

Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods

Helen Elizabeth Hartnell[†]

I. INTRODUCTION	2
II. SPHERE OF APPLICATION OF THE CONVENTION	10
A. <i>Scope of the Convention</i>	11
B. <i>Conflict of Laws Implications</i>	14
III. INTERPRETATION OF ARTICLE 4(A) OF THE CONVENTION	19
A. <i>Introduction</i>	19
B. <i>Travaux Préparatoires</i>	22
1. <i>ULIS, Article 8</i>	25
2. <i>ULIS, Articles 4 and 5(2)</i>	31
3. <i>Drafting History of the CISG</i>	36
a. <i>Relationship of CISG to UNIDROIT Harmonization Efforts</i>	37
b. <i>Relationship of CISG to Mandatory Rules of National Law</i>	41
C. <i>Interpretation According to CISG, Article 7(1)</i>	45
1. <i>Regard to CISG's International Character and to the Need to Promote Uniformity</i>	46
a. <i>Autonomous Interpretation</i>	46
b. <i>Displacement</i>	50
2. <i>Observance of Good Faith in International Trade</i>	53
D. <i>Mandatory Law Approach to the CISG</i>	54
E. <i>Conclusion</i>	60
IV. APPLYING ARTICLE 4(A) TO CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS	62
A. <i>Application of Article 4(a) to Selected Validity Issues</i>	63
1. <i>Capacity and Agency Authority</i>	64
2. <i>Formal Validity</i>	65
3. <i>Open Price Terms</i>	66
4. <i>Duress, Fraud, Misrepresentation, and Mistake</i>	69
a. <i>Fraud and Coercion</i>	70
b. <i>Innocent Misrepresentation and Mistake</i>	72
5. <i>Initial Impossibility</i>	78
6. <i>Illegality and Immorality</i>	79
7. <i>Unconscionability</i>	80
B. <i>Consequences of Validity Exclusions</i>	87
V. CONCLUSION	93

[†] Visiting Associate Professor of Law, Eötvös Loránd Tudományegyetem (ELTE University), Budapest, Hungary; B.S. (1976) and J.D. (1980), University of Illinois at Urbana-Champaign. I would like to thank Ingrid Depser, Ulrich Drobnig, Reinhard Ellger, E. Allan Farnsworth, David Gruning, Peter Linzer, Peter Maggs, Peter Schlechtriem, and Peter Winship, as well as my former colleagues at Tulane Law School, Ruth Colker, Ray Diamond, Catherine Hancock, Shael Herman, William Lovett, Suman Naresh, Vernon Palmer, and John Stick, for their helpful comments on earlier drafts of this article. Thanks also to my research assistants, Carolyn Bodner and Karin-Annabella Revuelta. The author would also like to acknowledge research grants from Tulane University School of Law which contributed to the writing of this paper.

I. INTRODUCTION

Since January 1, 1988, any contract for the sale of goods between a U.S. trader and a buyer or seller from one of a growing list of foreign countries may be subject to an international legal regime founded on the U.N. Convention on Contracts for the International Sale of Goods [CISG or Convention].¹ The CISG automatically governs all contracts falling within its scope unless the parties have agreed that another set of rules, such as the law of a domestic² jurisdiction, shall govern their relationship instead of the CISG.³ Therefore, the provisions of the Convention generally displace article 2 of the Uniform Commercial Code in contracts for the international sale of goods. However, domestic rules remain applicable to some issues arising in

1. Final Act of the U.N. Conference on Contracts for the International Sale of Goods, Apr. 10, 1980, S. TREATY DOC. NO. 9, 98th Cong., 1st Sess. (1983); 19 I.L.M. 668 (1980); *see also* U.N. CONF. ON CONTRACTS FOR THE INT'L SALE OF GOODS, OFFICIAL RECORDS at 176, U.N. Doc. A/CONF.97/19, U.N. Sales No. E.81.IV.3 (1981) [hereinafter OFFICIAL RECORDS]; JOHN H. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 764 (1989) [hereinafter HONNOLD, DOCUMENTARY HISTORY]. [Editorial note: For the reader's convenience, initial citations have been provided to both the *Official Records* and to *Honnold, Documentary History*. Subsequent citations, however, refer only to the *Official Records*]. In addition to these sources, the documents and records relating to the CISG are also compiled in volumes 1-10 of the YEARBOOK OF THE U.N. COMMISSION ON INTERNATIONAL TRADE LAW [hereinafter UNCITRAL Y.B.].

The literature on the CISG is too extensive to detail here. The reader is encouraged to consult the following for extensive bibliographic references: CESARE M. BIANCA & MICHAEL J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 843-73 (1987) [hereinafter BIANCA & BONELL]; JOHN H. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 U.N. CONVENTION 33-40 (2d ed. 1991) [hereinafter HONNOLD, UNIFORM LAW]; MICHAEL WILL, INTERNATIONALE BIBLIOGRAPHIE ZUM UN-KAUFRECHT (3d ed. 1990); John H. Honnold, *Bibliography: Unification of Trade Law and UNCITRAL*, 27 AM. J. COMP. L. 212 (1979); Peter Winship, *A Bibliography of Commentaries on the United Nations International Sales Convention*, 21 INT'L LAW. 585 (1987); Peter Winship, *Bibliography: International Sale of Goods*, 18 INT'L LAW. 53 (1984).

The CISG, which was ratified by the United States as an international treaty, is the law of the land under Article VI of the U.S. Constitution. It is a self-executing treaty, and does not require further legislative enactment. For a discussion of the process by which the United States became a party to the CISG, see Peter Winship, *Congress and the 1980 Sales Convention*, 16 GA. J. INT'L & COMP. L. 707 (1986). *See also* Francis A. Gabor, *Stepchild of the New Lex Mercatoria: Private International Law from the United States Perspective*, 8 NW. J. INT'L L. & BUS. 538, 558 (1988) [hereinafter Gabor, *Stepchild*].

On January 1, 1988, the CISG also entered into effect in Argentina, Egypt, France, Hungary, Italy, Lesotho, the People's Republic of China, Syria, Yugoslavia, and Zambia. Since then, the CISG has or will soon enter into effect in Australia, Austria, Belarus, Bulgaria, Canada, Chile, Czechoslovakia, Denmark, Ecuador, Finland, the Federal Republic of Germany (including the former German Democratic Republic), Guinea, Iraq, Mexico, the Netherlands, Norway, Romania, Spain, Sweden, Switzerland, Uganda, and Ukraine. In addition, the former Union of Soviet Socialist Republics deposited its instrument of ratification in 1990.

2. This term is intended to include both national law, in the sense of a unitary legal system such as the Netherlands, and state law, in the sense of a multijurisdictional system such as the United States. The term "municipal law" is often encountered in earlier literature, and should be understood as a synonym for "domestic law," as herein defined. The term "domestic law" as used in this article includes the substantive and procedural law rules, but *excludes* the choice of law rules of a particular jurisdiction.

3. CISG, article 6 provides that the "parties may exclude the application of this Convention or . . . derogate from or vary the effect of any of its provisions." Important limitations on the parties' autonomy are discussed *infra* in part III.D.

such contracts. The rules of contractual validity, for example, are excluded from the CISG's scope, and thus subject to the laws of the applicable domestic jurisdiction.

Enormous tension exists between the international legal order, on the one hand, and the various domestic legal systems, on the other. Generations of international commercial traders have exercised their contractual freedom⁴ in hopes of creating an autonomous international commercial law (*lex mercatoria*) free from those "awesome relics from the dead past"⁵ that are embedded in domestic legal systems.⁶ Although the CISG arose from that tradition, it is not entirely autonomous.⁷ Indeed, the Convention must occasionally yield to "important domestic policies that outweigh common international interests."⁸ This article explores the tension between domestic public policy and the needs of international commerce in the context of the international sale of goods. The fundamental rules of contractual validity — including capacity, mistake, open-price terms, and substantive or procedural unfairness — provide an ideal vehicle for examining the interplay between domestic rules

4. In particular, they have exercised their freedom to choose the applicable law. See Aleksandar Goldstajn, *The New Law Merchant Reconsidered*, in LAW AND INTERNATIONAL TRADE (FESTSCHRIFT FÜR CLIVE M. SCHMITTHOFF) 171, 177 (Fritz Fabricius ed., 1973) [hereinafter FESTSCHRIFT SCHMITTHOFF] ("all legal systems agree, subject to certain limitations, that the parties are at liberty to stipulate expressly the proper law of contract"); see also KONRAD ZWEIGERT & HEIN KÖTZ, 2 INTRODUCTION TO COMPARATIVE LAW 7-10 (2d ed. 1987); Ulrich Drobnig, *General Principles of European Contract Law* [hereinafter Drobnig, *General Principles*], in INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 305, 311 (Peter Šarčević & Paul Volken eds., 1986) [hereinafter DUBROVNIK LECTURES]; Campbell McLachlan, *The New Hague Sales Convention and the Limits of the Choice of Law Process*, 102 LAW. Q. REV. 591, 593-95 (1986); Eike von Hippel, *The Control of Exemption Clauses: A Comparative Study*, 16 INT'L & COMP. L.Q. 591, 592 (1967).

Party autonomy can also refer to the fact that many municipal legal rules are dispositive. See, e.g., U.C.C. § 1-102(2) ("The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed . . .").

5. Ernst Rabel, *The Hague Conference on the Unification of Sales Law*, 1 AM. J. COMP. L. 58, 61 (1952).

6. See, e.g., LEX MERCATORIA AND ARBITRATION (Thomas E. Carbonneau ed., 1990) [hereinafter LEX MERCATORIA]; Bernardo M. Cremades & Steven L. Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions*, 2 B.U. INT'L L.J. 317 (1984); Goldstajn, *supra* note 4, at 171 ("new, autonomous law is being developed in practice, [and] expressed in model contracts, standard clauses, general terms of delivery, commercial customs, and trade usage"); Clive M. Schmitthoff, *The Unification of the Law of International Trade*, 1968 J. BUS. L. 111; Symposium, *The Codification of International Commercial Law: Toward a New Law Merchant*, 15 BROOKLYN J. INT'L L. 1 (1989).

Arbitration has played a key role in the development of the so-called *lex mercatoria*, and the presence of an arbitration clause in an international commercial contract may fairly be viewed as an "essential requirement for the existence of the autonomous law of international trade." Goldstajn, *supra* note 4, at 175.

7. On the relationship between the living law of international commerce and the efforts to draft a uniform sales law, see ERNST RABEL, 1 DAS RECHT DES WARENKAUFS 35-49 (1936) ("Formularrecht"); Jan Hellner, *The Vienna Convention and Standard Form Contracts* [hereinafter Hellner, *Standard Form Contracts*], in DUBROVNIK LECTURES, *supra* note 4, at 325, 336-37.

8. Amy Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, 8 NW. J. INT'L L. & BUS. 574, 590 (1988).

rooted in the traditions of each legal system or in the desire to protect some class of persons, on the one hand, and the need for streamlined, standardized rules to govern international traders, on the other.

The U.S. government recognized early on that the needs of international commerce were at odds with the "traditions and concepts of domestic legal systems."⁹ The grandfather of the CISG, Ernst Rabel, had gone even further by asserting that the utility of an international uniform sales law depends on the extent to which it could remove important contractual issues from the domestic to the international realm. In particular, Rabel believed that an international sales law should "[embrace] the maximum possible number of matters which fall outside the autonomous intentions of parties," including basic issues of contractual validity.¹⁰ However, the potential for conflict between the domestic and international legal orders is especially great where the domestic rules in question concern issues, such as validity, so vital to the domestic legal order that they are excepted from the realm of contractual freedom.

The conflict between the international and domestic legal orders is played out each time a judge or arbitrator has to decide whether an issue falls within the scope of the Convention. This article analyzes one parameter of the CISG's substantive scope, namely "validity." Article 4(a) of the Convention provides that

[t]his Convention governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with the validity of the contract or of any of its provisions or of any usage.¹¹

Any issue of validity thus falls outside the scope of the Convention and is governed by the rules of the domestic jurisdiction whose law is otherwise applicable.¹² The exclusion of validity issues from the scope of the Convention raises difficult questions, such as how a tribunal is to ascertain which issues are validity issues and to what extent applying non-uniform domestic

9. *Preliminary Observations by the Government of the United States on the 1963 Draft ULIS*, U.N. Doc. V/Prep.8 (1963), reprinted in 2 *DIPLOMATIC CONFERENCE ON THE UNIFICATION OF LAW GOVERNING THE INTERNATIONAL SALE OF GOODS (DOCUMENTS)*, THE HAGUE, 2-25 APRIL 1964, at 235 (1966) [hereinafter *HAGUE CONFERENCE DOCUMENTS*] ("prime objective" of uniform sales law "should be clarity and consistency with the customs and needs of international trade — factors not closely related to the traditions and concepts of domestic legal systems").

10. Ernst Rabel, *Observations on the Utility of Unifying Law of Sale from the Standpoint of the Needs of International Commerce* (1929) [hereinafter Rabel, *Observations*], reprinted in *LEAGUE OF NATIONS: DRAFT OF AN INTERNATIONAL LAW OF THE SALE OF GOODS* 123, 128-31 (1935) [hereinafter *LEAGUE OF NATIONS*] (uniform sales law ought to "[lay] down rules on those matters which are imperative or which lie at least partially beyond the autonomy of the parties," such as passage of property and of risk, defects, form and formation of contract, domicile of the party in breach and its consequences, assessment of damages, prescription, and mistake). The fate of Professor Rabel's *Observations* and the draft uniform law they accompanied is detailed *infra* in parts III.B.1, III.B.2. and accompanying text.

11. CISG, art. 4(a) (emphasis added).

12. The conflict of laws implications of article 4(a) are elaborated *infra* in part II.B.

rules of validity to contracts for the international sale of goods seriously handicaps the CISG's potential for achieving its goals.

The success of the uniform law for international sales will depend largely on how well it suits the needs of modern international commerce. These needs were of central concern to the drafters of the CISG and its predecessors.¹³ The drafters undeniably sought to replace some of the obsolete domestic rules with a "modern law . . . appropriate for transactions of an international character."¹⁴ They also wished to promote fairness in international commerce, because they saw that the law chosen by parties would,

for one of the parties at least, . . . be a foreign law. Even though all municipal laws may on the whole be satisfactory, they also involve a variety of difficulties for foreigners. In the first place, many are difficult to ascertain Moreover, even if these laws are on the whole satisfactory, they always involve peculiarities to be explained by history, but which have little rational justification. The application of these peculiar rules to a foreign party often results in snares and traps.¹⁵

In their view, the unification of the law of sale was especially important for economically weaker traders who could not manage the risks and expenses of doing business under a foreign law as well as larger companies who had access to legal advice.¹⁶ Thus, the uniform sales law was meant to serve as a "guide to the drafting of standard contracts, general conditions and trade forms, supplying a recognised legal basis for them and facilitating their interpretation."¹⁷

The primary motive for the drafters' toil, however, was their belief that the "diversity of municipal laws" applicable to contracts for the international sale of goods posed a "serious obstacle to the free exchange of goods."¹⁸

13. The predecessors to the CISG are the Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107 (1972) [hereinafter ULIS], and the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 169 (1972) [hereinafter ULF]; see also DIPLOMATIC CONFERENCE ON THE UNIFICATION OF LAW GOVERNING THE INTERNATIONAL SALE OF GOODS (RECORDS), THE HAGUE, 2-25 APRIL 1964 (1966) [hereinafter HAGUE CONFERENCE RECORDS]; Literature on the ULIS and the ULF is collected in *Bibliography: International Sale of Goods*, 27 AM. J. COMP. L. 345, 345-50 (1979).

14. *Commentary on the [1978] Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat*, U.N. Doc. A/CONF.97/5 (1979) [hereinafter *1978 Secretariat Commentary*], reprinted in OFFICIAL RECORDS, *supra* note 1, at 14, 15, and in HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 404, 405; see also Otto Riese, *International Problems in the Law of Sale*, in Symposium, *Some Comparative Aspects of the Law Relating to Sale of Goods*, INT'L & COMP. L.Q., Supp. Pub. No. 9, at 32, 36 (1964). For insight into the drafters' further aspirations, see Rabel, *Observations*, *supra* note 10, at 131 ("[W]e must not forget that our ultimate goal is an ideal. We are seeking to open the way for a world law of all obligations."); André Tunc, *Commentary on the Hague Conventions of the 1st of July 1964 on International Sale of Goods and the Formation of the Contract of Sale* [hereinafter Tunc, *Commentary*], reprinted in HAGUE CONFERENCE RECORDS, *supra* note 13, at 355, 358 (unification of sales law represents "the most important contribution which lawyers can make in the field of private law to the creation of a more harmonious and fraternal world").

15. Tunc, *Commentary*, *supra* note 14, at 358.

16. *Id.*

17. Riese, *supra* note 14, at 36.

18. *Observations of Government of Federal German Republic on 1956 Draft ULIS* [hereinafter *F.R.G.*

Unless parties agree which law is to govern their contract in case of a dispute, they cannot be sure which law a tribunal will actually apply.¹⁹ The drafters believed that the unpredictability spawned by the conflict of laws was the key problem. An important function of the CISG is thus to eliminate, or at least to reduce, the need to resort to conflict of laws rules.²⁰ In sum, the goals of the Convention are to provide a "better law" for international commercial transactions, and thereby achieve greater fairness in international trade, and to increase the predictability of international commerce and thereby facilitate the process of negotiation and alleviate the complexities of transnational dispute resolution.²¹

The key to the Convention's success in achieving its preeminent goal — predictability — is the emergence of a "jurisprudence of international trade."²² Achieving this end requires not only world-wide adoption of the Convention, but also the development of a uniform body of case law interpreting its provisions.²³ The main tool provided in the CISG for

Government Observations], reprinted in HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 82. The efforts to create a uniform law for international sales were meant to reduce such obstacles, and thereby to "facilitate and strengthen economic ties between nations," *id.*, and to "contribute to the safeguarding of peace and the spread of prosperity." HAGUE CONFERENCE RECORDS, *supra* note 13, at 6 (opening statement of Minister of Justice of the Netherlands).

19. Tunc, *Commentary*, *supra* note 14, at 358 (parties can become "entangled in all the doubts which are involved in the application of the private international law of different municipal laws"); *see also* Riese, *supra* note 14, at 36.

20. *See* 1978 *Secretariat Commentary*, *supra* note 14, in OFFICIAL RECORDS, *supra* note 1, at 15 (discussing need to "reduce the search for a forum with the most favourable law; [and] reduce the necessity of resorting to rules of private international law"); *F.R.G. Government Observations*, *supra* note 18, at 83 (discussing need to ensure that uniform law operates in "such a way that the problem of discovering the municipal law governing a contract of sale in accordance with the principles of private international law arises as infrequently as possible when it is put into force . . . [T]he Uniform Law will only bring real progress if, as far as possible, it eliminates in its field of operation the foregoing question, which is so difficult to solve."); *Observations of the German & Belgian Delegations to the 1964 Diplomatic Conference*, reprinted in HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 251 (arguing for substitution of "substantive rules for the repeated interplay of the rules of conflict").

See also René David, *The International Unification of Private Law*, in II INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 5 (1971); Aubrey L. Diamond, *Conventions and Their Revision*, in UNIFICATION AND COMPARATIVE LAW IN THEORY AND PRACTICE (FESTSCHRIFT SAUVEPLANNE) 45, 47-48 (1984) [hereinafter FESTSCHRIFT SAUVEPLANNE]; Von Hans Dölle, *Einheitliches Kaufgesetz und Internationales Privatrecht*, 32 RABELSZ 438 (1968) [hereinafter Dölle, *EKG*]; John H. Honnold, *The 1964 Hague Conventions and Uniform Laws on the International Sale of Goods*, 13 AM. J. COMP. L. 451 (1964); Kurt Nadelmann, *The Uniform Laws on the International Sale of Goods: A Conflict of Laws Imbroglia*, 74 YALE L.J. 449 (1965) [hereinafter Nadelmann, *Imbroglia*]; Ernst Rabel, *A Draft of an International Law of Sales*, 5 U. CHI. L. REV. 543, 544 (1938) [hereinafter Rabel, *Draft Law*]; André Tunc, *The Uniform Laws on the International Sale of Goods: A Reply to Professor Nadelmann*, 74 YALE L.J. 1409 (1965).

21. Rabel, *Observations*, *supra* note 10, at 130; *see also* RABEL, *supra* note 7, at 35-49.

22. Kastely, *supra* note 8, at 601; *see also* Michael J. Bonell, in BIANCA & BONELL, *supra* note 1, at 74 (noting that "ultimate aim" of CISG is to "achieve world-wide uniformity in the law" governing contracts for international sale of goods).

23. Bonell, *supra* note 22, at 66; *see also* HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 1 ("the Convention's ultimate goal [is] uniform application of the uniform rules") (emphasis added). *But see* Jean Georges Sauveplanne, *Uitlegging van eenvormig privaatrecht* [hereinafter Sauveplanne, *Uitlegging*], in VERZEKERING VAN VRIENDSCHAP (ESSAYS IN HONOR OF T.J. DORHOUT MEES) 79, 100 (1974) ("The

achieving a uniform jurisprudence is article 7(1), discussed in part III.C, which instructs adjudicators to uphold the "international character" of the uniform law and to respect "the need to promote uniformity in its application."²⁴ Divergent interpretations of the Convention would lead back to the very uncertainties the Convention's drafters intended to eliminate²⁵ and would thereby increase the costs of international commerce.²⁶ The rule of interpretation found in CISG, article 7(1) requires at the very least that tribunals in one contracting state consider the opinions of tribunals in other contracting states. As a result, international norms will evolve as tribunals applying the CISG follow each other's precedents. However, the Convention does not provide a framework for the development of international norms to govern issues, such as validity, that fall outside the Convention's scope. The extent to which the exclusion of validity issues impairs the CISG's ability to fulfill its promise ultimately depends on the commercial significance of the issues thereby excluded from the international legal order.

The exclusion of validity issues from the Convention's scope significantly limits the development of an international body of case law to guide adjudicators, traders, and their counsel. Article 4(a) poses a particular danger to the development of a coherent jurisprudence of international trade,²⁷ because it gives adjudicators wide discretion to determine when to apply domestic law rather than the CISG to contracts for the international sale of goods.²⁸ Therefore, how adjudicators distinguish uniform, autonomous

question really is whether there is in fact a real danger that the desired uniformity will be prevented by non-uniform interpretations, and if so, how this can be prevented.") (author's translation).

24. These two criteria in article 7(1) "are only apparently independent from each other. On examination the second criterion [promoting uniformity] turns out to be nothing more than a logical consequence of the first [upholding its international character]." Bonell, *supra* note 22, at 72.

25. Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria*, in *LEX MERCATORIA*, *supra* note 6, at 139, 154 (such interpretations would "reintroduce the conflicts methodology that the Convention was meant to eliminate").

26. Timothy Tiggey, Note, *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, 21 *TEX. INT'L L.J.* 540, 555 (1986) ("lack of information may impose disproportionate costs on certain groups of traders"). Tiggey also suggests that the "lack of any amendment mechanism may leave uncorrected any divergencies thus undermining the Convention's relevance." *Id.*

27. See Audit, *supra* note 25, at 156 (calling article 4(a) a "roadblock" to growth of law governing international sales); Peter Winship, *Commentary on Professor Kastely's Rhetorical Analysis*, 8 *NW. J. INT'L L. & BUS.* 623, 636 (1988) [hereinafter Winship, *Commentary*] (commenting on "potential 'black hole' removing issues from the Convention's universe"). See generally ALBERT KRITZER, *GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 27-28, 81-86, 286-87, 480-81 (1989); E. Allan Farnsworth, *Review of Standard Forms or Terms Under the Vienna Convention*, 21 *CORNELL INT'L L.J.* 439 (1988) [hereinafter Farnsworth, *Standard Forms*]; Jacob S. Ziegel, *The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives* [hereinafter Ziegel, *Remedial Provisions*], in *INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* § 9.05 (Nina Galston & Hans Smit eds., 1984) [hereinafter *INTERNATIONAL SALES*]; Laura E. Longobardi, Note, *Disclaimers of Implied Warranties: The 1980 United Nations Convention on Contracts for the International Sale of Goods*, 53 *FORDHAM L. REV.* 863 (1985). *Contra* HONNOLD, *UNIFORM LAW*, *supra* note 1, at 116 ("Article 4(a) . . . does not provide a large door for escape from the uniform rules of the Convention.").

28. See Winship, *Commentary*, *supra* note 27, at 636 ("My concern is that a judge so disposed may

Convention issues from issues of validity is critical to the success of the CISG.

The exclusion of validity issues from the scope of the CISG embodies the tension between the domestic and the international legal orders. Yet this fundamental tension is often left to slumber through scholarly discussions of the proper interpretation of the validity exclusion, like a dog that, it is feared, would disturb the peace if roused. This article undertakes to analyze various methods of interpreting CISG, article 4(a) in the full glare of the underlying policy issues, and proposes a balanced approach that has the potential to relieve the tension in some important cases.

As part III will discuss, adjudicators can approach the task of interpreting article 4(a) in a variety of ways. Each of these approaches requires the adjudicator to determine which law to apply to an issue that has arisen in a contractual dispute. Viewed in its simplest light, then, the article 4(a) inquiry calls for a conflict of laws analysis.

One extreme approach to this task is for the adjudicator to decide that any applicable domestic law considered "mandatory" by a contracting state raises an issue of validity. This approach to validity would leave the article 4(a) exception wide open, thereby excluding many issues from the Convention and limiting the area in which international norms can evolve. By equating all mandatory law with issues of validity, this broad approach to article 4(a) unduly limits the potential development of a uniform body of law that can adapt to changing custom and practice. This broad reading responds to the protective interests of the contracting states but neglects their common goal of achieving workable, uniform substantive law. Moreover, the CISG's drafting history indicates that the drafters did not intend to equate validity with mandatory law and thereby provide an open-ended public policy exception to the uniform law. Though the two categories overlap, not every issue of mandatory law raises an issue of validity. Further, even though rules of contractual validity may be mandatory in connection with domestic contracts, different considerations obtain when the transaction is international.

At the other extreme, adjudicators might adopt an approach that would narrowly circumscribe the validity exception. Such a reading of article 4(a) would serve to "retain for international discourse as many significant issues as possible"²⁹ and thus foster the development of an "autonomous law of international trade."³⁰ One such narrow approach is for the adjudicator to adopt a uniform definition of validity, perhaps by designating an issue as one of validity only if a wide majority of contracting states agreed. This approach

find issues of validity much more readily than anticipated by the drafters and thereby turn to national law solutions.").

29. Kastely, *supra* note 8, at 616.

30. *Id.* at 606.

The Validity Exception to the CISG

is referred to as autonomous interpretation of article 4(a). A second such narrow approach is for adjudicators to rely on the clause in article 4(a) stating that validity of the contract is excluded from the scope of the CISG "except as otherwise expressly provided in this Convention." Read loosely, that proviso could displace a wide range of domestic validity rules by international norms based on the uniform law. This approach is referred to as the displacement reading of article 4(a). However, both of these approaches are flawed. If the broad reading of the validity exception neglects the uniformity goal, the narrow autonomous and displacement readings neglect the parochial interests that also concerned the drafters.

This article argues that adjudicators should adopt a course that treads a path between the overly-broad and overly-narrow approaches to validity. As part III.B will show, many of the CISG drafters intended to preserve the role for domestic laws designed to address protective interests in their respective jurisdictions. Adjudicators must take those parochial concerns into account in interpreting article 4(a). As a practical matter, this means that an adjudicator should look to the law of the forum in order to characterize an issue as one of validity or not. At the same time, however, the adjudicator must take into account the internationalist aspirations embodied in the Convention's interpretation clause, article 7(1), discussed in part III.C.

Adjudicators should approach the validity exclusion with a view to achieving a balance between the protectionist and internationalist concerns that article 4(a) regulates. On a case-by-case basis, adjudicators ought to consider whether an issue that has traditionally been considered one of validity and thus preserved to the parochial realm of domestic law should instead now be controlled by the goal of uniformity. This article refers to this type of analysis as the balanced approach to article 4(a). In striving to honor the internationalist goals of the Convention, tribunals must not disregard the limits of the unification process. By the same token, however, they should recognize that the purpose of reserving particular validity issues to the realm of domestic law may be less than compelling, or even inappropriate, in certain cases.

Great care is warranted in balancing the claims asserted by domestic jurisdictions against the claims of the international trading community. That balance may shift over time, as parties gain familiarity with the CISG and with the jurisprudence that develops under it. As that happens, even the notion of public policy may become less parochial and more internationalist. To facilitate such a development, adjudicators should take a flexible approach to the validity exception and pay heed to the spirit as well as the letter of article 4(a).

Part IV examines, in light of the proposed balanced approach to the validity exception, a number of issues that may trigger analysis under article 4(a). The balanced approach is applied by way of illustration to the issue of

exculpatory clauses (disclaimers), i.e., contractual clauses that modify, limit, or exclude the warranty otherwise provided by law, or that limit or exclude available remedies.³¹ Such clauses frequently appear in contracts for the international sale of goods, and tend to be of commercial significance.³²

The success of the CISG should be measured "at least in part according to how well it solves questions of liability . . . [including] its position on the validity of contractual risk limitation by way of exculpatory clauses."³³ In this context, more than in any other, the Convention falls short. In this area of contract practice — where unpredictability poses a real hindrance to traders and their counsel — a modern, fair set of international norms would be welcome. Because the CISG excludes exculpatory clauses from its scope, it regrettably does not call for the development of such a set of norms. However, if, as this article proposes, adjudicators approach the validity exception to the CISG with an eye to balancing the diverse goals of its drafters, and if scholars continue the search for unifying principles, then together they may be able to generate such norms.

II. SPHERE OF APPLICATION OF THE CONVENTION

The call for a balanced approach to CISG, article 4(a) must be preceded by a preliminary examination of the scope of the Convention³⁴ and its

31. See Arthur von Mehren, *A General View of Contract* [hereinafter von Mehren, *Contract*], in VII INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 41 (1982); D. YATES & A.J. HAWKINS, STANDARD BUSINESS CONTRACTS: EXCLUSIONS AND RELATED DEVICES 4 (1986) [hereinafter YATES & HAWKINS] ("exclusion" or "exemption" clauses are those that purport "to restrict, exclude or modify a liability, duty or remedy that would otherwise arise from a legally recognised relationship between the parties" to contract for sale of goods); see also G.H. TREITEL, THE LAW OF CONTRACT 166-212 (7th ed. 1987).

