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

INTRODUCTION


tions Committee of the United States Senate awaiting consideration for

printed in 3 I.L.M. 864 (1964). These conventions entered into force in 1972 after ratification by five countries. Historical Introduction, supra, para. 7, at 8, reprinted in Official Records, supra, para. 7, at 4; J. Honnold, supra, § 4, at 49; ABA Report, supra, at 40-41; Winship I, supra, § 1.01[3], at 1-13; Winship II, supra, at 1231; Practitioner's Guide, supra, at 85; Trade Usages, supra, at 630. They are in effect today in Belgium, the Federal Republic of Germany, Gambia, Israel, Italy, Luxembourg, the Netherlands, San Marino and the United Kingdom. Historical Introduction, supra, para. 7, at 8, reprinted in Official Records, supra, para. 7, at 4; Farnsworth I, supra, § 3.02, at 3-3 & n.3; Farnsworth II, supra, at 17-18; Reinhart, supra, at 93; Winship I, supra, § 1.01[3], at 1-13 n.25; Winship II, supra, at 1231. Notwithstanding acceptance by these countries, the impact that these conventions have had on international trade has been minimal. Winship I, supra, § 1.01[3], at 1-13; Winship II, supra, at 1231; Practitioner's Guide, supra, at 85; see ABA Report, supra, at 41 (conventions not widely adopted). The 1964 Conference was dominated by the Western industrialized nations. See Sono, supra, at 13. Many developing nations refused to ratify the conventions because of what they perceived to be a European bias. See Reinhart, supra, at 94; Winship, Formation of International Sales Contracts under the 1980 Vienna Convention, 17 Int'l Law. 1, 3 (1983) [hereinafter cited as Winship III]; Winship II, supra, at 1232; cf. Practitioner's Guide, supra, at 86 (American delegates noted bias against developing nations). The United States did not ratify either convention. See ABA Report, supra, at 41; Farnsworth II, supra, at 17; Winship II, supra, at 1232. This was due mainly to a lack of American influence and participation in the drafting of these conventions. The United States at that time was more concerned with preserving the success of the Uniform Commercial Code (UCC). See Reinhart, supra, at 93-94. Consequently, it did not join UNIDROIT until three months before the 1964 Conference. Winship II, supra, at 1232; see Farnsworth II, supra, at 17. This general lack of support made it apparent that wide-spread adoption of the Hague conventions was unlikely. J. Honnold, supra, § 9, at 53; Winship I, supra, § 1.01[3], at 1-12 to -13; Winship II, supra, at 1232; Trade Usages, supra, at 620-21; see also J. Honnold, supra, § 5, at 49-50 (conviction that world-wide success depended on world-wide participation led to establishment of United Nations Commission on International Trade Law (UNCITRAL)); Farnsworth I, supra, § 3.02, at 3-3 (UNCITRAL was revising the conventions even before they came into effect); Farnsworth II, supra, at 18 (same). UNCITRAL was established by the General Assembly in 1966 "to take such steps as would . . . further the harmonization and unification of international trade law." Report of the United Nations Commission on International Trade Law on the Work of its Second Session to the General Assembly, 24 U.N. GAOR Supp. (No. 18) para. 16, at 7, U.N. Doc. A/7618 (1969) [hereinafter cited as Second Session Report], reprinted in [1970] 1 Y.B. UNCITRAL para. 16, at 97, U.N. Doc. A/CN.9/SER.A/1970 [hereinafter cited as Yearbook 1]. For a discussion of the structure and workings of UNCITRAL, see J. Honnold, supra, §§ 5-8, at 49-52. At its first session in 1968, UNCITRAL sent inquiries to various nations to determine their intentions with respect to the 1964 conventions. Historical Introduction, supra, para. 8, at 8, reprinted in Official Records, supra, para. 8, at 4; Winship I, supra, § 1.01[4], at 1-13. After receiving these replies, UNCITRAL, at its second session in 1969, created a working group to determine whether any adaptations or modifications of the 1964 Uniform Laws were possible, or whether a completely new text should be drafted. Historical Introduction, supra, para. 9, at 8-9, reprinted in Official Records, supra, para. 9, at 4; Winship I, supra, § 1.01[4], at 1-13; see J. Honnold, supra, § 9, at 53; ABA Report, supra, at 41; Farnsworth II, supra, at 18; Reinhart, supra, at 94. There were numerous discussions on this subject. See Historical Introduction, supra, para. 10, at 9, reprinted in Official Records, supra, para. 10, at 4; Report of the United Nations Commission on International Trade Law on the Work of its Fifth Session to the General Assembly, 27 U.N. GAOR Supp. (No. 17) para. 27, at 22, U.N. Doc. A/8717 (1972), reprinted in [1972] 3 Y.B. UNCITRAL para. 27, at 17, U.N. Doc. A/CN.9/SER.A/1972 [hereinafter cited as Yearbook 3]; Report of the Sixth Committee to the General Assembly, 26 U.N. GAOR (Agenda Item 87) para. 24, at 7, U.N. Doc. A/8506 (1972), reprinted in Yearbook 3, supra, para. 24, at 6; Second Session Report, supra,
The Convention applies to international transactions3 beyond ratification.2 The Convention applies to international transactions3 be-


