**Northwestern Journal of International Law & Business**

Volume 16
Issue 2 *Winter*

Winter 1996

# The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods

Richard E. Speidel

# SYMPOSIUM

# The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods

*Richard E. Speidel**

## I. HORIZONTAL UNIFORMITY IN CONTRACTS FOR THE SALE OF GOODS

Uniformity in commercial law among the states of the United States is an important objective. This is a principal goal of the Uniform Commercial Code (UCC), which was sponsored by the National Conference of Commissioners on Uniform State Law (NCCUSL) and the American Law Institute (ALI) and has been enacted by the legislatures of 49 states rather than by act of Congress. The UCC achieves uniformity from the "ground up," leaving the task of uniform interpretation to courts and arbitrators and the primary responsibility for revision to NCCUSL and the ALI, its private sponsors.[1] A center-

* Richard E. Speidel, Beatrice Kuhn Professor of Law, Northwestern University School of Law. This article is based upon a paper given at the 5th Annual Conference of the Journal of Contract Law, held in Chicago in September, 1994. The conference was sponsored by Northwestern University School of Law, Emory School of Law and Freehill Hollingdale and Page, Sydney, N.S.W., Australia.

[1] For a critique of this private lawmaking process, see Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995).

piece of this system of domestic commercial uniformity is Article 2, Sales.

### A. International Developments

Similarly, it is agreed that horizontal uniformity in (or the unification of) transnational commercial law is equally important. This was a primary goal of the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG),[2] which is now in force in the three NAFTA trading partners: the United States since January 1, 1988, Canada since May 1, 1992[3] and Mexico since January 1, 1989.[4] CISG will be in force in a total of 47 countries by the end of 1995.[5]

In the United States, CISG is a self-executing treaty with the preemptive force of federal law. Unless otherwise agreed, CISG applies to "contracts for sale of goods between parties whose places of business are in different States. . .when the States are Contracting States."[6]

---

2 U.N. Conference on Contracts for the International Sale of Goods, Final Act April 11, 1990, U.N. Doc. A/Conf. 97/18, *reprinted in* S. TREATY DOC. No. 98-9, 98th Cong., 1st Sess. and 19 I.L.M. 668 (1980)[hereinafter CISG]. See 15 U.S.C.A. App. (Supp. 1995).

3 Laura A. Donner, *Impact of the Vienna Sales Convention on Canada*, 6 EMORY INT'L L. REV. 743 (1992).

4 Jorge Barrera Graf, *The Vienna Convention on International Sales Contracts and Mexican Law: A Comparative Study*, 1 ARIZ. J. INT'L & COMP. L. 122 (1982).

5 See Journal of Law and Commerce CISG Contracting States and Declarations Table, 14 J.L. & COM. 235 (1995)(as of April, 1995). There is a United Nations "hotline" for the current state of ratifications. Dial (212) 963-5047.

CISG is supplemented by a Convention on the Limitation Period in the International Sale of Goods, June 14, 1974, U.N. Doc. A/Conf.63/15, and an amending Protocol, April 10, 1980, U.N. Doc. A/Conf.97/18, to which the United States Senate has given advice and consent. See S. Treaty Doc. No. 10, 103d Cong., 1st Sess. (1993)(official text) and 139 Cong. Rec. S16,213 (daily ed. Nov. 18, 1993). The Convention took effect on December 1, 1994. See Peter Winship, *The Convention on the Limitation Period in the International Sale of Goods: The United States adopts UNCITRAL's First Born*, 28 INT'L L. 1071 (1994).

In addition, a draft convention on Electronic Data Interchange has been prepared to facilitate the transaction of international trade by computer. See UNCITRAL, *Report of the Working Group on Electronic Data Interchange (EDI) on the Work of its Twenty-Eighth Session*, A/CN.9/406 (Nov. 17, 1994). See also, C. Nicoll, *EDI Evidence and the Vienna Convention*, 1995 J. BUS. L. 2 (1995).

6 CISG art. 1(a). If a party "has more than one place of business, the place of business is that which the closest relationship to the contract and its performance. . . ." CISG art. 10(a). *See also* CISG art. 1(2), which states that the fact that the parties have places of business in different states is to be "disregarded" when that 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." In these cases, CISG applies "when the rules of private international law lead to the application of the law of a Contracting State." CISG art. 1(b). Because of a reservation by the United States, CISG art. 1(b) is not law in the United States. The complexity of choice of law under CISG is discussed in Arthur Rosett, *infra* note 9 at 273-81; Isaak I. Dore, *Choice of Law Under the International Sales Convention: A United States Perspective*, 77 AM J. INT'L L. 521 (1983).

When applicable, CISG preempts Article 2, Sales, of the UCC. When inapplicable, however, CISG does not displace Article 2. Both operate within their own sphere, creating horizontal bands of uniformity for the domestic and the international contract for sale of goods.

For some, CISG resolves the myths and enigmas of the *lex mercatoria* in the form of a multilateral treaty with the force of law.[7] Unlike the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[8] however, Congress did not enact legislation to implement CISG and made no provision for coordination with the domestic law of sales.[9] Thus, separate horizontal bands of uniform sales law exist in the United States without a federal mechanism for coordination or harmonization.

---

[7] See Kenneth C. Randall & John E. Norris, *A New Paradigm for International Business Transactions*, 71 WASH. U. L. Q. 599 (1993). They hail the replacement of the evolving *lex mercatoria*, which was uncertain in content and legal effect and dependent upon choice of law, with modern international commercial law treaties which have the force of law. For extended discussions of the nature, content and legal effect of the *Lex Mercatoria*, see also, LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW (1983); Georges R. Delaume, *Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria*, 63 TULANE L. REV. 575 (1989); Keith Highet, *The Enigma of the Lex Mercatoria*, 63 TULANE L. REV. 613 (1989); Harold J. Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 2 EMORY J. INT'L DISPUTE RES. 235 (1988).

More recently, however, a competitor to CISG has emerged. UNIDROIT has published its Principles for International Commercial Contracts (PICC), which both draw upon and expand CISG. UNIDROIT, Principles of International Commercial Contracts (1994). *See* Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORDHAM L. REV. 281 (1994). These principles, expressed in a form of a transnational restatement, have no legal force unless they are chosen by the parties to an international contract to govern their transaction or applied by a court or arbitrator by analogy. But they reflect a more ambitious and, for some at least, more persuasive statement of the *lex mercatoria* for international commerce.

[8] Usually called the New York Convention, see U.N. Doc. E/Conf.26/9 Rev.6/10 (1958), the U.N. Convention entered into force for the United States on Dec. 29, 1970. See 1970 U.S. Code Cong. & Admin. News 3601(legislative history). Congress implemented the Convention by an amendment to the Federal Arbitration Act, 9 U.S.C. §§ 1-16, see Pub. L. No. 91-368, 84 Stat. 692 (1970)(codified at 9 U.S.C. §§ 201-208). In an effort to accommodate international and federal (domestic) arbitration law, 9 U.S.C. § 208 provides that the domestic Federal Arbitration Act "applies to actions and proceedings" brought under the U.N. Convention to the extent. . .not in conflict" with the implementing legislation or the "Convention as ratified by the United States." *See generally*, I. MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT, Chapter 44 (Supp. 1995).

[9] *See* Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 303-04 (1984), who warned against this risk. A similar concern was raised by Professor Harold J. Berman. *See* Peter B. Maggs, *International Trade and Commerce*, 42 EMORY L.J. 449, 469-71 (1993)(analyzing Berman's argument).

