliance of the contract with contract law requirements regarding the form in which the contract of the parties must be expressed. *See* Joseph Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 Fordham L. Rev. 39, 43-68 (1974) (discussing functions of formal requirements in contract law). *See also*, ROBERTO UNGER, LAW IN MODERN SOCIETY, 203-16 (1976) (discussing function of formalities); Arthur T. von Mehren, *Civil Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 Harv. L. Rev. 1009, 1016-17 (1959) (discussing function of formalities in comparative law).

308. ICLAIC, *supra* note 2, art. 7, 33 I.L.M. at 734.

309. *See supra* note 233 and accompanying text (noting choice of substantive law left to parties).

310. ICLAIC, *supra* note 2, art. 13, 33 I.L.M. at 736.

311. *Id.*

the *situs* of contract performance.[312] The ICLAIC favors holding the contract valid if possible.[313] The ICLAIC attempt to reduce[314] situations in which a contract may be rescinded due to formal invalidity.[315]

2. Mandatory Rules Concerning Choice of Law

Despite the choice-of-law freedom given to contracting parties under other articles of the ICLAIC,[316] the forum is permitted to apply "mandatory requirements"[317] to the contract.[318] Thus, the ICLAIC's presumption in favor of the law of the particular state chosen by the contract may be displaced by the forum's determination that the foreign law is offensive to the forum's public policy and is not to be applied.[319] While the ICLAIC does not define this concept of mandatory requirements,[320] the concept traditionally includes rules of public order.[321] These rules serve to promote government interests.[322]

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312. *Id.*

313. *Id.* Article 13 distinguishes between a contract between parties in the same state and parties in different states at the time of the conclusion of the contract. *Id.* It provides:

> A contract between parties in the same state shall be valid as to form if it meets the requirements laid down in the law governing said contract pursuant to this Convention or with those of the law of the State in which the contract is valid or with the law of the place where the contract is performed. If the persons concerned are in different States at the time of its conclusion, the contract shall be valid as to form if it meets the requirements of the law governing it as to substance, or those of the law of one of the States in which it is concluded or with the law of the place where the contract is performed.

Id.

314. *See* ICLAIC, *supra* note 2, arts. 8, 12, 33 I.L.M. at 735 (providing for validity of contract under ICLAIC choice-of-law provisions).

315. *See supra* note 243 and accompanying text (defining term "validity" which may involve either material validity or formal validity).

316. *Id.* arts. 7, 8, 33 I.L.M. at 734-35 (stating law of contract to be chosen by parties). *See supra* note 233 and accompanying text (discussing ICLAIC's freedom-of-choice clause).

317. ICLAIC, *supra* note 2, art. 11, 33 I.L.M. at 735. *See supra* note 239 and accompanying text (discussing mandatory requirements).

318. ICLAIC, *supra* note 2, art. 11, 33 I.L.M. at 735. The ICLAIC allows the forum to decide mandatory provisions to be applied to contract. *Id.*

319. Hay, *supra* note 261, at 377.

320. *See* ICLAIC, *supra* note 2, art. 11, 33 I.L.M. at 735 (discussing mandatory rules with which the contract has close ties is decided by forum).

321. *Cf.* Rome Convention, *supra* note 5, art. 7 (providing for application of mandatory rules of forum in provisions separate from public order exception to choice-of-law rules in Rome Convention Article 6). Article 7(1) of the Rome Convention, which has now been adopted by all member states. Hay, *supra* note 261, at 382, n.442.

They override the otherwise applicable law, including the contract law chosen by the parties, in order to effectuate the forum's policy in cases before it.[323] Such public policies include those regulatory in nature[324] and those derived from public law.[325]

C. *Equal Bargaining Power*

Economic theorists believe that in the absence of legal rules to the contrary, parties try to exploit strategic opportunities and create uncertainty with regard to the conditions under which performance will occur.[326] Legal commentators have noted that conventions have sought to counter this type of economic exploitation by either filling gaps[327] and setting out international minimum standards,[328] or by mandating that rules provided under the convention shall apply to nonsignatories to the convention.[329] Similarly, the ICLAIC intends to promote economic interdependence by facilitating international contracts,[330] and

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The Convention permits the court to give effect to the mandatory rules of a third country which was a close connection to the case at hand, other than the forum state chosen by the parties or the forum's stipulated choice-of-law rules. *Id.* at 382. It remains to be seen how Article 7(1) will work in practice however, the attorney should be aware of the several tangents that the courts may apply in the view of public interest or private party interests. *Id.* at 383.

322. Hay, *supra* note 261, at 380.

323. *Id.* at 381.

324. *Id.* at n.439.

325. *Id.* at 381.

326. Anthony T. Kronman & Richard A. Posner, THE ECONOMICS OF CONTRACT LAW 4 (Little, Brown and Company 1979) [hereinafter ECONOMIC THEORY].

327. *See supra* note 30 and accompanying text (discussing usage of trade to resolve any ambiguity in agreement).