32. See, e.g., Johann Tiling, *Haftungsbefreiung, Haftungsbegrenzung und Freizeichnung im Einheitlichen Gesetz über den Internationalen Kauf Beweglicher Sachen*, 32 RABELSZ 258, 262 (1968) (noting that exculpatory clauses play important role in contracts for international sale of goods); Ziegel, *supra* note 27, at § 9.05 ("[I]t is a rare agreement, national or international, that will not exclude or severely curtail claims for consequential damages."). *Contra* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

33. Tiling, *supra* note 32, at 258 (author's translation). While Tiling was referring to earlier efforts to unify the law governing international sales of goods, described *infra* in part III, his statement is equally true of the CISG.

34. In the early stages of drafting a uniform law for international sales, a distinction was clearly drawn between the "sphere of application" of the uniform law, i.e., the international legal relationships which it governs, and the "object" of the uniform law, i.e., the matters which are subjected to it. The category of "object of the law" consists of provisions concerning the things to which the uniform law should be applied, and provisions concerning the juridical facts which the uniform law is intended to govern. See 1956 *Special Commission Report on Draft Uniform Law on the International Sale of Goods*, U.N. Doc. V/Prep.1/1 [hereinafter 1956 ULIS Report], reprinted in HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 29-30; see also CISG, Part I ("Sphere of Application and General Provisions"). For a thorough discussion of the scope of the CISG, see Paul Volken, *The Vienna Convention: Scope, Interpretation, and Gap-Filling*, in DUBROVNIK LECTURES, *supra* note 4, at 19; Peter Winship, *The Scope of the Vienna Convention on International Sales Contracts* [hereinafter Winship, *Scope*], in INTERNATIONAL SALES, *supra* note 27, at 1-1.

conflict of laws implications.³⁵ The discussion of these issues provides the necessary background against which the contours of the validity loophole can be projected.

A. Scope of the Convention

The preliminary task facing a judge or arbitrator called upon to resolve a sales contract dispute is to determine which legal rules apply to the various questions presented.³⁶ This task requires the adjudicator to undertake a complex conflict of laws analysis. As a first step, the tribunal must determine whether the contract triggers the application of the Convention. Article 1 is a conflict of laws rule that separates "international" sales of goods³⁷ from domestic ones.³⁸ If the particular transaction is for the international sale of goods, then the substantive provisions of the uniform law automatically apply in lieu of the parallel provisions of domestic law.³⁹ This first step actually substitutes the CISG's conflict of laws rule for the domestic conflict of laws rule that the tribunal would otherwise have applied to determine the applicable substantive law.⁴⁰

Having established that the contract is for an international sale of goods, the tribunal must next ascertain whether the substantive provisions of the uniform law actually govern the contract or issue in dispute. The Convention

35. For a thorough discussion of the conflict of laws implications of the CISG, see Isaak I. Dore, *Choice of Law Under the International Sales Convention: A U.S. Perspective*, 77 AM. J. INT'L L. 521 (1983); Peter Winship, *Private International Law and the U.N. Sales Convention*, 21 CORNELL INT'L L.J. 487 (1988) [hereinafter Winship, *Private International Law*]. Professor Winship points out that the terms "conflict of laws" and "private international law" are often used interchangeably to refer to problems of determining the applicable law (choice of law), although their meanings are not identical. *Id.* at 487 n.1.

36. To simplify the discussion, this article assumes that a dispute has been lodged in a judicial or arbitral forum (tribunal) that has proper jurisdiction to resolve the dispute.

37. Article 3 provides that the CISG shall not apply where "the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production" or where "the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services."

38. The Convention applies to "contracts of sale of goods between parties whose places of business are in different States when the States are contracting states." CISG, art. 1(1)(a). The fact that the parties have their places of business in different contracting states must "appear either from contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract." CISG, art. 1(2). In some countries, the CISG might also apply to a contract by virtue of article 1(1)(b), which provides that the Convention applies to "contracts of sale of goods when the rules of private international law lead to the application of the law of a contracting state." This provision is not applicable in cases involving a U.S. trader, however, since the United States declared when it deposited its instrument of ratification that it would not be bound by subparagraph (b) of article 1(1). See CISG, art. 95.

39. See McLachlan, *supra* note 4, at 613. The CISG contains substantive provisions dealing with the formation of contract (Part II) and with the rights and obligations of parties (Part III). Part IV permits a contracting state to make a variety of reservations to the CISG, including a declaration that it will not be bound by Part II or Part III. CISG, art. 92. See generally Winship, *Scope*, *supra* note 34.

40. Only if the contract is not for an international sale of goods would the tribunal proceed at this preliminary stage to apply its own choice of law rules to decide which law governs the contract.

provides two kinds of exceptions. First, the CISG explicitly permits the parties to "exclude the application of this Convention or . . . derogate from or vary the effect of any of its provisions,"⁴¹ subject to certain limitations.⁴² Parties often exercise this freedom to specify the body of law to govern their contract for the international sale of goods.

However, even though the parties to a contract for the international sale of goods are permitted to displace the CISG entirely — and may be expected to do so frequently in practice — this article assumes that the CISG will nevertheless govern many international sales transactions either by design or default.⁴³ In many cases, parties may incorrectly believe that they have excluded the CISG from their contract. For example, a contract containing a clause stating that the "laws of Kansas" or the "laws of Germany" shall govern would not displace the CISG, since the Convention is part of the laws of Kansas and Germany.

Particularly in cases of contracts governed by the rules of the battle of the forms,⁴⁴ there is a chance that the parties' attempt to exclude the application of the CISG will be ineffective. Forms used by buyers and sellers in international commerce are likely to contain provisions stating that the substantive law of a domestic jurisdiction — usually their own — shall govern any sales contract that may be concluded. The Convention's rule governing the battle of the forms, article 19 marks a partial return to the mirror-image rule, under which a purported acceptance that does not match the offer constitutes a rejection and counteroffer. Under this rule, the different choice of law clauses

41. CISG, art. 6. This provision "purports to give the parties an unqualified power to vary the effect of the Convention by agreement." Farnsworth, *Standard Forms*, *supra* note 27, at 441. It is uncertain whether the parties may exclude the Convention by implication as well as by express agreement. *See* Dore, *supra* note 35, at 532 n.62 (comparing CISG with ULIS, article 3 and concluding that express agreement is required under CISG, article 6); Kastely, *supra* note 8, at 587 n.49; Winship, *Commentary*, *supra* note 27, at 627; Winship, *Scope*, *supra* note 34, at 1-32; Maureen T. Murphy, Note, *United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law*, 12 FORDHAM INT'L L.J. 727, 743-50 (1989) (arguing that express exclusion should be required).

42. The parties may not vary the effect of articles 12 and 96, which permit a contracting state to preserve the effect of domestic legislation requiring contracts of sale to be concluded in or evidenced by writing. If a contracting state has not expressly declared its intention to preserve its writing requirement, then article 11 provides that a contract for the international sale of goods "need not be concluded in or evidenced by writing," nor is it "subject to any other requirements as to form." *See also* CISG, art. 29 (contract may be modified or terminated "by the mere agreement of the parties"). In addition to article 12, which is expressly declared by article 6 to be of a mandatory character, there are "some other provisions [of the CISG] which by their very nature seem to be incapable of being excluded or modified by the parties . . . [for example, article 4], whose only purpose is to exclude specific issues from the scope of the Convention." Bynell, *supra* note 22, at 61-62.

43. *See* Farnsworth, *Standard Forms*, *supra* note 27, at 439 ("[I]n all likelihood" the CISG "will soon be the governing law for most of our exports and imports of goods.").

44. *See, e.g.,* Michael Esser, *Commercial Letters of Confirmation in International Trade: Austrian, French, German and Swiss Law and Uniform Law Under the 1980 Sales Convention*, 18 GA. J. INT'L & COMP. L. 427 (1988); E. Allan Farnsworth, *Formation of Contract* [hereinafter Farnsworth, *Formation*], in INTERNATIONAL SALES, *supra* note 27, at 3-1; Arthur von Mehren, *The "Battle of the Forms": A Comparative View*, 38 AM. J. COMP. L. 265 (1990) [hereinafter von Mehren, *Battle of the Forms*].

in the buyer's and seller's forms alone should be sufficient to prevent a contract from being formed on the basis of the parties' exchange of forms, since it is probable that differences in applicable law "materially alter the terms of the offer."⁴⁵ If the parties nevertheless perform before a dispute arises, and a contract comes into being under the Convention's other formation rules,⁴⁶ the question then arises whether the effect of article 19 is to bind either the offeror to the terms contained in the offeree's form, or vice versa ("last shot" or "first shot" doctrines). Scholarly opinion on this question is divided.⁴⁷ As a policy matter, the CISG should be applied in battle of the forms cases, absent clear agreement by the parties to apply another law or to avoid the rules of the CISG, because the Convention is designed to avoid uncertainties about the applicable law and to provide an equitable set of rules for international traders.

The second kind of exception from the application of the Convention's uniform rules is the outright exclusion of certain disputes from its scope. The CISG excludes numerous types of contracts from its scope,⁴⁸ in particular contracts historically covered by specialized local rules that did not "lend themselves to unification."⁴⁹ The drafters of the CISG avoided a complex area of potential disagreement by excluding from the Convention's scope the question of "the liability of the seller for death or personal injury caused by the goods."⁵⁰ They also attempted to preserve the effect of domestic consumer protection legislation by excluding certain transactions with

45. CISG, art. 19(2). Article 19(3)'s list of additional or different terms which are considered to "alter the terms of the offer materially" includes terms relating to "price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes." Professor Farnsworth has observed that article 19 (3) "makes it clear that almost all variations would be material." Farnsworth, *Formation*, *supra* note 44, at 3-16.

46. Part II of the Convention governs formation. The basic rules concerning offers are found in CISG, articles 14 through 17. Article 18(1) states that acceptance may be by "conduct of the offeree indicating assent to an offer."

47. See, e.g., François Vergne, *The "Battle of the Forms" under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 33 AM. J. COMP. L. 233, 256 (1985) (suggesting either that buyer would be bound to seller's counter-offer, or seller would be bound to terms in buyer's initial offer); Peter Winship, *Formation of International Sales Contracts Under the 1980 Vienna Convention*, 17 INT'L LAW. 1, 12 (1983) [hereinafter Winship, *Formation*].

48. See CISG, art. 2 (excluding *inter alia* sales by auction; sales on execution or otherwise by authority of law; sales of stocks, shares, investment securities, negotiable instruments, or money; sales of ships, vessels, hovercraft, or aircraft; and sales of electricity); see also *First Committee Deliberation*, 2d mtg., U.N. Doc. A/CONF.97/C.1/SR.2 (1980), reprinted in OFFICIAL RECORDS, *supra* note 1, at 240.

49. The very first draft of a uniform law for the international sale of goods (i.e., the predecessor to the ULIS) also excluded from its scope matters that were already subject to special rules contained in international agreements, or to "detailed rules of a regional character which do not lend themselves to unification." *Projet d'une loi internationale sur la vente*, UNIDROIT S.D.N. - U.D.P. 1935, *Projet I* [hereinafter 1935 Draft ULIS], reprinted in LEAGUE OF NATIONS, *supra* note 10, at 19. The drafting history of the ULIS is further explored *infra* in part III.B.

50. CISG, art. 5. The purpose of this provision is to "remove from the sphere of application of the Convention the complex area of the law dealing with product liability." Warren Khoo, in BIANCA & BONELL, *supra* note 1, at 34, 49.

consumers from the Convention's scope,⁵¹ although it remains possible that a case falling within the scope of the CISG will also be subject to consumer protection legislation.⁵² Finally, the drafters excluded questions of property⁵³ and validity⁵⁴ from the Convention's scope.

The present article focuses on this last exclusion from the Convention's scope. Although validity issues implicate an important category of cases, the Convention does not provide guidance on how to determine whether or not a question is one of validity. Article 4(a) thus creates a methodological quagmire that tribunals must carefully negotiate.

B. *Conflict of Laws Implications*

The central goal of the CISG is to avoid the confusion and uncertainty engendered by the conflict of laws. Yet conflict of laws rules still play an important role in disputes to which the Convention applies.

In each case in which the CISG excludes a contract or issue from its scope, the adjudicator must engage in a traditional conflict of laws analysis to determine which substantive law then governs.⁵⁵ A great variety of conflict of laws rules are available at both the international⁵⁶ and the domestic⁵⁷

51. CISG, article 2(a) provides that the Convention does not apply to 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." Consequently, the CISG has a narrower scope than the Uniform Commercial Code, which does not exclude sales of goods for personal, household, or family use from its scope. *Cf.* U.C.C. § 2-102 ("Unless the context otherwise requires, this Article applies to transactions in goods; . . . nor does this Article impair or repeal any statute regulating sales to consumers").

52. For example, a case falling within the scope of the CISG may also be subject to consumer protection legislation if domestic consumer legislation applies to protect a buyer who purchased goods for personal, family, or household use, regardless of whether the seller knew or ought to have known that the goods were bought for such use. *See* Khoo, *supra* note 50, at 34-40.

53. Article 4(b) provides that the Convention is not concerned with "the effect which the contract may have on the property in the goods sold."

54. CISG, art. 4(a).

55. McLachlan, *supra* note 4, at 610 ("Consideration of the layers of law which may apply to a contract for the international sale of goods can be a bewildering task, even for initiates."); Rabel, *Draft Law*, *supra* note 20, at 545 ("The doctrines of the American conflict of laws concerning sales are not so bad as certain others, yet they inflict enough racking on the unwary who comes to consult their oracles.").

The supplementation of a uniform law by reference to the pre-existing legal system which underlies the codification is familiar to U.S. lawyers who work with the Uniform Commercial Code. U.C.C. § 1-103 provides that:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

See also Shael Herman, *Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code*, 56 TUL. L. REV. 1125, 1154-56 (1982).

56. A tribunal must initially consider whether it is bound to apply a choice of law rule derived from an international convention to the contractual dispute before it. If a conflict of laws convention is in effect in the forum, then its provisions should be consulted to determine which law is applicable to the dispute. For example, the Convention on the Law Applicable to the Sale of Goods, June 15, 1955, 510 U.N.T.S.

levels. While the law of the seller's place of business frequently governs contracts of sale absent agreement of the parties,⁵⁸ a tribunal could conceivably apply domestic (buyer's) law rather than foreign (seller's) law when a local buyer brings suit in a local tribunal against a foreign seller.⁵⁹ Thus, a

149 [hereinafter 1955 Conflicts Convention], has been ratified by Belgium, Denmark, Finland, France, Greece, Ireland, Italy, Niger, Norway, and Sweden, and came into force in 1964. *See* Diamond, *supra* note 20, at 50-60.

In the wake of the CISG, the Hague Conference on Private International Law convened a Diplomatic Conference in 1985 in cooperation with UNCITRAL, at which participants adopted a revised version of the 1955 Conflicts Convention. Convention on the Law Applicable to Contracts for the International Sale of Goods, Oct. 30, 1985, 24 I.L.M. 1573 (1985) [hereinafter 1985 Conflicts Convention] (not yet in force). *See generally* DICEY AND MORRIS ON THE CONFLICTS OF LAWS (Lawrence Collins et al. eds., 4th Supp. to the 11th ed. 1991) [hereinafter DICEY & MORRIS]; Francis A. Gabor, *Emerging Unification of Conflict of Laws Rules Applicable to the International Sale of Goods*, 7 NW. J. INT'L L. & BUS. 696 (1986); Gabor, *Stepchild*, *supra* note 1, at 539-40; McLachlan, *supra* note 4.

For certain European countries, the question of applicable law in contract cases is determined by the Convention on the Law Applicable to Contractual Obligations, *opened for signature* June 19, 1980, 1980 O.J. (L 266) 1 [hereinafter 1980 Rome Convention] (entered into force, Apr. 1, 1991). This convention is in force in Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, and the United Kingdom. *See generally* Samuel Cohen, *The EEC Convention and U.S. Law Governing Choice of Law for Contracts, with Particular Emphasis on the Restatement Second: A Comparative Study*, 13 MD. J. INT'L L. & TRADE 223 (1989).

57. An American tribunal would ordinarily apply the conflict of laws rule in U.C.C. § 1-105 in a case falling within the scope of the Uniform Commercial Code. *Compare* U.C.C. § 1-105 ("Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.") with RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971) [hereinafter RESTATEMENT (SECOND)] ("The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties. . . .").

In other cases, including cases in which the U.C.C. is supplemented by the "principles of law and equity" pursuant to § 1-103, the general conflict of laws rules of the forum would be applied in order to determine the applicable law. *Compare* RESTATEMENT OF CONFLICTS OF LAW § 332 (1934) (*lex loci contractus* governs "validity of contract") with RESTATEMENT (SECOND), *supra*, § 191 ("The validity of a contract for the sale of an interest in a chattel and the rights created thereby are determined . . . by the local law of the state where under the terms of the contract the seller is to deliver the chattel unless, with respect to the particular issue, some other state has a more significant relationship . . . to the transaction and the parties, in which event the local law of the other state will apply."). *See generally* E. SCOLES & P. HAY, CONFLICT OF LAWS (1981); ERNST RABEL, 2 THE CONFLICT OF LAWS: A COMPARATIVE STUDY 361 (1960) [hereinafter RABEL, COMPARATIVE CONFLICTS].

58. *See, e.g.*, Longobardi, *supra* note 27, at 884 & n.124 (analyzing American law). This trend is particularly noticeable in modern international conflicts enactments. The 1980 Rome Convention, *supra* note 56, provides that "[w]here the parties have failed to choose the applicable law, article 4 prescribes an objective test [which is] derived from American sources such as the Restatement Second of Conflict of Laws." Erik Jayme, *The Rome Convention on the Law Applicable to Contractual Obligations* (1980), in INTERNATIONAL CONTRACTS AND CONFLICTS OF LAWS 36, 42 (Peter Šarčević ed., 1990) [hereinafter ŠARČEVIĆ]. Article 4(2) of the 1980 Rome Convention presumes "that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has . . . his habitual residence, or . . . its central administration." *See also* 1985 Conflicts Convention, *supra* note 56 (article 7 gives priority to parties' agreement on applicable law; but absent choice of law by parties, article 8(1) presumes that "contract is governed by the law of the State where the seller has his place of business at the time of conclusion of the contract.").

59. In a case involving suit under a contract for the international sale of goods in which the buyer alleges breach by the seller, the buyer would likely seek his remedy in a local court. In this situation, there would be a strong temptation for the tribunal to apply the substantive law with which it is most familiar,

seller in the international market may be surprised by the law ultimately applied to govern the seller's rights and liabilities.

Even if the tribunal concludes that the contract itself and the various issues it raises all fall within the substantive scope of the CISG, the case is not entirely immune from conflict of laws problems. On the contrary, the conflict of laws continues to play a role in cases that fall squarely within the scope of the CISG.⁶⁰ Article 7(2) provides that

[q]uestions concerning matters *governed* by this Convention which are *not expressly settled in it* are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.⁶¹

This guideline for interpreting the Convention demonstrates the tension between those drafters who wished to create an entirely autonomous legal order for international sales,⁶² and those who believed that domestic legal orders should continue to play a role in such transactions.⁶³ The solution embodied in article 7(2) represents an important — if awkward — compromise

rather than apply the law of a foreign jurisdiction (i.e., the seller's law) to the dispute. The conflict of laws rules prevailing in the United States are flexible enough to permit this result. *See, e.g.*, U.C.C. § 1-105(1) ("Failing such agreement [to apply either the law of the forum or of another state or nation with which the transaction bears a reasonable relation] this Act applies to transactions bearing an appropriate relation to this state.").

60. *See* Jan Kropholler, *Der "Ausschluss" des internationalen Privatrechts im Einheitlichen Kaufgesetz*, 38 RABELSZ 372, 373 (1974) (discussing dual function of choice of law rules in field of uniform sales law: first, to determine whether uniform law applies (*anwendungsbestimmende Funktion*), and second, to supplement uniform law (*anwendungsergänzende Funktion*)); McLachlan, *supra* note 4, at 613.

61. CISG, art. 7(2) (emphasis added).

62. The ULIS, *supra* note 13, differs markedly from the CISG in this respect. CISG, article 7(2) can best be understood by comparing it to its two predecessors, ULIS, article 2 (virtually banning the rules of private international law from the realm of the uniform law) and ULIS, article 17 (providing that "[q]uestions concerning matters governed by the [ULIS] which are not expressly settled therein shall be settled in conformity with the general principles on which the [ULIS] is based"). Taken together, ULIS, articles 2 and 17 "indicate that the ULIS was intended to constitute a self-contained law of sales, to be construed and applied autonomously, i.e. without any reference to or interference from the different national laws." Bonell, *supra* note 22, at 66; *see also Note of the Special Commission on the Observations Presented by Various Governments and by the I.C.C. Relating to the 1956 Draft of a Uniform Law on the International Sale of Goods*, U.N. Doc. V/Prep.13 [hereinafter *Special Commission Note*], reprinted in HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 180 (ULIS "should, as far as possible, be self sufficient").

63. Some representatives to the U.N. Commission on International Trade Law argued for limiting CISG to a set of clear rules that could be applied simply and mechanically, and were concerned that "it was difficult and dangerous to attempt to solve problems by reference to unstated general principles." Kastely, *supra* note 8, at 604; *see also Report of the Working Group on the International Sale of Goods*, 1st Sess., U.N. Doc. A/CN.9/35 (1970) [hereinafter *First W.G. Session*], reprinted in [1968-1970] 1 UNCITRAL Y.B. 176, 182, U.N. Doc. A/CN.9/SER.A/1970, and in HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 14, 20 (discussion of proposal to insert reference to rules of private international law in case of questions not settled by uniform law); *Report of the Working Group on the International Sale of Goods*, 2d Sess., U.N. Doc. A/CN.9/52 (1971) [hereinafter *Second W.G. Session*], reprinted in [1971] 2 UNCITRAL Y.B. 50, 62, U.N. Doc. A/CN.9/SER.A/1971, and in HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 55, 68; *Twentieth Meeting of Committee on Sale*, U.N. Doc. CONF./V/Amend/78 [hereinafter *Twentieth ULIS Meeting*], reprinted in HAGUE CONFERENCE RECORDS, *supra* note 13, at 139-40 (discussion of similar proposal).

between those different camps.⁶⁴ Article 7(2) presents tribunals with two exceptionally difficult tasks: first, they must determine what matters are "governed by" the CISG but "not expressly settled in it," and second, where such a matter exists, they must fill the "gap"⁶⁵ in the Convention by resorting to the "general principles upon which it is based."⁶⁶ Only if the judge or arbitrator fails to discover such general principles is it appropriate to engage in a conflict of laws analysis to determine the proper law to resolve the matter.

Article 7(2) thus permits the development of an international jurisprudence of trade with respect to matters governed by the Convention, but only within the limits set by the general principles upon which the CISG is based. In other words, the international legal regime founded upon the CISG is autonomous only within the unclear confines of its scope and its general principles. This limited autonomy denies the Convention the full flexibility it needs to adapt to the changing needs of international commerce, and thus diminishes its chances for success.⁶⁷

64. See Kastely, *supra* note 8, at 603-05; see also HONNOLD, *UNIFORM LAW*, *supra* note 1, at 150 first part of CISG, article 7(2) was added to allay fears "that courts might turn too quickly to national law" to fill gaps in uniform law, while second part of article 7(2) was added to pacify "those who doubted that general principles . . . could always be found").

65. The term "gap" can be used broadly or narrowly. In the narrow sense, it refers to an issue "governed by this Convention but not expressly settled in it," per CISG, article 7(2). In the broader sense, however, "gaps exist both in relation to the subject matters of sales and in relation to the matters which fail to be regulated." Rabel, *Observations*, *supra* note 10, at 127. In this article, the term "gap" refers solely to questions to which CISG, article 7(2) applies. While it is concededly difficult to separate the questions of interpretation and gap-filling, failure to recognize the distinction would do violence to the hard-fought compromise embodied in CISG, article 7(2). See Winship, *Commentary*, *supra* note 27, at 635 ("Gaps in the Law: Issues of Validity"); see also Bonell, *supra* note 22, at 72 (pointing out that interpretive rule in CISG, article 7(1) is "decisive for determining the precise scope" of article 7(2), and that "the different rules or techniques adopted in the process of interpretation have an influence not only on the way in which ambiguities in the legislative language are solved, but also on the decision whether there exists a true gap in the Convention").

66. See HONNOLD, *UNIFORM LAW*, *supra* note 1, at 61-62; Bonell, *supra* note 22, at 76-78, 80-82; Winship, *Private International Law*, *supra* note 35, at 509-15; see also Michael J. Bonell, *A "Restatement" of Principles for International Commercial Contracts: An Academic Exercise or a Practical Need?*, 7 *REVUE DE DROIT DES AFFAIRES INTERNATIONALES* 873 (1988) [hereinafter Bonell, *Restatement*] (discussing UNIDROIT efforts to elaborate set of "Principles for International Commercial Contracts"); Drobnig, *General Principles*, *supra* note 4, at 305-33 (discussing role of general principles in European law). For comparative studies of legal reasoning, see Shael Herman, *Quot judices tot sententiae: A Study of the English Reaction to Continental Interpretive Techniques*, 1 *LEGAL STUD.* 165 (1981); Hanns Hohmann, *The Nature of the Common Law and the Comparative Study of Legal Reasoning*, 38 *AM. J. COMP. L.* 143 (1990).

67. Professor Audit has observed that "[t]he Convention is meant to adapt to changing circumstances. Amending it is practically impossible The provisions of the Convention must be flexible enough to be workable without formal amendment for a long period of time. The Convention, therefore, must be regarded as an autonomous system, capable of generating new rules. This feature of the Convention is reflected in article 7, dealing with interpretation and gap-filling." Audit, *supra* note 25, at 153; see also Kurt H. Nadelmann, *Uniform Interpretation of "Uniform" Law*, 1959 *Unification of Law Y.B.* 383 [hereinafter Nadelmann, *Uniform Interpretation*].

The validity exception provides an example of how a tribunal that ends up resorting to conflict of laws analysis in lieu of uniform substantive law thereby limits the chances for the Convention's success. Since questions of validity are excluded from the *scope* of the Convention, they do not present "gaps" which can be filled by resorting to "general principles" under article 7(2).⁶⁸ Whenever a matter of validity arises, therefore, it must be resolved under the domestic law that the tribunal is bound to apply by virtue of the relevant rules of private international law. The judge or arbitrator who concludes that an issue is one of validity simultaneously precludes that issue from debate and discussion within the framework of the "international rhetorical community"⁶⁹ created by the CISG. Article 4(a) thus blocks the development of a "jurisprudence of validity" and hampers the evolution of an effective international sales law. This is especially troubling where non-uniform treatment of validity issues under domestic law conflicts with the reasonable expectations of international traders.

The Convention accords a high priority to domestic rules of validity. Viewed as a whole, the CISG establishes a "tripartite hierarchy"⁷⁰ of norms to apply to contracts for the international sale of goods. The Convention accords highest priority to domestic rules in those areas that are excluded from the Convention's scope, followed next in priority by the parties' contractual autonomy. For example, when validity is at issue, the applicable domestic rules trump the parties' autonomy and thus override any conflicting terms contained in their agreement.⁷¹ At the bottom of the hierarchy are the dispositive provisions (i.e., the provisions from which the parties may derogate) of the Convention itself and the "general principles upon which it is based."⁷² The privileged status bestowed upon domestic rules of validity — together with the threat to the Convention's overall success posed by an overly-broad interpretation of the validity exception — is troubling, because

68. See HONNOLD, *UNIFORM LAW*, *supra* note 1, at 152 (questions of validity are "beyond the reach of 'gap-filling' under Article 7(2)"); Bonell, *supra* note 22, at 75 ("Issues which are not within the scope of the Convention [as generally defined by article 4] have been deliberately left to the competence of the existing non-unified national laws. The fact that there is no provision in the uniform law dealing with them cannot be regarded as a gap, but is a logical consequence of that preliminary decision."); Farnsworth, *Standard Forms*, *supra* note 27, at 441 n.7 ("validity to be determined by the law applicable under choice of law rules" and not under CISG, article 7(2)); *see also F.R.G. Government Observations*, *supra* note 18, at 82.

69. Kastely, *supra* note 8, at 604.

70. Audit, *supra* note 25, at 159 (hierarchy of norms); Farnsworth, *Standard Forms*, *supra* note 27, at 441; Winship, *Commentary*, *supra* note 27, at 638 ("the principle of freedom of contract . . . is subject to the express exclusion of validity issues").

71. This can also be expressed by saying that CISG, article 4(a) controls article 6. A more difficult private international law question is whether the parties may exercise their contractual autonomy by selecting a more lenient domestic law to govern the validity issues raised by their contract over the potentially applicable law of another jurisdiction whose validity rules are more prohibitive than those of the selected jurisdiction. See the discussion of "internationally mandatory" rules of law *infra* in part III.D.

72. CISG, art. 7(2).

it limits the extent to which the CISG can fulfill the internationalist dreams of its drafters. This limitation compels careful study of the contours of article 4(a), which are defined by the drafting history of the Convention and the Convention's own internal rules of interpretation. It is to these two interpretive tools that this article now turns.

III. INTERPRETATION OF ARTICLE 4(A) OF THE CONVENTION

A. Introduction

What does it mean to speak of the validity of a contract for the international sale of goods? This question is not new,⁷³ but has yet to be fully answered. It is easier to compile a list of issues or contracts that raise questions of "validity" and therefore fall outside the scope of the Convention than it is to explain how a tribunal faced with a concrete problem should decide whether the particular issue or contract is governed by domestic law or by the CISG (including the general principles upon which it is based). Although the applicable domestic law may assign the label "validity" to an issue, the issue may warrant different consideration in the international context than it does in the domestic context. Defining validity simply by compiling a list of issues traditionally classified under that heading would not be sensitive to the need to balance competing domestic and international policies. It is crucial to fashion a balanced approach to the validity question, since article 4(a) delimits a substantive boundary of the international legal regime.

"Validity" is an ambiguous term that hardly lends itself to precise definition within the confines of a single country, much less within the diverse international community in which the CISG has force. According to Professor Corbin, validity "is a term with a shifting content; but it is often used with the notion that the 'living thought' within its 'skin' is unchangeable and certain. A contract is 'valid' insofar as it has legal operation and 'invalid' insofar as it has not."⁷⁴ Lawyers trained in the United States tend to think of different

73. More than 25 years ago, an Italian delegate to the 1964 Hague Diplomatic Conference on the Unification of Law Governing the International Sale of Goods asked, "[W]hat [is] the meaning of the expression *le contrat n'est pas valable*. [Does] it mean: that the contract is not concluded; that the contract is not valid; [or] that the contract is valid, but it is not enforceable?" *Records of the Fourteenth Meeting of the Committee on Sale* [hereinafter *Fourteenth ULIS Meeting*], reprinted in HAGUE CONFERENCE RECORDS, *supra* note 13, at 105.