### B. Revision of Domestic Sales Law

Article 2, Sales of the UCC, which has remained constant since 1958, is now under revision.[10] Article 2 was designed to replace the Uniform Sales Act of 1906 which, in turn, was based upon the British Sale of Goods Act of 1893. Both of these earlier statutes purported to codify the common law of sales in what might be called a "classical" form.[11] Article 2, however, represented a sharp break with these earlier statutes, both in form and content. Drafted in the realist tradition, Article 2 relies upon a broad definition of agreement and a collection of flexible standards rather than rules to mesh the particular sale with the surrounding business context.[12] Together with the Restatement, Second, of Contracts, Article 2 is a pillar of what has been called "neoclassical" contract law.[13]

From the beginning, the Drafting Committee questioned the extent to which Article 2 should be revised to harmonize with CISG. Although state law cannot vary CISG, state law can be revised to clarify the relationship or to achieve consistency with CISG. In 1991 Professor Peter Winship properly concluded that no systematic study of CISG had been done to provide answers to the revisers.[14] After suggesting a strategy for coordination, Professor Winship did a careful comparative analysis which has been very helpful to the Drafting Committee.[15] As a result, the October, 1995 Draft of the revision

---

10 In 1988, the Permanent Editorial Board (PEB) for the Uniform Commercial Code appointed a Study Group to consider whether Article 2, Sales, should be revised. Based upon its Preliminary Report, see PEB STUDY GROUP: UNIFORM COMMERCIAL CODE ARTICLE 2, (Preliminary Report 1990), *reprinted as An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981 (1991) [hereinafter *Appraisal*], the Study Group's answer was yes. *See PEB Study Group: Uniform Commercial Code, Article 2 Executive Summary*, 46 BUS. LAW. 1869 (1991).

In response, the National Conference of Commissioners on Uniform State Law (NCCUSL) appointed a Drafting Committee to revise Article 2, to which I serve as Reporter, in late 1991. The most recent draft of revised Article 2, Sales, is dated Oct. 1, 1995, hereinafter referred to as the October, 1995 Draft. *See generally, Symposium: The Revision of Article 2 of the Uniform Commercial Code*, 35 WM. & MARY L. REV. 1299 (1994).

11 *See* Kevin M. Teeven, *A History of Legislative Reform of the Common Law Contract*, 26 U. TOL. L. REV. 35, 69-76 (1994), who calls the sale of goods a "paradigmatic transaction" for formalists such as Langdell and Willison.

12 For a discussion of Article 2's underlying policies, see *Appraisal, supra* note 10, at 988-994.

13 *See* Robert Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103 (1988) and a response, Jay Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283 (1990).

14 *See generally*, 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, 45 (1991).

15 In sum, Professor Winship thought it unlikely that the UCC sponsors would adopt CISG with little or no change. *Id.* at 47. Rather, he argued that a strategy for coordination "might identify (1) issues so important that differences between the two laws should be justified; (2)

shows the occasional influence of CISG[16] and the Official Comments, when completed, will discuss and compare its relevant provisions.

Nevertheless, the Drafting Committee has not embraced CISG as a model for revision. This stance partially reflects NCCUSL's historical ambivalence toward international commercial unification.[17] Ironically, the desire for horizontal uniformity in sales law among the states of the United States and among the nations has not been translated into strong pressure for vertical uniformity between domestic (state) and international sales law (federal).[18] At best, the process of harmonization to date has been *ad hoc* and reflects highly selective borrowing.

## II. The Uneasy Case for Vertical Uniformity

To what extent should CISG serve as a model for the revision of Article 2, Sales? Should the Drafting Committee accept it *in toto* or should the process of piecemeal borrowing continue? If the latter, how does one decide what and when to borrow? These questions highlight the reality that any proposed marriage of national and international commercial law is indeed "complex and uncertain."[19] Nevertheless, a case for some vertical uniformity between CISG and revised Article 2 can be made.

---

issues so relatively unimportant that there is no reason for differences even in language; and (3) devices to ensure that sellers and buyers know how the two laws complement each other." *Id.* at 48.

16 Most notably, repeal of the statute of frauds, U.C.C. § 2-201(a)(Tentative Draft October 1, 1995), treatment of "no oral modification" clauses, U.C.C. § 2-210(c)(Tentative Draft October 1, 1995), adoption of a general mitigation of damage policy, U.C.C. § 2-703(b)(Tentative Draft October 1, 1995), deletion of the complex delivery terms in Part 3 of the 1990 Official Text, U.C.C. § 2-309 (Tentative Draft October 1, 1995), and expansion of the seller's power to "cure" a nonconforming tender, U.C.C. § 2-610 (Tentative Draft October 1, 1995).

17 *See* Peter Winship, *The National Conference of Commissioners on Uniform State Laws and the International Unification of Private Law*, 13 U. Pa. J. Int'l Bus. L. 227 (1992), tracing the history of NCCUSL's involvement. This ambivalence is understandable. It is hard enough to persuade 50 states to enact uniform, domestic legislation, much less enact domestic legislation based upon international conventions.

18 This precise issue does not arise in Great Britain, which has not adopted CISG. *See* Robert G. Lee, *The United Nations Convention on Contracts For the International Sale of Goods: OK for the UK?*, 1993 J. Bus. L. 131. *See also*, Barry Nicholas, *The Vienna Convention on International Sales Law*, 105 Law Q. Rev. 201 (1989). The domestic law of sales is governed by the 1979 Sale of Goods Act, which consolidated without substantive change the 1893 Sale of Goods Act, as occasionally amended. See Michael Furmston, Sale and Supply of Goods 1-2 (1994).

19 Joseph M. Lookofsky, *Loose Ends and Contorts in International Sales: Problems in Harmonization of Private Law Rules*, 39 Am. J. Comp. Law. 403, 415 (1991).

The general arguments for uniformity among the states of the United States apply with equal vigor to the quest for uniformity among the nations of the world in the area of private international sales law. In transactions which cross national boundaries or involve citizens residing in different countries, uniform international sales law avoids disputes over which domestic law applies or the uncertain content and legal status of the *lex mercatoria.* This certainty should promote the free flow of goods, credit, services and persons between the nations, stimulate economic and social development and neutralize pressure for uniformity from other sources.[20] Uniformity also facilitates transaction planning and dispute settlement by the parties and promotes a consistent approach to interpretation by courts and arbitrators.[21]

There are also special needs for vertical uniformity between international and domestic sales law. Although CISG and Article 2 operate in separate spheres, the transactions governed do not observe the sometimes arbitrary jurisdictional lines between domestic and international law. For example, uniformity would eliminate uncertainty and surprise over the scope of state (UCC) and federal (CISG) sales law and avoid disruptions in transactions that originate as domestic sales and conclude, through export, as international sales. This is particularly true where disputes over the quality of the goods are directly involved.[22] Since this import-export transaction pattern is a reality in international sales, a sharp line between domestic and international sales law seems contrived.

In addition, there are other reasons to doubt an approach that appears to treat international sources as an inherently hostile influence on the domestic system.[23] According to Randall and Norris, a new paradigm is emerging in international commercial transactions. The paradigm is rooted in the centralization and interdependence of

---

20 *See, e.g.*, National Conference of Commissioners on Uniform State Laws, 1992-93 REFERENCE BOOK at 2 (1992), stating the probable consequences of non-uniform state law.

21 *See generally, The Need for Uniform Interpretation of the 1980 U.N. Convention on Contracts for the International Sale of Goods*, 50 U. PITT. L. REV. 197 (1988), which discusses the value of transnational uniformity. For discussion of the problems of uniform interpretation of CISG among the enacting countries, *see* Peter Winship, *Private International Law and the U.N. Sales Convention*, 21 CORNELL INT'L L.J. 487 (1988). *See also* Michael J. Bonell, *International Uniform Law in Practice—Or Where the Trouble Begins*, 38 A. J. COMP. L. 865 (1990).