328. Ole Lando, *The Conflict of Laws of Contracts General Principles*, 6 ACADEMIE DE DROIT INTERNATIONAL RECUEIL DES COURS COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 225, 362 (1984). One of the international minimum standards which the ICLAIC establishes is that the contracting parties select the law to apply to the contract, which is to be evidenced in the contract. ICLAIC, *supra*, note 2, art. 7, 33 I.L.M. at 735. The law chosen must have close tie to contract. *Id.* art. 9, 33 I.L.M. at 735. Another example of an international minimum standard that is instituted by the ICLAIC is that in the absence of a choice of law by the parties, the ICLAIC will determine the applicable law to the contract, by establishing which contracting party's law has the closest ties to the contract. *Id.*

329. *See* J.H. Reichman, *Legal Hybrids between the Patent and Copyright Paradigms*, 94 COLUM. L. REV. 2432, 2499 (1994) (discussing application of international intellectual property rules to nonsignatory parties to contracts involving patents and copyrights).

330. ICLAIC, *supra* note 2, pmbl., 33 I.L.M. at 733. "[T]he economic interdependence of States has fostered regional integration and . . . in order to stimulate the process it is necessary to facilitate international contracts . . . ." *Id.*

attempts to supply guidance to the parties when terms are not set out expressly in the contract,[331] and requires that the law that it designates as applying to a contract must be used even if it is the law of a state that is not a party to the convention.[332]

Unlike the Rome Convention, which presupposes that the law of the seller's home state will generally apply[333] the ICLAIC allows the parties to bargain freely over the law that will apply to their contract.[334] Where the parties do not choose the law of the contract, the ICLAIC itself permits the respective laws of the buyer's and seller's home states to govern separable parts of the contract, if each part has a closer tie to one state or the other.[335]

III. *THE UNITED STATES SHOULD NOT ADOPT ICLAIC BECAUSE THE NEGATIVE EFFECTS OF THE ICLAIC OUTWEIGH ITS BENEFITS*

In theory, the ICLAIC offers advantages for O.A.S. Member States.[336] The intended benefits of the ICLAIC arise from its promotion of uniformity in international contract law.[337] In practice, however, these provisions would prove unpredictable and inconsistent when compared with current domestic and international contract law utilized in the United States.[338] The United States, therefore, should not adopt the ICLAIC.

A. *The Intended Benefits Associated with U.S. Adoption of the ICLAIC*

The purposes of the ICLAIC are to improve and unify international contract law.[339] First, the ICLAIC appears to promote uniformity in international contract law by establishing uniform standards for determining the applicable law governing international contracts.[340] Second, it encourages equal bargaining be-

331. *Id.* art. 9, 33 I.L.M. at 735.

332. *Id.* art. 2, 33 I.L.M. at 733.

333. Rome Convention, *supra* note 5, art. 4(2), 1992 Gr. Brt. T.S. No. 2, O.J. L 266/1 (1980).

334. ICLAIC, *supra* note 2, arts. 7-8, 33 I.L.M. at 734-35.

335. *Id.* art. 9, 33 I.L.M. at 735.

336. *See supra* notes 263-69 and accompanying text (outlining benefits of ICLAIC).

337. ICLAIC, *supra* note 2, art 4., 33 I.L.M. at 734.

338. *Cf. Paradigm*, *supra* note 5, at 185 (criticizing uncertainty involved in provisions of Rome Convention, which are similar to those of ICLAIC).

339. ICLAIC, *supra* note 2, pmbl., 33 I.L.M. at 734.

340. *Id.* art. 4, 33 I.L.M. at 734.

tween contracting parties in different states by granting equal weight to a buyer's place of business.[341] Third, the ICLAIC provides the forum court with broad authority to promote government interests despite the existence of an explicit choice-of-law provision in the contract.[342]

1. Uniformity in International Contract Law

The ICLAIC attempts to promote uniformity in international contract law,[343] as evidenced by provisions seeking to establish a concrete standard for determining applicable law.[344] Uniformity is a benefit because it promotes a consistent understanding among market participants, increasing cooperation among the parties.[345] Furthermore, uniformity reduces transaction costs accompanying international contracts.[346]

a. Providing a Cooperative Forum

The process of bringing together community members to discuss comparative law at a legislative level facilitates community interaction, and promotes continued cooperation and understanding.[347] This interaction allows groups currently excluded from the legislative process to exert greater influence[348] on the regulatory process by expressing their policy prefer-

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341. *Id.* art. 4, 33 I.L.M. at 735 (determining applicable law). *Cf. Paradigm, supra* note 5, at 182 (noting benefits of equal bargaining by protecting "traditionally weaker parties" under Rome Convention provisions corresponding to ICLAIC).

342. ICLAIC, *supra* note 2, 33 I.L.M. at 734.

343. *Id.* pmbl., 33 I.L.M. at 733 (facilitating international contracts "by removing differences in the legal framework").

344. *Id.* pmbl., 33 I.L.M. at 734.

345. Perillo, *supra* note 30, at 285. Perillo argues that, if markets are to function properly and efficiently, they must be policed and regulated, and the rules of decision must be uniformly applied. *Id.*

346. ECONOMIC THEORY, *supra* note 326, at 4. *See supra* note 268 and accompanying text (discussing transaction costs associated with international contracts).