74. ARTHUR CORBIN, CORBIN ON CONTRACTS § 279 (1952); *see also* ARTHUR CORBIN, 5 CONTRACTS § 993 (1963) (valid contract is one in which "the transaction consists of operative facts that satisfy the requirements of the rules . . . with respect to the formation of contracts"); *cf.* 17 C.J.S. *Contracts* § 1(2) (1963) ("The law, not private agreement, determines the essential elements of a *valid* contract, and it is not every agreement which results in a *binding, legally enforceable* contract. . . . The absence of any of the essential elements . . . is a bar to . . . enforceability; and a contract may be legal but, for one or more reasons, unenforceable.") (emphasis added).

degrees of validity,⁷⁵ that is, all matters which make an agreement void, voidable, or unenforceable.⁷⁶ The term "validity" — understood as an "end" rather than as a "means" to an end — "covers a lot of territory."⁷⁷ Under article 4(a), all the means that lead to that end also lead a question out of the scope of the Convention's uniform law and back — via traditional conflict of laws analysis — to domestic substantive law. The legal complexity inherent in the exclusion of validity issues is multiplied by the number of jurisdictions in which the CISG is in force, since the term "validity" has a different meaning in each national legal system.⁷⁸ The potential plethora of meanings of the term "validity" hardly seems consistent with the Convention's call for uniformity and predictability. This apparent inconsistency cautions a balanced approach to the validity exception.

Article 4(a) mediates the tension between the international and domestic legal orders. On the one hand, it makes the CISG politically tenable by acknowledging that diversity sets limits to the goal of unification. This is the major idea that emerges from the CISG's negotiating history, as will be discussed in part III.B. On the other hand, precisely because article 4(a) is an elastic exception, it should be able to accommodate changes in international commercial practice which further the goals of uniformity and predictability.

The drafters of the CISG never defined the term "validity,"⁷⁹ although they did exchange views on whether a particular issue fell within the scope of the exclusion, and occasionally suggested issues that were excluded.⁸⁰ The lack of debate as to the meaning of the term "validity" indicates that the drafters preferred to keep this term ambiguous in order to allow each reader to ascribe a satisfactory meaning to it. However, the term's ambiguity does not mean that the validity exception provides an unlimited opportunity for parochial interests to creep into contracts for the international sale of goods. The drafters did not intend to equate validity with all mandatory domestic law, for to do so would have endangered the Convention's aim of introducing a degree of uniformity into the international commercial order.

To assert that the ambiguous term "validity" fosters confusion is simultaneously to oversimplify and to identify one of the key features of the

75. See *Wrap-Vertiser Corp. v. Plotnick*, 143 N.E.2d 366 (N.Y. 1957) (recognizing varying degrees of validity).

76. See CORBIN, 1 CONTRACTS § 6 (voidable contracts), § 7 (void contracts), § 8 (unenforceable contracts) (1963). Professor Farnsworth refers to the manner in which "courts 'police' agreements against unfairness by placing limits on their enforceability." E. ALLAN FARNSWORTH, CONTRACTS § 4.1 (1982).

77. *Coler v. GCA Corp.*, 331 N.Y.S.2d 938, 941 (App. Div. 1972) (McGivern, J., dissenting).

78. See *Winship*, *Scope*, *supra* note 34, at § 1.02 ("In the abstract, the exclusion of issues of validity is potentially the most troublesome. There is no uniformity among jurisdictions on the grounds for declaring a contract invalid on some ground.").

79. *Kastely*, *supra* note 8, at 593-94 (noting also that broad, nontechnical definitions of terms encourage discussion about meanings).

80. The debates on particular validity issues are examined *infra* in part IV.A.

problem under scrutiny. The drafting history undeniably suggests that the drafters intended article 4(a) to serve as a loophole which could stretch to fit the needs of each domestic legal system. "Validity" is an ideal parameter of the Convention's scope, because it means something — albeit not the same thing — to everyone. The drafters viewed "validity" as an umbrella to shelter residual issues which they preferred not to discuss at the time, since they feared that they could not reach agreement or that, at the very least, discussing such topics would result in substantial delays.⁸¹ Professor Winship has remarked that, "[d]espite [the] lack of controversy, Article 4(a) has the potential for mischief."⁸² But in fact, this "potential for mischief" has always been at the root of the lack of debate. Ambiguity, it seems, was intended, and in this the drafters succeeded. By resorting to ambiguity, the drafters postponed but did not eliminate the validity debate. They simply deferred to those who would later interpret the Convention.

The starting point for interpreting article 4(a) is the text of the Convention. However, since the text itself is ambiguous, the tribunal must look beyond it to determine when application of domestic law is warranted.

The Convention is both a private international law treaty and a uniform body of substantive law that may be applied to determine the rights and obligations of parties to a contract.⁸³ Each aspect of the Convention's dual nature includes an interpretive technique that must be taken into account when examining article 4(a). First, because the Convention is a treaty, the Convention's drafting history (*travaux préparatoires*) provides clues to its interpretation. As the discussion in part III.B will show, the *travaux* clearly indicate that the drafters intended to preserve the role of domestic law in protecting parochial interests. However, the *travaux* also indicate that the drafters of the CISG did not intend for the validity exception to provide an unlimited opportunity for domestic laws implicating public policy to apply to international sales transactions. Second, because the CISG is a uniform law, the Convention's own interpretive provisions — in particular article 7(1) — also provide clues to its meaning.⁸⁴ Article 7(1) embodies the drafters'

81. The drafting history of the CISG is discussed *infra* in part III.B.3.

82. Winship, *Commentary*, *supra* note 27, at 637.

83. For the special problems of interpreting international uniform law, see John H. Honnold, *General Report: Methodology to Achieve Uniformity in Applying International Agreements, Examined in the Setting of the Uniform Law for International Sales Under the 1980 U.N. Convention*, in 12TH INTERNATIONAL CONGRESS OF COMPARATIVE LAW (1986); John H. Honnold, *The Unification of Rules for International Trade and the Role of Specialized Agency*, 1959 Unification of Law Y.B. 237-39 [hereinafter Honnold, *Unification of Rules*]; Nadelmann, *supra* note 67; *Report of the 11nd Meeting of the Organizations Concerned with the Unification of Law, Les Divergences dans l'Interpretation du Droit Uniforme*, 1959 Unification of Law Y.B. 247, 247-390; Sauveplanne, *Uitlegging*, *supra* note 23.

84. The relationship of article 7(1) to article 4(a) is explored *infra* in part III.C.1. In addition to article 7(1) concerning interpretation of the Convention itself, the CISG also contains in article 8 an interpretive rule for statements and other conduct of a party to a contract. See E. Allan Farnsworth, in BIANCA & BONELL, *supra* note 1, at 95-102.

internationalist aspirations and will be examined in part III.C.

In contrast to the drafting history and article 7(1) approaches to interpreting article 4(a), a third interpretive approach to the validity exception must be considered. This approach arises from the erroneous equation of "validity" and "mandatory law." Tribunals should avoid this oversimplified approach to article 4(a), whose roots lie in the debates preceding the CISG, because it accords undue emphasis to the role of domestic public policy in international trade. If adjudicators automatically exclude from the scope of the Convention all questions implicating so-called "mandatory" domestic laws, they will subvert the internationalist purpose of the Convention by overemphasizing parochial interests. This would allow the validity exception tail to wag the unification dog.

The proper interpretation of article 4(a) must steer a path between the desire to preserve the effect of parochial interests evidenced by the *travaux préparatoires*, and the desire to develop internationalist norms for international sales transactions, embodied in article 7(1). Adjudicators should heed the lessons of the drafting history and avoid the trap of reflexively applying any domestic law that claims to be mandatory. In addition, the tribunal should take care not to push every question through the validity loophole in a way that would undermine the purpose of the Convention. Although tribunals must consider domestic law when defining validity under article 4(a), as a general proposition they should go one step further and consider the internationalist purpose of the CISG, as set out in article 7(1), when deciding whether a contract or issue is "governed by" the Convention or excluded from its scope. A tribunal called upon to decide whether a contract, provision, or usage is "governed by" the Convention or excluded from its scope by article 4(a) must strive to interpret "validity" in a manner that upholds the integrity of the Convention and respects the political compromises made during the drafting process. After analyzing articles 4(a) and 7(1), in parts III.B and III.C respectively, the discussion will focus in part III.D on the problems that arise in connection with overly-broad conflict of laws rule (i.e., a rule that equates validity with mandatory law) to determine whether a particular issue is governed by domestic or uniform international law.

B. Travaux Préparatoires

The 1969 Vienna Convention on the Law of Treaties⁸⁵ governs the interpretation of promises that states make to one another. Although the 1969 Vienna Convention does not apply directly to the relationship of private

85. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) [hereinafter Vienna Convention].

parties under the CISG, Professor Honnold has argued persuasively that the interpretive rules contained in the 1969 Vienna Convention "would be pertinent to a question concerning the construction of [CISG, article 7, because that article] embodies mutual obligations of the contracting states as to how their tribunals will construe the Convention."⁸⁶ By the same logic, these interpretive rules should also apply to article 4(a), since this provision implies mutual obligations of the contracting states to apply the provisions of the Convention only to cases which properly fall within its scope.

The general interpretive rule of the 1969 Vienna Convention, as stated in article 31, is that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."⁸⁷ Article 32 of the Vienna Convention, provides that

[r]ecourse may be had to supplementary means of interpretation including the *preparatory work of the treaty and the circumstances of its conclusion*, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning *ambiguous or obscure*; or (b) leads to a result which is manifestly absurd or unreasonable.⁸⁸

Thus, adjudicators should consult the *travaux préparatoires* of the CISG in order to determine the meaning of article 4(a), since the key term "validity" may fairly be described as "ambiguous or obscure."

Substantial scholarly support exists for resolving "[p]ossible doubts about the precise meaning and effect of a single provision [of the CISG] . . . by reference to the *travaux préparatoires*."⁸⁹ Fortunately for scholars, judges, and arbitrators, there is a wealth of material generally available on the preparation of the uniform law for international sales.⁹⁰ While *travaux préparatoires* are not always accepted as being as authoritative as, for instance, national ratification histories,⁹¹ *travaux* can play an important role

86. HONNOLD, UNIFORM LAW, *supra* note 1, at 159 n.44.

87. Vienna Convention, *supra* note 85, art. 31(1).

88. *Id.* art. 32 (emphasis added). See generally MYRES MCDUGAL ET AL., THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER 363, 365 (1972); IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 116 (2d ed. 1984) (stating that resort to *travaux préparatoires* is for "purpose of elucidating the meaning of the text, not for purpose of ascertaining, independently of the text, the intentions of the parties").

89. Bonell, *supra* note 22, at 90; cf., HONNOLD, UNIFORM LAW, *supra* note 1, at 136-37 ("words of the Convention . . . [should be] projected against an international background. With time, a body of international experience will develop through international case law and scholarly writing In the meantime, the only international setting for the Convention's words is its legislative history — its genetic background."); Sauveplanne, *Utlegging*, *supra* note 23, at 100.

90. See generally HAGUE CONFERENCE DOCUMENTS, *supra* note 9; HAGUE CONFERENCE RECORDS, *supra* note 13; HONNOLD, DOCUMENTARY HISTORY, *supra* note 1; OFFICIAL RECORDS, *supra* note 1.

91. O.C. GILES, UNIFORM COMMERCIAL LAW: AN ESSAY ON INTERNATIONAL CONVENTIONS IN NATIONAL COURTS 40-42 (1970) ("materials, even when accessible . . . have a habit of not providing the expected insight into the minds of those drafting conventions Another reason why preparatory materials have so far had little influence on the interpretation of convention law is that their contents, just

in ensuring the uniform interpretation of uniform law in different countries. A judge or arbitrator might be expected to attach more weight to *travaux préparatoires* when interpreting a treaty that is also a uniform law than when interpreting other types of treaties.⁹²

At first blush, the prevailing understanding that emerges from the CISG negotiations appears to support a broad reading of the validity loophole. Clearly, the negotiators were concerned with preserving the diverse parochial interests of each state. However, they also struggled with an important distinction between validity and mandatory law, and while the exclusion of the former survived earlier iterations of uniform trade law, the exclusion of the latter did not. Moreover, the negotiators' simultaneous desire to avoid the unpredictability spawned by the conflict of laws impelled them to include article 7(1), which defines the Convention's internationalist purpose. An overly-broad reading of the validity exception would undermine that purpose. Therefore, a more complete understanding of article 4(a) requires an appreciation for both the parochial and internationalist interests reflected in the Convention.

When interpreting article 4(a), it is necessary — but not sufficient — to examine the various drafts and reports prepared by the U.N. Commission on International Trade Law (UNCITRAL) in connection with the Convention itself. Since the CISG represents the pinnacle of a half century of unification initiative, it must be viewed in the context of previous efforts to create a uniform law for international sales. In particular, the CISG should be viewed against the backdrop of related harmonization efforts of the International Institute for the Unification of Private Law (UNIDROIT)⁹³ — i.e., the Uniform Law on the International Sale of Goods (ULIS)⁹⁴ and the UNIDROIT Draft Law for the Unification of Certain Rules Relating to the

as those of statutes, can be understood in different ways by different courts."); Bonell, *supra* note 22, at 90 (*travaux* may reveal diversity of opinion or consensus; but even in cases of consensus, intention of the drafters is only one element to employ when interpreting uniform law); Sauveplanne, *supra* note 23, at 101 ("Het komt voor dat de bronnen geen uitsluites geven over wat precies beoogd is.") ("It can occur that the *travaux* give no insight into exactly what was intended.") (author's translation).

92. Professor David has stated that:

Resort to the *travaux préparatoires* is only one of the possible methods of interpreting legislation . . . and in fact their authority is usually fairly weak. In a number of hypotheses it is accepted that the intention of the authors of the law, even when ascertained, is not necessarily a decisive argument: laws have a life of their own, and their meaning can change with time. However, different attitudes can be adopted for uniform laws. Here the *travaux préparatoires* have a utility they lack in the case of ordinary laws: here, they are a means of ensuring uniform interpretation of the law in all countries.

René David, *The International Unification of Private Law*, II-5 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 3, 105-06 (1971); see also *Air France v. Saks*, 470 U.S. 592 (1985) (suggesting that *travaux préparatoires* must be generally available in order to be persuasive).

93. For background information on UNIDROIT, see Charter Establishing the International Institute for the Unification of Private Law, *opened for signature* Mar. 15, 1940, 15 U.S.T. 2494, T.I.A.S. No. 5743 (*entered into force for the United States on* Mar. 13, 1964).

94. See *supra* note 13.

Validity of Contracts of International Sale of Goods (LUV).⁹⁵

Like the authors of the ULIS, the CISG drafters wished to preserve the application in international commerce of certain domestic laws. The ULIS drafters accomplished this goal by excluding from the scope of the uniform law both validity (article 8) and other provisions of mandatory law (articles 4 and 5(2)). The latter exclusion amounted to a straightforward conflict of laws rule. The CISG drafters excluded only validity. However, the CISG drafters provided no guidance to interpreters of the Convention as to the definition of validity. They produced no list of validity issues, and indeed even rejected the list prepared by the drafters of the LUV. These two facts suggest that the definition of validity in article 4(a) cannot be reduced to a simple, static set of criteria.

These nuances in the CISG's history, as well as the overriding concern for preserving some domestic law, will be highlighted in part III.B.1 by examining ULIS, article 8, the predecessor of CISG, article 4(a). This will be followed in part III.B.2 by an analysis of ULIS, articles 4 and 5(2), which serves to illustrate the difference between the overly-broad "mandatory law" approach and the more balanced interpretation that article 4(a) requires. With this background established, the analysis will turn in part III.B.3 to the CISG itself and will focus on how the CISG differs from the ULIS.

1. *ULIS, Article 8*

On April 29, 1930, the UNIDROIT Governing Council resolved to appoint a Special Committee for the purpose of preparing a draft Uniform Law on the International Sale of Goods (*Corporeal Moveables*).⁹⁶ The very first draft of a uniform law for the international sale of goods was ready in 1935.⁹⁷ From the start, the matter of formation of contracts was treated separately from the rights and obligations of the parties to a contract. The 1935 Draft Uniform Law on the International Sale of Goods contained no reference to validity. However, predecessors to CISG, article 4(a) appeared soon afterwards, and evolved during the decades of drafting⁹⁸ that culminated in the 1964 conven-

95. UNIDROIT Draft Law for the Unification of Certain Rules Relating to the Validity of Contracts of International Sale of Goods, UNIDROIT U.D.P. 1972, ETUDES: XVI/B, Doc. 22 [hereinafter LUV].

96. For a thorough history of the UNIDROIT initiative, see Winship, *Scope*, *supra* note 34, at 1-1; see also 1964 Unification of Law Y.B. 31-39, 58-61; Kastely, *supra* note 8, at 579-85; K.C.T. Sutton, Note, *Hague Conventions of 1964 and the Unification of the Law of International Sale of Goods*, 7 U. QUEENSLAND L.J. 145 (1971).

97. The 1935 Draft ULIS, *supra* note 49, and Rabel's *Observations*, *supra* note 10, were submitted to the UNIDROIT Governing Council, which adopted the 1935 Draft ULIS on October 5, 1934, and forwarded it to the Council of the League of Nations. The Council transmitted it to the Governments for their comments in 1935.

98. In April 1937, the UNIDROIT Governing Council entrusted a second committee to revise the 1935 Draft ULIS in accordance with the comments of the Governments. These efforts resulted in the Draft of a Uniform Law on the International Sale of Corporeal Movables and Report (Revised Edition),

tions relating to a Uniform Law on the International Sale of Goods (ULIS) and to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).⁹⁹

The exclusion of validity issues from the scope of the uniform law for international sales dates back to 1937. The Government of the Netherlands raised for the first time the question of the relationship between the uniform law and issues "derived from the general theory of obligations (such as mistake)."¹⁰⁰ Professor Rabel, taking the Dutch comments to heart, agreed that it was desirable that the uniform law specify "*les matières qu'il traite,*" and stated unequivocally that the uniform law governed only the obligations between buyer and seller, and that "it [did] not treat mistake, nor the other vices of consent, nor the impossibility of the promise existing at the time of the conclusion of the sale; thus the draft presupposes conclusion of a valid contract."¹⁰¹ This is consistent with the fact that formation issues were not

UNIDROIT U.P.L. 1939, Draft I(2) [hereinafter 1939 Draft ULIS], which the UNIDROIT Governing Council approved on May 29, 1939.

World War II halted efforts to unify the law governing the international sale of goods. After the war, however, the UNIDROIT Governing Council resumed efforts in this field and shortly thereafter, UNIDROIT forwarded the 1939 Draft ULIS to the Dutch Government which, in turn, convened a Diplomatic Conference on the Unification of Law Governing the International Sale of Goods in 1951. See *Actes de la Conférence par le Gouvernement Royal des Pays-Bas sur un projet de convention relatif a une loi uniforme sur la vente d'objets mobiliers corporels élaboré par l'Institut International pour l'Unification du Droit Privé, 1-10 Novembre 1951* (UNIDROIT 1952). In an effort to assist the Diplomatic Conference, UNIDROIT prepared and forwarded a summary of discussions and proposed amendments concerning the 1939 Draft ULIS, including the conclusions of the October 1950 session in Sta. Margherita Ligure. See 1939 Draft ULIS, UNIDROIT U.D.P. 1952, ETUDES: IV, Vente Doc. 99. A Special Commission appointed by the Diplomatic Conference undertook to revise the 1939 Draft ULIS, which resulted in the 1956 Draft Uniform Law on the International Sale of Goods, U.N. Doc. V/Prep./I (1956) [hereinafter 1956 Draft ULIS], reprinted in HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 3-25 (sometimes called the "Pilotti Draft"). The 1956 Draft ULIS was transmitted to the Dutch government, along with a suggestion that the Diplomatic Conference be reconvened. On the basis of the extensive observations which had been presented on the 1956 Draft ULIS, see *Observations Presented by Various Governments and the I.C.C. Relating to the 1956 Draft of a Uniform Law on the International Sale of Goods*, U.N. Doc. V/Prep./2, reprinted in HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 81-177, the Special Commission undertook further revisions, which culminated in the Draft of a Uniform Law on the International Sale of Goods. U.N. Doc. V/Prep./4 (1963) [hereinafter 1963 Draft ULIS], reprinted in HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 213-31; see also *Special Commission Note*, *supra* note 62, at 179-209.

99. For information about the ULIS and ULF, see *supra* note 13. The 1963 Draft ULIS, *supra* note 98, was the focal point of the Diplomatic Conference on the Unification of Law Governing the International Sale of Goods held at The Hague from April 2-25, 1964, together with various observations and amendments that were submitted prior to and during the Diplomatic Conference, and with the reports of the Working Groups. The ULIS and the ULF were adopted by the Final Act of the Diplomatic Conference on the Unification of Law Governing the International Sale of Goods. In addition to the 28 states which were represented at the Hague Diplomatic Conference, four other states were represented by observers. The Final Act was signed on April 25, 1964, and the two Conventions, to each of which is annexed the text of the respective uniform law, were opened for signature on July 1, 1964. For a discussion of the U.S. criticism of the ULIS, see Dore, *supra* note 35, at 521-22.

100. *Réponses des Gouvernements*, UNIDROIT S.D.N. - U.D.P. 1937, ETUDES: IV, Vente Doc. 82, at 5 (Dutch Government criticizing 1935 Draft ULIS).

101. *Rapport au Président, Projet d'une Loi Internationale sur la Vente*, UNIDROIT S.D.N. - U.D.P. 1937, ETUDES: I, Vente Doc. 87(1), at 14.

covered. Consequently, the 1939 Draft ULIS contained the first forerunner to CISG, article 4(a). It provided that the Uniform Law

governs the obligations of the seller and the buyer arising from a contract *which is valid according to the principles of private international law . . .* [and] excludes the application of any municipal law on the matters which it governs, except where it expressly provides to the contrary. Where, in the field of this law, problems arise which have not been expressly solved by this law the court shall apply the general principles which are the basis of this law.¹⁰²

This provision indicates that the function of the validity exclusion was to preserve the role of conflict of laws analysis. The express direction to apply conflict of laws analysis in order to determine the validity of a contract was especially important under the ULIS, because the ULIS drastically curbed the adjudicator's ability to engage in such analysis. Article 11 of the 1939 Draft ULIS prohibited tribunals from resorting to domestic law to fill a gap in the Uniform Law. The excluded areas were clearly meant to fall outside the autonomous realm in which the ULIS would lead to development of a jurisprudence of international trade. The CISG, on the other hand, provides more opportunities for tribunals to resort to conflict of laws analysis, such as under article 7(2), discussed below, and thus limits the extent of the uniform law's autonomy.

The 1956 Draft ULIS contained a provision resembling CISG, article 4(a) in both structure and content.¹⁰³ The final (1964) version of the ULIS provides in article 8 that

the present Law shall not, except as otherwise expressly provided therein, be concerned with the formation of the contract, nor with the effect which the contract may have on the property in the goods sold, nor with the validity of the contract or of any of its provisions or of any usage.¹⁰⁴

This provision found its way into CISG, article 4(a) almost verbatim. Because of the nexus between the exclusion of matters of validity from the scopes of both the ULIS and the CISG, the analysis of "validity" under the CISG is incomplete unless the legislative history of the 1964 Uniform Sales Law is also taken into account.¹⁰⁵

Many regretted the exclusion of important issues, such as formation, validity, and property, from the scope of the ULIS.¹⁰⁶ One government

102. 1939 Draft ULIS, *supra* note 98, art. 11 (emphasis added).

103. The 1956 Draft ULIS, *supra* note 98, article 12 provided that the uniform law "shall govern only the obligations of the seller and the buyer arising from a contract of sale; in particular, it shall not be concerned with the formation of the contract . . . nor with the validity of the contract or of any of its provisions nor of any usage to which it refers." This provision was unchanged in the 1963 Draft ULIS, *supra* note 98, but underwent further modification during the 1964 Hague Diplomatic Conference.

104. ULIS, *supra* note 13, art. 8.

105. See Audit, *supra* note 25, at 154 (courts should also refer to ULIS and ULF "in order to ascertain the most likely intent underlying the wording of a given provision").

106. See, e.g., UNIDROIT U.D.P. 1952, ETUDES: IV, Vente Doc. 99, *supra* note 98 (noting that "[c]ertain delegates would like that the draft treat equally the formation of the contract and its validity, from the point of view of consent and the vices of consent, and eventually in relation to the rules of the

noted that the uniform law failed to live up to its name inasmuch as "its authors do not propose to achieve complete unification of the law" and left "questions of great importance, such as the validity of the contract" to the realm of domestic law.¹⁰⁷ Nevertheless, that delegation believed that the limitation was inevitable "because of the difficulty of unification of law," and it was "ready to accept [the limitation] because if this unification is to be achieved, it will only be by stages."¹⁰⁸ Only one delegate requested that the "validity of the contract and its necessary effects . . . be dealt with in the Uniform Law."¹⁰⁹

While the exclusion of validity issues troubled internationalists, other delegates — including some who wished to preserve as much as possible to domestic law — objected to the apparent contradiction between the general exclusion of validity issues by article 8 and the inclusion of specific issues that bore on validity. At the 1964 Hague Conference, vigorous debates surrounded the provisions of the ULIS dealing with matters of form,¹¹⁰ open price terms,¹¹¹ and mistake.¹¹² The lengthy discussion on how to reconcile the provision stating that no particular form was required for a contract of sale with the provision excluding matters concerning formation and validity from the scope of the ULIS typifies the disputes surrounding validity.¹¹³ Dele-

draft on defect of the thing." (author's translation)).

107. *F.R.G. Government Observations*, *supra* note 18, at 82; see also *Observations of the Hungarian Government on the 1956 Draft* [hereinafter *Hungarian Observations*], reprinted in HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 122 ("[I]t is regrettable that the [1956] Draft . . . leaves numerous important questions unanswered.").

108. *F.R.G. Government Observations*, *supra* note 18, at 82.

109. *Records of the Third Meeting of the Committee on Sale* [hereinafter *Third ULIS Meeting*], reprinted in HAGUE CONFERENCE RECORDS, *supra* note 13, at 33 (comment of Bulgarian delegate).

110. Compare 1956 Draft ULIS, *supra* note 98, art. 19 and 1963 Draft ULIS, *supra* note 98, art. 19 ("No particular form is required for a contract of sale. It may be proved by means of witnesses.") with ULIS, *supra* note 13, art. 15 ("A contract of sale need not be evidenced by writing and shall not be subject to any other requirements as to form. In particular, it may be proved by means of witnesses.") and CISG, art. 11 ("A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses."). The topic of form is discussed *infra* in part IV.A.2.

111. The 1956 Draft ULIS, *supra* note 98, article 67, provided that

[w]here a sale is concluded but no price is fixed by the contract, the buyer shall be bound to pay the normal price charged by the seller at the time of conclusion of the contract; should the seller fail to indicate such price, the buyer must pay a reasonable price determined, if possible, on the basis of the current market price at the time of the conclusion of the contract. The parties may not plead the provisions of a municipal law which renders invalid a contract which does not stipulate a price.

For more discussion of open price terms, see *infra* part IV.A.3.

112. Article 41 of the 1956 and 1963 ULIS Drafts, *supra* note 98, provided that when the seller does not deliver goods in conformity with the contract, "the rights conferred upon the buyer by [the ULIS] exclude all other remedies upon which he might otherwise have relied, and in particular those based on mistake." Mistake is discussed *infra* in part IV.A.4.

113. For examples of delegations that opposed this provision, see *Hungarian Observations*, *supra* note 107, at 125 ("Leaving on one side the point that this Article deals with a question which — according to the sense of Article 12 [ULIS, article 8] — should have been left outside the Draft, we do not find ourselves in agreement with the content of this Article."); *Observations of the French Government*,

The Validity Exception to the CISG

gates proposed numerous ways to eliminate the perceived inconsistency, including amending¹¹⁴ or deleting¹¹⁵ the provision stating that no particular form was required, or transferring it to the ULF.¹¹⁶ Many delegates supported the idea of amending the validity exclusion itself.¹¹⁷ The Hungarian government even proposed deleting the provision which excluded validity issues from the scope of the uniform law.¹¹⁸ In the end, however, the Conference retained the provisions on form and validity, and struck a compromise to resolve the internal contradictions in the uniform law.¹¹⁹ As

reprinted in HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 118-19 ("Article 12 [ULIS, article 8] is incorrect, in the present state of the Draft, when it affirms that it does not relate to the validity of the contract of sale, since Article [19] . . . clearly . . . relat[es] to the validity of the sale."); *Observations of the Austrian Government* [hereinafter *Austrian Observations*], reprinted in HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 108-09 (arguing against article 12 [ULIS article 8] because draft uniform law did not govern formation of contracts), and at 277-78 (arguing that national laws which require special forms for contracts between certain classes of parties, such as relatives, "must be safeguarded"); see also *Observations of the Finnish Government*, U.N. Doc. V/Prep.19, reprinted in HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 277; *Observations of the United States Government*, U.N. Doc. V/Prep.18 (1963), reprinted in HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 277. Delegates also disagreed as to whether matters of form raised questions of formation or validity. The ULIS excluded both formation and validity, so the issues did not need to be resolved. Tunc, *Commentary*, *supra* note 14, at 370.

114. *Records of Second Plenary Session* [hereinafter *Second ULIS Session*], reprinted in HAGUE CONFERENCE RECORDS, *supra* note 13, at 280 (proposing amendment so that provision on form would "not infringe upon the imperative provisions of the law applicable to the formation of contracts"); *Records of the Seventh Meeting of the Committee on Sale* [hereinafter *Seventh ULIS Meeting*], reprinted in HAGUE CONFERENCE RECORDS, *supra* note 13, at 56 (proposing to amend provision on form so as to allow for exceptions).

115. See, e.g., U.N. Docs. CONF./V/Amend./20, CONF./V/Amend./32, and V/Prep./16, reprinted in HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 278-79; *Second ULIS Session*, *supra* note 114, at 280; see, e.g., U.N. Doc. V/Prep./11, reprinted in HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 267 (Austrian Government stated that it would have preferred to delete article 19 dealing with form and the notion of mistake in article 41. "If, however, it is considered undesirable to make these deletions, the necessary references should also be inserted in [article 8], regarding the afore-mentioned exceptions to the rule. . . ."); *Third ULIS Meeting*, *supra* note 109, at 33 (Austrian delegate "thought that [article 8] clearly contradicted Articles 19 and 41 and was at any rate in apparent contradiction with Articles 62 and 63 [open price terms]. So his delegation proposed that a certain number of reservations should be included in [article 8] He reserved the right, if the Committee did not do so, subsequently to demand the omission of Articles 19 and 41.").

116. *Third ULIS Meeting*, *supra* note 109, at 34 (noting, with respect to 1963 Draft ULIS, article 12, that it was not content of provision, "but its place in the [ULIS] which raised difficulties," and arguing that it would be "preferable to include [ULIS, article 8] in the [ULF]"); *Seventh ULIS Meeting*, *supra* note 114, at 55; cf. *Third ULIS Meeting*, *supra* note 109, at 34 (suggesting that ULF should be added to ULIS).