22 *See infra* text accompanying notes 75-105. *See* Winship, *supra* note 14, at 45-47. For criticism, see Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183, 196-97 (1994).

23 *See* Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185 (1993), who explains but does not defend the dualistic conception.

international markets and reflected in the replacement of private choice of law and the *lex mercatoria* with multilateral commercial treaties, of which CISG is but one example. In reality, integrated transnational commercial transactions are facilitated by modern computer technology and governed by supernational public norms.[24] In this new paradigm, a dualism between domestic and international sales law seems arbitrary, if not quaint and archaic.

Despite these developments and the perceived benefits of vertical uniformity,[25] the Drafting Committee chose not to adopt CISG as the model for the revision of Article 2, Sales.[26]

## III. CISG: An Inappropriate Model for Article 2 Revision

The Drafting Committee's position is supported by a number of critical differences which cast doubt upon the fungibility of CISG as part of the UCC. They call in question the "fit" of CISG should it be adopted *in toto* as the domestic law of sales. They suggest that vertical uniformity based upon CISG is not advisable.

Briefly stated, the following factors support the Drafting Committee's position that the CISG should not be used as a model for UCC revision: (1) absence of compatible background law; (2) Article 2 is part of an integrated commercial code; (3) nature of the code; (4) limitations in scope: (5) differences in drafting process; (6) differences in substance; and (7) technological and transactional obsolescence.

### A. Absence of compatible background law

Article 2 was drafted and operates within a context of established principles of domestic contract law. To the extent not displaced, there are fall-back principles that reduce the need for complete elaboration of all aspects of contract law in a code.[27] For example, if Article 2 does not provide for or displace a principle of contract formation (i.e., what is an "offer?"), the common law or the Restatement, Second of

---

24 Kenneth C. Randall & John E. Norris, *A New Paradigm for International Business Transactions*, 71 Wash. U. L. Q. 599 (1993).

25 For example, uniformity between international and domestic law rather than uniformity among the states or among nations.

26 *But see* Alan Watson, Legal Transplants: an Approach to Comparative Law 100-01 (2d ed. 1993), who argues for a single code of private law for the Western world, with each nation free to modify that not to its liking. He suggests that if the basic code were regularly revised in light of domestic modifications, a "virtually unitary legal system" would result. For Watson, the main barrier to such a move is the "psychological value of having one's own legal system" rather than the lack of fit between a "transplant" and domestic law.

27 U.C.C. § 1-103 (1994).

Contracts, may fill the gap.[28] Similarly, "validity" doctrines dealing with fraud, duress, mistake and undue influence are available to supplement where not displaced by the UCC. Common law and code mesh with an acceptable level of compatibility and certainty, even though choice of law questions still remain.

CISG, on the other hand, has no fall-back base of established international principles except for the elusive *lex mercatoria.* Beyond that there is the chaos of domestic law and the uncertainty of international choice of law.[29] Thus, since CISG was drafted to be independent of rather than to mesh with domestic law, its utility as a substitute for Article 2 can be questioned.

### B. Article 2 is part of a commercial code

Article 2 is part of a commercial code that also covers leases of goods, commercial paper, funds transfers, letters of credit, documents of title and secured transactions. There are common definitions and policies and a sense of functional unity in the UCC.[30]

CISG, on the other hand, does not at present have a comprehensive international commercial treaty network within which to fit. Apart from such staples as the Incoterms of the International Chamber of Commerce and Uniform Customs and Practices 500 for letters of credit, there are huge gaps in coverage. Moreover, without substantial revision, CISG would not mesh with other articles of the UCC.

### C. Nature of code

Article 2 is, at best, part of a code drafted in the common law tradition. It goes as far as it goes, but no further. Thus, unless the code displaces an otherwise relevant principle of law, that principle applies.[31]

---

28 I have elsewhere called this a "marriage of convenience" between Article 2, Sales, and the time tested principles of the common law. Richard E. Speidel, *Contract Formation and Modification Under Revised Article 2*, 35 WM. & MARY L. REV. 1305, 1309-10 (1994). *See generally*, Nathan M. Crystal, *Codification and the Rise of the Restatement Movement*, 54 WASH. L. REV. 239 (1979).

29 The new UNIDROIT Principles of International Commercial Contracts would operate as a backup. *See supra* note 7.

30 *See* Julian B. McDonnell, *Definition and Dialogue in Commercial Law*, 89 Nw. U. L. REV. 623 (1995).

31 The U.C.C. derived from the "common law, not the civil law tradition" and is, more appropriately, a "collection of statutes bound together in the same book—which goes as far as it goes and no further." Grant Gilmore, *Article 9: What is Does for the Past*, 26 LA. L. REV. 285, 286 (1966). *But see* RICHARD M. BUXBAUM, *Is the Uniform Commercial Code a Code?, in*

CISG, on the other hand, resembles a code in the civil law tradition. Disputes within its scope for which there are no clear answers 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."[32]

## D. Scope

Both CISG and Article 2 fail to cover all aspects of the sales transaction. CISG, however, is less comprehensive than Article 2. For example, CISG is not concerned with the "validity of the contract or of any of its provisions or of any usage."[33] This excludes defenses that the contract is against public policy or should be avoided because of mistake, fraud, duress or unconscionability. Similarly, CISG does not cover the sale of goods "bought for personal, family or household use,"[34] or "apply to the liability of the seller for death or personal injury caused by the goods to any person."[35] Moreover, unless "otherwise expressly provided," CISG is not concerned with the "effect which the contract may have on the property in the goods sold"[36] or the rights of third persons who are not parties to the contract. In essence, CISG is limited to two-party commercial contracts for sale and assumes that all sellers and buyers have relatively equal bargaining capacity.

The 1990 Official Text of Article 2, with its special rules for "merchants,"[37] also covers commercial sales and, like CISG, leaves most rules of validity to other law.[38] Moreover, non-merchant sellers and buyers are governed by the same principles of liability and rem-

---

RECHTSREALISMUS, MULTIKULTURELLE GESELLSCHAFT UND HANDELSRECHT 197, 220 (1994)(UCC is indeed a code within the American frame of reference).

32 CISG art. 7(2).

33 CISG art. 4(a). For an excellent analysis, see Helen E. Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on the International Sale of Goods*, 18 YALE J. INT'L L. 1 (1993). *See also*, Harry M. Flechtner, *More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, "Validity" and Reduction of Price Under Article 50*, 14 J. L. & COM. 153, 165-169 (1995).

34 CISG art. 2(a). An exception is where the seller "at any time before or at the conclusion of the contract, neither knew nor ought to have known that such goods were bought for any such use." As a practical matter, the sale by a Canadian commercial seller to a consumer buyer in the United States is not covered by CISG.

35 CISG does not apply to the "liability of the seller for death or personal injury caused by the goods to any person." CISG art. 5.

36 CISG art. (4)(b).

37 *See* U.C.C. § 2-104(1), cmt. 2.