347. *Paradigm, supra* note 5, at 182. "If a true 'community' is the ultimate goal of the [drafters], an act which facilitates community interaction is highly desirable." *Id.*

348. C. Frederick Beckner, *The FDA's War on Drugs*, 82 GEO. L.J. 529, 557 (1993). Professor Macey argues that judicial review and the Framers' constitutional scheme of separation of powers are consistent when two conditions are satisfied: Judicial review must (1) result in making legislation more public-regarding by serving as a check on legislative excess, and it must (2) not intrude on the constitutional authority of the legislature to make law.

Id. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, (1989) (discussing interest group theory). "Increasing transactions costs can encourage interest group activity." *Id.* at 88.

ences.[349] To the extent that the ICLAIC rules vary from domestic legislation, adoption of the ICLAIC may provide an opportunity for legislators to review[350] domestic legislation, and revise it to achieve results similar to ICLAIC's goals.[351]

b. Reducing Transaction Costs

The transaction costs of doing business overseas can be significantly higher than those of domestic transactions.[352] The risk of non-enforceability of a contract with a foreign trading partner is greater[353] absent unification of either choice-of-law rules or substantive legal rules governing contractual transactions.[354] Potential liabilities arising from unenforceable contract impose costs on each party.[355] Because of the greater chance of unenforceability of international contracts, where conflicting laws may apply, increased transaction costs accompany international transactions.[356] Actors in the market must have reason, therefore, to trust the integrity of the market and the transactions conducted in the global marketplace.[357]

2. Equal Bargaining Positions

The ICLAIC's attempt to equalize parties' bargaining positions[358] benefits contracting parties by encouraging freedom to contract,[359] and promoting the development of the commercial

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349. Beckner, *supra note* 348, at 557. The legislative and judicial process approach seeks to correct the source of the political market failure. *Id.*

350. *See Notice from the State Department*, 52 Fed. Reg. 6262-02 (1987). "Traders and their counsel are advised to study the C.I.S.G. carefully . . . ." *Id.*

351. *See supra* notes 345-46 and accompanying text (discussing need to harmonize domestic law to reflect international law). *Winship III*, *supra* note 29, 50-92 (discussing revision of U.C.C. in light of C.I.S.G.). *See generally* Perillo, *supra* note 30 (discussing unlikely result of uniformity unless merchants and their attorneys have information made available to them regarding implementation).

352. *See* Gray & Jarosz, *supra* note 292, at 13 (discussing transaction costs).

353. ECONOMIC THEORY, *supra* note 326, at 26 (discussing risk).

354. *Winship 3*, *supra* note 29, at 45-48. Costs of non-uniformity are barriers to the free flow of trade in goods. *Id.*

355. JACKSON & DAVEY, *supra* note 13, at 36.

356. *Id.*

357. *See* Perillo, *supra* note 30, at 316 (discussing interdependence of marketplace).

358. *See supra* notes 326-35 and accompanying text (discussing equal bargaining power under ICLAIC).

359. ICLAIC, *supra* note 2, art. 7, 33 I.L.M. at 734.

law of smaller countries.[360] Freedom of the parties to determine the choice of law is recognized in many countries,[361] and implies that the express or presumed intentions of the parties will determine the law of the contract.[362] Current U.S. policy towards domestic and international contracts supports this goal of freedom of contract,[363] in order to simplify commercial transactions and to encourage the continued expansion of commercial practices.[364] By encouraging equal bargaining power, the ICLAIC gives smaller countries a greater stake in the legislative process of international contract law.[365] Specifically, parties may not chose an economically stronger state's law if a smaller state takes the initiative to enact contract rules that are more useful to the parties.[366] Consequently, the United States' smaller trading partners may be encouraged to develop their commercial laws to meet their citizens' needs for useful contract rules.[367] In addition, under the ICLAIC, the weaker transacting party's state law has an equal opportunity, in principle, to determine the legal rights and obligations of the contract.[368]

3. Judicial Discretion

The ICLAIC preserves governments' policy interests by providing judicial discretion to promote public policy requirements.[369] First, the ICLAIC compels the application of

360. *Id.* art. 10, 33 I.L.M. at 735. *See supra* notes 306-13 and accompanying text (discussing effect of Article 10).

361. *See* Lando, *supra* note 328, at 255-66 (discussing theory of free choice recognized in many countries, its historical development, and its application in legal systems of today).

362. *Id.* at 255.

363. *See supra* note 31 and accompanying text (discussing current U.S. policy under U.C.C. and C.I.S.G.).

364. *See, e.g.*, U.C.C. § 1-102(2)(a), (c) (providing that purpose of U.C.C. is to simplify transactions and permit continued expansion).

365. ICLAIC, *supra* note 2, art. 11, 33 I.L.M. at 735.

366. *Cf. Paradigm*, *supra* note 5, at 179 (discussing similar effect on "weaker parties" under Rome Convention).

367. ICLAIC, *supra* note 2, arts. 3-4, 33 I.L.M. at 734 (applying ICLAIC in development of international trade; promoting uniformity in application of ICLAIC).

368. *See id.* art. 9, 33 I.L.M. at 735 (selection of applicable law in absence of choice by parties to contract).