117. Proposals were made to add a general exception clause, and to add language specifically excepting the offending provisions from the broad exclusionary sweep of the precursor to ULIS, article 8. See *Third ULIS Meeting*, *supra* note 109, at 34 (Finnish delegate found drafting of ULIS, article 12 "too strict" and suggested adding general exception clause); *Report of the Working Group on Articles 6-14*, U.N. Doc. CONF./V/Amend./25, reprinted in HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 271 (Working Group voted on question whether forerunner to ULIS, article 8 should be amended by adding language "subject to Articles 19, 41, 62, 63, and 67."); see also *Proposed Amendment*, U.N. Doc. CONF./V/Amend./16, reprinted in HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 267-68.

118. U.N. Doc. CONF./V/Amend./37, reprinted in HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 268. The author of that proposal expressed willingness to vote for the proposal to list specific exceptions in the precursor to ULIS, article 8, or "if the Committee does not desire to vote for the Hungarian proposal: to delete the whole article." *Records of the Sixth Meeting of the Committee on Sale* [hereinafter *Sixth ULIS Meeting*], reprinted in HAGUE CONFERENCE RECORDS, *supra* note 13, at 48.

119. Perhaps this occurred because these contradictions did not trouble all delegates. See, e.g., *Third*

per the compromise, the final version of ULIS, article 8 states that, "except as otherwise expressly provided," issues of validity are excluded from the scope of the ULIS.¹²⁰ This compromise demonstrates the drafters' belief that the provisions of the ULIS dealing with form, mistake, and open price terms raised questions of validity (or of formation) which would have been governed by domestic law had they not been allocated to the autonomous realm of the ULIS.

During their debates on the apparent contradictions in the text of the uniform law, the drafters rarely indicated why they believed that a particular issue constituted one of validity, nor did they explore the difference between issues of validity and issues of formation in great detail.¹²¹ In a few cases, however, they gave clues to the principles guiding their judgment. For example, early discussions about the role of trade usages under the uniform law evoked clear statements that the exclusion of validity issues was closely tied to "public policy and morality," as well as the need to protect certain categories of persons.¹²² An authoritative report states that validity concerns

ULIS Meeting, supra note 109, at 33 (comment of Professor Tunc) (expressing view that apparent contradictions were only "slight" and that perfection sought represented an excess of caution). *But see id.* at 33-34 (comment of Mr. Loewe) ("[A]ll manifest contradiction with the principles stated in a law should be noted in the text of the law itself.").

120. After defeat of the proposal to delete the forerunner to ULIS, article 8, the proposal to modify the text of the article by adding the words "subject to reference to articles 19, 41, 62, 63, and 67" was referred to the Drafting Committee. *See Sixth ULIS Meeting, supra* note 118, at 49. The Drafting Committee opted instead to insert the phrase "except as otherwise expressly provided therein." *Drafting Committee Text, U.N. Doc. VI/Red.1/3-4, reprinted in HAGUE CONFERENCE DOCUMENTS, supra* note 9, at 378.

121. Indeed, a considerable overlap exists between validity and formation issues. *See Tunc, Commentary, supra* note 14, at 363 (ULIS "does not govern the formation of contract, nor does it regulate it in regard to the capacity of the parties or the exchange of their consents or in regard to vitiating factors [A]s regards the exchange of consents, States now have, of course, the opportunity to ratify the [ULF].").

122. *See Observations of the Governments of Finland, Sweden, and Norway Submitted Before the Opening of the Diplomatic Conference, U.N. Docs. VI/Prep.1/9, 10 & 13, reprinted in HAGUE CONFERENCE DOCUMENTS, supra* note 9, at 268-69 (Swedish delegate emphasizing that "parties are not always bound by the usages . . . for example, if the usages are contrary to public policy or morality"); *Observations of the Swiss Government on the 1956 Draft ULIS, reprinted in HAGUE CONFERENCE DOCUMENTS, supra* note 9, at 176 (pointing out "character, often contrary to good faith, even dictatorial, if not immoral of certain usages and conditions of sale . . . (e.g., the seller reserves the right arbitrarily to increase the price; a guarantee clause giving the seller the right to exclude any action for damages; the buyer is bound to take delivery without taking action in respect of defects which may appear or of lack of conformity anticipated by the contract). Provisions of this kind amount to a shocking disproportion between the performance of the seller and the corresponding performance of the buyer. . . . One looks in vain in the [1956] Draft for a provision apt to protect the economically weaker party against such outrages."); *see also 1956 ULIS Report, supra* note 34, at 30 ("[J]udge . . . retains the possibility of setting aside as contrary to the public policy of his country a usage which may seem to him to disregard a fundamental right of one of the parties."); *Third ULIS Meeting, supra* note 109, at 34-35; *Seventh ULIS Meeting, supra* note 114, at 56 ("rules of municipal legal systems relating to [formal requirements in] contracts between close relatives, or involving a minor or person under an interdiction should be applied for they related more to the protection of persons than to the rules regulating the substance of contracts."); Tunc, *Commentary, supra* note 14, at 363 (noting that ULIS "in no way trenches [sic] upon regulations of a police character or for the protection of persons which may be included in municipal legal systems").

The Validity Exception to the CISG

very delicate matters where the *traditions of different States would have rendered difficult either the adoption of a uniform law, or, at the least, its uniform interpretation*. It follows from this restriction that the [ULIS] does not in any way [affect] the imperative rules of municipal law; if municipal law has established certain police regulations concerning the sale of goods, for example poisons or pharmaceutical substances, these rules will be applicable in accordance with the law in force; similarly it will be for municipal law to provide the legal rules concerning the validity of certain clauses, as for instance exemption or partial exemption clauses which can be found especially in standard form contracts.¹²³

This early passage does more than just mention two types of issues that are reserved to domestic law. It suggests the emergence of a functional view of validity, under which "validity" issues are those with respect to which different national traditions would have rendered difficult either the adoption of a uniform law, or uniform interpretation of such a law.

The validity exception may be seen, therefore, as an acknowledgment of the practical limitations of unification. That point of view invites an expansive reading of the validity loophole. On the other hand, not every issue which raises questions of validity in domestic transactions implicates traditions which, in an international context, would render adoption or uniform interpretation of a uniform law difficult. Thus, a functional view of validity suggests a method for staking out the outer limit of this exception from the Convention's scope.

2. ULIS, Articles 4 and 5(2)

CISG, article 4(a) is based not only on ULIS, article 8, but also on ULIS, articles 4 and 5(2).¹²⁴ Both articles 4 and 5(2) concern the relationship between the uniform law and so-called "mandatory" or "imperative" rules of national law and reflect a preoccupation with private international law methodology. Although the CISG itself does not contain any direct references to "mandatory" or "imperative" provisions of domestic law the issues they raise are central to a complete understanding of CISG, article 4(a).¹²⁵

123. 1956 ULIS Report, *supra* note 34, at 30 (emphasis added); see also Tunc, *Commentary*, *supra* note 14, at 363.

124. 1978 Secretariat Commentary, *supra* note 14, at 17.

125. In this article, the terms "mandatory law" and "imperative law" are used interchangeably. Some of the confusion surrounding the references to mandatory or imperative rules of law may be traced to definitional problems, including the relation of these two terms to the terms *jus cogens*, public policy (*ordre public*), international public policy (*ordre public international*), evasion of the law (*fraude à la loi*), *loi d'application immédiate*, and overriding statutes. The terms "mandatory" and "imperative" are normally used interchangeably. See RABEL, *COMPARATIVE CONFLICTS*, *supra* note 57, at 361 ("Parties wanting to secure their transaction against the possible legal intricacies of the unknown governing law, would be made more helpless by the assertion popular in the literature that they cannot escape imperative rules of the governing law by agreeing on the applicable law. . . . [T]he parties are unable to transcend the margin of freedom left them in the particular primary legal system. Under this system, all stipulations except those which they may establish in the domestic field, are also forbidden them to enter into in the international realm. The so-called 'imperative' provisions, *jus cogens*, of the predestined law are clamped down on all

Because ULIS, articles 4 and 5(2) illustrate the methodological "road not taken" by the drafters of the CISG, they provide valuable guidance for mapping out the correct approach to interpretation of the CISG's validity exception.

Although the 1956 ULIS Report prepared by the UNIDROIT Special Commission evidences the drafters' concern for "imperative rules of municipal law," the 1956 Draft ULIS itself did not contain any provision expressly addressing the relationship between the uniform law and mandatory rules of domestic law. Once again, the Government of the Netherlands started the ball rolling. In commenting on a provision of the 1956 Draft ULIS that permitted parties from non-contracting states to opt into the uniform law,¹²⁶ the Dutch Government asked whether the "parties in declaring the [ULIS] applicable to their relationship could derogate from the imperative rules of their municipal law."¹²⁷ A proposal was made to delete the opt-in provision on the ground that

[i]t is obvious that the parties may select a law other than the law applicable according to the rules of conflict to govern their contract. But they may never prejudice the provisions of public order, and can set aside the rules of imperative law only where there is a sufficient connection with the law selected.¹²⁸

During the debate on this proposal at the 1964 Hague Diplomatic Conference, one observer perceptively "saw no reason for deleting [the opt-in provision], since [ULIS, article 8] could be interpreted as preserving rules of public policy."¹²⁹ The proposal to delete the opt-in provision failed.¹³⁰ In order to allay residual concerns that the ULIS might be interpreted to "allow parties . . . to contract out of the rules of public policy" of a state,¹³¹ the Confer-

transactions — they *cannot* be avoided."). *But see* Kalman Leloczky, *General and Specific Features of Certain European Product Liability Laws*, in *PRODUCT LIABILITY: PREVENTION, PRACTICE AND PROCESS IN EUROPE AND THE UNITED STATES* 61, 69 (Rudolph Hulsenbek & Dennis Campbell eds., 1989) ("In such a situation, the answer depends on whether the . . . rules are *only mandatory or whether they are imperative.*" (emphasis added)); *see also* Thomas G. Guedj, *The Theory of the Lois de Police, a Functional Trend in Continental Private International Law — A Comparative Analysis with Modern American Theories*, 39 *AM. J. COMP. L.* 661 (1991).

126. 1956 Draft ULIS, *supra* note 98, article 7, provided that "[t]his law shall apply also where it has been chosen as the proper law of the contract by the parties having their places of business, or in default thereof, their habitual residences within the territory of different States, whether such States be signatories or not." A similar provision appeared as article 7 in the 1963 Draft ULIS, *supra* note 98.

127. *Comments of the Government of the Netherlands on the 1956 Draft*, [hereinafter *Dutch Comments*], reprinted in *HAGUE CONFERENCE DOCUMENTS*, *supra* note 9, at 138.

128. U.N. Doc. CONF./V/Amend./100, reprinted in *HAGUE CONFERENCE DOCUMENTS*, *supra* note 9, at 261 (proposal made by governments of Belgium, Luxembourg, and the Netherlands). The three Benelux governments were especially concerned that article 7 of the 1956 Draft ULIS, *supra* note 98, might be interpreted so as to permit parties who are nationals of the same state to "set aside the imperative law by choosing" the ULIS. *Id.* at 261-62.

129. *Records of the Twenty-Fourth Meeting of the Committee on Sale* [hereinafter *Twenty-Fourth ULIS Meeting*], reprinted in *HAGUE CONFERENCE RECORDS*, *supra* note 13, at 179.

130. *Second ULIS Session*, *supra* note 114, at 276-77.

131. *Twenty-Fourth ULIS Meeting*, *supra* note 129, at 179 (Swedish delegate noting that it was "doubtful whether anyone had ever intended to allow parties who had their places of business in the same

ence adopted an amended version of the opt-in provision which provided that parties who exercise their autonomy and choose the ULIS as the applicable law may not thereby displace "any mandatory provisions of law which would have been applicable if the parties had not chosen the Uniform Law."¹³² Thus the precedent was set for using mandatory law analysis to restrict the scope of international uniform law.

The debate on ULIS, article 4 dealt abstractly with the relationship between the uniform law and mandatory domestic law. As during their discussions on "validity," the (largely Continental) drafters seem tacitly to have understood the meaning of "mandatory" or "imperative" law. Professor Tunc contributed a modicum of clarity by observing that "mandatory provisions [protected] each party against the potential abuse by the other of his power."¹³³ However, the meaning of "mandatory" remained ambiguous.

Fortunately, the debates surrounding special rules for installment sales (i.e., credit-sale or hire-purchase transactions) which, like the opt-in provision, implicate mandatory laws, provide tools that lead to a more concrete understanding of this issue. Prior to the opening of the Diplomatic Conference, the Dutch government observed that "[s]everal national legislations contain imperative provisions" pertaining to installment sales that exist "both to protect the buyer and . . . the interests of the national economy."¹³⁴ It proposed including in the uniform law a provision expressly honoring such municipal enactments, lest

internationally conducted hire-purchase and credit-sale transactions . . . leave the buyer without any protection. Such a situation hardly seems desirable in view of the development of commerce in frontier areas and of mail-order transactions. It is also possible that unscrupulous sellers may arrange their transactions in such a

State to contract out of the rules of public policy of that State, even though they had chosen the Uniform Law to govern the other aspects of their mutual relations"); see also Tunc, *Commentary*, *supra* note 14, at 369 ("[I]t is not the intention of the draftsmen of the Law to allow this opportunity [i.e., for parties to designate the ULIS as controlling, whether or not their places of business or their habitual residences are in different States] to open the door of *frauds on the law*.") (emphasis added).

132. See *Second ULIS Session*, *supra* note 114, at 277. ULIS, article 4 provides that the provisions of the ULIS shall also apply where it has been chosen as the law of the contract by the parties, whether or not [they have their places of business in different States and whether or not such States are contracting states], to the extent that it does not affect the application of any mandatory provisions of law which would have been applicable if the parties had not chosen the Uniform Law. ULIS, article 4 has been paraphrased here in order to avoid unnecessary complexity arising from the fact that the ULIS and the CISG have different scopes. In effect, the working definition of "international sale contract" under ULIS, article 1 is different from that found in CISG, article 1. The paraphrasing is not meant to suggest that the scope of the two uniform laws is similar, but rather, to make the provisions of ULIS, article 4 meaningful as an analogy to the CISG.

133. *Records of the Second Meeting of the Committee on Sale* [hereinafter *Second ULIS Meeting*], reprinted in HAGUE CONFERENCE RECORDS, *supra* note 13, at 27.

134. *Preliminary Observations by the Government of the Netherlands on the 1963 Draft ULIS*, U.N. Doc. V/Prep./14 (1963) [hereinafter *Netherlands Observations*], reprinted in HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 265; see also Tunc, *Commentary*, *supra* note 14, at 369 ("mandatory rules . . . have been brought into force to protect hire purchasers and credit purchasers of consumer goods against various abuses").

way as to avoid the requirements of municipal laws by way of application of the uniform law, which, being purely adoptive, gives them complete liberty to stipulate whatever they consider expedient.¹³⁵

Delegates from various other countries were quick to agree with the Dutch government's view that the ULIS should not disturb the application of special (often statutory) rules designed to "protect the buyer" and to guarantee "the equality of conditions of competition in a given market,"¹³⁶ although some preferred to exclude such transactions entirely from the scope of the uniform law rather than introduce a conflict of laws rule into the ULIS.¹³⁷ In the end, however, a conflict of laws provision expressly preserving the superior role of domestic rules protecting consumers in certain credit transactions was incorporated in ULIS, article 5(2), in lieu of a provision excluding such special transactions entirely from the scope of the ULIS.¹³⁸ The final text of ULIS, article 5(2) provides that the provisions of the uniform law "shall not affect *the application of 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 instalments."¹³⁹ Thus, the debates surrounding ULIS, article 5(2) anchor the preoccupation with mandatory rules of domestic law in the historical development of consumer protection statutes.

Both articles 4 and 5(2) of the ULIS restate apparently obvious and overriding limits on the parties' freedom to choose the law which will govern their contract. They affirm that the uniform international law must yield to the

135. *Netherlands Observations*, *supra* note 134, at 265. Accordingly, the Dutch government proposed adding the following language as ULIS, article 9(2):

When the municipal law of the country in which the buyer has his place of business or, in default thereof, his habitual residence contains imperative provisions in respect of hire-purchase or credit-sale, such provisions shall be applicable besides the present law; in case of conflict, the said provisions shall take precedence.

Id. In its view, hire-purchase and credit-sale are "merely particular kinds of sale (at least, according to the legal definitions in the Netherlands)," as to which the ULIS contains no special rules. *Id.* The suggested provision would

not exclude the application of the uniform law: even in this sphere the benefits of unification are safeguarded as far as possible. It is only to imperative provisions . . . that the uniform law must give way in case of conflict. The suggested text puts forward as the applicable law in this matter the law of the buyer.

Id. at 265-66.

136. *Id.* at 266; *see also Second ULIS Meeting*, *supra* note 133, at 29-30 (Luxembourg delegate proposing either "exclusion of sales by instalments, or . . . a decision forbidding any infringement on the imperative provisions governing them").

137. *See Third ULIS Meeting*, *supra* note 109, at 32, 33 (United Kingdom delegate noting "matters mentioned in [ULIS, article 5(2)] were governed in internal law by different rules from those applied to sales: it would thus be difficult to bring them under the Uniform Law," and preferring exclusion); *id.* (representative of Hague Conference on Private International Law expressed preference to exclude installment purchases rather than introduce conflict rule which would raise issue of the extent to which, under ULIS, imperative law could affect a contract).

138. *See Tunc, Commentary*, *supra* note 14, at 369 (noting impossibility of excluding hire purchase and credit sales from ULIS, "if only because of the number of sales in which an element of credit is to be found and the difficulty of defining the concept of a hire purchase or credit sale transaction").

139. ULIS, *supra* note 13, art. 5(2) (emphasis added).

national legal order on those issues where domestic public policy curbs the parties' contractual autonomy. It was especially important to ensure the continuing applicability of national mandatory laws under the ULIS, since ULIS, article 17 — unlike CISG, article 7(2) — envisioned the creation of an autonomous code whose gaps would be filled by resort to general principles rather than to domestic law. Thus, as to issues not otherwise excluded from the scope of the ULIS, adjudicators were not permitted to engage in conflict of laws analysis after making the initial determination as to whether or not the contract triggered the application of the Uniform Law. Viewed in this context, the mandatory law methodology employed by the drafters of the ULIS was an appropriate method of preserving the effect of domestic rules embodying important public policies concerning matters within the substantive scope of the uniform law. CISG, article 7(2), in contrast to ULIS, article 17, preserves a greater role for private international law (conflict of laws) analysis, which suggests that the effect of important domestic policies can be preserved without resorting to the broad brush of the mandatory law methodology embodied in ULIS, articles 4 and 5(2).

"Validity" and "mandatory law" are related, but not identical concepts. Both the validity exclusion and the mandatory law provisions found in the ULIS reflect tensions between domestic public policy, on the one hand, and the movement towards unification and internationalization of legal norms, on the other. Both also concern state-imposed limits on party autonomy. However, these two types of provisions embody distinct methodologies for resolving this tension within the framework of a uniform law, and reflect changing attitudes about the most effective way to solve some of the common problems that arise in international trade.

ULIS, article 8 (which excludes validity from the substantive scope of the uniform law) calls upon a tribunal to analyze the relevant domestic law of contract to determine whether the question raised is one of validity, whereas ULIS, articles 4 and 5(2) simply direct the tribunal to ask whether there is any important domestic rule which overrides the provisions of the uniform law. The former inquiry imposes a substantive constraint upon the adjudicator's ability to opt out of the international legal realm, while the latter inquiry leaves a more discretionary avenue of escape, since it expressly permits an adjudicator freer rein to examine the universe of domestic, parochial policies.

The juxtapositioning in the ULIS of these two types of provisions raises questions which are important for the proper interpretation of their successor provision, CISG, article 4(a). Notably, while the drafters of the CISG retained the validity exclusion, they failed to provide expressly for the continuing applicability of mandatory law. This dichotomy suggests that validity and mandatory law should not be equated, as some have done in applying the CISG. By retaining the validity exception only, the CISG drafters closed off

the broader avenue of escape from uniformity formerly offered by the mandatory law provisions.

3. Drafting History of the CISG

In 1969, even before the ULIS and ULF entered into force,¹⁴⁰ the U.N. Commission on International Trade Law (UNCITRAL) resolved to create a Working Group on the International Sale of Goods and instructed it to determine "which modifications of the existing texts [of the ULIS and ULF] might render them capable of wider acceptance by countries of different legal, social and economic systems, or whether it will be necessary to elaborate a new text for the same purpose."¹⁴¹ The Working Group's efforts between 1970 and 1977 resulted in draft conventions on sale of goods and formation,¹⁴² which were then combined into the 1978 Draft Convention on Contracts for the International Sale of Goods. UNCITRAL unanimously approved this draft and recommended "that the U.N. General Assembly convene an international conference of plenipotentiaries to conclude a final Convention."¹⁴³ In 1980, the Vienna Diplomatic Conference unanimously approved the CISG.¹⁴⁴

The treatment of validity in the final version of CISG, article 4(a) is practically identical to its treatment in ULIS, article 8, except that the language excluding matters of formation from the scope of the uniform law was dropped after the 1977 Draft Sales and Formation Conventions were combined. As discussed below, the studies and reports generated by the UNCITRAL Working Group and the records from the 1980 Vienna Conference aid further understanding of CISG, article 4(a).

Numerous proposals were made during the Working Group deliberations to delete article 8 from the Uniform Law for International Sales.¹⁴⁵ One

140. The ULIS and ULF, *supra* note 13, both entered into force in August 1972, although neither has been widely adopted. The ULIS and ULF were ratified by Belgium, the Federal Republic of Germany, Gambia, Israel, Italy, Luxembourg, the Netherlands, San Marino, and the United Kingdom. See CHRISTOPH REITHMANN AND DIETER MARTINY, *INTERNATIONALES VERTRAGSRECHT* 375, 383 (4th ed. 1988).

141. *Report of UNCITRAL*, 2d Sess., U.N. GAOR, 24th Sess., Supp. No. 18, at para. 38, U.N. Doc. A/7618 (1969), reprinted in [1969-1970] 1 UNCITRAL Y.B. 100, U.N. Doc. A/CN.9/SER.A; see also OFFICIAL RECORDS, *supra* note 1, at 3-5.

142. The Working Group's 1976 Draft Convention on the International Sale of Goods was followed by the 1977 Draft Convention on the International Sale of Goods. [1977] 8 UNCITRAL Y.B. 15, U.N. Doc. A/CN.9/SER.A/1977 [hereinafter 1977 Draft Sales Convention]. It also prepared a 1977 Draft Convention on the Formation of Contracts for the International Sale of Goods. [1977] 8 UNCITRAL Y.B. 88, U.N. Doc. A/CN.9/128, Annex I [hereinafter 1977 Draft Formation Convention]. For a succinct drafting history of the CISG, see HONNOLD, *DOCUMENTARY HISTORY*, *supra* note 1, at 2-5 and HONNOLD, *UNIFORM LAW*, *supra* note 1, at 633-34.

143. HONNOLD, *DOCUMENTARY HISTORY*, *supra* note 1, at 364.

144. See *supra* note 1 and accompanying text.

145. Despite these proposals, the Working Group initially recommended the adoption of ULIS, article

delegate argued that "it was not necessary to say what was not covered" since "what was covered by the Convention was obvious."¹⁴⁶ It was also noted that there would be less need for such a provision in the CISG, since its interpretive rules would provide adjudicators more flexibility and opportunity to apply domestic law than ULIS, article 17 had provided.¹⁴⁷ The provision excluding validity from the scope of the uniform law was nevertheless retained,¹⁴⁸ because the delegates recognized that it "served the purpose of preventing the Convention from overruling domestic law relating to the validity of contracts."¹⁴⁹ In addition, the delegates feared that deleting ULIS, article 8 might be seen as a rejection of article 8's rule, rather than as the simple elimination of a redundancy.¹⁵⁰ Overall, the *travaux préparatoires* indicate that CISG, article 4(a) plays a pivotal role in defining the relationship of the Convention to other international harmonization efforts relating to validity of contract, as well as to mandatory rules of domestic law.

a. Relationship of CISG to UNIDROIT Harmonization Efforts

The discussions of validity in the framework of the UNCITRAL debates on the CISG were substantially more sophisticated than they had been in the UNIDROIT debates on the ULIS, in part because the drafters of the CISG benefited from the early work that led to the 1964 Hague Diplomatic Conference. However, an even greater factor responsible for focusing the

8 without change, "no comments or proposals having been made in connexion with [it]." *Second W.G. Session*, *supra* note 63, at 57.

146. *Report of the Working Group on the International Sale of Goods*, 6th Sess., U.N. Doc. A/CN.9/100 (1975) [hereinafter *Sixth W.G. Session*], reprinted in [1975] 6 UNCITRAL Y.B. 52, U.N. Doc. A/CN.9/SER.A/1975, and in HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 243; see also *Report of the Secretary General: Pending Questions with Respect to the Revised Text of a Uniform Law on the International Sale of Goods*, U.N. Doc. A/CN.9/100/Annex III (1975) [hereinafter *S.G. Report on Pending Questions*], reprinted in [1975] 6 UNCITRAL Y.B. 88, 93, U.N. Doc. A/CN.9/SER.A/1975, and in HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 218 ("[I]n the absence of [ULIS] article 8 there seems little likelihood that a reader would suppose that the law dealt with the formation of the contract, or the effect of the contract on the property in the goods sold."); *Report of Committee of the Whole I Relating to the Draft Convention on the International Sale of Goods*, U.N. Doc. A/32/17/Annex I (1977) [hereinafter *1977 Draft Report*], reprinted in [1977] 8 UNCITRAL Y.B. 25, 30, U.N. Doc. A/CN.9/SER.A/1977, and in HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 323 (suggestion to delete ULIS, article 8 "since it was a declaratory provision which did not . . . serve any useful purpose").

147. See *S.G. Report on Pending Questions*, *supra* note 146, at 92-93 (suggesting that article 8 had been included in ULIS "because [ULIS, article 17] provided that questions concerning matters governed by that law 'which are not expressly settled therein shall be settled in conformity with the general principles' on which the law is based. The Working Group has deleted this language and replaced it with a provision emphasizing that in interpreting the Law regard should be had to its international character and to the need to promote uniformity. The need for article 8 has been diminished by the deletion of the above language in article 17 of ULIS.").

148. *Sixth W.G. Session*, *supra* note 146, at 52.

149. *1977 Draft Report*, *supra* note 146, at 30; see also *S.G. Report on Pending Questions*, *supra* note 146, at 93 (noting "utility in preserving at least the provision of [ULIS, article 8] that the present Law does not deal with the validity of the contract or of usages").

150. *S.G. Report on Pending Questions*, *supra* note 146, at 93.

validity debate was the work of UNIDROIT in the field.¹⁵¹ Indeed, the interaction between UNCITRAL and UNIDROIT provides some clear guidelines to the drafters' understanding of CISG, article 4(a).

Prior to the first session of the UNCITRAL Working Group, the Secretariat acknowledged the UNIDROIT Draft Law for the Unification of Certain Rules Relating to the Validity of Contracts of International Sale of Goods (LUV).¹⁵² The Secretariat stated that [t]he subject of validity of contracts is . . . complex and touches sensitive issues of domestic policy. The Working Group might consider whether including this subject would also impede completion and acceptance of the final product.¹⁵³ The Working Group requested the Secretary-General's assistance in analyzing the LUV¹⁵⁴ and in examining "the feasibility and desirability of dealing with questions of both formation and validity in a single instrument."¹⁵⁵

The Secretary-General recommended that the uniform law limit its coverage to the formation issues of offer and acceptance, and not include any provisions concerning validity of contracts based on the LUV.¹⁵⁶ The Secretary-General first observed that a uniform law should "offer solutions to practical problems caused by . . . differences in the law in various legal systems," rather than try to "codify every aspect of the subject in a text of a uniform law,"¹⁵⁷ and proposed that the uniform law address issues that

151. In 1960, the UNIDROIT Governing Council resolved to begin studies on the possibility of preparing international uniform provisions on the Conditions of Validity of the Contract of Sale of Goods. 1960 Unification of Law Y.B. 39-41. A preliminary comparative study on this subject, prepared by the *Max-Planck-Institut für ausländisches und internationales Privatrecht* (Max-Planck-Institut or M.P.I.), was submitted to UNIDROIT in 1963. MAX-PLANCK-INSTITUT, *DIE MATERIELLE GÜLTIGKEIT VON KAUFVERTRÄGEN* (Hamburg 1968) [hereinafter M.P.I., VALIDITY REPORT]. See generally Jean Georges Sauveplanne, *Geldigheidsvereisten voor Internationale Koopvereenkomsten*, in VAN OPSTALL-BUNDEL 139 (1972); Konrad Zweigert et al., *Der Entwurf eines einheitlichen Gesetzes über die materielle Gültigkeit internationaler Kaufverträge über bewegliche Sachen*, 32 RABELSZ 201 (1968).

152. LUV, *supra* note 95. Prepared by the Max-Planck-Institut and approved by the UNIDROIT Governing Council on May 31, 1972, the LUV was forwarded to UNCITRAL in 1973, along with an invitation "to include the consideration of this draft as an item on its agenda." *Formation and Validity of Contracts for the International Sale of Goods, Report of the Secretary General*, U.N. Doc. A/CN.9/128/Annex II (1977) [hereinafter *S.G. Report on Formation & Validity*], reprinted in [1977] 8 UNCITRAL Y.B. 90, 91, U.N. Doc. A/CN.9/SER.A/1977, and in HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, 254, 255. The LUV contained provisions on interpretation of the acts of the parties, initial impossibility, mistake, fraud, and duress.

153. *Working Paper, Prepared by the Secretariat*, U.N. Doc. A/CN.9/35/Annex II (1970), reprinted in [1968-1970] 1 UNCITRAL Y.B. 188, 196, U.N. Doc. A/CN.9/SER.A/1970, and in HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 34. This Working Paper formed the basis for the first session of the Working Group. Subsequently, the Working Group was instructed to "consider the establishment of uniform laws governing the validity of contracts for the international sale of goods, on the basis of the . . . UNIDROIT draft, in connexion with its work on uniform rules governing the formation of contracts for the international sale of goods." *S.G. Report on Formation & Validity*, *supra* note 152, at 92.

154. *Report of the Working Group on the International Sale of Goods*, 7th Sess., U.N. Doc. A/CN.9/116 (1976), reprinted in [1976] 7 UNCITRAL Y.B. 87, 88, U.N. Doc. A/CN.9/SER.A/1976; see also *Sixth W.G. Session*, *supra* note 146, at 62.

155. The *S.G. Report on Formation & Validity*, *supra* note 152, was submitted on February 3, 1977.

156. *S.G. Report on Formation & Validity*, *supra* note 152, at 92.