38 *See* U.C.C. § 1-103.

edy whether they are commercial or consumer parties.[39] Unlike CISG, however, protection is provided against unconscionable contracts and clauses[40] and buyers injured in person or property by breach of warranty have claims that may, in many states, be asserted against remote sellers without privity of contract.[41] Finally, Article 2 determines the effect of a contract for sale on interests in the goods claimed by third persons[42] and, to a limited extent, resolves disputes between one party to the contract and the creditors of the other.[43]

In sum, Article 2, unlike CISG, is not strictly limited to the two-party commercial transactions where claims of economic loss are involved and contains a potentially powerful validity principle in the unconscionability concept.[44] The October, 1995 Draft of Revised Article 2 accentuates the differences by incorporating a number of consumer protection provisions[45] and by accelerating the gradual decline of the privity requirement in warranty disputes.[46]

### E. Differences in drafting process

There are similarities in the processes by which CISG and Article 2 were formulated and their ultimate reliance upon persuasion rather than imposition to achieve legal effect. Both processes started from an existing legal framework: Article 2 from the Uniform Sales Act and CISG from the two 1964 Hague Conventions.[47] Both involved

---

39 *But see* U.C.C. § 2-719(3), where a special rule "in case of consumer goods" is provided. "Consumer goods," for purposes of Article 2, are defined in U.C.C. § 9-109(1). *See* U.C.C. § 2-103(3).

40 U.C.C. § 2-302. *See* U.C.C. § 2-316(2).

41 U.C.C. § 2-715(2)(b). The scope of the privity defense in each state depends upon what alternative to U.C.C. § 2-318 has been enacted and relevant judicial decisions.

42 U.C.C. § 2-403.

43 For example, unsecured creditors of a seller who has retained identified goods are subject to the buyer's right to those goods under U.C.C. § 2-716(1) and U.C.C. § 2-502. *See* U.C.C. § 2-402(1). Similarly, creditors of and purchasers from a buyer in possession may be subject to the seller's limited right to reclaim the goods under U.C.C. § 2-702(2).

44 The general unconscionability standard in U.C.C. § 2-302 is implemented in particular situations, such as the "battle of the forms," U.C.C. § 2-207, and disclaimers of implied warranties, U.C.C. § 2-316(2).

45 *See, e.g.*, U.C.C. §§ 2-210(b)(no oral modification clause not enforceable), 2-316(e) (disclaimer of implied warranty), 2-317(3) (cumulation of warranties), 2-709(d) (remedies where limited remedy fails essential purpose), and 2-710(a) (liquidated damages)(Tentative Draft October 1, 1995).

46 U.C.C. § 2-318 (Tentative Draft October 1, 1995).

47 *See* Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107 (1972); 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). The United States neither participated in the drafting nor approved the final product.

representative working groups or drafting committees under the auspices of credible organizations: Article 2 under the National Conference and the American Law Institute, and CISG under UNCITRAL. Both produced a product that had no legal effect in the United States until formally adopted: Article 2 by the states of the United States rather than by Congress, and CISG by ratification.[48] Finally, there were safety valves in both cases: Article 2 through the process of non-uniform amendments by the states and CISG through reservations by the ratifying country.

The CISG process, however, involved representatives from different legal traditions and different economic regions of the world. A primary objective of unification was to achieve independence from domestic sales law. The result tends to be a compromise among legal traditions and economic regions rather than a document that responds to the realities of international sales.[49]

The UCC process involved representatives from the same legal tradition attempting to draft a code that both meshed with the existing legal background and responded to domestic transactional realities. Although compromise was clearly involved, it was of a different order than in CISG. One should not be surprised, then, that the final product looks, feels and is different.[50]

### F. Differences in substance

There are differences in substance between CISG and the 1990 Official Text of Article 2. For example, CISG has no statute of frauds or parol evidence rule[51] and does not define delivery terms in shipment contracts.[52] Further, the contract formation articles are highly

---

48 *See* Peter Winship, *Congress and the 1980 International Sales Convention*, 16 GA. J. INT'L & COMP. L. 707 (1986).

49 *See* Alejandro M. Garro, *Reconciliation of Legal Traditions in the United Nations Convention on the International Sale of Goods*, 23 INT'L LAW. 443, 444 (1989).

50 Moreover, CISG was never studied by NCCUSL or the ALI and was not subjected to scrutiny by the law revision commission of any state.

51 *See* CISG arts. 11 and 12. The October, 1995 Draft of Article 2 repeals the statute of frauds for the formation and modification of contracts for the sale of goods. U.C.C. § 2-201(a)(Tentative Draft October 1, 1995).

52 *See* J.D. Feltham, *C.I.F. and F.O.B. Contracts and the Vienna Convention on Contracts for the International Sale of Goods*, 1991 J. BUS. L. 413 (1991). The October 1, 1995 Tentative Draft of Article 2 repeals the definitions of delivery terms in §§ 2-319 through 2-324 of the 1990 Official Text and leaves their meaning to trade usage, course of dealing and, if all else fails, the Incoterms as published by the International Chamber of Commerce. U.C.C. § 2-309 (Tentative Draft October 1, 1995).

formalistic[53] and fail to respond to the use and abuse of standard forms in the formation process.[54] Similar rigidity can be found in the risk of loss[55] and "force majeure" provisions,[56] which resemble concepts out of the 19th century British Sale of Goods Act.

Another well-publicized example involves the buyer's rights when the seller tenders non-conforming goods. Unlike Article 2, the CISG buyer may not reject the goods and avoid price liability but can, in some situations, require the seller to repair or replace them.[57] Similarly, the CISG seller has a broader right to cure non-conformities[58] and hold the buyer to its obligation to pay the adjusted price.[59] Finally, the CISG buyer may not cancel or "avoid" the contract unless there is a "fundamental breach."[60] In fact, the alternative remedies of "cover" or market damages depend upon a proper avoidance of the contract.[61] These rights and remedies, which favor preserving the contract and implementing the civil law preference for specific perform-

---

53 I.e., there is an exclusive reliance on the concepts of offer and acceptance. CISG arts. 14-24. For example, the effect of conduct by both parties on the formation of a contract is not sufficiently addressed. *See* U.C.C. § 2-203(a) (Tentative Draft October 1, 1995); PICC art. 2.1 (contract may be made by conduct).

54 *See* Henry D. Gabriel, *The Battle of the Forms: A Comparison of CISG, the UCC and the Common Law*, 49 BUS. LAW. 1053 (1994). The October, 1995 Draft of Article 2, influenced by PICC arts. 2.19 - 2.22, now provides a general principle to govern the effect of assent to standard forms and a special rule to deal with conflicting standard terms. U.C.C. §§ 2-206 and 2-207 (Tentative Draft October 1, 1995).

55 CISG arts. 66 - 70. *See* U.C.C. § 2-516 (Tentative Draft October 1, 1995), where the risk of loss principles are stated in one section. *See also*, Mitchell Stocks, *Risk of Loss Under the Uniform Commercial Code and the United Nations Convention on Contracts for the International Sale of Goods: A Comparative Analysis and Proposed Revision of UCC Sections 2-509 and 2-510*, 87 NW. U. L. REV. 1415 (1993).

56 *See* CISG art. 79(1), which limits a party's excuse to cases where the failure to perform was "due to an impediment beyond his control [that] he could not reasonably be expected to have taken. . .into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences." The October 1, 1995 Tentative Draft, which follows U.C.C. §§ 2-613 - 2-616 of the 1990 Official Text of Article 2, provides a broader framework for excuse. *See* U.C.C. §§ 2-616 - 2-618 (Tentative Draft October 1, 1995).

57 CISG art. 45(1)(a) and art. 46. The buyer's power to reject a nonconforming tender is preserved under revised Article 2. U.C.C. § 2-603 (Tentative Draft October 1, 1995). A buyer who fails to make an "effective rejection" is liable for the price. U.C.C. §§ 2-607(a)(2) and 2-722(a)(1) (Tentative Draft October 1, 1995).