369. *See id.* art. 11, 33 I.L.M. at 735 (discussing mandatory rules with which contract has close ties to be decided by forum). *See also supra* note 321 and accompanying text (discussing mandatory rules as defined under Rome Convention). *Cf.* Rome Convention, *supra* note 5, art. 7, 1992 Gr. Brit., T.S. No. 2, O.J. L 266/1 (198) (providing rules for application of mandatory rules of forum, separate from article 6 public order

mandatory rules of the forum.[370] Such mandatory rules serve primarily to override the otherwise applicable law, in order to effectuate the forum's policy in cases connected to it.[371] Second, the ICLAIC provides for the application of generally applicable commercial standards, which are enforced in the interest of justice and equity.[372]

B. *The Disadvantages Associated with U.S. Adoption of the ICLAIC*

Despite the intended benefits of the ICLAIC, its adoption may present serious disadvantages for the United States.[373] The C.I.S.G. and the U.C.C. are two authoritative texts that currently govern U.S. contract law.[374] An additional text, such as the ICLAIC, would create conflict, resulting in unpredictability for U.S. parties to international contracts.[375] Such tension between these three texts will lead to inconsistency in U.S. substantive contract law.[376]

1. Unpredictability and Uncertainty

If the United States were to adopt the ICLAIC, it would face three sets of concerns regarding the uniformity of international contract rules. First, U.S. law would have to resolve when domestic contract rules, like the U.C.C., could be applied by agreement of the parties to a contract, to the exclusion of one or

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exception to choice-of-law rules). Article 7(1) of the Rome Convention, which has now been adopted by all member states, permits the forum court to give effect to the mandatory rules of a third country that has a close connection to the case at hand, regardless of the forum state chosen by the parties or the forum's stipulated choice-of-law rules. Hay, *supra* note 261, at 382 n.442. While it remains to be seen how Article 7(1) will work in practice, counsel should be aware of the several tangents that the courts may apply in the view of public interest or private party interests. *Id.* at 383.

370. Hay, *supra* note 261, at 380.

371. *Id.* at 381.

372. ICLAIC, *supra* note 2, art. 10, 33 I.L.M. at 735. *See supra* notes 275-85 and accompanying text (discussing effect of Article 10).

373. *Cf. Paradigm*, *supra* note 5, at 183-93 (discussing disadvantages of adopting Rome Convention, substantially similar to ICLAIC).

374. *See supra* note 29 and accompanying text (noting that U.C.C. and C.I.S.G. coexist as U.S. contract law).

375. *See, e.g., Paradigm*, *supra* note 5, at 184-85 (analyzing problems of uncertainty in implementation of Rome Convention).

376. *See, e.g.*, *supra* note 235 and accompanying text (discussing inconsistency between ICLAIC and C.I.S.G. contract modification provisions).

more provisions of the ICLAIC.[377] Second, where a contract lacks express agreement as to whether the C.I.S.G. or the ICLAIC applies, no U.S. law would exist to resolve such a conflict.[378] Finally, in a contract involving a party in the United States, an ICLAIC jurisdiction and a non-U.S. party of a non-ICLAIC jurisdiction, a conflict would arise as to whether the ICLAIC or the applicable law of the non-ICLAIC jurisdiction would control[379] when the contract is silent on operative law.

Though the ICLAIC embraces existing general principles of law,[380] the language of the ICLAIC is intentionally ambiguous,[381] encourages judicial discretion in resolving conflicts,[382] and provides no neutral basis for judicial resolution of conflicts.[383] The ICLAIC concedes to the forum court great discretion in determining alternative law,[384] except where parties provide an ex-

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377. *Cf.* Perillo, *supra* note 30, at 283 (discussing function of new legislation and other international agreements).

378. *Cf. id.* at 284 (discussing rules of new legislation at variance with rules laid down by earlier legislation). *See* Hartnell, *supra* note 44, at 5 (discussing range of interpretations available to adjudicators and proposing a "middle of the road" approach). *See* Perillo, *supra* note 30, at 284 (discussing process of mutual education and expansion of understanding required to break out of common law and civil law conceptual frameworks).

379. *Cf.* Perillo, *supra* note 30, at 283 (discussing rules of conflict of law and practical uses for judge, arbitrator or practicing lawyer to have neutral resource of law to apply to State whose law is obscure, undeveloped, or merely difficult to ascertain).

380. ICLAIC, *supra* note 2, art. 10, 33 I.L.M. at 735.

381. *See* UNIFORM LAW, *supra* note 8, at 143 (indicating that language of C.I.S.G. intentionally ambiguous, because of its basis in compromise between advocates of different legal systems).

382. *See supra* notes 236-41 and accompanying text (discussing ambiguity of terms "closest ties" and "mandatory requirement"). *See also* ICLAIC, *supra* note 2, art. 6, 33 I.L.M. at 734 (providing that "The provisions of this Convention shall not be applicable to contracts which have autonomous regulations in international conventional law in force among the States Parties to this Convention"). The "autonomous regulations" provision must refer to something other than the application of other international conventions, since otherwise Article 20 of the ICLAIC would be superfluous. *See Id.* art. 20, 33 I.L.M. at 737 (providing for continued application of other conventions, notwithstanding the ICLAIC). *Cf.* Perillo, *supra* note 30, at 285 (discussing problem of ambiguity). While international conventions are ambiguous because of their basis in compromise between advocates of different legal systems, contract parties are always free to avoid such ambiguity by employing clear language. *Id.*

383. *See* Perillo, *supra* note 30, at 283 (discussing practical effects of providing neutral resources of law).