157. *Id.* This is particularly true in fields such as formation and validity which are "vast and deeply

caused genuine problems in international trade (such as offer and acceptance).¹⁵⁸ Moreover, the Secretary-General doubted as a practical matter whether the subjects covered by the LUV posed significant problems in contracts for the international sale of goods. He noted that

the problems of validity covered by LUV rarely arise in contracts for the international sale of goods [since] such contracts are concluded between merchants who are, at least as compared to the average person, relatively sophisticated in matters of contracting. The problems of mistake, fraud and duress — which are the heart of the LUV — are less likely to occur between merchants than they are in transactions between merchants and consumers or between two non-merchants.¹⁵⁹

Even if such problems did arise, the Secretary-General argued that unification of the rules of validity was unnecessary, since problems such as "mistake, fraud or duress" could "usually be handled as well under non-uniform national law as under any proposed text of uniform law."¹⁶⁰ In short, he perceived no need to escape the application of conflict of laws rules in this field, where the issues tend to fall outside the range in which the parties are free to exercise their contractual autonomy.

The Secretary-General also believed that issues of validity did not lend themselves to successful unification.¹⁶¹ His pessimistic view was premised on practical considerations. In the first place, validity issues are vague and require extensive interpretation by the adjudicator.¹⁶² In the second place,

the law governing the validity of contracts [like the rules on duress, or similar rules on usury, unconscionable contracts, good faith in performance and the like] is . . . an important vehicle by which the political, social and economic philosophy of the particular society is made effective in respect of contracts . . . Statutory prohibitions and public policy vary to such an extent from country to country that it is impossible to achieve the goal of unification, namely the development of a uniform body of case law . . . It is by the extensive or the restrictive interpretation of such rules that many legal systems have effected the balance between a philosophy of sanctity of contract with the security of transactions which that affords and a philosophy of protecting the weaker party to a transaction at the cost of rendering contracts less secure.¹⁶³

Finally, the Secretary-General recognized that considering such complex matters would unduly delay the progress of the Working Group on the Formation of Contracts for the International Sale of Goods.

imbedded in legal theory on the nature of contractual obligations." *Id.*

158. *Id.*

159. *Id.* at 92-93.

160. *Id.* ("the common examples of mistake, fraud or duress which would justify a party to avoid the contract under the LUV would justify that party to avoid the contract under any applicable legal system").

161. *Id.* at 93 ("it does not appear that any text" could achieve result of increasing "degree of unification in those areas where there are divergencies in the law between legal systems").

162. *Id.* ("The event which activates the legal rules in a text on the validity of contracts is usually not an objective physical event, but an event which must be characterized by the adjudicator . . . [e.g., a provision of the LUV providing] that the threat which justifies avoidance of the contract must have been 'unjustifiable, imminent and serious.'").

163. *Id.* (citing as examples rules invalidating contract because of violation of statutory prohibition or public policy).

In light of the Secretary-General's arguments that unification of validity issues was unnecessary, practically impossible, and time-consuming, the Working Group decided not to include any of the LUV validity rules in the uniform law,¹⁶⁴ and left these issues to UNIDROIT, which has continued its work in the field.¹⁶⁵ The division of competence between UNCITRAL and UNIDROIT provides a handy reference list of validity issues. It would be oversimplifying, however, to equate the issues excluded by CISG, article 4(a) with the issues treated in chapter 3 of the Draft UNIDROIT Principles on substantive validity. Although the Draft UNIDROIT Principles provide a fairly comprehensive list of validity issues common to many legal systems, such an approach would constitute an analytical short-cut, which, in an unusual case might frustrate the main purpose of article 4(a), which is to admit of national divergences regarding sensitive issues.¹⁶⁶ The exclusion of validity issues from the scope of the CISG represents more than just a truce line between two harmonization projects. CISG, article 4(a) must be viewed

164. However, the draft CISG did incorporate LUV, articles 3, 4, and 5, which related to interpretation. See *Report of the Working Group on the International Sale of Goods*, 9th Sess., U.N. Doc. A/CN.9/142 (1978) [hereinafter *Ninth W.G. Session*], reprinted in [1978] 9 UNCITRAL Y.B. 61, 65-66, U.N. Doc. A/CN.9/SER.A/1978, and in HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 292, 297; see also *Report of the Secretary-General: Analysis of Unresolved Matters in Respect of the Formation and Validity of Contracts for the International Sale of Goods*, U.N. Doc. A/CN.9/W.G.2/WP.28 (1978), cited in [1978] 9 UNCITRAL Y.B. 65, and in HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 297; *Report of the Working Group on the International Sale of Goods*, 8th Sess., U.N. Doc. A/CN.9/128 (1977) [hereinafter *Eighth W.G. Session*], reprinted in [1977] 8 UNCITRAL Y.B. 73, 74, U.N. Doc. A/CN.9/SER.A/1977, and in HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 275.

165. After UNCITRAL decided not to include validity rules in the CISG, UNIDROIT generalized the LUV rules so that they could be applied to a wider range of international contracts. See Drobnič, *General Principles*, *supra* note 4, at 315. While a full examination of the fate of the LUV is beyond the scope of this article, it is interesting to note that UNIDROIT has not only continued, but expanded its comparative work in the field of contract law, and has nearly completed the elaboration of a set of Principles for International Commercial Contracts. See UNIDROIT 1992 Study L-1: Doc. 40, Rev. 9 (Jan. 1992) [hereinafter *Draft UNIDROIT Principles*]. Some of the Draft UNIDROIT Principles are examined in connection with the discussion of individual validity issues *infra* in part IV.A.

The Draft UNIDROIT Principles contain chapters on general provisions, formation, substantive validity, interpretation, performance, and non-performance. Chapter 3 on substantive validity, informally sub-titled "Mistake, Fraud, Threat and Gross Disparity," is based in large part on the LUV. UNIDROIT 1989 Study L: Doc. 43 (1989) [hereinafter 1989 UNIDROIT Validity Study]; see also Bonell, *Restatement*, *supra* note 66, at 879 ("[T]he purpose of the proposed Principles is not to unify the existing laws but rather to enunciate principles and rules which are common to the existing national legal systems and, where such a 'common core' cannot be established, to select the solutions which seem best adapted to the special requirements of international commercial contracts."); M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law,"* 11 MICH. J. INT'L L. 768 (1990); David, *supra* note 20, at 123; Arthur von Mehren, *The Role of Comparative Law in the Practice of International Law*, in Festschrift für Karl Neumayer 479, 480-82 (1985).

166. See, e.g., John H. Honnold, *The Sales Convention: Background, Status, Application*, 8 U. PITT. J.L. & COM. 1, 7 (1988) ("It would have been folly to try to overturn domestic rules prohibiting and invalidating various types of transactions and contract provisions; the Convention does not intrude on this sensitive domain."); Kastely, *supra* note 8, at 590 ("The contracting states are conceived as equal; no hierarchy of power or authority is recognized. The states are acknowledged as autonomous, each pursuing important domestic policies that outweigh common international interests. The Convention preserves domestic law on the validity of contracts. . . . This preserves each member state's autonomous policies.")

in terms of its role in regulating the tension between the domestic and international legal orders. To fulfill this role, it must be flexible enough to accommodate changes in states' notions of public policy.

b. Relationship of CISG to Mandatory Rules of National Law

Just as article 4(a) should not be interpreted as referring implicitly to the list of validity issues enumerated by UNIDROIT, it also should not be read as an exemption of all issues considered mandatory under domestic law. The latter pitfall turns the validity exception into an overly-broad conflict of laws inquiry which, if carried too far, could vastly diminish the scope of the Convention. Although validity is an elastic term, the contrast with ULIS, articles 4 and 5(2) indicates that CISG, article 4(a) is meant to provide a less sweeping escape from the provisions of uniform law than those mandatory law provisions enabled. Nevertheless, it is true that some drafters favored equating validity with mandatory law. This dilemma was never adequately resolved.

The UNCITRAL Working Group addressed this exceedingly difficult problem at its first session, when it considered whether to retain either ULIS, article 4 or ULIS, article 5(2). It recognized that the problem of the relationship between mandatory domestic law and the uniform law was not limited to the situations addressed in ULIS, articles 4¹⁶⁷ and 5(2),¹⁶⁸ but rather that mandatory law was a general problem requiring a general solution.¹⁶⁹ However, the Working Group noted that

[d]ifferent legal systems follow differing approaches in deciding what rules are mandatory or imperative, and these concepts have no generally understood meaning. A general exception for local mandatory rules would undermine the uniformity of the law. On the other hand, it was recalled that at the Hague Conference many felt that the present solution was not wholly satisfactory.¹⁷⁰

Since the "provisions touching this problem in [the] ULIS were . . . incomplete,"¹⁷¹ the Working Group considered including a general provision on

167. See *Second W.G. Session, supra* note 63, at 54-55 ("[T]he effect of national mandatory rules should not be dealt with solely in connexion with the applicability of the law resulting from the choice by the parties; the problem of national mandatory rules may also arise when the law is automatically applicable."); *S.G. Report on Pending Questions, supra* note 146, at 90.

168. At the First Working Group Session, a participant noted that ULIS, article 5(2) "specifically protects only one type of mandatory law," i.e., a 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 in installments. Concern was expressed that this narrowly drawn provision might be read to imply that other mandatory laws not expressly mentioned in the uniform law would be overridden. *First W.G. Session, supra* note 63, at 187; see also *Second W.G. Session, supra* note 63, at 54-55.

169. See, e.g., *Second W.G. Session, supra* note 63, at 54 ("This problem calls for a general provision.").

170. *First W.G. Session, supra* note 63, at 187. A participant suggested that members of the Working Group provide examples of national rules that were regarded as mandatory to aid in further work on the problem.

171. *Second W.G. Session, supra* note 63, at 55.

the relationship between the CISG and mandatory rules of national law.¹⁷² In the end, however, the CISG incorporated clauses excluding specific types of transactions and issues from its scope rather than a general provision on mandatory law. Instead of resolving the general mandatory law problem, the drafters buried it in CISG, article 4(a). This solution was at best a partial one, because issues mandatory law and issues of validity overlap only part of the time.

The debates on the relationship between the uniform sales law and domestic consumer protection legislation show how the issues of validity and of mandatory law intertwine and may become confused with one another.¹⁷³ The recognition that ULIS, article 5(2) was broad enough to preserve the application of some, but not all, domestic consumer protection legislation¹⁷⁴ prompted debate as to how to ensure the continued application of domestic rules not covered by that provision. One way to preserve the effect of mandatory domestic consumer protection rules would have been simply to broaden the scope of article 5(2) by adding to the list of consumer protection laws actually preserved therein.¹⁷⁵ The other, more sweeping alternative, and the one that ultimately prevailed, was to exclude all sales "of goods bought for personal, family or household use" from the scope of the CISG.¹⁷⁶ However, even excluding most consumer transactions from the scope of the CISG was at best a partial solution to the mandatory law problem, because conflicts could still arise in which domestic consumer protection laws will apply to contracts which also fall within the scope of the CISG.¹⁷⁷

In response to those who demanded further assurance that such national legislation "should nevertheless take precedence over" the CISG, some drafters argued that the "Convention did not relate to matters of validity and

172. *Id.* at 56.

173. At its first session, the Working Group observed that "protective legislation . . . for the benefit of consumers . . . is primarily designed to invalidate oppressive and unfair contracts and contract clauses; hence these laws would seem to relate to 'validity' of the contract and thus were protected by [ULIS], article 8." *First W.G. Session, supra* note 63, at 183.

174. Cf. *Analysis of Comments and Proposals Relating to Articles 1-17 of the Uniform Law on International Sale of Goods (ULIS) 1964: Note by the Secretary-General*, U.N. Doc. A/CN.9/W.G.2/WP.6 (1971) [hereinafter *S.G. Analysis*], reprinted in [1971] 2 UNCITRAL Y.B. 37, 44, U.N. Doc. A/CN.9/SER.A/1971, and in HONNOLD, *DOCUMENTARY HISTORY, supra* note 1, at 41, 49 (Norwegian delegation's study of rules of consumer protection concluded that such rules "implement public policy and have a mandatory character similar to those mentioned in [ULIS, article 5(2)], but are not protected by article 5").

175. *First W.G. Session, supra* note 63, at 183.

176. CISG, art. 2(a); see also *supra* note 51 and accompanying text. A similar provision had been offered as a substitute for ULIS, article 5(2). *First W.G. Session, supra* note 63, at 183-84; see also *S.G. Analysis, supra* note 174, at 45 (Norwegian delegate proposed "completely to exclude consumer sales or all civil non-commercial sales from" uniform law.).

177. For example, "national legislation designed to protect the buyer in instalment sales and 'door to door' sales." *1977 Draft Report, supra* note 146, at 30.

that the question of whether the types of sales contract to which the proposal referred were valid would be left to national law."¹⁷⁸ In other words, some drafters believed that by excluding issues of validity CISG, article 4(a) could serve as a loophole to preserve the effect of those mandatory rules of national law not otherwise expressly excluded. However, not everyone agreed that article 4(a) could live up to this task.

The drafters identified two problems with relying on article 4(a) to resolve the mandatory law issue. First, some feared that excluding issues of validity from the scope of the CISG would not suffice to "guarantee the effect of the national policies embodied in the mandatory laws" because the CISG would simply override such laws unless their effect was expressly preserved.¹⁷⁹ Second, the Working Group expressed doubt as to whether "regulatory provisions restricting or supplementing provisions of a contract" would be preserved since they might not be "deemed to constitute matters of 'validity.'"¹⁸⁰ Thus, the drafters recognized that some — but not all — questions of mandatory law were also questions of validity.

So long as the two categories of rules overlapped, there was no need to decide whether the mandatory laws would continue to have effect after the uniform law came into force. The simple argument that a matter of validity was at stake would suffice to protect national interests. Since validity issues and mandatory law are not identical, however, cases will arise in which article 4(a) will not necessarily uphold a domestic mandatory rule, such as where the "national rule afforded a party (such as a consumer) rights or privileges supplementing (rather than invalidating) the contract."¹⁸¹ The relationship between the CISG and mandatory rules of domestic law vexed the drafters, who feared that the uniform law would deprive such national rules of their effect. At one point during the long drafting process, the drafters seemed to agree that the effect of mandatory rules of domestic law would automatically be preserved under the CISG,¹⁸² and thus that no special provision was

178. *Id.*

179. *S.G. Analysis, supra* note 174, at 45 (Norwegian study on consumer protection noted "prevalent view . . . that mandatory provisions of national laws which are not expressly upheld by special provisions in [the uniform law] will be overridden by the [uniform law's] provisions").

180. *Second W.G. Session, supra* note 63, at 55.

181. *S.G. Analysis, supra* note 174, at 45.

182. Delegates debated whether to retain a draft article which provided that "this Convention also applies where it has been chosen by the law of the contract by the parties," 1977 Draft Sales Convention, *supra* note 142, article 4, but which did not simultaneously subject the parties' agreement to the mandatory provisions of law that would have been otherwise applicable. Some delegates feared that this provision would allow parties to circumvent CISG, article 2(a) (excluding consumer sales from the Convention's scope), and thus proposed reintroducing the mandatory law language from ULIS, article 4. Instead, the delegates deleted the entire provision from the uniform law, on the theory that mandatory law would automatically curb the exercise of the parties' autonomy, and thus that the provision was not necessary to achieve the desired effect. *1977 Draft Report, supra* note 146, at 28 ("Whatever the parties agreed would only be valid within the limits of mandatory law.").

required to guarantee this effect. However, even this reassuring conclusion was later called into doubt.¹⁸³

The drafters never fully decided whether all mandatory rules of national law would remain applicable to contracts to which the CISG applied. Nor did they succeed in articulating a common understanding of what they meant by mandatory rules of national law. Instead, they hoped to avoid the possibility of conflict between the domestic legal order and the CISG by specifically excluding consumer sales and other special types of contracts (article 2), validity and property issues (article 4), and liability for death and personal injury (article 5) from the Convention's scope. Instead of resolving the underlying issue, the drafters largely avoided it by restricting the Convention's scope "to transactions and issues which, within the various domestic laws, are traditionally governed by provisions of a non-mandatory character."¹⁸⁴

The fact that validity issues frequently are *equated* with mandatory rules of national law complicates the task of ascertaining the meaning of article 4(a).¹⁸⁵ The role ascribed to article 4(a) as "residual defender" of national public policy is broader than the role indicated by Professor Rabel's early concern with valid formation of contracts.¹⁸⁶ The drafters' preoccupation with ensuring the continued application of rules based on domestic public policy permeated their discussion of validity and cannot be omitted from the calculus for interpreting article 4(a). However, neither can their concern with preserving the goal of unification be neglected, as it would be if national public policy were the only factor a tribunal considered.

On balance, then, the drafting history of CISG, article 4(a) demonstrates a clear concern for preserving the applicability of certain domestic laws. Any reading of the validity exception cannot neglect the parochial interests that inspired it. However, adjudicators should also bear in mind the more subtle point that emerges from the drafting history regarding the different methodologies applied to validity analysis and mandatory law analysis. While the

183. During the 1980 Vienna Diplomatic Conference, the German Democratic Republic proposed an amendment that would have allowed parties to agree to apply the CISG to contracts excluded from its scope by CISG, articles 2 and 3. U.N. Doc. A/CONF.97/C.1/L.32 (1980), reprinted in OFFICIAL RECORDS, *supra* note 1, at 86 and in HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 658. This proposal evoked the familiar counterarguments that such a proposal would permit the parties to circumvent mandatory rules. See, e.g., *Fourth Meeting of the First Committee*, U.N. Doc. A/CONF.97/C.1/SR.4 (1980), reprinted in OFFICIAL RECORDS, *supra* note 1, at 248, 252-53 and in HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 469, 473-74. The Italian delegate observed that "[t]he provisions of articles 2 and 3 [raised] problems. If the parties chose to apply the Convention to the cases referred to in those articles, it should be clearly stated that the mandatory provisions of national law should be respected and could not be excluded by the parties." *Id.*, at 252.

184. Bonell, *supra* note 22, at 54; see also *S.G. Report on Pending Questions*, *supra* note 146, at 90 (mandatory rules will rarely apply, because "under most legal regimes in commercial transactions full effect is given to the agreement of the parties.").

185. For discussion, see *infra* part III.D.

186. See *supra* note 101 and accompanying text.

mandatory law exception allows the adjudicator to examine domestic public policy broadly, the validity exception directs him to characterize an issue as one of validity only if a domestic law would render the contract void, voidable, or unenforceable. The contrasting methodologies were illustrated by ULIS, articles 4 and 5(2) and ULIS, article 8 respectively. The absence in the CISG of any provision resembling ULIS, articles 4 and 5(2) should counsel against applying the mandatory law methodology to CISG, article 4(a), especially given the inconclusive debate on equation of the validity exclusion and mandatory law provisions. Moreover, as discussed below, the adjudicator ought to move beyond the preliminary step of limiting the definition of validity according to whether a domestic law would render the contract void, voidable, or unenforceable and adopt a more balanced approach to the matter of validity in order to preserve the internationalist goals articulated in CISG, article 7(1).

C. Interpretation According to CISG, Article 7(1)

Determining whether a particular issue is one of validity, and therefore governed by domestic law, is not simply a choice of law question to be resolved using traditional characterization or mandatory law techniques. CISG, article 7(1) complicates a tribunal's inquiry by requiring that "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."¹⁸⁷ Accordingly, article 4(a) should be interpreted as narrowly as possible, keeping in mind the limits discussed above, to allow the Convention to have the "widest possible application consistent with its aim as a unifier of legal rules governing the relationship between parties to an international sale."¹⁸⁸ On closer examination, this simple formulation proves quite complex in practice.

187. CISG, article 7(1). See generally FRITZ ENDERLEIN ET AL., KOMMENTAR: KONVENTION DER VEREINTEN NATIONEN ÜBER DEN INTERNATIONALEN WARENKAUF 45-50 (1985); ROLF HERBER & BEATE CZERWENKA, INTERNATIONALES KAUFRECHT 45 (1991); HONNOLD, UNIFORM LAW, *supra* note 1, at 135-61; PETER SCHLECHTRIEM, EINHEITLICHES UN-KAUFRECHT 23-25 (1981) [hereinafter SCHLECHTRIEM, KOMMENTAR]; Bergsten, *The Law of Sales in Comparative Law*, in LES VENTES INTERNATIONALES DE MARCHANDISES 3, 4-6 (Yves Guyon ed., 1981); Bonell, *supra* note 22, at 65-94; Gyula Eörsi, *General Provisions*, in INTERNATIONAL SALES, *supra* note 27, at 2-1; Rolf Herber, *Commentary on Article 7(1)* [hereinafter Herber, *Article 7*], in PETER SCHLECHTRIEM & ERNST VON CAEMMERER, KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT 86-94 (Peter Schlechtriem ed., 1990) [hereinafter SCHLECHTRIEM & VON CAEMMERER]; Kastely, *supra* note 8, at 600-02.

188. HONNOLD, UNIFORM LAW, *supra* note 1, at 161 ("Regard for the Convention's 'international character' requires sensitive response to the purposes of the Convention in the light of its legislative history rather than the preconceptions of domestic law."); see also Bonell, *supra* note 22, at 73 (tribunals called upon to interpret CISG with regard for its international character should not hesitate to take a "liberal and flexible attitude and to look, wherever appropriate, to the underlying purposes and policies of individual provisions as well as of the Convention as a whole"); Khoo, *supra* note 50, at 48.

1. *Regard to CISG's International Character and to the Need to Promote Uniformity*

Two means of achieving a narrow interpretation of article 4(a) have received attention among scholars and practitioners. The first is to adopt an autonomous interpretation of validity, that is, to set uniform parameters for the exception within the CISG instead of defining the term by reference to the many national laws. Under this approach, divergent substantive rules of validity could still exist within the various contracting states, but there would be a single definition of what issues constitute validity and thus may be governed by those national rules. The second means of achieving a narrow interpretation of article 4(a) is to address the validity inquiry *after* considering express provisions in the CISG that might resolve a dispute. To the extent other CISG provisions can resolve the dispute, they displace national validity rules which might otherwise apply. This displacement theory may be justified by the language of article 4(a) which excludes validity from the scope of the Convention "except as otherwise expressly provided."

Although the autonomous method and the displacement method of interpreting article 4(a) both honor the internationalist goals of the CISG, neither of these approaches gives sufficient weight to the drafters' desire to use article 4(a) to protect domestic public policy concerns. Consequently, interpreters must find another approach which reconciles the internationalist goals of article 7(1) with the parochial concerns of article 4(a). A balanced approach to article 4(a) would examine domestic validity law in the light of evolving international practice, without threatening extant national public policy concerns. This method of incorporating article 7(1) into the article 4(a) analysis does not suggest a generic methodology, such as an autonomous or displacement approach to the validity exception. Rather, the balanced approach suggests a case-by-case examination of issues in light of evolving concepts of public policy and the development of jurisprudence under the CISG. Before turning to the balanced approach, the following sections examine the weaknesses in the autonomous and displacement approaches.

a. *Autonomous Interpretation*

International uniform law differs significantly from domestic law, which tends to be "interpreted against a background of institutions and rules well known" to the tribunal.¹⁸⁹ In order to facilitate uniform interpretation of the CISG, the drafters attempted to avoid "as far as possible the use of what may be called legal shorthand, that is, the use of terms of art peculiar to the system

189. *Special Commission Note, supra* note 62, at 179.

of law prevailing in one group of countries signing a convention."¹⁹⁰ Thus, the drafters of the CISG searched for "sufficiently neutral language"¹⁹¹ and endeavored to "replace local legal idioms with references to *facts* of commercial life."¹⁹²

The choice of the term "validity" as a parameter of the CISG reflects the drafters' effort to employ terminology that was not laden with legal meaning in any one State. In this sense, "validity" appears to be an ideal choice. Most jurists are comfortable with this functional term and are satisfied that it bears some ascertainable meaning in their respective legal systems. Yet it is difficult to conceive of "validity" as "plain language that refers to things and events for which there are words of common content in the various languages."¹⁹³ At most, "validity" refers to common, or at least comparable, *effects* in different legal systems. As far as its content is concerned, however, it is an elastic term that permits some national differences.

CISG, article 7(1) urges tribunals to reach beyond the domestic legal system with which they are intimately familiar and to resist their "natural tendency to read the international rules in light of the legal ideas that have been imbedded at the core of their intellectual formation."¹⁹⁴ Many view this "homeward trend" problem as the main impediment to achieving uniform

190. GILES, *supra* note 91, at 34; see also HONNOLD, *UNIFORM LAW*, *supra* note 1, at 136 (lamenting problem of "concepts that have similar names but different meanings — *des faux amis*"); *Observations of the French Government on the 1956 Draft ULLIS*, HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 117 [hereinafter *French Observations*] (discussing "use of 'neutral' words or complicated circumlocutions" to get around language barriers).

Another common problem in the interpretation of uniform law results from linguistic differences. The CISG, for example, was drawn up in the six official languages of the United Nations (Arabic, Chinese, English, French, Russian, and Spanish). The texts of the six original versions of the Convention, as well as unofficial German and Italian versions, are reprinted in BIANCA & BONELL, *supra* note 1, at 681-840. In many cases, the various languages will "not translate with exact precision, so that the words used in one language will carry implications different from those in another." Kastely, *supra* note 8, at 593.

191. Bonell, *supra* note 22, at 74 ("Even in the exceptional cases where terms or concepts were employed which are peculiar to a given national law, it was never intended to use them in their traditional meaning."); see also John H. Honnold, *The Sales Convention in Action — Uniform International Words: Uniform Application?*, 8 U. PITT. J.L. & COM. 207, 207 (1988) [hereinafter Honnold, *Uniform Application*] (suggesting that use of untranslatable civil law concepts was one reason ULLIS was "rejected by the common law world").

192. Honnold, *Uniform Application*, *supra* note 191, at 208; see also HONNOLD, *UNIFORM LAW*, *supra* note 1, at 60. Notwithstanding these intentions, "debate tended to focus on legal concepts drawn from either the civil law or the common law traditions. As a result, most of the words and concepts used in the Convention are Anglo-American or Western European in origin." Kastely, *supra* note 8, at 593, citing Gyula Eörsi, *Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods*, 27 AM. J. COMP. L. 311, 315-23 (1979).

193. HONNOLD, *UNIFORM LAW*, *supra* note 1, at 136.

194. HONNOLD, *DOCUMENTARY HISTORY*, *supra* note 1, at 1; see also GILES, *supra* note 91, at 29-30 ("The Drag of National Law"); Gabor, *Stepchild*, *supra* note 1, at 546 (courts and arbitral tribunals likely to be influenced by "legal and cultural background of each decisionmaker"); Honnold, *Unification of Rules*, *supra* note 83, at 238; John H. Honnold, *A Uniform Law for International Sales*, 107 U. PA. L. REV. 299, 324-26 (1959); Ernst von Caemmerer, *Rechtsvergleichung und Internationales Privatrecht*, in *FESTSCHRIFT FÜR HALLSTEIN* 63, 83 (1966) (*Heimwärtsstreben*); Tiggey, *supra* note 26, at 554-57.

interpretation of uniform law.¹⁹⁵ Article 7(1) generally requires that provisions of the CISG be interpreted "autonomously, i.e., in the context of the Convention itself and not by referring to the meaning which might traditionally be attached to them within a particular domestic law."¹⁹⁶

Some scholars argue that this interpretive maxim should be applied to scope provisions of the Convention, such as article 4(a), as well as to its substantive provisions. According to this view, ascertaining the meaning of the term "validity" is "not . . . initially a question of domestic law."¹⁹⁷ Rather, "[w]hether a given issue is [governed by the CISG] or not should be decided on the basis of a characterization detached from any particular national law and committed to the goals formulated in art. 7(1) CISG."¹⁹⁸ Professor Schlechtriem, who espouses interpreting article 4(a) in a manner "independent from all national laws," suggests that in order to preserve uniformity, an issue should only be reserved to national law if it is treated as a question of validity everywhere, that is, in all or at least in the majority of the world's legal systems.¹⁹⁹ In his view, the Convention, including its article 4(a), must be interpreted "teleologically," i.e., in accordance with its policies, having regard to its "principal and preponderant purpose . . . to reach unification."²⁰⁰

195. See, e.g., Bonell, *supra* note 22, at 74-75; Kastely, *supra* note 8, at 621; von Caemmerer, *supra* note 194, at 83. But see Nadelmann, *Uniform Interpretation*, *supra* note 67, at 386 (arguing that the "major causes of diversity [of interpretation] are not interpretative in nature. . . . [C]ourts often are not equipped to deal with what is essentially a legislative task.").

196. Bonell, *supra* note 22, at 74; see also Kastely, *supra* note 8, at 621 (language of Convention will "lose its integrity if courts and arbiters interpret it according to their own domestic law"); Sauveplanne, *Utlegging*, *supra* note 23, at 100 (discussing need to avoid "nationalistic" interpretation of uniform law). In addition, tribunals should "avoid relying on the rules and techniques traditionally followed in interpreting ordinary domestic legislation." Bonell, *supra* note 22, at 72-73. For an example of the continental attitude toward the traditional common law method of narrowly construing statutes, see Audit, *supra* note 25, at 153 (The common law "is geared to the concept of written law as an exception to the common law [so that] statutes must be interpreted narrowly. An international instrument requires a more liberal approach.").

197. Winship, *Commentary*, *supra* note 27, at 637.

198. Peter Schlechtriem, *Unification of the Law for the International Sale of Goods* [hereinafter Schlechtriem, *Unification*], in XIITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW (GERMAN NATIONAL REPORT) 121, 127 (1987); see also *id.* at 138 (CISG, article 7(1) constitutes "guideline for interpretation which must in no way be influenced by the internal law of the contracting state to whose legal system the conflict-of-laws rules" refer). The "autonomous interpretation" theory derives from the work of Ernst Rabel. See generally DICEY & MORRIS, *supra* note 56, at 40 (describing Rabel's "analytical jurisprudence, i.e., that general science of law, based on the results of the study of comparative law, which extracts from this study essential general principles of professedly universal application"); RABEL, 1 *COMPARATIVE CONFLICTS*, *supra* note 57, at 49-52, 54-55 (arguing for "comparative method" of characterization in conflict of laws); SCOLES & HAY, *supra* note 57, at 52 (1981). In conflict of laws terms, "autonomous interpretation" requires the forum to characterize an issue as one of validity by referring to a set of uniform principles deduced by comparative analysis, rather than by referring to the forum's own choice of law rules, as it would do in an ordinary conflict of laws case to which the CISG did not apply. Only if the issue is characterized as one of validity would the tribunal look to its own conflict of laws rules to decide which law governs the issue.

199. Schlechtriem, *Unification*, *supra* note 198, at 128.

200. *Id.* at 141.