between merchants\(^4\) for the sale of goods.\(^5\) Certain issues raised by such transactions, however, are specifically excluded from its scope.\(^6\) For ex-

\section*{References}


2. *ABA Report* (available on request).

3. *Senate Hearing* (available on request).

4. *Senate Hearing* (available on request).

5. *Senate Hearing* (available on request).


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\(^{4}\) For example, see *Practitioner's Guide* (available on request). See also *Senate Hearing* (available on request).

\(^{5}\) See *Senate Hearing* (available on request). See also *Senate Hearing* (available on request).

\(^{6}\) See *Senate Hearing* (available on request). See also *Senate Hearing* (available on request).
ample, if the domestic law that would govern the contract absent the Convention places in question "the validity of the contract or of any of its provisions," the issue of validity must be determined under that domestic law. If, however, the domestic law does not set forth requirements for validity, the Convention will not be displaced, and its General Provisions will be applied to interpret the parties' agreement.

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

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

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


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


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

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disclaim all implied warranties. 15 Nowhere, however, does it set out requirements for how such a disclaimer is to be made. 16 The inference to be drawn is that the parties are free to make their agreement in whatever manner they wish. 17 This freedom conflicts with section 2-316 of the Uniform Commercial Code (UCC or Code), 18 which lists specific methods for effectively disclaiming the Code’s implied warranties. 19 These warranties are in substance the same as those implied by the Convention. 20 The question raised by this conflict is whether the UCC’s disclaimer provisions are requirements for “validity” within the meaning of the Convention. 21 If the UCC’s requirements are not within the Convention’s concept of validity, the Convention applies to the disclaimer provision, and a seller may effectively disclaim an implied warranty by the use of general language 22 that may not conform to section 2-316. If the UCC


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


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


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

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

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

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

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

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

26. See id. § 234, at 258-59.

27. Id.

28. Id. at 259.
UCC language is mandatory. If a disclaimer clause does not meet section 2-316's prescriptions, that clause cannot be valid. The Convention will not give effect to a contract provision if the substantive domestic law that would otherwise govern the contract would not do so.