58 CISG art. 48. The "cure" provision in revised Article 2 has been expanded to follow CISG art. 48(1). U.C.C. § 2-610(a)(2)(ii) (Tentative Draft October 1, 1995).

59 CISG art. 50. The scope of the buyer's duty to pay is stated in CISG art. 52.

60 CISG art. 49. "Fundamental breach" is defined in CISG art. 25. *See* Richard E. Speidel, *Buyer's Remedies of Rejection and Cancellation under the UCC and the Convention*, 6 J. CONT. L. 131 (1993).

61 CISG art. 75 and art. 76. Remedies under revised Article 2 are cumulative and do not explicitly depend upon cancellation. See U.C.C. § 2-703(c) (Tentative Draft October 1, 1995).

ance,[62] are plausible when the realities of time and place in international trade are considered.[63] They pervade the CISG remedial structure for both parties and are difficult to accommodate to domestic sales law built on the common law tradition.

A final example is the duty of good faith. CISG imposes no explicit duty of good faith in the performance or enforcement of the contract for sale. Rather, Article 7(1) states that in the *interpretation* of the Convention, "regard is to be had to. . .the need to promote. . .the observance of good faith in international trade." No definition of good faith is provided.[64]

"Good faith," however, is an important duty in the UCC in particular[65] and domestic contract law in general.[66] Indeed, "good faith and fair dealing" is a fundamental idea underlying the UNIDROIT Principles of International Commercial Contracts as well.[67] Thus, CISG appears to differ on this significant point. Although commentators have argued that the difference can be minimized through the interpretation process,[68] the impression of backwardness remains.

### G. Technological and transactional obsolescence

Both CISG and Article 2 are behind the technological times, in that they fail to respond to the current reality that both domestic and international sales are increasingly made by computer. For example, in electronic data interchange (EDI), there is no "writing" as that term is defined in CISG[69] and the UCC.[70] Presumably, this gap between technology and commercial law will be closed in part in domes-

---

62 *See* Steven Walt, *For Specific Performance Under the United Nations Sales Convention*, 26 TEX. INT'L L. J. 211 (1991).

63 *See* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 64-65 (2d ed. 1991)[hereinafter HONNOLD], who says that the "international sales. . .problem has special significance because of the cost of transporting goods to a distant buyer and the difficulty of disposing of rejected goods in a foreign country."

64 *Id.* at 146-47 (2d ed. 1991)(meaning of "good faith" should be derived from a "common core" of meaning in domestic or international law).

65 U.C.C. §§ 1-203, 1-201(19) and 2-103(1)(b).

66 *See* RESTATEMENT (SECOND) CONTRACTS §§ 205 & 208 (1978).

67 PICC art. 1.7. *See also*, Klein & Bachechi, *Precontractual Liability and the Duty of Good Faith in International Transactions*, 17 HOUS. J. INT'L L. 1 (1994).

68 In interpretation, regard is also to be had to the Convention's "international character and the need to promote uniformity." Some commentators, however, argue that art. 7(1) imposes a duty of good faith, *see* Winship, *supra* note 14, at 59, or, at the very least, provides a rhetorical device for unification. Amy H. Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, 8 Nw. J. INT'L L. & BUS. 574 (1988).

69 CISG art. 13 ("writing" includes telegram and telex).

70 U.C.C. § 1-201(46).

tic law by appropriate revisions of the UCC[71] and in international law by a UN Convention.[72] In the meantime, computer technology continues to advance and to be used in business at an amazing pace.

Equally important, neither CISG nor Article 2 clearly apply to transactions of increasing economic importance, such as the license of information or computer technology[73] or international currency exchanges.[74] Neither of these omissions is likely to be corrected in the revision of Article 2, Sales.

In sum, although CISG and Article 2 deal with the same transaction type, the contract for sale of goods, CISG should not serve as a model for the revision of Article 2. There are too many differences to surmount. CISG is a code in the civil law tradition. Unlike Article 2, it must survive without the back-up of a surrounding commercial code and an established body of general, domestic contract law. Also, it reflects a compromise among different legal systems and different economic regions more than a systematic response to the needs of international commerce, is limited in scope, is drafted in a formalistic, rule-oriented style that resembles the Uniform Sales Act rather than Article 2, contains numerous substantive differences from Article 2 and is limited to two-party transactions between commercial parties.

## IV. Selective Borrowing: Warranties of Quality

If CISG is not appropriate *in toto* as a model for revising Article 2, Sales, what about selective borrowing in the interest of harmonization? Given the case for vertical uniformity, such an approach is commendable. But, then, when is such borrowing appropriate? Moreover, what is the proper role of a state law-making process in attempting to harmonize state law with potentially preemptive federal law?

### A. Three Test Cases

A testing ground for the harmonization effort is disputes over the quality of goods. Canada, the United States and Mexico have each ratified CISG. Suppose a Canadian seller, whose sole place of busi-

71 *See* U.C.C. §§ 2-208, 2-212 and 2-213 (Tentative Draft October 1, 1995). *See also* U.C.C. §§ 2-102(a) (Tentative Draft October 1, 1995)(new definitions).

72 *See supra* note 1.

73 *See* Thomas L. Lockhart & Richard J. McKenna, *Software License Agreements in Light of the UCC and the CISG*, 70 Mich. B. J. 646 (1991); Arthur Fakes, *The Application of the United Nations Convention on the International Sale of Goods to Computer, Software and Data Base Transactions*, 3 Software L. J. 55, 584-87 (1990).

74 *See* S.C. Veltri, *Should Foreign Exchange be Foreign to Article 2 of the U.C.C.?*, 27 Cornell Int'l L. J. 343, 351-61 (1994).

ness is in Canada, manufactures goods for export to the United States and to Mexico. The product is advertised in both countries. The goods are sold and shipped to a distributor in New York whose sole place of business is in the United States and who then resells to buyers in either Mexico or the United States.[75] Suppose, further, that a resale buyer claims that the goods do not conform to its expectations of quality and that commercial loss has resulted. There is no damage to property or injury to person.

Consider three cases where the degree of conformance between CISG and Article 2 might be important. In the first two, only CISG applies. In Case #3, both CISG and Article 2 apply.

*Case #1.* The claimant is the United States buyer in New York (the distributor) who sues the Canadian seller. CISG applies to this contract for sale between them and the dispute over conformity[76] unless they have excluded the Convention by agreement.[77] Since there are no obvious exclusions under Articles 2 through 4, Article 2 is preempted. Remember, however, that CISG is "not concerned with. . .the validity of the contract or of any of its provisions or of any usage."[78] Thus, CISG applies to everything except where issues of validity are involved.[79]

*Case #2.* The claimant is a Mexican buyer (a resale buyer) from the American distributor. The Mexican buyer's claim against the New York seller is governed by CISG to the same extent as *Case #1* and Article 2 is preempted. But the Mexican buyer has no claim under CISG against the Canadian seller, even though their places of business are in different contracting states; under Article 1(1), CISG only "applies to contracts of sale of goods *between parties*" whose places of business satisfy the jurisdictional requirements. Moreover, Article 4 states that CISG "governs only the formation of the contract for sale and the rights and obligations of the seller and buyer arising from such

---

75 *See generally*, Mark F. Murray, *The Nuts and Bolts of International Product Distribution*, 40 PRAC. LAW. 33 (#1, 1994). The contract for sale is just one of many documents typically involved in an international sale. Also involved may be an "after-sales" service agreement, commercial invoices, a bill of lading, warehouse receipts, an export packing list, a letter of credit and an insurance certificate.