384. *See supra* note 232 and accompanying text (discussing forum's determination of applicable law). *See also supra* note 52 and accompanying text (discussing C.I.S.G. conflict-of-laws imbroglio).

The ICLAIC allows forum court discretion to determine applicable law in the ab-

press choice-of-law provision.[385] Instead of promoting certainty for parties to international contracts, the ICLAIC's deference to judicial discretion would lead to unpredictable results in adjudicating disputes between contracting parties.[386]

As a result of such unpredictability, the ICLAIC would promote forum shopping by encouraging parties to bring suit in states whose public policy interests would induce judges to apply laws favorable to them.[387] Consequently, the ICLAIC frustrates the freedom of contract, and impedes contracting parties' ability to determine the risks and obligations that they will incur.

2. Frustration of Existing U.S. Substantive Law

If the United States were to adopt the ICLAIC, contract law would be defined by the C.I.S.G., the U.C.C., and the ICLAIC.[388] By its own terms, the C.I.S.G. provides rules of international contract formation.[389] Whereas the C.I.S.G. provides substantive rules for international contract formation, and the U.C.C. offers substantive rules for domestic contracts, the ICLAIC provides a set of choice-of-law principles that determine whose substantive law will apply.[390] As a choice-of-law document, however, the ICLAIC would nullify application of both the C.I.S.G. and the U.C.C. in certain situations.[391]

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sence of choice of law. ICLAIC, *supra* note 2, art. 11, 33 I.L.M. at 735. *See supra* note 236 and accompanying text (discussing forum choice-of-law in absence of parties' choice).

385. ICLAIC, *supra* note 2, arts. 7-11, 33 I.L.M. 734-35.

386. *See supra* notes 48-50 and accompanying text (discussing ULIS and ULF and their failure as result of rejecting private international law rules and applying universalist approach). *Cf. Paradigm*, *supra* note 5, at 200-01 (discussing Rome Convention and need for uniform tribunal).

387. Lando, *supra* note 328, at 401.

388. *Cf.* Perillo, *supra* note 30, at 282-317 (discussing application of UNIDROIT *Principles* and interplay of U.C.C. and C.I.S.G.).

389. C.I.S.G., *supra* note 17, arts. 14-24, 19 I.L.M. at 674-77. *See supra* note 86 and accompanying text (noting that C.I.S.G. applies only to international contracts for sale of goods).

390. *See supra* note 222 and accompanying text (discussing term "applicable law"). *See* ICLAIC, art. 14, 33 I.L.M. at 736 (discussing law applicable under ICLAIC to govern substantive contract issues); *see also id.* art. 20, 33 I.L.M. at 737 (providing that ICLAIC does not affect application of other pertinent international conventions to which ICLAIC member is party, if declaration is made).

391. *See supra* note 240 and accompanying text (discussing mandatory requirements of forum in spite of choice of law by parties). *But see supra* note 239 and accompanying text (discussing possible "mandatory requirements" of U.S. law under ICLAIC Article 11). ICLAIC provides that the selection of a forum by the parties does not nec-

C. *Practical Application of the ICLAIC: Four Scenarios*

Assuming for the sake of discussion that the United States had become a party to the ICLAIC, the following scenarios illustrate the possible interplay between the U.C.C., the C.I.S.G., and the ICLAIC.[392] The three U.C.C. provisions chosen to elucidate the effects of this interplay include: (1) the unconscionability provision;[393] (2) the provision governing exclusion or modification of warranties;[394] and (3) the provision governing third-party beneficiaries of warranties,[395] all of which are found in Part

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essarily entail selection of applicable law governing the contract. ICLAIC, *supra* note 2, art. 7., 33 I.L.M. at 734. *See supra* note 369 and accompanying text (discussing need for counsel to be aware that *lex fora* does not assume jurisdiction of applicable law).

392. ICLAIC, *supra* note 2, art. 20, 33 I.L.M. 737. As of February 1992, the following member states of the O.A.S. are signatories of the C.I.S.G.: Argentina, Chile, Ecuador, Mexico, United States, and Venezuela. Randall & Norris, *supra* note 21, at 612 n.48.

393. *See supra* note 239 and accompanying text (discussing U.C.C. unconscionability provision). U.C.C. § 2-302 states:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Id. § 2-302(1).

394. *Id.* § 2-316. This provision states:

> (1) . . . [N]egation or limitation [of express warranties] is inoperative to the extent that such construction is unreasonable.
>
> (2) . . . [T]o exclude or modify the implied warranty of merchantability [created under § 2-314] or any part of it the language must mention merchantability and in the case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness [created under § 2-315] the exclusion must be by a writing and conspicuous.

Id.

395. *Id.* § 2-318. This provision, which focusses on products liability exists in three alternative formulations in the Official Draft of the U.C.C. *See id.* (setting forth three alternative provisions).