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

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

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

29. See infra notes 84-89 and accompanying text.
30. See infra notes 90-108 and accompanying text.
32. See infra notes 109-19 and accompanying text.
33. CISG, supra note 1, art. 1(1), at 1, reprinted in 19 I.L.M. 668, 672 (1980); see ABA Report, supra note 1, at 39, 42; Farnsworth II, supra note 1, at 19; Récezi, The Area of Operation of the International Sales Conventions, 29 Am. J. Comp. L. 513, 517 (1981); Reinhart, supra note 1, at 95; Rosett, supra note 2, at 277; Winship I, supra note 1, § 1.02[4], at 1-26 to -29; Practitioner's Guide, supra note 1, at 87. That the parties have places of business in different countries is to be disregarded if that fact has not appeared under any of the circumstances before concluding the contract. CISG, supra note 1, art. 1(2), at 1, reprinted in 19 I.L.M. at 672; Rosett, supra note 2, at 278. The nationality of the parties and the civil or commercial character of the parties or the contract are irrelevant in determining whether the Convention applies. CISG, supra note 1, art. 1(3), at 2, reprinted in 19 I.L.M. at 672.
34. CISG, supra note 1, art. 1(1)(a), at 1, reprinted in 19 I.L.M. 668, 672 (1980); J. Honnold, supra note 1, § 45, at 81. See supra note 2.
35. The terms "private international law" and "conflict of laws" are synonymous. See H. Goodrich & E. Scoles, Handbook of the Conflict of Laws 5-6 (4th ed. 1964); P. North, Cheshire and North Private International Law 12-13 (10th ed. 1979); M. Wolff, Private International Law 10 (2d ed. 1950).
36. CISG, supra note 1, art. 1(1)(b), at 1, reprinted in 19 I.L.M. 668, 672 (1980); J. Honnold, supra note 1, § 46, at 82; Winship I, supra note 1, § 1.02[4][b], at 1-30 to -31. Article 95 of the Convention permits a Contracting State to make a declaration at the time of "ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1." CISG, supra note 1, art. 95, at 30, reprinted in 19 I.L.M. at
ution governs formation of the contract and the corresponding rights and obligations of the seller and buyer.\textsuperscript{37} This broad scope is limited in several ways. Article 6 expressly permits the parties to exclude application of the Convention and to derogate from or vary the effect of any of its provisions.\textsuperscript{38} The Convention also excludes certain types of transactions, most notably consumer sales,\textsuperscript{39} and certain issues, such as "the validity of the contract or of any of its provisions."\textsuperscript{40}

The term validity, however, is never defined in the Convention.\textsuperscript{41}

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


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

\textsuperscript{39} The Convention specifically excludes from its scope any sales "of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use." CISG, \textit{supra} note 1, art. 2(a), at 2, reprinted in 19 I.L.M. 668, 672 (1980); see J. Honnold, \textit{supra} note 1, § 50, at 85-87; \textit{ABA Report}, \textit{supra} note 1, at 39, 42; Farnsworth II, \textit{supra} note 1, at 19; Reinhart, \textit{supra} note 1, at 96; \textit{Practitioner's Guide}, \textit{supra} note 1, at 88.

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

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

\textsuperscript{41} Samson, \textit{supra} note 6, at 929 ("La Convention ne définit pas le terme 'validité' \ldots").
Before an issue can be excluded from the Convention as a question of validity the meaning of that term must be determined. When a treaty's42 drafters do not directly enact definitions of statutory terms, they may do so indirectly by means of interpretational directives.43 These are rules that, without reference to particular words, "specifically how provisions ... are to be construed and applied, or what effects are to be given them."44 The Convention contains such interpretational directives in its General Provisions.45 Article 7 in particular sets out instructions for interpreting the Convention and settling questions governed by it.

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

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

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

44. Id. at 308.

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

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

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


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

47. The Convention's legislative history shows that the necessity and meaning of a provision on "general principles" were hotly debated issues. See Summary Records, First Committee, Fifth Meeting, supra note 1 (discussions as to desirability and wording of what would become article 7), in Official Records, supra note 1, paras. 6, 8, 12-14, 17, 20-21, 23-24, 26, 28, 31, 34-35, 39, 41, 43, 53, 59, at 255-59; Report, First Committee, Sixth Plenary Meeting, supra note 1 (discussion of proposed amendments to article 6, the immediate precursor of article 7), in Official Records, supra note 1, paras. 37-44, at 202; Report, First Committee, supra note 1, at 13-14 (proposal adopted as to article 6 for consideration at the 1980 Conference), reprinted in Official Records, supra note 1, paras. 2-3, at 87; Tenth Session Report, supra note 1, paras. 139-40, at 65, paras. 145-47, at 66-67 (proposed amendment to draft article 13, another ancestor of Convention article 7),
not possible, questions not expressly settled in the Convention are to be settled "in conformity with the law applicable by virtue of the rules of private international law." Thus, the language of the Convention points to domestic law as the source for a definition of validity. It is clear from article 4(a) that because the Convention excludes all matters of validity, domestic law will govern such matters. Article 7(2) makes it apparent that domestic law not only governs validity, but indeed must define it as well.