76 CISG art. 1(1)(a), art. 35(1).

77 CISG art. 6.

78 CISG art. 4(1).

79 *See* E. Allan Farnsworth, *Review of Standard Forms or Terms Under the Vienna Convention*, 21 CORN. INT'L L.J. 439 (1988), who suggests that CISG Articles 4 and 6 create a "tripartite hierarchy," with CISG on the bottom, agreements excluding CISG in the middle and domestic law on validity on the top. If no agreement excludes, CISG applies in full only if no validity issues are raised.

a contract" and Article 35(1) states that the seller must "deliver goods which are of the quantity, quality and description *required by the contract.*" CISG, therefore, requires a contract between a seller and a buyer and says nothing about the disposition of third party claims.[80]

*Case #3.* Suppose that the United States distributor in New York resold the goods to a United States buyer in Illinois. If the Illinois buyer sues the New York distributor, Article 2 rather than CISG applies. Their places of business are in the same country. If, however, the Illinois buyer sues the Canadian seller, the jurisdictional test of CISG is satisfied but the seller can defend against the claim on the ground that there was no privity of contract. The Illinois buyer is now in the same position as the Mexican buyer in *Case #2.* If CISG does not apply to third party claims, can the Illinois buyer sue the Canadian seller under Article 2? The Canadian seller is clearly a seller as defined by Article 2[81] and CISG does not specifically foreclose a resort to domestic law. Assuming that such an action is permitted,[82] the Canadian seller's liability to the Illinois resale buyer depends upon the extent to which the seller's warranties are extended to a remote buyer under the applicable version of Article 2.[83]

In all cases, New York, the forum state, has substantial contacts with the transaction and, without CISG, its version of Article 2 would probably apply.[84] So the question is whether there are dramatic differences between CISG and Article 2 when disputes over quality arise and, if so, should they be reduced or eliminated in the revision of Article 2?

---

80 *See* Arthur Rosett, *Critical Reflections on the UN Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 292-93 (1984)(failure to deal with remote buyer problem is a weakness). Professor Honnold, on the other hand, argues that a manufacturer who has participated substantially in a resale to a remote buyer might be a seller for purposes of CISG. HONNOLD, op. cit. *supra* note 63, at 112-14.

81 There is no exclusion because a seller's place of business is in another country. *See* U.C.C. § 2-103(1)(d).

82 And that jurisdiction can be obtained and that New York law applies.

83 The extent to which lack of privity is a defense in economic loss cases varies from state to state. The answer turns on which Alternative to U.C.C. § 2-318 has been enacted and how the courts have resolved the problem. For example, Illinois enacted Alternative A and the courts insisted on privity of contract in most breach of warranty claims. *See* Steve Bonanno, *Privity, Products Liability, and UCC Warranties: A Retrospect of and Prospects for Illinois Commercial Code S 2-318*, 25 J. MARSHALL L. REV. 177 (1991). It is only where lack of privity is not a defense that tension between Article 2 and CISG is created.

84 U.C.C. § 1-105(1). This includes the interpretive case law.

## B. Differences in the Nature and Scope of Quality Protection in Warranty Disputes

The starting point under CISG and Article 2 is the same; the seller must tender goods that conform to what the contract requires.[85] The problem arises when the agreement is not sufficiently clear on such things as description, basic attributes or uses to which the goods can be put. An incomplete or indefinite agreement prompts disagreement over whether the goods conformed to the contract.

Under Article 2, disputes of this sort are resolved under a warranty theory. The seller may make an express warranty, an implied warranty of merchantability, an implied warranty of fitness for particular purpose or all three in a particular transaction.[86] These warranties are terms of the contract to which the goods must conform.[87]

Under CISG, the warranty rubric is not used. Rather, Article 35(1) simply provides that the seller "must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract."[88] Interpretation of the terms of the contract is guided by Article 8. Article 35(2), however, provides standards to which the goods must conform "except where the parties have agreed otherwise." These standards include the requirement that the goods are "fit for the purposes for which goods of the same description would ordinarily be used" and, under the proper circumstances, the goods are "fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract."[89]

CISG and Article 2 seemingly agree on the treatment of the so-called implied warranties. Without saying so, the standards in CISG Article 35(2) closely track the UCC's implied warranties of merchantability[90] and fitness for particular purpose.[91] The track is not com-

---

85 CISG art. 30. U.C.C. § 2-501(a) (Tentative Draft October 1, 1995).

86 U.C.C. §§ 2-313, 2-314 and 2-315. These section numbers are the same in the October 1, 1995 Tentative Draft.

87 *See* U.C.C. § 2-317, which provides standards for reconciling conflicts among warranties.

88 This implements CISG art. 30 which requires the seller to "deliver the goods. . .and transfer the property; in the goods, as required by the contract and this Convention." The word "contract" is not defined.

89 *See generally,* Richard Hyland, *Conformity of Goods to the Contract Under the U.N. Sales Convention and the UCC, in* EINHEITLICHES KAUFRECHT UNDER NATIONALES OBLIGATION RECHT 305 (Peter Schlectriem, ed. 1987).

90 Under the 1990 Official Text, U.C.C. § 2-314(1) implies a warranty of merchantability where the seller is a "merchant with respect to goods of that kind." "Merchant" is defined in U.C.C. § 2-104(1). Any commercial seller under CISG, however, may be held to CISG art. 35(2). More importantly, U.C.C. § 2-314(2) states six factors relevant to the content of

pletely parallel, however, since under Article 2 only a merchant seller makes an implied warranty of merchantability and goods which pass without objection in the trade under the contract description[92] may still be unfit for the "ordinary purposes for which such goods are used." Thus, when the implied warranty is made, the scope of merchantability protection is somewhat higher under Article 2 than under CISG.[93]

These differences are trivial compared to the fact that CISG has no mechanism for dealing with affirmations of fact or commendations about the goods made by the seller to the buyer either before or after the contract is formed. Assuming that such affirmations or commendations are made, unless they are "required by the contract," the goods need not conform to them.[94]

UCC § 2-313 of the 1990 Official Text, however, deals specifically with statements of this sort. It draws a line between affirmations of fact and statements of opinion or commendation ("puffing")[95] and states in the comments that affirmations of fact presumptively become part of the contract unless the seller establishes that the buyer was unreasonable in concluding that they became part of the bargain.[96]

---

merchantability. CISG art. 35(2)(a) and (d) track these factors, but do not go all of the way. For example, under U.C.C. § 2-314(2)(a) and (c), merchantable goods must "pass without objection in the trade under the contract description" and be "fit for the ordinary purposes for which such goods are used." Under CISG art. 35(2)(a), conforming goods must be "fit for the purposes for which goods of the same description would ordinarily be used." There are no changes of substance in the October 1, 1995 Tentative Draft.

91 U.C.C. § 2-315 and CISG art. 35(2)(b).

92 The "sale by description" was probably the transaction from which the implied warranty of merchantability evolved. See William Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 139-45 (1943).

93 For example, a piece of machinery may pass in the trade under the contract description of "drill press," but still not be fit for the ordinary purposes for which drill presses are used. In most cases, this may be a distinction without substance.

94 Unlike U.C.C. § 2-202, CISG has no formal statement of a parol evidence rule. Article 11 simply provides: A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses." This increases the chance that affirmations or promises made but not contained in a final writing may be "required by the contract." *See* CISG art. 8 on the interpretation of "statements made by and other conduct of a party." *See also*, Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc., 993 F.2d 1178, 1182 n. 9 (5th Cir. 1993), where the court noted the difference but ducked the choice of law question.