> Alternative A
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> A seller's warranty whether express or implies extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.
>
> Alternative B
>
> A seller's warranty whether express or implies extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.
>
> Alternative C

three of the U.C.C.[396]

	Scenario			
	1	2	3	4
Parties agree to operative law	Y	Y	N	Y
ICLAIC member	XX	XX	XX	XX
C.I.S.G. member	X	XX	X	XX
U.C.C. member	X	X	X	XX
U.C.C. applies	Y	Y	N	?
C.I.S.G. applies	N	Y	N	N
ICLAIC applies	Y	Y	Y	?

Key

XX = both parties
X = only one party
Y = yes
N = no
? = result uncertain

1. Interplay between the ICLAIC and the U.C.C.: Scenario 1

In the first hypothetical scenario, both contracting parties are signatories to the ICLAIC, but only one, the United States, is a C.I.S.G. signatory. Scenario 1 assumes that a U.S. seller ("S1") enters into a contract for the sale of goods with a non-U.S. buyer ("B1"), who is located in state X, a party to the ICLAIC, but not a contracting state under the C.I.S.G. The parties choose U.S. law to govern the contract, referring to the ICLAIC in the contract clause. S1 subsequently refuses to perform unless B1 agrees to a disclaimer of any warranty of fitness.[397] B1 orally agrees to this modification of the agreement.

Under Scenario 1, presumably, the ICLAIC would govern the choice of the law of the contract, since S1 and B1 are located in different states that are parties to the ICLAIC, and have cho-

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A seller's warranty whether express or implies extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

Id. Both Alternatives A and B exclude corporations as they are not natural persons. *Id.* Alternative A is narrower in scope, because it requires familial privity (or guest status) in order to recover from a breach. *Id.* Alternative B is broader in scope, because it allows recovery by any potential user. *Id.* Alternative C includes corporations; however, it limits the amount to be recovered, excluding damages to property damage. *Id.* Each alternative includes language which limits the ability of the seller to limit warranties. *Id.*

396. *See* U.C.C. §§ 2-312 - 315 (providing seller's warranties).

397. *See, e.g.*, U.C.C. § 2-315 (establishing "an implied warranty that goods shall be fit for [a known] purpose" under contract for sale of goods).

sen U.S. law to govern the contract.[398] It would appear, therefore, that because the United States is a contracting state of the C.I.S.G, the C.I.S.G. would apply as part of U.S. law. The United States, however, has submitted a declaration[399] refusing to accept the alternative, choice-of-law basis of jurisdiction under the C.I.S.G.[400] Accordingly, the C.I.S.G. does not apply and, instead, the U.S. law that governs under this contract is the U.C.C. As a result, the oral disclaimer of the warranty of fitness is impermissible.[401] Even if the C.I.S.G. did apply to this contract, however, the U.C.C. provision concerning disclaimer of warranties of fitness would not necessarily be displaced by the C.I.S.G.[402]

2. Interplay between the ICLAIC and the C.I.S.G.: Scenario 2

In the second scenario, both parties are signatories to the C.I.S.G. and signatories to the ICLAIC. Scenario 2 assumes that U.S. seller ("S2") enters into a contract for the sale of goods with buyer ("B2"), located in state Y, an ICLAIC signatory. S2 and B2 choose U.S. law to govern the contract, referring to the ICLAIC in a contract clause. The contract contains terms concerning charges for late payments or other deviations from promised performance on the part of B2 that arguably would be unconscionable if included in a U.S. domestic contract.[403]

Under Scenario 2, presumably, the ICLAIC would govern the choice of the law of the contract, since S2 and B2 are located in different states that are parties to the Convention.[404] Coincidentally, the parties' choice of U.S. law would probably lead them to the C.I.S.G., since it applies to international contracts for the sale of goods.[405] The ICLAIC, however, by its own terms, does not invoke the application of the C.I.S.G., and so the con-

398. ICLAIC, *supra* note 2, art. 1, 33 I.L.M. at 733.

399. *See supra* note 94 and accompanying text (discussing U.S. declaration preventing non-signatories from invoking C.I.S.G. protection).

400. *See supra* notes 91-92 and accompanying text (discussing alternative basis for C.I.S.G. jurisdiction).

401. U.C.C § 2-316(2) (requiring exclusion of warranty of fitness to be in writing and conspicuous).

402. *See* UNIFORM LAW, *supra* note 8, at 258-59 (arguing that U.C.C. § 2-316(2) is not "validity" provision excluded from scope of C.I.S.G. under Article 4(a)).

403. *See, e.g.*, Perdue v. Crocker Natl. Bank, 702 P.2d 503 (1985) (holding that price term may involve unconscionability).

404. ICLAIC, *supra* note 2, art. 1, 33 I.L.M. at 733.

405. C.I.S.G., *supra* note 17, art. 1(1)(a), 19 I.L.M. at 672.

tract would, therefore, have to be analyzed independently under the C.I.S.G. to determine whether it would apply. One requirement for application of the C.I.S.G. is that the parties' places of business must be in different states, both of which are contracting states under the C.I.S.G.[406] In addition, the C.I.S.G. requires that the locations of the parties' places of business be express either in the contract or from information disclosed by the parties.[407]

Assuming that the C.I.S.G. does in fact apply to the contract, the question arises whether the contract terms concerning charges can be challenged under the unconscionability provision of the U.C.C.[408] Unconscionability is considered an issue of "validity" of a contract provision,[409] and it is therefore not an issue preempted by the C.I.S.G.[410] Thus, contract terms may be challenged under the U.C.C., despite the applicability of the C.I.S.G.