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

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

48. See CISG, supra note 1, art. 7(2), at 3, reprinted in 19 I.L.M. 668, 673 (1980).
49. Id., reprinted in 19 I.L.M. at 673.
50. See Kahn, supra note 38, at 962. When a matter is not governed by the Convention, "recourse to domestic law is necessary, because a development of the Uniform Sales Law into fields not governed by the Convention would be an infringement of the law-making powers and bodies of the countries whose domestic law should be applied instead of the Uniform Law." Schlechtriem, From the Hague to Vienna—Progress in Unification of the Law of International Sales Contracts?, in The Transnational Law of International Commercial Transactions 133 (1982).
51. By requiring reference to domestic law, the Convention conforms to the traditional rule of private international law that the validity of a contract is determined by the "proper law." A. Dicey & J. Morris, Dicey and Morris On The Conflict of Laws 739 (J. Morris 10th ed. 1980); J. Falconbridge, Essays on the Conflict of Laws § 4, at 381 (2d ed. 1954); R. Graveson, The Conflict of Laws 345 (5th ed. 1965); P. North, supra note 35, at 223. Under the rules of private international law, a court can look to its own law to determine the validity of a contract if the court decides that enforcement of the contract under the proper law would contravene the public policies of the forum. See A. Dicey & J. Morris, supra, at 801-02; J. Falconbridge, supra, § 6, at 387; A. Kuhn, Comparative Commentaries on Private International Law or Conflict of Laws 37 (1937); P. North, supra note 35, at 224. Thus, the analogy: The Convention requires reference to the domestic law that would otherwise be applicable under the rules of private international law to determine the validity of the contract; the rules of private international law permit reference to the public policies of the forum to determine the validity of the contract. See infra notes 60-64 and accompanying text.
52. CISG, supra note 1, art. 7(1), at 3, reprinted in 19 I.L.M. 668, 673 (1980).
of validity. He asserts that article 4(a)'s reference to validity "may not be read so broadly as to import domestic rules that would supplant other articles of the Convention." This argument, however, is not supported by the Convention's legislative history, which demonstrates that the Convention's international character requires deference to mandatory national laws founded on public policy principles. Many governments feared that an international sale of goods law would supplant such laws. To assuage such fears, the drafters excluded from the Convention's scope all matters concerning "the validity of the contract or of any of its provisions." The drafters recognized that certain forms of mandatory national laws exist solely for public benefit—to prevent the occurrence of any event those legislatures deem to be improper. Under