While autonomous interpretation of CISG, article 4(a) appeals to the internationalist spirit, it is fraught with problems. Autonomous interpretation would ideally yield a list of discernable validity issues that states could regulate in respect of contracts for the international sale of goods, if they desired to do so. This approach would add an extra measure of predictability to the contracting process, since the validity "loophole" would be of uniform dimension and could not be stretched to fit the peculiarities of a particular legal system. However, while it is an appropriate task for comparative lawyers to strive to compile such a list, it is questionable whether confining article 4(a) only to those issues which are treated as valid "in all *or at least in the majority* of the world's legal systems" is consistent with the spirit of the Convention as a whole, or article 4(a) in particular.

Article 4(a) itself presents a paradox. The drafting history demonstrates that this provision fulfills a peculiar role which is fundamentally at odds with the unification goals of the Convention. The purpose of article 4(a) is precisely to admit of national divergences regarding sensitive issues. The tension between the international and domestic legal regimes reaches its peak in article 4(a).²⁰¹ The drafters did their utmost to avoid sensitive matters that involved a measure of public policy, and excluded such matters from their deliberations so as to prevent the harmonization efforts from stumbling over insurmountable political hurdles. For the drafters, article 4(a) did more than address the traditional issues of substantive validity of contract. Article 4(a) also allowed the drafters to wink at the problem of how to accommodate domestic public policies within the international uniform law. Thus, imposing a majority rule to define validity would do violence to the political compromise embodied in article 4(a).

Autonomous interpretation of article 4(a) would subvert the purpose of that provision and cannot be strictly observed. Tribunals must have the power to characterize an issue as one of validity in accordance with domestic concepts and cannot be limited to a uniform meaning of validity ascertained through the process of comparative law. By the same token, however, tribunals would violate the internationalist spirit of the CISG if they were to take too cavalier an attitude towards the integrity of the uniform law and too broad a view of domestic public policy. The need to walk a middle ground between public policy concerns and internationalist goals thus supports a balanced approach to article 4(a). Such an approach would necessarily preclude the precise definition of article 4(a)'s parameters sought by proponents of an autonomous interpretation.

201. See Ulrich Drobnig, *Substantive Validity*, 40 AM. J. COMP. L. (forthcoming 1993) [hereinafter Drobnig, *Substantive Validity*] (article 4(a) is "the most sensitive crossroad of uniform law and of domestic legal systems").

b. *Displacement*

A second possible way of achieving a narrow interpretation of article 4(a) arises from the issue of whether article 4(a) "excludes domestic validity issues from the scope of Convention or whether the exclusion is only warranted after the remainder of the Convention has been examined and found not to offer a response of its own to the fact pattern that would invoke the domestic law."²⁰² The text of the Convention itself states that it is not concerned with the validity of the contract "*except as otherwise expressly provided* in this Convention."²⁰³ As such, the fundamental question is how strictly to interpret the phrase "expressly provided."

A number of distinguished scholars argue that the Convention *displaces* domestic rules of validity insofar as it contains provisions invoked by the same "operative facts" that invoke the domestic validity rule.²⁰⁴ In other words, "[i]f the same operative facts are involved, then the [CISG] does expressly provide otherwise and there is no exclusion for issues of validity."²⁰⁵ This view finds partial support in the UNCITRAL Secretariat Commentary on the 1978 Draft, which recognized that

[a]lthough there are no provisions in this Convention which expressly govern the validity of the contract or of any usage, some provisions may provide a rule which would *contradict* the rules on validity of contracts in a national legal system. In case of *conflict* the rule in this Convention would apply.²⁰⁶

Scholars favoring a loose interpretation of the "expressly provided" language in article 4(a) justify it by claiming that any other interpretation would permit

202. KRITZER, *supra* note 27, at 91; *see also* S.G. ANALYSIS, *supra* note 174, at 45 (noting that scope of ULIS, article 8 "was subject to various questions. Although national rules on validity would apparently control contract provisions where the Uniform Law had no rules supporting the contract provision, it was questionable whether national rules would override contract provisions supported by the Law; a similar question might arise with respect to rules applied by the Law in the absence of a contractual provision.").

203. CISG, art. 4(a) (emphasis added).

204. *See* ENDERLEIN, *supra* note 187, at 42 (national rules of validity are not applicable when CISG contains "functionally equivalent solution" for problem addressed by such national rules); HONNOLD, UNIFORM LAW, *supra* note 1, at 115 ("the crucial question is whether the domestic rule is invoked by the same operative facts that invoke a rule of the Convention"); *id.* at 122 ("Domestic rules that turn on substantially the same facts as the rules of the Convention must be displaced by the Convention; any other result would destroy the Convention's basic function to establish uniform rules."); *id.* at 124 ("Displacing inconsistent domestic law is the essence of establishing uniform law."); SCHLECHTRIEM, KOMMENTAR, *supra* note 187, at 19; Christoph R. Heiz, *Validity of Contracts Under the United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, and Swiss Contract Law*, 20 VAND. J. TRANS. L. 639, 647-50 (1987); Herber, *Article 7, supra* note 187, at 72 (domestic rules rendering contract void or voidable not applicable insofar as rules of CISG displace them); Schlechtriem, *Haager Einheitliches Kaufrecht und AGB-Gesetz*, in GESETZGEBUNGS-THEORIE, JURISTISCHE LOGIK, ZIVIL UND PROZESSRECHT (GEDÄCHTNIS-SCHRIFT FÜR JÜRGEN RÖDIG) 255 (1978); Schlechtriem, *Unification*, *supra* note 198, at 126 ("In the absence of reservation clauses or other exceptions . . ., the contracting states are under the obligation not only to enact the uniform law . . ., but also to refrain from applying *conflicting domestic law* — in effect to regard it as inapplicable within the sphere covered by the Convention.").

205. Winship, *Commentary, supra* note 27, at 638.

206. 1978 Secretariat Commentary, *supra* note 14, at 17 (emphasis added).

the Convention's "unifying role" to be "crippled by domestic rules that govern the same situations as those governed by the Convention."²⁰⁷

This displacement argument fails to recognize that article 4(a) is a general scope provision which states that issues of validity are preserved to domestic legal systems, and thus *not governed by* the CISG. The argument that article 4(a) only applies to issues not governed by the CISG is tautological and contrary to the drafters' sentiment on the validity issue at and prior to the 1980 Vienna Diplomatic Conference. A loose reading of the language "except as otherwise expressly provided" also disregards the strict interpretation indicated by the Secretariat Commentary on the 1978 Draft, which stated that "[t]he only article in which the possibility of such a conflict [i.e., between express provisions and domestic law] is apparent is [the article providing] that a contract of sale of goods need not be concluded in or by writing and is not subject to any other requirements as to form."²⁰⁸

Professor Honnold emphasizes that "the substance rather than the label" of the domestic rule of validity is relevant.²⁰⁹ A domestic *label* of validity is certainly irrelevant to the task of determining whether article 4(a) permits a tribunal to apply a particular domestic rule to a contract to which the CISG otherwise applies. The term "validity" is a functional term that refers to an *effect* — i.e., void, voidable, and perhaps also unenforceable — rather than to the various domestic labels that may lead to such an effect. The key issue is not the label used by domestic law but the concept of displacement.

The limiting language in article 4(a) should have regard to its historical roots in the ULIS, where the concern was to avoid logical inconsistencies between ULIS, article 8 and other provisions on open price terms, mistake and form. The provisions dealing with open price terms²¹⁰ and mistake²¹¹ in the 1963 Draft ULIS *expressly* prohibited parties from having recourse to local law on those topics, while the draft provision stating that no form requirements were applicable to contracts for the international sale of goods was clearly contrary to the rules of formal validity in numerous states.²¹² In this historical context, the language "except as otherwise expressly provided" in ULIS, article 8 may be taken literally. Its inclusion in the text of the ULIS appears to have derived not from a mere "abundance of caution,"²¹³ but rather from a desire to avoid outright contradictions in the text of the uniform

207. HONNOLD, *UNIFORM LAW*, *supra* note 1, at 317.

208. *1978 Secretariat Commentary*, *supra* note 14, at 17.

209. HONNOLD, *UNIFORM LAW*, *supra* note 1, at 115, 120-24, 318.

210. 1963 Draft ULIS, *supra* note 98, art. 67; *see also* the discussion of open price terms *infra* in part IV.A.3.

211. 1963 Draft ULIS, *supra* note 98, art. 41; *see also* the discussion of mistake *infra* in part IV.A.5.

212. 1963 Draft ULIS, *supra* note 98, art. 19; *see also* the discussion of formal validity *infra* in part IV.A.2.

213. *See Khoo*, *supra* note 50, at 45; Tunc, *Commentary*, *supra* note 14, at 358.

law. The addition of the word "expressly" suggests that the drafters of the ULIS were cautiously trying to avoid any inference that provisions of the uniform law implicitly displaced national laws on validity.

In the CISG, the reference in article 4(a) to "express" displacement appears to be a historical accident. Except for the articles stating that the Convention does not require a writing or any other form for formation or modification of a contract,²¹⁴ the CISG contains no provision which "expressly" governs a matter of validity. But this does not resolve the underlying issue, i.e., whether the CISG displaces domestic rules of validity — or, for that matter, mandatory rules of domestic law²¹⁵ — by implication.

In connection with his observation that displacement of inconsistent domestic law is "the essence of . . . uniform law," Professor Honnold recognized that the Convention "carved out exceptions" in those areas — including validity — "where appeals for domestic law were persuasive to the international legislative body."²¹⁶ This recognition points up the difficulty of reconciling the "implied displacement" theory with article 4(a).

Issues of validity *are* exceptions to the displacing effect of the Convention. Article 4(a) drew the line between consensus and dissent among the drafters. This line cannot be disregarded in the greater service of uniformity. In some cases, therefore, a tribunal may apply a domestic rule of validity which competes with a remedy provided by the Convention. Although undesirable from the standpoint of the Convention's goal of achieving unification, this choice of law is not prohibited.

The displacement argument, like the autonomous interpretation argument discussed above, appeals to the internationalist spirit. An expansive reading of the substantive provisions of the Convention would cut off many claims to apply national rules of validity and would thereby facilitate the development

214. See CISG, arts. 11 & 29; see also *infra* part IV.A.2.

215. Numerous commentators have asserted that the Convention also displaces mandatory rules of domestic law. See e.g. Herber, *Article 7*, *supra* note 187, at 84 (CISG guarantees parties to contract within its scope a freedom of contract which displaces conflicting, or even mandatory, domestic law); Dietrich Maskow, in ENDERLEIN, *supra* note 187, at 45 (even mandatory rules of domestic law do not apply to issues that fall within scope of CISG); see also HONNOLD, UNIFORM LAW, *supra* note 1, at 134 (suggesting that "[r]ules of domestic law that are 'mandatory' are not disturbed when the Convention becomes applicable by virtue of an agreement by the parties. When the Convention is applicable by the action of Contracting States, the terms of the Convention control the extent to which the Convention displaces applicable law; questions may arise as to whether the Convention addresses and displaces a rule of domestic law that in some States would be classified as 'mandatory.'"). *But see* Audit, *supra* note 25, at 159 (at top of "hierarchy of norms that may apply to an international sales contract" are "mandatory norms of domestic law, which prevail over the rules of the Convention (art. 4[a])"); A. Boggiano, *International Contractual Arrangements: Study on International Contracts*, OEA/Ser.K/XXI.4, CIDIP-IV/doc.8/88 (1988), at 101-02 ("Of course, the *lois de police* or immediately applicable rules from appropriate national law or even a *third law* are applied *before* the [CISG]. Thus, the national states do not consider that their power to dictate this type of rule is impaired by the [CISG] since these rules generally govern matters not governed by the Convention (Art. 4).").

216. HONNOLD, UNIFORM LAW, *supra* note 1, at 124.

of a jurisprudence of international trade. However, this interpretation strikes at the heart of article 4(a).

Tribunals should interpret the substantive provisions of the Convention broadly, in order to serve the overriding goal of developing an international body of case law, but they may not deny recourse to domestic rules of validity in the process. Competent counsel will raise domestic law validity arguments on behalf of a client alongside Convention-based arguments, and this will occasionally place tribunals in the awkward position of having to choose between inconsistent remedies available under the various bodies of potentially applicable law. It is lamentable that article 4(a) opens such a breach in the international legal order for sales. At the same time, however, it is important that tribunals respect the limitations inherent in the unification process. To do otherwise would tend to make states mistrust the process and thereby endanger the success of future unification efforts.

Like rejection of an autonomous interpretation of validity, rejection of a displacement theory leads back to the argument that article 4(a) calls for a balanced approach. Neither an autonomous approach, nor a displacement approach, nor even the mandatory law approach, examined below, fully captures the many factors bound up in the validity exception. The problems with the displacement theory reconfirm the argument that the only way to be sensitive to both the parochial interests reflected in the CISG's drafting history and the internationalist object and purpose embodied in article 7(1) is to consider domestic validity law in light of evolving concepts of public policy and the development of jurisprudence under the CISG.

2. Observance of Good Faith in International Trade

CISG, article 7(1) further requires 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." Considerable disagreement exists over the meaning of this directive,²¹⁷ with some commentators arguing that it should be narrowly construed,²¹⁸ and others preferring a broader reading.²¹⁹ Despite this dispute, commentators seem to agree that the

217. See KRITZER, *supra* note 27, at 109-14 (summarizing debates surrounding this provision).

218. See, e.g., HONNOLD, *UNIFORM LAW*, *supra* note 1, at 146 (UNCITRAL had "decided that a 'good faith' provision should not be confined to formation of the contract; . . . [nor should it be] imposed loosely and at large, but should be restricted to a principle for interpreting the provisions of the Convention. This compromise was generally accepted, and was embodied in the concluding words of Article 7(1)."); Robert A. Hillman, *Clarifying 'No Oral Modification'*, 21 *CORNELL INT'L L.J.* 449, 458 (1988) (article 7(1) should be used "only as a supplement to the interpretation of the Convention, rather than as an affirmative obligation of the parties to a contract").

219. See, e.g., Audit, *supra* note 25, at 155 ("Good faith is certainly a factor in the application of article 8 that deals with the interpretation of the parties' statements and conduct in order to ascertain their obligations."); Bonell, *supra* note 22, at 84 (good faith requirement is "also necessarily directed to the

concept of good faith should be interpreted in the international context of the Convention and without resorting to domestic definitions, except to the extent that domestic definitions reflect universal understanding.²²⁰ This view is more tenable in the case of good faith than in the case of validity, since article 7(1) is a pure interpretation provision which, unlike article 4(a), does not itself mark the boundary between the domestic and international legal orders. Good faith, therefore, should be interpreted autonomously.

Whether the requirement to interpret the Convention so as to promote the observance of good faith in international trade can assist in the interpretation of article 4(a) itself is another question. The good faith requirement does not provide much assistance for the general interpretation of article 4(a). This requirement could, however, have a bearing on the treatment of one category of validity issues which is currently excluded from the Convention's scope, i.e., exculpatory clauses, discussed below in part IV.A.

D. *Mandatory Law Approach to the CISG*

The above analysis has referred frequently to mandatory law and to the problems of equating it with validity. The analysis suggested that equating the two would lead adjudicators to apply an overly-broad conflict of laws inquiry when interpreting article 4(a). Such an inquiry threatens to undermine the article 7(1) instruction to interpret the CISG in light of its internationalist object and purpose. This section brings together the arguments against an oversimplified conflicts approach to article 4(a) and in favor of a more balanced approach to the validity exception.

Throughout the drafting history of the CISG, delegates equated validity with mandatory law.²²¹ For example, one delegate noted that "fraud and contract validity were matters of public policy regulated by mandatory provisions of national law."²²² More recently, domestic rules relating to

parties to each individual contract of sale"); *id.* at 85 (good faith is general principle that can be used to fill gaps under CISG, art.7(2)).

220. See HONNOLD, *UNIFORM LAW*, *supra* note 1, at 147 (good faith requirement should "bar the use of purely local definitions and concepts in construing the international text But this objection does not apply to 'good faith' principles that reflect a consensus — a 'common core' of meaning — in domestic law."); Bonell, *supra* note 22, at 86 ("in the context of the Convention the principle of good faith may not be applied according to the standards ordinarily adopted within the different national legal systems . . . such national standards may be taken into account only to the extent that they prove to be commonly accepted at a comparative level"). *But see* Pedro Silva-Ruiz, *Some Remarks About the 1980 Vienna Convention for the International Sale of Goods — Emphasis on Puerto Rico*, 4 *ARIZ. J. INT'L & COMP. L.* 137, 141 (1987); Note, *Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods*, 97 *HARV. L. REV.* 1991 (1984).

221. See, e.g., *First W.G. Session*, *supra* note 63, at 187 (Soviets objected to article 11 as contrary to national mandatory rules that certain contracts be in writing); *id.* at 183 (suggesting close relationship between article 4(a) and mandatory rules invalidating unreasonable or oppressive terms); see also *supra* part III.B.2.

222. *Report of the Working Group on the International Sale of Goods*, 5th Sess., U.N. Doc.

validity of contract and warranty disclaimers have been described as mandatory domestic laws that embody public policies.²²³ While there is some justification for equating validity with mandatory law, doing so is confusing at best and imperils the success of the CISG at worst. Therefore, the mandatory law interpretive approach to article 4(a) should be abandoned.

Unlike the ULIS, the CISG contains no provision expressly referring to mandatory domestic rules, in part because the drafters wanted to avoid the discord engendered by such rules.²²⁴ The purposeful deletion from the CISG of the mandatory law approach found in ULIS, articles 4 and 5(2) speaks in favor of abandoning the mandatory law approach to the CISG. Several other factors also support this conclusion.

First, use of the term "mandatory" law in the context of CISG, article 4(a) is inherently confusing, since the term can refer either to special protective or other market regulatory legislation (economic *dirigisme*),²²⁵ or to any rule of law which restricts the parties's autonomy,²²⁶ or to both. In its broadest sense, the term "mandatory" law encompasses general issues relating to the formation and validity of contract, as well as the "secondary problems identical with what is properly called *ordre public* [i.e., public policy] . . . [such as] wagering, usury, smuggling, or social protection."²²⁷

A/CN.9/87 (1975) [hereinafter *Fifth W.G. Session*], reprinted in [1974] 5 UNCITRAL Y.B. 29, 46, U.N. Doc. A/CN.9/SER.A/1974, and in HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 174, 192.

223. Audit, *supra* note 25, at 156 (such rules "can preempt the provisions of the Convention and prevail over them"); Bonell, *supra* note 22, at 61 (contractual terms may be stricken because of "inconsistency with the mandatory rules of the law governing the validity of the contract.").

224. See *First W.G. Session*, *supra* note 63, at 187 ("[d]ifferent legal systems follow differing approaches in deciding what rules are mandatory or imperative, and these concepts have no generally understood meaning"); see also RABEL, 2 COMPARATIVE CONFLICTS, *supra* note 57, at 364, 396 ("Although the numerous followers of this doctrine are categoric in asserting that imperative rules are inescapable, they strongly disagree in determining what rules are imperative."); McLachlan, *supra* note 4, at 626 ("What is urgently needed is some more specific formulation as to what types of mandatory rules are to be recognised, or rather, how mandatory rule problems are to be resolved. A way forward here may be found in a preference for international standards.").

225. See McLachlan, *supra* note 4, at 620-621 (noting that "growth of *dirigisme*, of the imposition of mandatory rules, has occurred in areas of contract other than the international sale of goods. Areas of particular importance in domestic contract law are those where the law seeks to protect the weaker party to a contract: the consumer, the employee, the agent or small trader, the insured, the party to a contract of adhesion. Another major focus of attention for legal intervention in the contracting process has been the social and economic interests of the state: restrictions on the import and export of certain goods, exchange control regulations, law for the protection of the cultural heritage or of vital economic interests, trade embargoes and antitrust legislation."); *id.* at 598-99 ("[T]he state insists on taking a much greater role in controlling private transactions, both to ensure their fairness at the private law level, and to ensure that they do not conflict with the state's economic goals as expressed in public law."); Ole Lando, *The 1985 Hague Convention on the Law Applicable to Sales*, 51 RABELSZ 60, 76 (1987) [hereinafter Lando, *Applicable Law*] ("Such rules are called 'directly applicable rules' or 'lois d'application immédiate' and may frequently be found in economic legislation — for instance, in exchange control regulations and cartel laws and in laws protecting presumably weak parties against unfair contract terms.").

226. The *Restatement of Conflict of Laws* considered the following validity issues to lie beyond the scope of the parties' autonomy: consideration, capacity, mutual consent, formality, fraud and error, illegality, and any other vitiating factor. RESTATEMENT OF CONFLICT OF LAWS § 332 (1934).

227. RABEL, 2 COMPARATIVE CONFLICTS, *supra* note 57, at 396-97. Professor Rabel noted that one

Second, even if it is technically correct to describe issues of validity as mandatory in the broad sense, it is inaccurate to assert that mandatory law is the measure of article 4(a). In fact, the category of mandatory rules is broader than article 4(a), because not all mandatory laws raise questions of validity of contract.²²⁸

Third, use of the term "mandatory" law is not analytically useful in the context of article 4(a), since no agreement exists as to which laws are mandatory. At best, the term "mandatory" law is a label which refers to the underlying tension between party autonomy and the State's interest in regulation of the market — thus implicating the tension between the international and the domestic legal orders — without providing any useful criteria for resolving it.

Fourth, it is misleading to use the term "mandatory" law to suggest that general rules of contract formation and validity (i.e., rules that are mandatory in the broad sense) are legally equivalent to special rules of public policy and rules of "economic *dirigisme*" embodying state regulation of the market (i.e., rules that are mandatory in the narrow sense).²²⁹ While it may be technically correct to say that all questions of validity constitute questions of mandatory law,²³⁰ this generalization creates more problems than it solves in the context of the Convention.

In fact, the private international legal implications of rules which are mandatory in the broad sense differ significantly from those of rules which are mandatory in the narrow sense. The difference is one of degree, and it has important consequences in a case in which a tribunal is called upon to determine whether a particular mandatory rule of domestic law *must*²³¹ be

author "sternly warned against the frequent tendency of the literature to reduce these norms to . . . *ordre public* Imperative rules, on the contrary, . . . cover 'a vast and normal domain,' including formation and validity of contracts, the principle of freedom of contracting, the *clausula rebus sic stantibus*, rescission on the ground of nonperformance, the effect of contracts on third persons, assignment, [etc.]. Thus, not much remains for agreement of parties." *Id.* Under this view, "[a]ll legal requisites of validity, such as offer and acceptance, consent, permissibility, significance of error, fraud or duress" would fall within this category. *Id.* at 399.

228. For example, regulatory provisions restricting or supplementing provisions of a contract which might not be deemed to constitute matters of validity. *Second W.G. Session, supra* note 63, at 54-55.

229. It is not at all clear where to draw the line, however. By way of example, "illegality" has traditionally been viewed as an issue of contractual validity, but may in some cases (e.g. usury and currency control laws) also be mandatory in the narrow sense. For a summary of different ways to draw the line, see REINHARD ELLGER, *DER DATENSCHUTZ IM GRENZÜBERSCHREITENDEN DATENVERKEHR* 597, 600 (1990). One author suggests that a distinction should be drawn between public policy norms (i.e., mandatory in the narrow sense) that safeguard institutional structures such as competition and currency (*statuta institutionalia*), on the one hand, and those that protect particular groups against market failure (*statuta interventionalia*), on the other. Jürgen Basedow, *Wirtschaftskollisionsrecht: Theoretischer Versuch über die ordnungspolitischen Normen des Forumstaates*, 52 *RABELSZ* 8 (1988).

230. This statement is true if one equates mandatory law with all limitations on party autonomy. See Bernard Lenhoff, *Optional Terms (Jus Dispositivum) and Required Terms (Jus Cogens)*, 45 *MICH. L. REV.* 39 (1946); see also 1980 Rome Convention, *supra* note 56, art. 3(3) (defining mandatory rules (*dispositions imperatives*) as rules "which cannot be derogated from by contract").

231. The gist of mandatory rules, at least those in the narrow "public policy" sense, is that they

applied to a contract for the international sale of goods. Some rules which are mandatory for domestic transactions are not necessarily mandatory with respect to an interstate or international contract, while other rules are mandatory in both domestic and international transactions.

The general rule of party autonomy holds that parties are free to select the law which will govern their contract.²³² However, the choice of law rules pertaining to validity issues such as capacity, form, consideration, vices of consent, and illegality, are more complicated. In a purely domestic transaction, these issues lie beyond the parties' freedom of contract.²³³ However, parties to an interstate or international contract *may* designate the law which will govern the issues of validity raised by their contract, subject to certain exceptions described below, and thereby avoid the application of the validity rules of the jurisdiction whose law they do not chose.²³⁴ Therefore, the fact that domestic rules of contract formation and validity are mandatory in domestic contracts, does *not* compel the tribunal to apply such rules to a contract for the international sale of goods when the contract is governed by a different body of law.

The situation of mandatory rules as more narrowly defined above — i.e., regulatory rules inspired by considerations of public policy²³⁵ or economic

"operate directly or immediately upon the issue, thus putting the conflict-of-law rules that would lead to another law on the issue out of action." Lando, *Applicable Law*, *supra* note 225, at 77; see also Allan Philip, *Recent Provisions on Mandatory Laws in Private International Law*, in *MULTUM NON MULTA* (FESTSCHRIFT FÜR KURT LIPSTEIN) 242 (1980) ("The trend in recent years increasingly to let mandatory law regulate the relations of private persons between themselves, especially with a view to protecting the weaker party, has had as a consequence a tendency to erode the importance of the choice of law rules.").

232. See, e.g., RESTATEMENT (SECOND), *supra* note 57, § 187(1) (providing that "[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue").

233. For example, two parties who live and carry out their business activities in State X cannot agree in a contract concluded in State X to disregard the laws of State X governing capacity or fraud. See generally Lenhoff, *supra* note 230. The law applicable to "issues which the parties could not have resolved by an explicit provision in their agreement directed to that issue" is to be "determined by the law selected by application of the rules of sections 187-188." RESTATEMENT (SECOND), *supra* note 57, §§ 187-188. Such issues include the capacity of the parties (§ 198), the formal requirements for a writing (§ 199), the substantive validity of a contract in respects other than capacity and formalities (§ 200), the effect of misrepresentation, duress, undue influence, and mistake (§ 201), and the effect of illegality (§ 202).

234. RESTATEMENT (SECOND), *supra* note 57, § 187(2) provides that the "law of the state chosen by the parties to govern their contractual rights and duties will be applied, *even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue . . .*" (emphasis added).

235. Much confusion surrounds the terms "public policy" and *ordre public*. The terms are vague, and lend themselves to various meanings. *Ordre public* may mean "public policy" in the common law sense of the term, i.e., that "courts will not enforce contracts the performance of which would contravene fundamental moral principles (*bonnes moeurs*, or *gute Sitten*), or which would offend against some other overriding public interest." Michael Forde, *The "Ordre Public" Exception and Adjudicative Jurisdiction Conventions*, 29 INT'L & COMP. L.Q. 259 (1980). However, the term *ordre public* may also be used in the civil law sense to mean "legislative provisions which are [peremptory] or *jus cogens*, i.e. provisions which cannot be contracted out of or otherwise undercut." *Id.* at 259. *Ordre public international* can be employed both defensively and offensively. *Id.* at 259-60.

dirigisme — is rather different. This sort of domestic rule, such as a rule regulating contracts between parties of unequal bargaining power, has a more compelling effect in a conflict of laws analysis.²³⁶ A forum may be *obliged* to apply such a domestic rule, despite the fact that the contract is governed by a different body of law.²³⁷ Such mandatory (usually statutory) rules override the law that would normally apply²³⁸ and limit the parties' autonomy in international cases as well as in purely domestic cases. Such rules are internationally mandatory, that is, the parties may not derogate from them by selecting another law to govern their contract.

Most of the current debate on mandatory rules of domestic law concerns the question of where to draw the line between rules which are mandatory only domestically and rules which are mandatory internationally as well as domestically. A second important issue in the current debate is whether a tribunal should apply mandatory rules of a third state other than the forum state or the state whose law governs the contract.²³⁹ Rather than plunge into

236. RESTATEMENT (SECOND), *supra* note 57, § 187(2). This section restricts the parties' freedom to choose the applicable law in respect of issues "which the parties could not have resolved by an explicit provision in their agreement directed to that issue" if

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of section 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Id. Examples of such fundamental policies include "a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power." *Id.*, § 187 cmt. g; see Gabor, *Stepchild*, *supra* note 1, at 544 ("A major additional limitation on parties' choice of law freedom is based on 'the fundamental policy of a state which has a materially greater interest than the chosen state and which would be the state of the applicable law in the absence of choice of law by the parties.'") (*citing* Barnes Group, Inc. v. C & C Products, Inc., 716 F.2d 1023 (4th Cir. 1983)); 17 C.J.S. *Contracts* § 16 (1963) (concerning enforcement of contracts which are valid under foreign governing law but which in one way or another offend the public policy of the forum); *cf.* Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). For a discussion of English law on mandatory public policy rules, see DICEY & MORRIS, *supra* note 56, at 1225-28.

237. In this context, it does not matter whether such other law governs by virtue of the parties' choice or by the tribunal's determination of applicable law pursuant to its conflict of laws rules.

238. See DICEY & MORRIS, *supra* note 56, at 21-22 (overriding statute is exception to general rule that "a statute does not normally apply to a contract unless it forms part of the proper law of the contract. . . . Laws of this kind are referred to variously as 'mandatory rules' or *lois de police* or *lois d'application immediate*. Where such legislation is part of the law of the forum it applies because it is interpreted as applying to all cases within its scope. Where the legislation is part of the applicable law it will be applied, subject to English public policy, in accordance with the normal rules.")

239. The 1985 Conflicts Convention, *supra* note 56, contains two provisions restricting party autonomy. Compare article 17 ("The Convention does not prevent the application of those provisions of the law that must be applied irrespective of the law that otherwise governs the contract.") with article 18 ("The application of a law determined by the Convention may be refused only where such application would be manifestly incompatible with public policy (*ordre public*)."). One author has explained that article 17 "opens the door to the so-called 'internationally mandatory rules' (*ordre public international*)," whereas article 18 "provides the standard, and narrowly confined, Hague Conference recognition of the role of public policy." McLachlan, *supra* note 4, at 604.