3. Interplay between the ICLAIC, the C.I.S.G., and U.C.C.: Scenario 3

In the third scenario, the U.S. party ("S3") is a C.I.S.G. and ICLAIC member and the other party ("B3") is operating in Venezuela, which is only an ICLAIC member. Scenario 3 assumes that S3 enters into a requirements contract[411] with B3 for data collection, compilation, and distribution services, and that the contract does not include an explicit choice of law by the parties. Under the contract, S3 is licensed to transmit data to B3 and to distribute one hundred thousand to one hundred and fifty thousand disks to Venezuelan clients. Finally, S3 is to provide complete hardcopy of the data to B3's corporate headquarters in Cuba,[412] which is an O.A.S. member but not a signatory of the

406. *Id.* art. 1(1)(a), 19 I.L.M. 672.

407. *Id.* art. 1(2), 19 I.L.M. at 672.

408. U.C.C. § 2-302.

409. *See* UNIFORM LAW, *supra* note 8, at 259-60 (discussing continued application of U.C.C. § 2-302 to contracts under C.I.S.G.).

410. C.I.S.G., *supra* note 17, art 4(a), 19 I.L.M. at 673.

411. *See, e.g., id.* § 2-306 (defining requirements contract as "term which measures the quantity [under a contract for sale of goods] by . . . the requirements of the buyer").

412. *See* MICHAEL P. MALLOY, ECONOMIC SANCTIONS AND U.S. TRADE, 349-393 (1990 & 1994 Cum. Supp.) (discussing U.S. economic sanctions against Cuba). This aspect of the hypothetical does not consider the legal implications for the transaction of the U.S. embargo against Cuba. *Id.*

ICLAIC. B3 is upgrading its telecommunications lines, which will be only nominally operative for at least six months. S3 makes several frustrated attempts to transfer the data and thereafter provides only diskcopy to B3 and hardcopy to corporate headquarters in Cuba. As a result, B3 stops making monthly payments.

Under Scenario 3, arguably the U.C.C. cannot apply, since a preponderant part of the contract is a contract for services.[413] The C.I.S.G. does not apply to service contracts and therefore cannot apply to the "mixed" portion of this contract.[414] Furthermore, while the United States is a party to the C.I.S.G., Venezuela is not, and the United States has reserved against applying the C.I.S.G. to contracts involving a non-C.I.S.G. state.[415]

Even assuming the C.I.S.G. does apply to that severable part of the contract that is predominately a sale of goods, under the ICLAIC the law of the state where the contract has the closest ties will govern.[416] In determining which state has the closest ties with the contract — the United States, Venezuela or Cuba — the ICLAIC requires a court to account for every objective and subjective element of the contract and to separate out the parts of a contract that may have closer ties to different states, so that the law of those states would apply respectively to the different parts of the contract. Further, the courts take account of the generally accepted commercial principles of international law in the interests of justice and equity.[417] As a result, it would be necessary to examine the forum court's policy to determine which abstract policy factors would be used to determine the applicable law.[418]

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413. *See supra* note 20 and accompanying text (noting U.C.C. limitation to sale of goods).

414. *See* C.I.S.G., *supra* note 17, art. 3(2), 19 I.L.M. at 672 (limiting C.I.S.G. to contracts where preponderant part is goods); *see supra* note 85 (discussing "mixed contracts").

415. *See supra* note 94 and accompanying text (discussing U.S. declaration preventing non-signatories from invoking C.I.S.G. protection).

416. ICLAIC, *supra* note 2, art. 9, 33 I.L.M. at 735.

417. *Id.* art. 10, 33 I.L.M. at 735.

418. *See supra* notes 382-84 and accompanying text (discussing concern that ICLAIC, like Rome Convention, provides excessive discretion to forum court to determine public policy).

4. Interplay between the ICLAIC, the C.I.S.G., and U.C.C.: Scenario 4

In this final scenario, both parties are U.S. citizens. Scenario 4 assumes that the U.S. seller ("S4") enters into a requirements contract[419] that is silent as to the operative law with a U.S. buyer ("B4") for retail goods. The goods are to be shipped by S4 to B4's stores in state Z, which is a party to the ICLAIC and the C.I.S.G. The contract contains an exclusion of all S4's warranties with respect to any consumer in state Z who purchases goods from B4.

Under Scenario 4, the ICLAIC may apply even though S4 and B4 are both located in the United States, since, arguably, state Z, a party to the ICLAIC, has objective ties to the contract as the place of performance.[420] Because the applicable law governing the contract is not explicitly chosen, the ICLAIC would require that the contract be evaluated by the law of the state with the closest ties to the transaction.[421]

If that state is the United States, the question arises whether the C.I.S.G. applies to the contract.[422] The Convention may not apply since, unlike the ICLAIC,[423] the C.I.S.G. only applies to contracts between parties with places of business in different states.[424] If the C.I.S.G. does not apply to the contract, then the U.C.C. will be the governing law, and the exclusion of third-party beneficiaries from the contract warranties will be open to serious question.[425]

However, if B4's stores in state Z have the closest relation-

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419. *See supra* note 409 and accompanying text (discussing requirements contracts).