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53. See J. Honnold, supra note 1, § 234, at 259.
54. Id.
55. One of the earliest working group discussions centered on what issues were explicitly excluded from the 1964 Uniform Laws. Article 5(2) of the ULIS preserved "any mandatory provision of national law for the protection of a party to a contract which contemplates the purchase of goods by that party by payment of the price by installments." ULIS, supra note 1, art. 5(2), 834 U.N.T.S. 107, 125, reprinted in 3 I.L.M. 855, 857 (1964). Article 8, the forerunner of Convention article 4(a), stated that the Uniform Law was not concerned "with the validity of the contract or of any of its provisions or of any usage." Id. art. 8, 834 U.N.T.S. 107, 125, reprinted in 3 I.L.M. at 857. The perceived problem was whether the specific reference to the preservation of national laws relating to installment sales implied that all other mandatory rules were superseded by the ULIS, or whether they too were preserved under article 8. See Third Session Report, supra note 1, paras. 60-63, at 16-17, reprinted in Yearbook 1, supra note 1, paras. 60-63, at 136-37. The predominant belief was that regulatory laws would be preserved by article 8, although any such laws which were not confined to the validity of the contract would not be protected. Id. para. 61, at 17, reprinted in Yearbook 1, supra note 1, para. 61, at 136-37. See infra note 56 and accompanying text.
56. Early comments on the ULIS by various countries indicated that governments felt very strongly about their mandatory national rules. Norway, for example, wanted article 5(2) of the ULIS deleted or amended to extend it to all mandatory rules relating to public policy. Analysis of Studies, supra note 1, para. 72, at 28, reprinted in Yearbook 1, supra note 1, para. 72, at 168. It argued that whether a national mandatory rule should be regarded as an imperative for an international transaction should be governed by national law. Id., reprinted in Yearbook 1, supra note 1, para. 72, at 168. The government of Hungary also thought that rules of public policy should prevail over the Uniform Law. Id. para. 74, at 28, reprinted in Yearbook 1, supra note 1, para. 74, at 168.
57. CISG, supra note 1, art. 4(a), at 2, reprinted in 19 I.L.M. 668, 673 (1980).
58. See Honnold, supra note 8, at 23-24. Mandatory national laws of public policy relating to the validity of a contract were left solely to the relevant domestic law. See Senate Hearing, supra note 2, at 26 (statement of Mark R. Joelso, Chairman, Section of Int'l Law and Practice, Am. Bar Ass'n); see also Naon, The UN Convention on Contracts for the International Sale of Goods, in The Transnational Law on International Commercial Transactions 101 (1982) ("validity of usages will depend on the mandatory provisions of the internal law indicated by national conflicts rules"). It was clear that matters such as capacity to make a contract, see J. Honnold, supra note 1, § 66, at 97, error, mistake, fraud, duress and illegality were also excluded from the Convention through article 4(a). Winship I, supra note 1, § 1.02[6], at 1-37; see Reinhart, supra note 1, at 96. The Convention does not overrule domestic laws relating to the validity of a contract. See Tenth Session Report, supra note 1, paras. 74, 76, at 54-55, reprinted in Yearbook 8, supra note 1, paras. 74, 76, at 30. It does not confer validity on a contractual provision if that provision would not be valid under the applicable domestic law. See Commentary,
the Convention, a contractual provision is invalid if enforcing it will produce an effect proscribed by national law.59 This definition of validity comports with that recognized by the traditional rules of private international law. Generally, the validity of the contract is determined under the proper law—the law of the country with the most substantial connection to the contract.60 However, this is subject to a well-known exception: The court need not apply the proper law to a contract if it finds that such application will contravene an important public policy of the forum.61 A court may find a contract invalid, and thus refuse to enforce it, for reasons of justice and morality,62 as well as for less emotional public policy reasons such as negligence and risk of loss,63 and formal requirements for validity.64

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

59. Schlechtriem, supra note 14, § 6.01, at 6-3.
60. See A. Dicey & J. Morris, supra note 51, at 739; J. Falconbridge, supra note 51, § 4, at 381; R. Graveson, supra note 51, at 345; P. North, supra note 35, at 223.
erled when construing the Convention.\textsuperscript{65} It may be argued that such application could be hindered by a broad view of validity. A contractual provision could be valid under one domestic law, yet invalid under another. This argument fails to recognize, however, that article 7(1) discusses uniform application, not uniform results.\textsuperscript{66} Although a broad view of validity—one which recognizes national mandatory laws—may lead to different results in different contracts,\textsuperscript{67} it would not prevent uniform application of the Convention if employed consistently.

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

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


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

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

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

\textsuperscript{70} See supra notes 40-41, 48-50 and accompanying text.

\textsuperscript{71} See infra notes 109-19 and accompanying text.
II. DISCLAIMERS OF IMPLIED WARRANTIES UNDER THE UCC

Under the UCC, there are two types of implied warranties relating to the quality of the goods: fitness for a particular purpose and merchantability. The warranty of merchantability arises by operation of law in a sale of goods transaction in which the seller is a merchant with respect to the goods sold. The seller warrants that the goods "are fit for the ordinary purposes for which such goods are used." The warranty of fitness for a particular purpose arises by operation of law when the seller has reason to know that the buyer has a particular purpose in purchasing goods and that the buyer is relying on the seller's skill or judgment in selecting goods suitable for that purpose. The seller can disclaim either or both warranties by following the methods provided in section 2-316. An examination of that section's language, legislative history and public policy purposes demonstrates that its provisions set forth requirements for validity within the Convention's concept of that term.

A. The Language of Section 2-316

Section 2-316(2) states that "to exclude . . . the implied warranty of fitness for a particular purpose, the seller must clearly disclaim it in a writing signed by the buyer."