Article 17 "only applies to internationally mandatory rules of the *forum*. Mandatory rules of the *lex causae*, the *lex loci solutionis*, or of other interested legal systems are not dealt with." *Id.*; see DICEY &

the details of these issues, it is important to notice here the existence of a spectrum of mandatory laws restricting party autonomy. Where a domestic validity rule falls on this scale will determine whether a tribunal *must* apply that rule, because it is mandatory internationally as well as domestically, to a contract otherwise governed by a different body of law.²⁴⁰

In the context of article 4(a), the term "mandatory" law should be restricted to those limitations on party autonomy inspired by *ordre public* (public policy) which international traders cannot contract out of with a choice of law clause. Thus, even if it is true to say that all validity issues raise mandatory questions of domestic law, it is misleading to analyze article 4(a) in terms of mandatory law, because this approach fails to distinguish rules which are mandatory only in domestic transactions from those which may also be mandatory in an interstate or international transaction. Contracts governed by the Convention inevitably involve more than one legal system, so the private international law effect of rules which are mandatory only in domestic transactions, such as most general rules of validity, is practically irrelevant. Equating validity with mandatory rules of law thus engenders considerable confusion.

The final problem suggested by mandatory law analysis is methodological. Equating article 4(a) with mandatory law incorrectly suggests that determining the scope of article 4(a) is an ordinary choice of law task to be resolved through traditional conflict of laws analysis. Such a mandatory law approach to article 4(a) suggests that the tribunal need ask only one question: Is there an overriding domestic rule that "must apply" to the contract or issue in question? If the key to determining the scope of the Convention is for the judge or arbitrator to ascertain whether any mandatory law is applicable, then article 4(a) is nothing more than a conflict of laws rule that allows the tail of domestic public policy to wag the transnational dog.

This mandatory law approach to article 4(a) is incompatible with the goals of the Convention and poses the danger that tribunals will place undue emphasis on domestic public policy at the expense of the internationalist goals of the uniform law. Such an emphasis is misplaced, since the Convention admits of no general exception for public policy or *ordre public* and

MORRIS, *supra* note 56, at 21-22 ("Where the legislation is neither legislation of the forum nor of the applicable law it has no application in England."). Compare the 1980 Rome Convention, *supra* note 56, article 7 which "goes a step further" than the 1985 Conflicts Convention by providing "for the application of internationally mandatory rules of third states." McLachlan, *supra* note 4, at 622.

240. See DICEY & MORRIS, *supra* note 56, at 1228 ("The fact, therefore, that a rule of the common law, such as the requirement of consideration or the invalidity of contractual penalties, is 'imperative,' i.e., cannot be excluded by a contract subject to English law, does not mean that this rule will be applied to a contract governed by a foreign legal system. Only if the court regards a common law principle as one expressing a basic public policy, will it enforce it in a case in which otherwise foreign law applies. To adopt the convenient language used by French jurists: not every rule of law which belongs to the '*ordre public interne*' is necessarily part of the '*ordre public externe* or *international*.'").

specifically instructs interpreters to take into account the Convention's "international character and . . . [the] need to promote uniformity in its application."²⁴¹ Mandatory rules of domestic law do not apply to contracts for the international sale of goods unless and to the extent that they involve issues excluded from the Convention's scope.²⁴² The mandatory law approach improperly places public policy concerns in the front line of article 4(a) analysis. These concerns must be subsumed under the Convention's scope and substantive provisions.

Rejection of the mandatory law approach to article 4(a) should sway tribunals away from an overly-broad interpretation of the validity exception to the CISG. At the same time, tribunals should avoid the overly-narrow autonomy and displacement theories, which pay too little heed to parochial interests. All three of these approaches endanger the integrity of the unification process. Instead, tribunals should choose an approach at some point between the overly-broad and overly-narrow extremes. If tribunals adopt a balanced view of the validity exception, that point may shift over time as common rules become increasingly accepted within the international commercial community. Entrenchment of those common rules in CISG jurisprudence, in turn, would greatly facilitate trade.

E. Conclusion

Abstract theories aside, tribunals must devise a method to determine when article 4(a) requires the application of a domestic law to a contract to which the Convention applies. Taken by itself, the Convention's uniformity goal, embodied in article 7(1), would be served if courts interpreted the Convention's provisions autonomously, by developing (through comparative analysis) a uniform definition of the term validity. In most cases arising under article 4(a), this methodology can be applied de facto with satisfactory results, since it is possible to compile a fairly comprehensive set of validity issues that is recognized in practically all contracting states. However, the autonomous interpretation approach is insufficient to resolve the exceptional case involving an issue not included in the uniform definition of validity, but which raises a question of validity in one or a few contracting states. In principle, article 4(a) permits a tribunal to apply the domestic rule of validity in such cases.

In determining whether the particular issue is one of validity that is preserved to the domestic sphere, however, a tribunal must do more than

241. CISG, art. 7(1).

242. *Contra* Audit, *supra* note 25, at 159 (stating that mandatory rules of domestic law are at the top of the "hierarchy of norms that may apply to an international sales contract under the Convention"). Nevertheless, Professor Audit goes on to state that application of such mandatory rules "should be the exception." *Id.*

simply look to its conflict of laws rules or accept unquestioningly the label attached to the issue by a particular legal system. Such a methodological short-cut ignores the unification principles of the Convention. Rather, the tribunal must ascertain whether the issue is one of validity *in the sense of article 4(a)*. The judge or arbitrator should ask whether a particular domestic rule of validity meets the spirit as well as the letter of article 4(a) before applying it to a contract for the international sale of goods. This requires an examination of the domestic validity rule in light of the evolving international commercial context in which the issue arises. A balanced approach to article 4(a) can honor both its unification goals and the protective conditions that make it politically tenable. Overall, the validity exception to the Convention should be invoked with caution.

The drafters took a practical approach to issues involving different national traditions or public policies. They excluded validity issues from the Convention's scope in order to prevent the unification process from bogging down in issues that could not be successfully unified. A tribunal faced with the question of whether to apply a domestic rule of validity to a contract for the international sale of goods should therefore look to see whether subsequent unification efforts might address the particular issue, or whether case law developments pursuant to the Convention indicate the potential for development of a uniform interpretation of that issue. Looking at validity issues through this functionalist lens, the tribunal may find it possible to reconcile the political compromise enshrined in article 4(a) with the Convention's goal of uniformity.

At the very least, article 7(1) requires courts to read their states' public policies narrowly in cases to which the Convention applies.²⁴³ It is realistic to expect that courts will do so. A similar requirement is familiar to tribunals accustomed to deciding claims brought under the public policy exception to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.²⁴⁴ In that context, the U.S. Supreme Court has demonstrated on several occasions its willingness to read domestic public policy narrowly when the dispute involves international commerce.²⁴⁵ It would not be surprising, therefore, to see the same reasoning applied to the validity

243. See Audit, *supra* note 25, at 157-58 (tribunal should not "impose a domestic public policy on the entire world. It should strive to give predominant consideration to the special needs of international transactions.").

244. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (1959).

245. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (enforcing arbitration clause despite important antitrust public policy issues implicated in case); *Scherk v. Alberto Culver*, 417 U.S. 506 (1974) (enforcing arbitration clause despite allegation of violation of § 10(b) of Securities Exchange Act of 1934). Both of these cases stand for the principle that preserving international comity and the parties' self-selected arbitration clauses is more important than deciding every issue, even those issues implicating public policy, in a domestic court.

exception where a contract is governed by the CISG.

The international community should strive to find a common approach to the interpretive problems posed by article 4(a). Tribunals are best advised to steer clear of unexamined statements which, at one extreme, call for autonomous interpretation of the Convention or displacement of domestic law by the Convention, or which, at the other extreme, endorse the application of mandatory rules of domestic law to contracts for the international sale of goods. Rather, tribunals should be aware of the history of the Convention, including the validity exclusion, and the purposes it was designed to serve, in order to recognize the delicate nature of the conflict of laws analysis they are required to undertake, and to balance carefully the tension between domestic public policy and the needs of the international legal order.

IV. APPLYING ARTICLE 4(A) TO CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

In many cases, a clear consensus exists that a specific issue, such as contractual capacity or duress, is indeed one of validity, and that domestic law will govern. However, these issues arise infrequently in international commerce. By contrast, issues that do arise frequently among international trading partners, such as mistake and exculpatory clauses, are more difficult to resolve. In addressing this latter set of issues adjudicators should avoid an oversimplified conflict of laws approach to the validity exception and balance the negotiating history of the CISG with the internationalist directive of article 7(1). Failure to approach these issues in a way that narrowly reads domestic public policy and that incorporates evolving norms of custom and practice in international commerce will undermine the object and purpose of the CISG. It is especially appropriate that tribunals take the balanced approach to article 4(a) proposed in part III to issues such as mistake and exculpatory clauses that can be expected to arise frequently in international commerce.

Most of the validity issues that are excluded from the scope of the Convention — such as fraud, mistake, initial impossibility, and illegality — are issues that do not figure largely in the process of planning contracts for the international sale of goods. Their exclusion, therefore, poses less of a danger to the goal of promoting predictability through unification than does the exclusion of rules governing the treatment of exculpatory clauses, which diminishes predictability in a significant area of contractual practice. The importance of this area suggests that uniform rules are needed to guide international traders. Accordingly, scholars should study the feasibility of achieving unification of the rules governing exculpatory clauses. In the meantime, taking a balanced approach to the treatment of exculpatory clauses in contracts for the international sale of goods can contribute towards the goal

of achieving predictability in this field.

The drafting history of the ULIS and the CISG reveals numerous instances of unification with respect to issues that were once considered "too hot to handle." This historical perspective should guide tribunals faced with the contention that a domestic rule of validity governs an issue arising in a contract for the international sale of goods. Adjudicators should always proceed beyond the first step of ascertaining whether an issue of validity is presented by examining subsequent developments to see whether in fact international consensus has begun to emerge with respect to traditional issues of validity. In any case, adjudicators are cautioned to read domestic public policy narrowly in such cases.

Three themes from the preceding discussion assist in delineating validity issues. First, the origins of the validity exclusion can be traced to the ULIS drafters' early decision to exclude all issues of *formation and validity* from the scope of the Uniform Law. Second, the harmonization efforts of the UNIDROIT in preparing the LUV and the UNIDROIT General Principles provide valuable (though not conclusive) evidence of the drafters' — as well as of the general — understanding of validity. Third, CISG, article 4(a) must be viewed in the context of the growing body of regulatory legislation (i.e., mandatory law in the narrow sense) that affects contracts for the international sale of goods. This part will examine briefly the validity issues about which there is relative consensus and then focus on issues, such as mistake and exculpatory clauses, that lend themselves to the analysis set forth in part III.

A. Application of Article 4(a) to Selected Validity Issues

Validity of contract relates not only to the form of a contract but also to a variety of its substantive aspects.²⁴⁶ A clear systematization of the various rules of validity is difficult to achieve, not least because this field involves concepts that are fundamental to the different legal systems in which the Convention is in force.²⁴⁷ The *M.P.I. Validity Report* prepared under the

246. The distinction between formal validity and substantive or material validity is frequently recognized in conflict of laws rules. Compare 1985 Conflicts Convention, *supra* note 56, art. 10(2) ("The existence and material validity of a contract of sale, or of any term thereof, are determined by the law which under the Convention would govern the contract or term if it were valid.") with 1985 Conflicts Convention, *supra* note 56, art. 11(1) ("A contract of sale concluded between persons who are in the same State is formally valid if it satisfies the requirements either of the law which governs it under the Convention or of the law of the State where it is concluded."). See generally DICEY & MORRIS, *supra* note 56, at 1207 (discussing formal validity) and 1213 (discussing material or "essential" validity).

247. Drobniq, *General Principles*, *supra* note 4, at 313 ("legal complexities and divergent social policies impede general agreement on principles to interpret validity of contracts"). Professor Drobniq subdivides the topic of validity into three separate issues: "first, the binding effect of contractual promises; second, defects of consent; and third, illegality and immorality." *Id.*; see also Drobniq, *Substantive Validity*, *supra* note 201.

auspices of UNIDROIT dealt only with the substantive validity (*materielle Gültigkeit*) of contracts of sale.²⁴⁸ It covered lack of capacity; defects (vices) of consent (*Willensmängel*); illegality, immorality and initial impossibility; and the requirement of consideration (or its civil law analogues). The category of defects (or vices) which vitiate the consent of one of the parties is familiar to jurists from different legal systems.²⁴⁹ Under the common law, for example, contracts based on agreement presuppose real (as opposed to apparent) consent.²⁵⁰ "Since mutual consent is essential to every agreement, and agreement is generally essential to contract, there can, as a rule, be no binding contract where there is no real consent. Apparent consent may be unreal because of mistake, misrepresentation, fraud, duress, undue influence, or mental incapacity."²⁵¹ These validity issues, and others, will be considered individually.

1. Capacity and Agency Authority

Issues of contractual capacity are clearly excluded from the scope of the Convention.²⁵² However, this exclusion is of little practical concern, since "questions of capacity rarely occur in international transactions."²⁵³ Issues of agency authority are also excluded from the scope of the Convention,²⁵⁴

248. M.P.I., VALIDITY REPORT, *supra* note 151. The civil law analogues to consideration examined in the Report were *cause* and *Objekt*.

249. Caution is warranted, however, since terminology is imprecise and may have different connotations in different jurisdictions. Compare Tunc, *Commentary, supra* note 14, at 363 ("the exchange of their consents or in regard to vitiating factors") with JACOB S. ZIEGEL & SAMSON, REPORT TO THE UNIFORM LAW CONFERENCE ON CANADA ON [THE] CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 42 (1981) [hereinafter ZIEGEL & SAMSON] ("any defense that may vitiate the contract under the law or laws").

250. This distinction between real and apparent consent appears to be mirrored in German references to internal and external consent. See, e.g., Herber, *Article 7, supra* note 187, at 71 (Convention's provisions govern only external consent).

251. 17 C.J.S. *Contracts* § 132 (1963); cf. DICEY & MORRIS, *supra* note 56, at 1199 ("reality of consent," e.g., mistake, misrepresentation, duress, and undue influence); Saul Litvinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 LA. L. REV. 1, 1 (1989) (comparing Louisiana and French law).

252. See HONNOLD, UNIFORM LAW, *supra* note 1, at 116 (CISG does not "displace domestic rules on the effect of insanity, infancy or other disability on a party's capacity to make a contract."); Herber, *Article 7, supra* note 187, at 71; see also M.P.I., VALIDITY REPORT, *supra* note 151, at 1-35; Tunc, *Commentary, supra* note 14, at 363; cf. Draft UNIDROIT Principles, *supra* note 165, art. 3.19(a) ("These Principles do not deal with an invalidity arising from lack of capacity.").

253. Bonell, *supra* note 22, at 59. But see Bydlinski, *Das allgemeine Vertragsrecht, in DAS UNCITRAL-KAUFRECHT IM VERGLEICH ZUM ÖSTERREICHISCHEN RECHT* 57, 85 (Peter Doralt ed., 1985) (raising question whether effect of death or loss of capacity of offeror should be dealt with under CISG provision on revocation of offer).

254. See HONNOLD, UNIFORM LAW, *supra* note 1, at 116 (CISG does not address "the legal power of one person to represent another"); Herber, *Article 7, supra* note 187, at 71; cf. Draft UNIDROIT Principles, *supra* note 165, art. 3.19(b) ("These Principles do not deal with an invalidity arising from lack of authority."). But see *infra* note 260 (some domestic rules relating to agency authority may also qualify as rules of formal validity).

although these issues are often important in contracts for the international sale of goods. Fortunately, this topic has been partially covered in the Convention on Agency in the International Sale of Goods, although this uniform law has not yet entered into effect.²⁵⁵

2. Formal Validity

CISG, article 4(a) does not permit tribunals to apply domestic writing requirements or other formalities, since the Convention contains an express provision which contradicts any domestic rule requiring a written or other form for validity or enforceability of a contract.²⁵⁶ A similar provision included in the ULIS evoked heated debate among drafters of the CISG.²⁵⁷ The compromise embodied in CISG, articles 12 and 96 (permitting contracting states to make a declaration preserving the effect of domestic writing and other formal requirements) evidences a victory for those who thought that formalities should be excluded from the scope of the uniform law.²⁵⁸

As clear-cut as the Convention may appear to be on the question of formalities, however, difficult questions still arise. Professor Farnsworth has raised the question whether the provision of U.C.C. § 2-205, requiring that language making an offer irrevocable "on a form supplied by the offeree" be "separately signed by the offeror," is a question of validity preserved to national law under article 4(a).²⁵⁹ A similar question arises in connection

255. Convention on Agency in the International Sale of Goods, *opened for signature* Feb. 17, 1983, 22 I.L.M. 249; see Michael J. Bonell, *The 1983 Geneva Convention on Agency in the International Sale of Goods*, 32 AM. J. COMP. L. 717 (1984); Peter Šarčević, *The Geneva Convention on Agency in the International Sale of Goods*, in DUBROVNIK LECTURES, *supra* note 4, at 443; see also Dietrich Maskow, *Internal Relations Between Principals and Agents in the International Sale of Goods*, 1989 UNIFORM L. REV. 60. The European Community has also taken steps towards harmonization in this area. See, e.g., Council Directive 86/653 of 18 December 1986 on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents, 1986 O.J. (L 382) 17.

256. CISG, article 11 provides that an international sales contract "need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." See 1978 Secretariat Commentary, *supra* note 14, at 20; see also KRITZER, *supra* note 27, at 81; Bonell, *supra* note 22, at 59.

257. ULIS, *supra* note 13, article 15 provided that "a contract of sale need not be evidenced in writing and shall not be subject to any other requirements as to form." Some UNCITRAL delegates objected to this provision because it raised questions of validity, see *Second W.G. Session*, *supra* note 63, at 61, while others viewed it as involving "partially formation, partially validity and partially proof." See *Sixth W.G. Session*, *supra* note 146, at 54.

258. As of September, 1992 only Argentina, Belarus, Chile, Hungary, the People's Republic of China, Russia, and Ukraine have exercised the option to preserve the effect of their domestic rules requiring the observance of certain formalities.

259. Farnsworth, *Standard Forms*, *supra* note 27, at 444 ("Under a broad definition of 'validity,' the Code's requirement of separate signing survives even under the Convention; under a narrow definition it might not."); see also KRITZER, *supra* note 27, at 92 (raising similar question with respect to "Italian Civil Code requirement that parties to a contract specifically and directly sign certain agreement positions, such as those limiting liability"); Ole Lando, *On the Form of Contracts*, in Festschrift Schmitthoff, *supra* note 4, at 256-58 (mandatory legislation designed to protect parties having weaker bargaining position).

with domestic laws requiring contracts with some holders of public office to be in writing.²⁶⁰ Such requirements directly pose the fundamental question of the scope of article 4(a), and of the relationship between the Convention and mandatory domestic law. In this situation, a domestic rule which may be characterized a rule of validity — and perhaps also as mandatory in the narrow sense — contradicts an express term of the Convention (article 11). In these cases, the provisions of the Convention control, rather than the provisions of domestic law, because the Convention "expressly provides otherwise" and thus displaces the domestic rules.²⁶¹ Even domestic rules of formal validity which are mandatory in the narrow sense must yield to the international legal regime, absent a contracting state's declaration preserving the effect of such rules. The option of making such a declaration softens the blow to domestic mandatory law. Among states that decline to make such a declaration — thus far all but seven — article 11 advances the goal of facilitating international commerce and evidences the drafters' success in partially unifying commercially significant rules as to which deep-seated national differences made unification difficult.

3. *Open Price Terms*

The applicability to international sales contracts of domestic validity rules requiring that a contract expressly or implicitly fix or make provision for determining the price has been disputed for decades. Under the Convention, such domestic rules are not applied, but their effect is preserved because the CISG itself requires the contract to fix a price either expressly or implicitly. In this instance, the CISG actually harmonized a set of protective concerns, rather than relegate them to adjudication under domestic law.

Different groups of countries objected to open price term contracts during the drafting of the CISG and the ULIS. Socialist countries "objected to the conclusion of contracts with open price terms," because open price terms would frustrate the principle that parties should "conform their contracts to a predetermined macroeconomic governmental plan."²⁶² Others argued that contracts with open price terms placed developing countries trading in raw materials at a disadvantage by subjecting them to unpredictable swings in commodities markets.²⁶³ Finally, some civil law countries, such as France,²⁶⁴ view open price terms "with hostility, particularly where the

260. Bydlinski, *supra* note 253, at 83-84 (Austrian law classifies rules requiring that sales contracts concluded by some holders of public office must be in writing as issues of power of agency); Schlechtriem, *Unification, supra* note 198, at 126-27 (describing similar situation in Germany).

261. See Bydlinski, *supra* note 253, at 84.

262. Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443, 463 (1989).

263. *Id.* at 463.

264. French law requires "that the price — in sale as in any other contract — be determined or at

unilateral fixing of the price works to the disadvantage of the weaker party."²⁶⁵

During the drafting of the ULIS, various delegations launched an attack against domestic rules invalidating contracts with open price terms. An early draft provided a rule for determining the price in a case where the contract did not state (or make provision for determining) the price and expressly prohibited the parties from pleading any rule of municipal law which renders invalid a contract that does not stipulate a price.²⁶⁶ The French led the protest against this provision, arguing that it clearly related to the validity of the sale, and therefore conflicted with the provision excluding validity issues from the scope of the Uniform Law.²⁶⁷ The final version of the ULIS provided a rule for determining the price in a case where the contract did not state (or make provision for determining) price, but *deleted* the language expressly prohibiting recourse to domestic law.²⁶⁸ However, the dispute between those delegates who favored a measure of unification in this important area,²⁶⁹ and those who vigilantly fought to preserve the applicability of domestic rules was not laid to rest.²⁷⁰ On the contrary, the battle to

least determinable, for instance by reference to a market price; but if the price is undetermined or indeterminable this want of certainty in regard to one of the essential elements of the contract entails it a nullity." *French Observations, supra* note 190, at 120. The French government stated, "It does not seem possible, or desirable, to abrogate in an international law a rule so deeply rooted in the French legal system, a rule which moreover is the sole means of protection for a contracting party against the arbitrary will of the judge." *Id.*; see also *Records of Thirteenth Meeting of the Committee on Sale* [hereinafter *Thirteenth ULIS Meeting*], reprinted in HAGUE CONFERENCE RECORDS, *supra* note 13, at 101.

265. Garro, *supra* note 262, at 463.

266. 1956 Draft ULIS, *supra* note 98, art. 67. The Special Committee made it clear in the 1956 ULIS Report that it intended beyond the "existence of any doubt" that this provision "forbids the Courts of any State which has accepted the Uniform Law from declaring a contract of sale to be invalid if no price is fixed." *1956 ULIS Report, supra* note 34, at 65.

267. *French Observations, supra* note 190, at 119-20; see also *Observations of the Government of Switzerland on the 1956 Draft ULIS, reprinted in HAGUE CONFERENCE DOCUMENTS, supra* note 9, at 176 (rule prohibiting parties from pleading any rule of domestic law which renders invalid contract which does not stipulate price "seems to us at once useless and dangerous"); see also *Third ULIS Meeting, supra* note 109, at 33-34 (Hungarian delegate noted contradiction between ULIS, article 67 and exclusion of validity issues).

268. See ULIS, *supra* note 13, art. 57 ("Where a contract has been concluded but does not state a price or make provision for the determination of the price, the buyer shall be bound to pay the price generally charged by the seller at the time of the conclusion of the contract."). The language prohibiting recourse to domestic rules was deleted despite the Special Commission's view that "this text does not create any real danger." *Special Commission Note, supra* note 62, at 197. No explanation was offered for the deletion of the reference to municipal law. Compare *Report of the Working Group on Articles 62-73, U.N. Doc. CONF./N/Amend./73, reprinted in HAGUE CONFERENCE DOCUMENTS, supra* note 9, at 338-39, with *Records of the Twentieth Meeting of the Committee on Sale, reprinted in HAGUE CONFERENCE RECORDS, supra* note 13, at 154.

269. See, e.g., *Thirteenth ULIS Meeting, supra* note 264, at 104 (Loewe noted that "the Draft intended to exclude the notion that the contract was not concluded if the price was not settled in the contract," and urged that "[w]e should find a common rule").

270. See, e.g., *Observations of the German Government, U.N. Doc. V/Prep./15, reprinted in HAGUE CONFERENCE DOCUMENTS, supra* note 9, at 332 (proposal to delete express prohibition against recourse to rules of municipal law because "[t]he wording of this provision runs counter to the municipal legislations, which lay down that a contract of sale shall automatically be void if the selling price is not

preserve the role of domestic rules prohibiting open price terms continued.

CISG, article 55 essentially upholds the role of domestic rules prohibiting open price terms. During the drafting of the Convention, many argued that the ULIS provision fixing a price for an open term contract should be deleted from the CISG, since that provision governed issues pertaining to validity which were excluded from the scope of the uniform law.²⁷¹ The delegates came to agree that the uniform law's mechanism for filling an open price term would apply *only* if the applicable domestic law recognized that the contract was validly concluded.²⁷² This understanding is clearly reflected in the text of the Convention, which provides that

[w]here a contract *has been validly concluded* but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.²⁷³

The emphasized language indicates that an applicable domestic rule prohibiting open price terms would prevent the tribunal from fixing a price according to the rule of CISG, article 55.²⁷⁴

In practice, however, it will only rarely be possible to invoke a national rule prohibiting open price terms in a case involving a contract for the international sale of goods. While both CISG, articles 55 and 4(a) would preserve the applicability of such a domestic validity rule, their impact is limited by article 14(1), which provides that an offer is too indefinite unless it "expressly or implicitly fixes or makes provision for determining the . . . price."²⁷⁵ In other words, the Convention's own formation rules specify that

fixed"); *Amendment submitted by the French Government*, U.N. Doc. CONF./V/Amend./51, reprinted in HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 332; *Fourteenth ULIS Meeting*, *supra* note 73, at 104; see also Tunc, *Commentary*, *supra* note 14, at 379.

271. See *Report of the Working Group on the International Sale of Goods*, 4th Sess., U.N. Doc. A/CN.9/75 [hereinafter *Fourth W.G. Session*], reprinted in [1973] 4 UNCITRAL Y.B. 61, 73, U.N. Doc. A/CN.9/SER.A/1973, and in HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 138, 151; *Sixth W.G. Session*, *supra* note 146, at 52 (CISG, article 4(a) "served a useful purpose in that it made clear that provisions such as [ULIS,] article 57 . . . are not intended to make valid a contract which would not otherwise be valid under the domestic legislation of one of the Contracting States"); *1977 Draft Report*, *supra* note 146, at 30, ("the question of the validity of [open-price] contracts was, as article [4] made clear, left to national law"); HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 341 ("[M]any legal systems considered that a determined or determinable price was an essential ingredient of a contract and accordingly article [55] would have no application in those legal systems. It was thus more appropriate to leave the question of price determination in such agreements to those legal systems which recognized the validity of those agreements.").

Note that the question of open price terms also was considered a question of formation, which was beyond the scope of the uniform law on sales until the 1977 Draft Sales and Formation Conventions, *supra* note 142, were combined.

272. See *1977 Draft Report*, *supra* note 146, at 48, (draft CISG, article 55 "did not confer validity on an agreement in which the price was neither determined nor determinable. The article merely provided a uniform method for the calculation of the price if the applicable law enabled the agreement in question to constitute a valid contract.").

273. CISG, art. 55 (emphasis added).

274. See HONNOLD, UNIFORM LAW, *supra* note 1, at 411-13; Khoo, *supra* note 50, at 46.

275. See Farnsworth, *Formation*, *supra* note 44, at 3-8 ("The United States, which had consistently

open price terms are invalid, unless the offer contains an express pricing provision, or unless a price can be implied by interpretation of the offeror's statements under article 8 or by reference to usages under article 9.

As between the two inconsistent provisions, article 14(1) is controlling, since article 55 presupposes that the contract has been validly concluded.²⁷⁶ As a result article 55 is of little practical significance, since it operates only in isolated instances.²⁷⁷ This should not disturb the countries who fought to preserve the effect of domestic rules invalidating contracts that do not state (or make provision for determining) the price, however, since article 14(1) practically raises such rules to the level of international uniform law.²⁷⁸ In the end, therefore, the CISG achieved unification in the area of open price terms. However, the unification favors the very interests of those who encourage preservation of domestic rules. Article 14(1) is a rare example of the Convention itself declaring that the absence of certain provisions renders a contract invalid.

4. Duress, Fraud, Misrepresentation, and Mistake

The relationship between the Convention and domestic rules that vitiate the parties' requisite intent — such as duress, fraud, misrepresentation, and mistake — is complicated both by definitional problems and by conceptual differences between common and civil law systems.²⁷⁹ While some of the

opposed this language, was unsuccessful in attempting to have it deleted at Vienna.”).

276. See *id.* at 3-9; Hager, in SCHLECHTRIEM & VON CAEMMERER, *supra* note 187, at 520; see also HONNOLD, UNIFORM LAW, *supra* note 1, at 201-02 (suggesting that reference to “validly concluded” in CISG, article 55 only refers to domestic law, not to rules of Part II of Convention on Formation). The inconsistency between CISG articles 14(1) and 55 has been discussed at length. See *Eighth Meeting of First Comm.*, U.N. Doc. A/CONF.97/C.1/SR.8 (1980), reprinted in OFFICIAL RECORDS, *supra* note 1, at 270, 275-77, and in HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 491, 496-98; *Eleventh Meeting of the First Comm.*, U.N. Doc. A/CONF.97/C.1/SR.11 (1980), reprinted in OFFICIAL RECORDS, *supra* note 1, at 291-95, and in HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 511, 511-16; *Twenty-Fourth Meeting of the First Comm.*, U.N. Doc. A/C.97/C.1/SR.24 (1980) [hereinafter *24th Meeting: 1st Comm.*], reprinted in OFFICIAL RECORDS, *supra* note 1, at 361, and in HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 582; *Twenty-Ninth Meeting of the First Comm.*, U.N. Doc. A/C.97/C.1/SR.29 (1980), reprinted in OFFICIAL RECORDS, *supra* note 1, at 388, 392-93, and in HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 609, 613-14; see also HONNOLD, UNIFORM LAW, *supra* note 1, at 197-203; KRITZER, *supra* note 27, at 149-59; Farnsworth, *Formation*, *supra* note 44, at 3-8; Peter Schlechtriem, in SCHLECHTRIEM & VON CAEMMERER, *supra* note 187, at 131-33.

277. See Farnsworth, *Formation*, *supra* note 44, at 3-9; Hager, *supra* note 276, at 520. CISG, article 55 will only come into play when a contracting state has made a declaration pursuant to article 92 that it will be bound by Part III of the Convention (containing article 55) but not by Part II (containing article 14), see Farnsworth, *Formation*, *supra* note 44, at 3-9, or if the parties to the contract have derogated from article 14(1) pursuant to article 6, or if, pursuant to article 9, an applicable trade usage varies the effect of article 14(1), see Hager, *supra* note 276, at 520.

278. Cf. KRITZER, *supra* note 27, at 157-58 (suggesting that in some instances article 14(1) will contradict, and therefore displace, domestic laws of validity).