95 U.C.C. § 2-312(2).

96 U.C.C. § 2-313, cmt. 8 and the relevant case law draws a distinction between affirmations of fact, which can be express warranties, and "puffing," which cannot. Most cases, drawing on the comments, have concluded that everything the seller says about the goods presumptively becomes part of the agreement unless the seller establishes that it was "puffing" or that the buyer did not reasonably rely on an affirmation of fact. *See, e.g.*, Daughtrey v. Ashe, 413 S.E.2d 336 (Va. 1992); Keith v. Buchanan, 220 Cal. Rptr. 392 (Cal. App. 1985). The October 1, 1995

In sum, a buyer's expectation of quality derived from the seller's express or implied representations has greater protection under Article 2 than under CISG. The standard of merchantability is somewhat higher and a presumption operates in favor of including affirmations of fact in the agreement as express warranties. Furthermore, the proposed revision of UCC § 2-313 incorporates the presumption favoring express warranties into the statute.[97] In the modern age of extensive, multi-media advertising that crosses national boundaries, this is an important difference of substance.

### C. Excluding or Limiting Warranties

Since the word "warranty" is not used, CISG has no provision dealing with the "exclusion or modification" of warranties. Rather, disputes over quality turn on what the contract "required" under Article 35(1) and whether the parties have "otherwise agreed" under Article 35(2). No special rules for interpretation are provided in these cases.

Article 2, however, offers some protection to the buyer against attempts by the seller to exclude or limit express and implied warranties by agreement. Thus, if an attempt to negate or limit cannot be construed as reasonably consistent with an express warranty, the disclaimer is "inoperative."[98] Similarly, a disclaimer of an implied warranty of merchantability must meet certain requirements of form and disclosure. Thus, the effort to limit or exclude "must mention merchantability" and, if the disclaimer is in writing, "must be conspicuous."[99] A disclaimer may also be vulnerable to attack on other unconscionability grounds.

Arguably, these limitations upon the enforceability of agreements limiting or excluding warranties involve the "validity of the contract or any of its provisions" with which CISG, under Article 4(a), is not

---

Tentative Draft incorporates this presumption as part of the statute. U.C.C. § 2-313(c) (Tentative Draft October 1,1995).

97 U.C.C. § 2-313(c) (Tentative Draft October 1, 1995).

98 U.C.C. § 2-316(1). There is no change in the October 1, 1995 Tentative Draft. An express warranty made during negotiations or contemporaneously with a written agreement, however, may be excluded if the writing was intended by the parties as a partial or total integration of the agreement. U.C.C. § 2-202. CISG has no Article dealing with the so-called "parol evidence rule."

99 U.C.C. § 2-316(2). The October 1, 1995 Tentative Draft requires that the disclaimer of any implied warranty be in a "record." U.C.C. § 2-316(b) & (c) (Tentative Draft October 1, 1995).

concerned.[100] If so, CISG applies to the transaction in general but does not preempt Article 2's limitations on the scope and effect of disclaimers. If not, there is a disagreement of substance between CISG and Article 2 that is subject to possible harmonization.[101]

### D. Privity

Differences in the scope of and power to disclaim warranties, discussed above, relate to *Case #1* and *Case #2* where there is privity of contract. Simply put, a commercial buyer has greater protection under Article 2 than under CISG. Moreover, the buyer has greater power to reject nonconforming goods without cure by the seller and to cancel the contract under Article 2 than under CISG.[102] Whether an effort to harmonize these differences should be made will be discussed shortly.

Whether a seller's warranty extends beyond the immediate to a remote buyer, however, directly involves *Case #3*.

CISG Article 35(1), by limiting quality disputes to what the *contract* requires, applies only to the two-person sale between commercial parties. No article of CISG extends the responsibility for quality to a remote buyer, either directly or through a third party beneficiary concept. Thus, if a Canadian seller sold goods required to be Quality X to an American distributor and the distributor resold the goods to a Mexican buyer under a contract that also required Quality X, the Mexican buyer could not sue the Canadian seller because the goods were not Quality X. There is no privity of contract. Presumably, this result follows even though the Canadian seller advertised in the United States and Mexico that the goods were Quality X and the

---

100 *See* Laura E. Longobardi, *Disclaimers of Implied Warranties: The 1980 U.N. Convention on the International Sale of Goods*, 53 FORDHAM L. REV. 863 (1985)(disclaimers are rules of validity).

101 Professor Honnold draws a distinction between the interpretation of statements and conduct under CISG art. 8 and rules of validity under CISG art. 4(a). The former are governed by CISG and the latter are left to domestic law. He concludes, on balance, that the controls on disclaimers in U.C.C. § 2-316(2) are rules of validity if they deny legal effect to a term without impairing the interpretive process under CISG art. 8. HONNOLD, *supra* note 63, at 310-312. In the process he suggests that one must first determine whether Article 2 was intended to apply to transactions subject to the Convention before one decides whether a rule of validity or a principle of interpretation is involved. HONNOLD, *supra* note 63, at 310. Professor Hartnell agrees that disclaimers or "exculpatory" clauses are rules of validity, but doubts that they should be reserved for domestic law. She prefers that the enforceability of clauses allocating risk in international sales, as opposed to doctrines of fraud or mistake, be determined by CISG. Hartnell, *supra* note 33, at 87-93.

102 *See supra* text accompanying notes 57-63.

Mexican buyer purchased the goods from the distributor in reliance on the ads.

*Case #3* arises when the Canadian seller advertises Quality X in the United States and the distributor in New York resells the goods to the buyer in Illinois, who was aware of and relied on the ads. Assume the goods were not Quality X. Here CISG governs the sale between Canada and New York and Article 2 governs the sale between New York and Illinois. But can the Illinois buyer sue the Canadian seller *under Article 2*? Put differently, is the Canadian seller who sells under the protective arm of CISG, but advertises in the domestic resale market, subject to *potential* liability for breach of warranty under Article 2?

Assuming that lack of privity is not a defense under applicable state law, a fair reading of the law suggests that the Convention does not foreclose claims arising under Article 2 against CISG sellers; it simply does not deal with them. Just because a seller does business in another country does not necessarily insulate that seller from potential Article 2 liability when goods are resold.[103] Thus, if an express warranty theory is pursued, the claim will probably be sucessful even though only commercial loss has occurred. Under the 1990 Official Text, liability depends upon which Alternative to UCC § 2-318 has been enacted and the decisional law of the state whose law applies. Under Alternative C[104] or the prevailing caselaw,[105] a CISG seller would probably be liable in most states for advertising that is treated

---

103 Tricky questions of federal preemption arise here. CISG is not clear whether CISG sellers are insulated from local sales law when the goods are resold by a CISG buyer to other buyers. Moreover, it is unclear to what extent state law can clarify the relationship, especially where the clarification tends to protect domestic policy. A revision of Article 2 that seeks to harmonize with rather than to discriminate against CISG, however, should be acceptable.

104 Alternative C provides: "[a] seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by the breach of warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an indiviudal to whom the warranty extends." U.C.C. § 2-318(c). Seven states have enacted Alternative C as drafted (Hawaii, Iowa, Minnesota, North Dakota, South Dakota, Utah and Wyoming) and five states have enacted non-standard versions that remove the prvity barrier (Arkansas, Maine, Massachusetts, New Hampshire and Virginia). *See* William L. Stallworth, *An Analysis of Warranty Claims Instituted by Non-Privity Plaintiffs in Jurisdictions that have Adopted Uniform Commercial Code Section 2-318 (Alternative B and C)*, 27 Akron L. Rev. 197 (1993).