73. See id. § 2-314. Section 2-312 implies a warranty of title in contracts for the sales of goods. See id. § 2-312. The issue whether § 2-312 sets forth requirements of validity is beyond the scope of this Note.
75. A sale of goods transaction under the Code is a transaction that consists of the "passing of title from the seller to the buyer for a price," U.C.C. § 2-106(1) (1977), and of anything which is "moveable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action," id. § 2-105(1).
76. "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.
77. Id. § 2-104(1).
79. See infra notes 84-105 and accompanying text.
80. See infra notes 84-108 and accompanying text.
81. See infra notes 109-19 and accompanying text.
82. See infra notes 109-19 and accompanying text.
83. See infra notes 109-19 and accompanying text.
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merchantability . . . the language must mention merchantability and in case of a writing must be conspicuous.\textsuperscript{84} The implied warranty of fitness for a particular purpose may be disclaimed by general language,\textsuperscript{85} but such a disclaimer "must be by a writing and conspicuous."\textsuperscript{86} Such repeated use of the auxiliary verb "must"\textsuperscript{87} is a primary indication of section 2-316(2)’s mandatory character.\textsuperscript{88} "The effect of holding a statute mandatory is to require strict compliance with its letter in order . . . to enable persons to acquire rights under it."\textsuperscript{89} Section 2-316(2)’s mandatory nature indicates that its requirements are those of validity.

These requirements are, however, "subject to"\textsuperscript{90} section 2-316(3).\textsuperscript{91} A seller who has failed to comply with section 2-316(2) may still have made a valid disclaimer under section 2-316(3).\textsuperscript{92} Whereas section 2-316(2)’s requirements are quite specific,\textsuperscript{93} section 2-316(3) allows for generali-
The existence of such generalities may compel the conclusion that section 2-316 sets forth mere guidelines for interpretation of the parties' agreement rather than requirements for valid disclaimers. This argument is unpersuasive, however, because a disclaimer that fails to meet the requirements of either subdivision will be held to be invalid. Section 2-316(3)(a) enables a seller to exclude an implied warranty by using expressions such as "with all faults," "as is," "or other language which in the common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." This is not an automatic disclaimer; the circumstances must be such as to give the buyer reason to know that there is no implied warranty.

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

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

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


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fusal to examine to constitute a disclaimer.100

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

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

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


102. Id. § 2-208(1).

103. See id. § 1-205(2).

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


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

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

B. Legislative History and Policy Considerations

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

113. Section 2-316 refers only to "a buyer." See U.C.C. § 2-316 (1977). The only differentiation contained in the section is found in official comment 8, which speaks of "pro-
merchants have less negotiating ability than others, and their bargaining power may not be great. 114 Although they are not consumers, merchant-buyers ought still to be protected from unbargained language of disclaimers.

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

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

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

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


119. See supra notes 106-08 and accompanying text.
lished a new policy, courts are required to give effect to such policy. It is well recognized in private international law that certain contractual matters, such as risk of loss clauses and Statute of Frauds, are sufficient public policy grounds for refusing to enforce a contract. A logical extension of this reasoning would include among such grounds disclaimers of implied warranties.