420. The ICLAIC, *supra* note 2, art. 1, 33 I.L.M. at 733 (providing that contract is "international" if it has "objective ties" to more than one state party). The fact that S4 and B4 are located in the same ICLAIC state party is not a bar to the application of the convention. *See id.* art. 13, 33 I.L.M. at 736 (applying ICLAIC to contract between parties in same state).

421. *Id.* art. 9, 33 I.L.M. at 735.

422. *See* C.I.S.G., *supra* note 17, art. 1(1)(a), 19 I.L.M. at 672 (governing scope of application).

423. *See supra* note 418 and accompanying text (noting that ICLAIC may apply to contracts between parties in same state). *Cf. supra* note 224 and accompanying text (discussing distinction between C.I.S.G. and ICLAIC with respect to "internationality" of contract between parties located in same state).

424. C.I.S.G., *supra* note 7, art. 1(1), 19 I.L.M. at 733.

425. U.C.C. § 2-318 (exclusion of third-party beneficiaries from warranties prohibited).

ship to the contract and its performance, state Z may be considered B4's place of business,[426] which would make the C.I.S.G. applicable. If the C.I.S.G. does apply, the question arises whether the pertinent U.C.C. provisions concerning contract warranties would still apply, as a validity issue outside the scope of the U.C.C.[427] Arguably the U.C.C. provisions concerning warranties would not be considered a "validity" issue under the C.I.S.G.[428] Accordingly, the corresponding C.I.S.G. provisions concerning conformity of goods would be the applicable law.[429]

D. *The Potential Disadvantages of the ICLAIC Outweigh its Intended Benefits*

The United States should refuse to adopt the ICLAIC as a choice-of-law convention because the burdens imposed by the ratification of the ICLAIC outweigh all advantages. Although the United States may support efforts by the O.A.S. community to harmonize, develop, and codify private international law, refusing to adopt the ICLAIC is in the best interests of the United States. The foregoing scenarios suggest a number of interpretive issues that will lead to uncertainty under the ICLAIC should it be adopted by the United States. The ICLAIC also defers to the forum with respect to the determination of the commercial law and practices that are to be applied in interpreting the parties contractual rights.[430] These determinations are likely to occur under confusing and unpredictable circumstances, as illustrated by the foregoing scenarios.

CONCLUSION

The ICLAIC is a faulty document, and the United States should not adopt it. The ICLAIC is a convention — originally intended to facilitate international contracts — that in fact will inject a greater degree of uncertainty and unpredictability in

426. C.I.S.G., *supra* note 7, art. 10(a), 19 I.L.M. at 674; *see* UNIFORM LAW, *supra* note 8, at 78-80 (discussing the effect of Article 10(a)).

427. C.I.S.G., *supra* note 17, art. 4(a) 19 I.L.M. at 673 (providing that C.I.S.G. does not govern issues of validity of contract or its provisions).

428. *See* UNIFORM LAW, *supra* note 8, at 257-59 (discussing U.C.C. warranties and the "validity" issue).

429. C.I.S.G., *supra* note 17, art. 35, 19 I.L.M. at 679. *See* UNIFORM LAW, *supra* note 8, at 250-56 (discussing Article 35).

430. ICLAIC, *supra* note 2, art. 9, 33 I.L.M. at 735.

such contracts. It fails to provide adequate guidance to forum courts to determine the intention of the parties and instead allows broad discretion in determining applicable law. Without restraints provided by a narrow definition of the applicable law, judges are left to their complete and unfettered discretion. For all practical purposes, judges will probably rely on methods or standards with which they are familiar — the standards of their jurisdiction.[431] Adoption of the ICLAIC will result in less uniformity by imposing numerous standards rather than harmonizing choice-of-law provisions through creation of a single standard. In order to avoid such systematic destruction of the goals sought by the ICLAIC's drafters, the United States should reject the document in its present form.

431. *See Paradigm, supra* note 5, 11-12 (discussing critical attitude towards Rome Convention which is bound to influence a judge when interpreting its provisions).

> The European Community has attempted to rectify the situation of manipulation with its discretionary provisions through a series of protocols. The stated purpose of these combined protocols is eventually to confer on the European Court of Justice [E.C.J.] the power to interpret the Rome Convention.
>
> The Protocols, however, may not necessarily solve the jurisdictional problem [because] the Convention's wording leaves the construction of most of its key concepts to the discretion of the (national) courts: 'effect may be given,' 'more closely connected,' 'deprives of protection,' etc. . . . Even assuming that the Protocols will solve the jurisdictional dilemma, there are experts who assert that some countries, such as the United Kingdom, will nonetheless refuse to submit to such provisions and will continue to refer interpretation to their own courts.
>
> If jurisdiction is eventually conferred on the E.C.J., there is no guarantee that it would interpret the Convention according to the drafters' intentions; indeed, there is persuasive evidence to the contrary.

Id. at 192.