105 The leading case is Randy Knitwear, Inc. v. American Cyanimid Co, 181 N.E. 2d 399 (N.Y. 1962). See also, Beyond the Garden Gate, Inc. v. Northstar Freeze Dry Mfg., Inc., 526 N.W.2d 305 (Ia. 1995); Alberti v. Manufacturer Homes, Inc., 407 S.E.2d 819, 825 (N.C. 1991). *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 11-7 (4th ed. 1995); Wayne Lewis, *Toward a Theory of Strict Claim Liability: Warranty Relief for Advertising Representations*, 47 Ohio St. L. J. 671 (1986).

as an express warranty under UCC § 2-313.[106] If so, the remedies of Article 2 apply even though there is no privity of contract. This theory is made more explicit and the outcome made more probable in the October, 1995 Draft of UCC § 2-313.[107]

### E. To Harmonize or Not?

If CISG is not adopted as a starting point for the revision of Article 2, when should the relevant sections of Article 2 be harmonized with CISG where disputes over the quality of goods arise? In other words, when should Article 2 be revised to conform to CISG in warranty disputes?

In disputes over the quality of goods, Article 2 provides more protection to the commercial buyer than does CISG. First, Article 2 has an explicit provision dealing with express warranties and CISG has none. In addition, Article 2 regulates the form and content of agreements limiting or disclaiming warranties while CISG excludes such regulations as rules of "validity." Finally, under Article 2, the privity requirement has been eroded by the courts while CISG is limited to contracts "between the parties." This buyer protection theme, which has emerged over time,[108] arguably reflects values that are consistent with the development of the United States as a consumer society. In other words, they are defeasible default rules which express underlying cultural and social expectations about product quality in the United States. Accordingly, they should be preserved in revised

106 In most states, the privity defense is available in actions to recover economic loss for breach of an implied warranty. *See* WHITE & SUMMERS, *supra* note 105, at § 11-6. Moreover, a tort recovery is usually not available when a breach of warranty causes only economic loss, i.e., loss of the bargain and damge to the goods sold. *See, e.g.*, Duquesne Light Co. v. Westinghouse Electric Corp., — F.3d. —, 27 U.C.C. Rep.Serv.2d 823 (3d. Cir. 1995). *See also*, Richard E. Speidel, *Warranty Theory, Economic Loss, and the Privity Requirement: Once More Into the Void*, 67 B.U. L. REV. 9 (1987). The October, 1995 draft of Article 2 does not change these results.

107 The October 1, 1995 Tentative Draft of U.C.C. § 2-313(c) provides that an "express warranty may be made by the seller. . .to a remote buyer through any form of public advertising." When made under subsection (d), the express warranty may be enforced "directly against the seller, even though the express warranty is not part of the contract with the remote buyer's seller." Subsection (e). This warranty is enforceable "without regard to the terms of the contract between the seller and the immediate buyer" and the remote buyer's rights are determined by Article 2, as modified in U.C.C. § 2-318(d).

108 According to Professor Teeven, the Uniform Sales Act, drafted in 1906, incorporated a current trend in the cases away from *caveat emptor* toward improvement of the buyer's rights when goods were defective. This responded to "new techniques of marketing and financing through middlement over great distances" and the emergence of more consumers with the resources to purchase mass produced goods. Teveen, *supra* note 11, at 71-72.

Article 2 unless clearly outweighed by the benefits of vertical uniformity.

This issue is clearly posed in *Case #1* and *Case #2*, where there is privity of contract and no rule of validity is involved. Here, CISG not Article 2 applies to the transaction. Differences between them in buyer protection are not relevant, since the separate bands of horizontal uniformity are in place. Vertical uniformity might be beneficial, however, where a mistake or poor planning by the buyer results in the application of CISG where Article 2 was intended to control. The risk of this error is increased by the scope provisions of CISG, which normally turn on the place of business of the parties rather than the contacts that the transaction might have with another country. The antidote to this risk, however, is not to eliminate the buyer protection provision from American sales law. Rather, the immediate answer lies in careful planning by the parties[109] and, in the long run, by efforts on the federal level for a revision in the scope provisions of CISG.[110]

A somewhat different issue is posed in *Case #1* and *Case #2* where privity of contract exists but a term limiting or excluding warranties is invoked by seller. Is that exculpatory term a rule of validity under CISG Article 4(a)? If not, CISG applies to the entire dispute, including the enforceability of the term. If so, then Article 2 applies to the extent that the enforceability of the term is determined under its provisions. Since there is sharp disagreement among the commentators and no authoritative judicial decision, harmonization requires increased clarity in what is a rule of validity in a particular case under CISG. In the absence of an existing federal process, the task of increasing clarity without altering the preemptive scope of CISG falls to the Article 2 drafting process. Thus, revised Article 2 should clearly state whether limitations on the disclaimer of warranties and related provisions are intended to be rules of validity under Article 4 of CISG. Are they so related to the policy of buyer protection that they should be governed by Article 2? The extent to which that intention controls will depend upon an authoritative interpretation of Article (4)(a) by a federal court.

In *Case #3*, CISG applies in general but there is no contractual relationship between a seller and a buyer who have places of business in different contracting states. Although CISG protects the seller from

---

109 *See* CISG art. 6; HONNOLD, *supra* note 63, at 74-84. U.C.C. § 1-102(3) permits the parties, with some limitations, to vary the effect of the provisions of the Act. However, there is no provision specifically authorizing the parties to contract out of Article 2.

110 The complexity of CISG art. 6 is well discussed in HONNOLD, *supra* note 63, at 39-48.

the claim of a remote buyer, it does not clearly state that such claims are foreclosed under domestic law. The issue is open. The policy question is whether the persistent erosion of the privity requirement in American warranty law[111] should be sacrificed to the end that foreign sellers who advertise and distribute goods in the United States are protected against liability to foreseeable resale buyers for commercial loss? If the answer is yes, the definitions in revised Article 2 might exclude sellers whose first sales are to buyers in a transaction covered by CISG. If the answer is no, the definition of seller might specifically include a seller under CISG whose goods are resold by the immediate buyer to a remote buyer in the United States. Either way, the method or approach involves a clear statement about who is an Article 2 seller for purposes of defining the scope and effect of CISG.

## V. Conclusion

The foregoing suggests that there is no easy way to make harmonization decisions. If, however, one is convinced that CISG is an inappropriate model for the revision of Article 2 and that Article 2's preference for buyers is an important domestic public policy, the argument for vertical uniformity in disputes over the quality of goods should be resisted. In this area, at least, domestic interests of substance should not be sacrificed to vertical uniformity.

A more difficult question is whether Article 2 should be revised to enhance the protection of domestic interests where the direct application of CISG is unclear. For example, should the definition of "seller" in revised Article 2 explicitly include a CISG seller in cases where there is no privity of contract or should revised Article 2 state that limitations on warranty disclaimers are rules of "validity" for purposes of CISG Art. 4(a)? Both revisions tend to clarify and enhance the domain of domestic warranty law and, in my judgment, are sound as a matter of policy.[112] Whether the revisions would be preempted by CISG, however, is less clear and is ultimately a matter for the federal courts.

---

111 For a stimulating treatment of these problems, *see* Jay M. Feinman, Economic Negligence: Liability of Professionals and Businesses to Third Parties for Economic Loss 63-83, 495-554 (1995).

112 Professor Watson reminds us, however, that legal change is brought about by human agency and is "limited by the knowledge and culture of that agency." Thus, when decisions on borrowing from another legal system are involved the process is restricted by what the agency does not know. *See* Watson, *supra* note 26, at 118. Unfortunately, drafters and reporters never know enough.