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

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

124. Senate Hearing, supra note 2, at 67 (responses of Mr. Orban submitted for the record); see 3 A. Ehrenzweig & E. Jayme, Private International Law §§ 369-371, at 35-37 (1977); Reinhart, supra note 1, at 90. There are situations involving an American buyer and a foreign seller, however, in which the rules of private international law would point to the UCC as the applicable law. The most widely recognized rule for determining a choice of law is to decide which of several jurisdictions has the "most significant relationship to," Restatement (Second) of Conflict of Laws § 188(1) (1969), or is the "center of gravity" of, H. Goodrich & E. Scoles, supra note 35, at 202, the contract. The factors that are to be considered include the places of contracting, negotiating and performing the contract, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation and place of business of the parties. Restatement (Second) of Conflict of Laws § 188(2) (1969); see Whiteside v. New Castle Mut. Ins. Co., 595 F. Supp. 1096, 1098 (D. Del. 1984); Phoenix Can. Oil Co. v. Texaco Inc., 560 F. Supp. 1372, 1379 (D. Del. 1983); Rototron Corp. v. Lake Shore Burial Vault Co., 553 F. Supp. 691, 695-96 (E.D. Wis. 1982), aff'd, 712 F.2d 1214 (7th Cir. 1983); Carriage Bags, Ltd. v. Aerolinas Argentinas, 521 F. Supp. 1363, 1367 (D. Colo. 1981); Adams Laboratories, Inc. v. Jacobs Eng’g Co., 486 F. Supp. 383, 389 (N.D. Ill. 1980); Bunge Corp. v. Biglane, 418 F. Supp. 1159, 1164 (S.D. Miss. 1976). United States courts have applied this rule in conflicts between the laws of two states, see, e.g., Whiteside v. New Castle
disclaimer clause will most often be subject to scrutiny only under that seller's domestic law. If the seller is American, requiring adherence to section 2-316 is not burdensome because such a seller presumably will be familiar with Code provisions. Thus, the initial effect of a determination that a clause is invalid under the UCC is not unreasonable.

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

Mut. Ins. Co., 595 F. Supp. 1096, 1098 (D. Del. 1984); Johnston Assocs. v. Rohm & Haas Co., 560 F. Supp. 916, 917 (D. Del. 1983); Rototron Corp. v. Lake Shore Burial Vault Co., 553 F. Supp. 691, 695-96 (E.D. Wis. 1982), aff'd, 713 F.2d 1214 (7th Cir. 1983), as well as in conflicts between the laws of a state and a foreign nation, see Gulf Trading & Transp. Co. v. The Vessel Hoegh Shield, 658 F.2d 363, 366-67 (5th Cir. 1981), cert. denied, 457 U.S. 1119 (1982); Phoenix Can. Oil Co. v. Texaco Inc., 560 F. Supp. 1372, 1379 (D. Del. 1983); Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1113, 1122 (S.D.N.Y. 1982); Carriage Bags, Ltd. v. Aerolinas Argentinas, 521 F. Supp. 1363, 1366-67 (D. Colo. 1981); Edinburgh Assurance Co. v. R.L. Burns Corp., 479 F. Supp. 138, 150, 152-54 (C.D. Cal. 1979), aff'd in part, rev'd and remanded in part on other grounds, 669 F.2d 1259 (9th Cir. 1982). If a foreign seller is bound by the UCC, it is because a tribunal has declared that under the rules of private international law, the UCC is the law with the most significant relationship to the transaction. In such a situation, the foreign seller has a sufficient relationship to the United States to justify his being bound by American law. The parties are always free to include a choice of law clause in their contract. See supra note 17 and accompanying text. It is unclear whether a clause stating that the law of a particular country applies to a contract is an implied exclusion of the Convention under article 6, or even whether such an exclusion would be effective. See supra note 38 and accompanying text. If the choice of law clause operates as an exclusion of the Convention, there is no difficulty in deciding the validity of the disclaimer clause: Such a determination is made according to the chosen law. See supra note 17 and accompanying text. If the choice of law clause does not effectively exclude the Convention, however, that law will still be applicable to those areas of the contract to which the Convention does not apply. See generally Dore, Choice of Law Under the International Sales Convention: A U.S. Perspective, 77 Am. J. Int'l L. 521, 525-39 (1983) (discussing jurisdictions of Code and Convention in different choice of law situations). Thus, the validity of the disclaimer clause will still be made according to the domestic law chosen by the parties.


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

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


129. See id. § 1-103.
severability must be made under the common law.

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

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


\text{135. See Schlechtriem, supra note 14, § 6.01, at 6-4. A body of law is needed to fill the void. The choice is between the domestic law that invalidated the provision and the Convention. Kahn, supra note 38, at 956.}
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the gap caused by severance. Additionally, because national laws are considered to be weaker than international norms, the UCC should go no further than determining the validity of the disclaimer clause. The gap that application of section 2-316 has created should therefore be filled with the Convention provisions governing the issue of conformity of the goods.

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

CONCLUSION

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

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

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

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

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

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

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

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

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

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

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