279. See generally WILLISTON ON CONTRACTS (3d ed. 1970), ch. 45 (fraud and misrepresentation), ch. 46 (mistake: reformation and rescission), and ch. 47 (duress and undue influence). Definitions of fraud, misrepresentation, and mistake tend to be slippery, although it may be said that fraud is a “mistake

issues that fall within this broad category are relatively straightforward, others are plagued by controversy that raises fundamental questions about the nature of the Convention and its interpretation.

a. *Fraud and Coercion*

Domestic rules that avoid a transaction where the consent of the party seeking avoidance was coerced clearly apply to contracts for the international sale of goods by virtue of CISG, article 4(a).²⁸⁰ The applicability of domestic rules of *duress* or *threat* is not controversial. Similarly, the application of domestic rules of *fraud* (or *deceit*) is preserved by CISG, article 4(a).²⁸¹ However, the drafting history with respect to this issue took a more circuitous route.

The drafters of the ULIS were explicit in their intention to exclude issues of fraud from the scope of the uniform law.²⁸² Suggestions to attempt unification in this field²⁸³ were rejected, since

[i]t is well known that the concepts of fraud and misrepresentation vary greatly from one law to another, together with the possibility

[or misrepresentation] of one party as to a material fact, wrongfully induced by the other in order that it might be acted upon, or, in cases where there is a duty of disclosure, at least, taken advantage of with knowledge of its falsity to secure action." *Id.* § 1487.

For a thorough comparative analysis, see M.P.I., VALIDITY REPORT, *supra* note 151, at 43-99 (mistake), 100-23 (fraud), and 123-42 (duress); WILLISTON, *supra*, §§ 1600 A-C (mistake under civil law). The issue of initial impossibility, which is considered in some legal systems as relating to mistake as to the possibility of performance of the contract, see M.P.I., VALIDITY REPORT, *supra* note 151, at 45, is treated *infra* in part IV.A.5.

280. See JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 151(B) (1990); Bonell, *supra* note 22, at 59; Kastely, *supra* note 8, at 590; Winship, *Scope*, *supra* note 34, at 37. Article 11 of the LUV, *supra* note 95, contained a rule permitting a party to "avoid the contract when he has been led to conclude the contract by an unjustifiable, imminent and serious threat." The Draft UNIDROIT Principles, *supra* note 165, art. 3.7, provide that

A party may avoid the contract when he has been led to conclude it by the other party's unjustified threat which, having due regard to the circumstances, is so imminent and serious as to leave him no reasonable alternative. In particular, a threat is unjustified if the act or omission with which the promisor has been threatened is wrongful in itself, or it is wrongful to use it as a means to obtain the promise.

281. See, e.g., HONNOLD, UNIFORM LAW, *supra* note 1, at 114-15; MURRAY, *supra* note 280, at § 151(B); Bonell, *supra* note 22, at 59; Kastely, *supra* note 8, at 590; Winship, *Scope*, *supra* note 34, at 37. The Draft UNIDROIT Principles, *supra* note 165, article 3.6, provides that "[a] party may avoid the contract when he has been led to conclude it by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which according to reasonable commercial standards of fair dealing he should have disclosed."

282. See *Special Commission Note*, *supra* note 62, at 188 ("it does not prevent a party from invoking fraud"); *Records of the Eighth Meeting of the Committee on Sale* [hereinafter *Eighth ULIS Meeting*], reprinted in HAGUE CONFERENCE RECORDS, *supra* note 13, at 66 (German delegate said that it "must not be made possible for any national theory on mistake to be invoked. But it should be allowed to rely on deceit or fraud").

283. See *Special Commission Note*, *supra* note 62, at 204 (reporting that one government had disliked reference to municipal law in 1956 Draft ULIS and preferred that ULIS itself be directed against fraud or misrepresentation). See *Dutch Comments*, *supra* note 127, at 143.

of equating gross negligence to fraud. The unification of law by reference to these notions would therefore be only apparent, and the [Special] Commission has thought it preferable openly to admit recourse to municipal laws.²⁸⁴

However, the Special Commission did think that the drafters could enunciate a uniform rule to determine the *results* of misrepresentation and fraud, rather than a uniform definition of the terms.²⁸⁵ Finally, the drafters reached a consensus that "higher damages should be allowed in case of misrepresentation or fraud."²⁸⁶ This goal was achieved by providing in ULIS, article 89 that "[i]n case of fraud, damages shall be determined by the rules applicable in respect of contracts of sale not governed by the present Law."²⁸⁷ The definition of fraud was left to domestic law.²⁸⁸ It is indicative of the definitional problems in this area that the issue of misrepresentation was frequently discussed during the drafting process, but omitted from the final text of the ULIS.

The CISG contains no provision corresponding to ULIS, article 89, even though the UNCITRAL Working Group initially proposed to include a provision expressly preserving domestic remedies for fraud.²⁸⁹ Both the delegates who preferred to retain a provision expressly deferring to domestic law in such cases and those who preferred not to include such a provision agreed that issues of fraud should be governed by domestic law; their only

284. *Special Commission Note*, *supra* note 62, at 204; *see also Dutch Comments*, *supra* note 127, at 143 ("the notions of 'deceit' and 'fraud' have by no means the same meaning in all countries").

285. *See, e.g., 1956 ULIS Report*, *supra* note 34, at 58 ("special rules as to fraud . . . are . . . expressly reserved in so far as they relate to damages, by Article 94 of the [1956] Draft"). Article 94 of the 1956 Draft ULIS, *supra* note 98, provided that where the contract had not been avoided, additional damages could be recovered in accordance with municipal law in "cases of deceit or fraud, as understood by municipal law" in addition to the recovery of damages measured by the "loss actually suffered and the loss of profit." *Cf.* 1963 Draft ULIS, *supra* note 98, art. 94 ("When the contract is not avoided, damages equal the loss actually suffered and the profit lost. However, in cases which constitute misrepresentation or fraud according to the law applicable in accordance with the rules of private international law of the jurisdiction seised, they shall not exceed the loss so calculated, which results from events which the party liable in damages knew or ought to have known at the time of the conclusion of the contract.").

286. *Twenty-Fifth Meeting of the Committee on Sale*, *reprinted in HAGUE CONFERENCE RECORDS*, *supra* note 13, at 187.

287. The purpose of this provision was to ensure that damages in cases of fraud or misrepresentation were not restricted to foreseeable damages, *HAGUE CONFERENCE RECORDS*, *supra* note 13, at 135, and thus to create an exception to the general rule of damages found in ULIS, *supra* note 13, article 82:

Where the contract is not avoided, damages for breach of contract by one party shall consist of a sum equal to the loss, including loss of profit, suffered by the other party. Such damages shall not exceed the loss which the contract, in the light of the facts and matters which then were known or ought to have been known to him, as a possible consequence of the breach of the contract.

288. *See Tunc, Commentary*, *supra* note 14, at 387 ("concept of fraud was difficult to define and too closely connected with public policy to be the subject of international regulation . . . [The] definition of fraud is thus left to whatever municipal law the Court hearing the case considers to be applicable.").

289. The LUV, *supra* note 95, article 10 contained a provision which would have given a party who "was induced to conclude a contract by a mistake which was intentionally caused by the other party" a right to avoid the contract for fraud.

disagreement concerned the means to achieve this end.²⁹⁰ In the end, the drafters realized that it was not necessary to create an express exception for fraud, since article 4(a) already clearly excluded fraud from the scope of the Convention.²⁹¹

b. *Innocent Misrepresentation and Mistake*

The position of domestic rules providing remedies for innocent (honest) misrepresentation and mistake²⁹² is less clear than the position of domestic rules providing remedies for fraud. Rules on misrepresentation and mistake are of great practical importance under the CISG, since they bear *inter alia* on warranty as to the quality of goods. The dispute over the role of domestic rules of innocent misrepresentation and mistake in contracts for the international sale of goods is nearly half a century old, and still raging.²⁹³

The issues raised by mistake and innocent misrepresentation and their corresponding remedies are the most difficult to resolve under the Convention. The adjudicator faced with a buyer's claim to avoid a contract because the goods are non-conforming must search in vain for a clear solution to the competition between the scheme of remedies under domestic law and under the CISG. While the *travaux préparatoires* strongly suggest that mistake is a validity issue to which domestic law may be applied, they also lend support to the argument that application of domestic remedies (i.e., nullification of the contract) is undesirable because it undercuts the Convention's damage-based remedial scheme. Tribunals must choose here between the extreme position of strictly upholding or denying the right of a party to rely on a domestic rule that would avoid the contract, on the one hand, and striking a compromise between the integrity of the competing CISG and domestic remedial systems, on the other. At the very least, the balanced approach to article 4(a) requires

290. See *Fifth W.G. Session*, *supra* note 222, at 46 (delegates who preferred to delete ULIS, article 89 "noted that national law would apply even in the absence of this article. The view was also expressed that in case of deletion of this article an express provision would have to be included in the [Uniform] Law [to the effect] that the provisions were without prejudice to . . . national law in cases of fraud.").

291. See *1977 Draft Report*, *supra* note 146, at 42 (proposal to limit "the rights of the buyer to those conferred on him by the Convention so that, except in cases of fraud, remedies based upon national law are excluded"). Supporters of the proposal argued that "the exclusion of national law remedies was desirable on grounds of uniformity since those remedies may permit a party to escape from the application of the sanctions of the [CISG] . . . [and that] the continued right to resort to national law remedies in case of fraud would permit the continued application of the public policy of the State concerned." *Id.*

292. Compare WILLISTON, *supra* note 279, § 1540, at 49-50 ("[T]he term 'mistake' might well be used inclusively to cover all kinds of mental error, however induced. Fraud and honest misrepresentation would then be considered subdivisions of the general heading 'mistake'.") with WILLISTON, *supra* note 279, § 1540, at 55 (the "term 'mistake' is generally used as including only such mistake as is made without misrepresentation by the other party to the transaction."). See generally HONNOLD, UNIFORM LAW, *supra* note 1, at 315-18 (discussing domestic rules based on innocent misrepresentation as to quality and "mistake"); WILLISTON, *supra*, note 279, §§ 1500-06 (honest misrepresentation and warranty).

293. See KRITZER, *supra* note 27, at 87-88, 90-91 (summarizing debate in this field).

the adjudicator to examine local articulations of domestic policy pertinent to this issue and to balance them as appropriate against the needs of international commerce.²⁹⁴

Attempts to exclude issues of mistake from the scope of the uniform law for the international sale of goods can be traced back to the 1930s,²⁹⁵ while attempts to bar parties from invoking domestic rules of mistake are only slightly more recent. The 1956 Draft ULIS expressly prohibited resort to "all other" domestic remedies for non-conforming goods upon which the buyer "might otherwise have relied, and in particular those based on mistake."²⁹⁶ Some delegates objected to this express exclusion of domestic mistake-based remedies on the grounds that it was unfair to buyers²⁹⁷ and that mistake raised issues of validity (or formation) that were properly excluded from the scope of the uniform law.²⁹⁸ Other delegates argued that the buyer must be precluded from invoking such domestic rules and thereby subverting the system of remedies set forth in the uniform law. But they also recognized that it was not necessary (or desirable) for the ULIS to place a wholesale ban on domestic laws pertaining to mistake.²⁹⁹ ULIS, article 34 reflects a compromise reached on this narrow point;³⁰⁰ it provides that "the rights conferred

294. Tribunals in or applying the law of U.S. states that have adopted the provisions of the Uniform Commercial Code should consider the policies articulated by that state in cases arising under U.C.C. § 1-103, which permits state rules on mistake to supplement the U.C.C. See *supra* note 55.

295. See *supra* note 101 and accompanying text; *Eighth ULIS Meeting*, *supra* note 282, at 66 (German delegate stated that "it must not be made possible for any national theory on mistake to be invoked").

296. 1956 Draft ULIS, *supra* note 98, art. 41; see also *1956 ULIS Report*, *supra* note 34, at 58 (this was "the only [provision] possible; in certain foreseeable cases, if the buyer could invoke the municipal law of mistake he would find that it recognized rights which the [ULIS] did not wish to be attributed to him in the case of delivery lacking conformity"); *Special Commission Note*, *supra* note 62, at 188 ("it is necessary to prevent a municipal theory of mistake (in particular error in substance) being invoked by a contracting party in case of lack of conformity").

297. See *Austrian Observations*, *supra* note 113, at 109-10 (excluding "any possibility of the buyer's enforcing, on the basis of a municipal rule relating to error, rights of which he is deprived" would go "much too far In many cases [involving delivery of non-conforming goods] the buyer can simultaneously rely on error and want of conformity, without knowing in advance which of these pleas will be regarded as well-founded by the court. From this it follows that it would be difficult to compel him to renounce in advance one or the other of these pleas.").

298. *Austrian Observations*, *supra* note 113, at 110 (noting 1956 and 1963 Draft ULIS, article 41 "forms an exception to the rule" excluding matters of formation and validity which "should be suppressed").

299. Tunc, *Commentary*, *supra* note 14, at 374 ("[I]n Article 41, it was only mistake as to the substance that was taken into consideration. For the other factors involved in the formation of the contract, [ULIS, article 8] excluding issues of validity and formation] should be applied."); *Thirteenth ULIS Meeting*, *supra* note 264, at 100 (ULIS, article 41 "involved a particularly difficult question in respect of error as to substance: its tendency was to eliminate the error as to substance to the extent that this latter was added to the rights that the Uniform Law gives to the buyer; but one must not touch the general problem of error as to substance, since this vice in consent was not regulated in the Uniform Law").

300. Tunc "proposed the deletion of any reference to mistake, provided that it were clearly stated that all other remedies based on lack of conformity were excluded. This provision would exclude national legal systems which admitted mistake as to the substance and it would become unnecessary to include any specification as to deceit or fraud." Honnold agreed. *Eighth ULIS Meeting*, *supra* note 282, at 68; see also

on the buyer by the [ULIS] exclude all other remedies based on lack of conformity of the goods."³⁰¹ Despite the deletion of the express reference to domestic laws of mistake, however, the prevailing view was that the ULIS did not

merely . . . preclude recourse to theories of warranty against defects in the goods: such recourse was prevented by the simple substitution of the Uniform Law for the municipal law. It is in particular intended to preclude the possibility of a party who has acquired goods [from] relying on a general theory of nullity based on mistake as to the substance of the goods. [ULIS, article 8], in limiting the field of the Uniform Law, would otherwise have allowed a person acquiring goods to avail himself of this doctrine, if Article 34 did not prevent it.³⁰²

The UNCITRAL Working Group deleted ULIS, article 34 at an early stage of its deliberations³⁰³ since that provision went too far, potentially precluding "those remedies that the parties might have agreed upon in the contract," rather than just preventing recourse to "other remedies available under some national rules, like a plea of nullity, based on mistake as to the quality of the goods."³⁰⁴ However, the Secretary-General agreed with the objective of ULIS, article 34, i.e., "to protect the uniformity of the [law] by prohibiting recourse to other remedies provided under some national rules that would be different than those established by the present Law for failure to perform the contract of sale."³⁰⁵ If this were the final word on the subject, it would weigh heavily in favor of the argument that domestic mistake-based remedies for non-conforming goods are "inconsistent" with, and thus displaced by, the Convention. However, the recurring discussions of this issue

Observations of the United States Submitted Before the Opening of the Conference, U.N. Doc. V/Prep./8, reprinted in HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 302-03 ("[P]erhaps Article 41 could simply state that the preceding section excludes other remedies based on alleged non-conformity of the goods."); *Amendment Submitted by the Government of the United Kingdom*, U.N. Doc. V/Prep./16, reprinted in HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 303.

301. ULIS, *supra* note 13, art. 34; see *Report of the Working Group on Articles 40-49, Conf./V/Amend./61*, reprinted in HAGUE CONFERENCE DOCUMENTS, *supra* note 9, at 309; see also *Records of the Eighteenth Meeting of the Committee on Sale*, reprinted in HAGUE CONFERENCE RECORDS, *supra* note 13, at 127; *Third Plenary Session of the Conference*, reprinted in HAGUE CONFERENCE RECORDS, *supra* note 13, at 286.

302. Tunc, *Commentary*, *supra* note 14, at 374.

303. *Report of the Working Group on the International Sale of Goods*, 3d Sess., U.N. Doc. A/CN.9/62/Add.1,2/1972 [hereinafter *Third W.G. Session*], reprinted in [1972] 3 UNCITRAL Y.B. 77, 80, U.N. Doc. A/CN.9/SER.A/1972, and in HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 97.

304. *Id.* at 87; see also *Obligations of the Seller in an International Sale of Goods; Consolidation of Work Done by the Working Group on the International Sale of Goods and Suggested Solutions for Unresolved Problems, Report of the Secretary General*, U.N. Doc. A/CN.9/W.G.2/WP.16 (1972) [hereinafter *S.G. Consolidated Report*], reprinted in [1973] 4 UNCITRAL Y.B. 36, 44, U.N. Doc. A/CN.9/SER.A/1973, and in HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 113, 121 ("It is also doubtful whether a provision like [ULIS,] article 34 was needed. There will be varying national rules on most of the provisions covered by the Uniform Law; these, of course, are displaced by virtue of the general obligation to give effect to the Uniform Law. . . . It is, of course, impractical to repeat that inconsistent national laws are displaced in connexion with each of the rules of the Uniform Law; inserting such a statement in isolated instances could lead to misunderstanding.").

305. *S.G. Consolidated Report*, *supra* note 304, at 44 ("This decision did not indicate disagreement with the objective of this article.").

during the drafting of the CISG evince an uneasy and inconclusive truce line, along which skirmishes continue.

Two events during the drafting of the Convention suggest that domestic mistake-based remedies for non-conforming goods may still apply to contracts for the international sale of goods. First, the Working Group considered, but ultimately decided not to include in the CISG, the mistake provisions proposed by UNIDROIT in the LUV.³⁰⁶ One of the rejected provisions would have prohibited avoidance on the ground of mistake where the buyer could have had a remedy based on the non-conformity of the goods.³⁰⁷ Second, the Netherlands delegate proposed restricting the buyer's ability to resort to "remedies deriving from the invalidity of the contract under the applicable national law" when remedies granted both under the CISG for lack of conformity and under that national law are available to the buyer.³⁰⁸ The proposal was debated along traditional lines: opponents argued that issues of mistake were reserved to domestic law,³⁰⁹ while proponents argued that it

306. *Ninth W.G. Session*, *supra* note 164, at 65-66. The LUV is discussed *supra* notes 152-163 and accompanying text; *see also* Heiz, *supra* note 204, at 649-51. The Draft UNIDROIT Principles, *supra* note 165, define "mistake" in article 3.2 as "an erroneous assumption relating to facts or to law existing when the contract was concluded," and contain a number of provisions concerning mistake, such as article 3.3, discussing relevant mistake, and article 3.4, discussing error in expression or transmission.

307. Article 9 of LUV, *supra* note 95, provided that "[t]he buyer shall not be entitled to avoid the contract on the ground of mistake if the circumstances on which he relies afford him a remedy based on the non-conformity of the goods with the contract." *See S.G. Report on Formation & Validity*, *supra* note 152, at 270. This provision was also understood to prohibit avoidance of the contract in "those cases in which the buyer might have relied on a remedy under [the CISG] if, in the circumstances, those remedies had not been barred (for example, because the lack of conformity is immaterial or the buyer has not given prompt notice)." *Id.* at 271. Thus, the buyer would be precluded from seeking a domestic mistake-based remedy if he had failed to give notice pursuant to CISG, article 39(2):

The buyer loses the right to rely on lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

Cf. Draft UNIDROIT Principles, *supra* note 165, art. 3.5 (providing that "[a] party shall not be entitled to avoid the contract on the ground of mistake if the circumstances on which he relies afford, or could have afforded, him a remedy for non-performance"); UNIDROIT Validity Study, *supra* note 165, at 9-10.

308. U.N. Doc. A/CONF.97/C.1/L.175 (1980), *reprinted in* OFFICIAL RECORDS, *supra* note 1, at 119, *and in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 1, at 691. The Dutch delegate argued that it was necessary to prevent parties from using CISG, article 4(a) to circumvent other provisions of the uniform law. For example, if a Dutch museum discovered four years after buying a Goya painting from France that the painting was by Goya's pupil, it would likely consult a lawyer to see whether it had any remedy. Although the ULIS provides remedies for non-conforming goods, the Dutch museum would be precluded from pursuing them unless it had given the seller notice within two years of receiving the goods. ULIS, art. 37(2) [CISG, art. 39(2)]. A Dutch lawyer would probably advise the museum to rely on the validity exclusion to seek avoidance of the contract under either the Dutch or French rules on error of substance. In the Dutch delegate's view, "[t]here would be a serious gap in the Convention if [CISG, article 39(2)] could be circumvented so easily." *24th Meeting: 1st Comm.*, *supra* note 276, at 361-62.

309. *See 24th Meeting: 1st Comm.*, *supra* note 276, at 362 ("all questions bearing on the validity of the contract had been deliberately excluded from the sphere of application of the Convention and were covered solely by municipal law"). *Contra* SCHLECHTRIEM, KOMMENTAR, *supra* note 187, at 66 (noting that majority of opponents to that proposal were of view that national law would not apply to such cases in any event, and that only one of opposing votes took the view that question of validity was presented).

was necessary to "protect the unified system of remedies from conflicting provisions of national law."³¹⁰ The Dutch proposal was ultimately rejected, thus leaving open the question whether parties to an international sales contract may avoid their contract pursuant to domestic rules of mistake, or whether they are restricted to the remedies for non-conformity of goods set forth in the Convention.

The evolution of CISG, article 4(a) indicates that all questions of mistake were intentionally excluded from the scope of the Convention — and thus reserved to domestic law³¹¹ — although some support may be found in the *travaux préparatoires* for the view that the Convention remedies for non-conformity were intended to displace domestic remedies based on mistake. This issue remains controversial. At the very least, the drafting history reveals a lack of consensus on the applicability of domestic rules permitting a party to avoid a contract for non-conformity of goods. Simple logic suggests that where there is no consensus to unify, there is no unification. However, the vigor with which some scholars would deny recourse to domestic laws that allow one of the parties to rescind the contract in such a case cannot merely be dismissed as illogical.

Professors Honnold and Schlechtriem are the leading proponents of the view that the Convention displaces domestic remedies for innocent misrepresentation or mistake because these remedies are based on operative facts that invoke rules of the Convention.³¹² In Schlechtriem's view, the Convention "specifically and conclusively" addresses the issue of error as to the quality of goods, and thus article 4(a) does not apply.³¹³ However, Professor Bydliniski argues that the Convention does not specifically and conclusively address this issue, since the Convention only addresses the liability of the seller for breach of contract, not the issue of whether a valid contract has been formed.³¹⁴ In his view, mistake — including mistake as to quality of

310. *24th Meeting: 1st Comm.*, *supra* note 276, at 362 (argument of Professor Schlechtriem).

311. Heiz, *supra* note 204, at 650. Heiz goes on to argue, however, that this inference is inconclusive.

312. See HONNOLD, *UNIFORM LAW*, *supra* note 1, at 315-18; PETER SCHLECHTRIEM, *UNIFORM SALES LAW: THE U.N.-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 33, 66-69 (1986) [hereinafter SCHLECHTRIEM, *UNIFORM SALES LAW*]; Peter Schlechtriem, *The Seller's Obligations Under the United Nations Convention on Contracts for the International Sale of Goods* [hereinafter Schlechtriem, *Seller's Obligations*], in *INTERNATIONAL SALES*, *supra* note 27, at 6-29 ("where it is not a matter of tortious conduct, the domestic remedies for mistakes in communication or motivation should be disregarded"); Schlechtriem, *Unification*, *supra* note 198, at 127 ("legal issues that in essence fall within the purview of the uniform sales law regardless of their classification and characterization according to national law"); see also UNIDROIT Validity Study, *supra* note 165, at 9; Heiz, *supra* note 204.

313. SCHLECHTRIEM, *UNIFORM SALES LAW*, *supra* note 312, at 33, 67-69. This view reflects the position of these issues under German domestic law. See Bydliniski, *supra* note 253, at 86. Bydliniski points out that Austrian law—unlike German law—permits election of remedies (*Konkurrenz*) in this regard. *Id.*; cf. HONNOLD, *UNIFORM LAW*, *supra* note 1, at 124 (discussing election of remedies in context of product liability).

314. Bydliniski, *supra* note 253, at 86 ("Die Haftung für mangelnde Beschaffenheit der Ware als

goods — is "doubtless" a question of validity preserved to domestic law by article 4(a).³¹⁵ Many have subscribed to this view,³¹⁶ although its implications have not been thoroughly explored.

As regrettable as it may be that the Convention failed to achieve full unification in this field, article 4(a) clearly would justify a tribunal's decision to rescind a contract pursuant to domestic law of mistake and restore the parties to the *status quo ante*. It is unlikely that such cases will occur often, since commercial parties will usually be interested in the spectrum of remedies — including damages measured by their expectation interest — that are available under the Convention.³¹⁷ A competing mistake-based remedy under domestic law will be most attractive to a buyer who has failed to give timely notice pursuant to article 39 and is thus precluded from seeking the remedies provided by the Convention. For such cases, Austrian scholars have argued that the domestic remedies for mistake as to quality of goods should be available, at least during the limitation period provided by article 39 of the Convention.³¹⁸ While this appears to be a sensible compromise, it ignores the fact that a similar proposal was considered and rejected by the drafters of the CISG.³¹⁹ Swiss scholars, on the other hand, have proposed that courts should, in the interest of unification, deny recourse to competing domestic remedies for mistake as to the quality of goods.³²⁰ This compromise, too, reflects a balanced approach to article 4(a) under which domestic policies are read narrowly. In any case, tribunals must weigh the policies to be furthered by permitting or denying resort to domestic remedies for mistake as to quality in a contract for the international sale of goods and balance these policies

Vertragsverletzung und die Gültigkeitsfrage des Eigenschaftsirrturns beim Vertragsschluss bleiben dann unterschiedliche Dinge.") (author's paraphrased translation in text).

315. *Id.*

316. See, e.g., MURRAY, *supra* note 280, at § 151(B); Bonell, *supra* note 22, at 59; Gyula Eörsi, in BIANCA & BONELL, *supra* note 1, at 140; Farnsworth, in BIANCA & BONELL, *supra* note 1, at 102; Kastely, *supra* note 8, at 590; Denis Tallon, in BIANCA & BONELL, *supra* note 1, at 577-78; Winship, *Scope*, *supra* note 34, at 1-37; see also Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 280 (1984) (noting that term "mistake" is not self-defining); Winship, *Commentary*, *supra* note 27, at 638.

317. The remedies for breach of contract by the seller, absent agreement to the contrary, are set forth in CISG, article 45:

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

(a) exercise the rights provided in articles 46 to 52;

(b) claim damages as provided in articles 74 to 77.

Article 74 provides the general rule for measuring damages. See generally Arthur G. Murphey, Jr., *Consequential Damages in Contracts for the International Sale of Goods and the Legacy of Hadley*, 23 GEO. WASH. J. INT'L L. & ECON. 415 (1989-90); Ziegel, *Remedial Provisions*, *supra* note 27, at 9-37.

318. MARTIN KAROLLUS, UN-KAUFRECHT 42 (1991). In any case, domestic rules of validity would be available only during the limitation period prescribed by national law.

319. See *supra* note 307 and accompanying text.

320. See Peter Schlechtriem, *Uniform Sales Law: The Experience with Uniform Sales Laws in the Federal Republic of Germany*, 3 JURIDISK TIDSKRIFT 1, 12 n.35 (1991-92).

against the needs of international commerce for a uniform, damages-based system of remedies for non-conforming goods.

5. *Initial Impossibility*

Similar controversy surrounds the role of domestic rules that avoid a contract for *initial impossibility*, for example where the goods had already perished or where the seller did not actually own the goods at the time of contracting. Such cases may trigger article 79, which contains the Convention's rule for excusing a party from its obligation to perform if *inter alia* "the failure [to perform] was due to an impediment beyond" the party's control, or article 68, which concerns risk of loss in certain cases where the goods had been lost or damaged at the time of the conclusion of the contract. Under the laws of some countries, however,

the existence of the subject-matter at the time of the conclusion of the contract is regarded as a condition of validity, as one cannot imagine a contract of sale that would relate to goods which do no longer exist. In this case, the absence of the subject-matter raises a problem of validity which is not governed by the Convention.³²¹

The controversy between those who believe that articles 68 and 79 displace domestic rules of validity relating to initial impossibility and those who would permit resort to domestic rules was not as thoroughly articulated as the similar controversy over mistake. The question nonetheless arose whether the Convention would prevail over any other contrary provision or national rule of validity.³²² No clear decision on this issue was made, thus leaving open the possibility that a tribunal in such cases may apply domestic rules of validity pursuant to article 4(a).³²³ Once again, under a balanced approach

321. Tallon, *supra* note 316, at 577-78 (discussing CISG, article 79); *see also* HONNOLD, *UNIFORM LAW*, *supra* note 1, at 529; KRITZER, *supra* note 27, at 88-90; M.P.I., *VALIDITY REPORT*, *supra* note 151, at 166-83; WILLISTON, *supra* note 279, ch. 58; Drobniig, *Substantive Validity*, *supra* note 201 ("old-fashioned rules"); Nicholas, in *BIANCA & BONELL*, *supra* note 1, at 501; *cf.* Draft UNIDROIT Principles, *supra* note 165, art. 3.9(1) ("The mere fact that at the time of the conclusion of the contract the performance of the assumed obligation was impossible *shall not affect the validity* of the contract.") (emphasis added).

322. *See Records of the Thirty-Second Meeting of the Committee on Sale*, U.N. Doc. A/CONF.97/C.1/SR.32 (1980), reprinted in *OFFICIAL RECORDS*, *supra* note 1, at 403, 406, and in HONNOLD, *DOCUMENTARY HISTORY*, *supra* note 1, at 624, 627 (comments of Indian and Canadian delegates relating to interaction between article 68 and national law governing validity of the contract).

323. *See* Tallon, *supra* note 316, at 578 ("When the existence of the subject-matter is regarded as a peremptory [i.e., mandatory] rule by a given domestic law, Article 79 ceases to apply by virtue of Article 4(a) of the Convention, especially in the absence of any provision similar to Article 34 of ULIS which excluded reliance on national remedies for mistake in cases of non-conformity of goods."). *Contra* Hager, *supra* note 276, at 565; Nicholas, *supra* note 321, at 501; Peter Schlechtriem, *Das Wiener Kaufrechtsübereinkommen von 1980 (Convention on the International Sale of Goods)*, 1990 *IPRAX* 277, 279 [hereinafter Schlechtriem, *Convention*] (initial impossibility is *Leistungsstörung* and therefore not to be treated as rule of validity under § 306 of German Civil Code). In support of the conclusion that a tribunal may not apply domestic rules of validity, Nicholas observes that an amendment that would have expressly preserved the effect of domestic rules of validity in cases to which CISG, article 68 applied was rejected.

the tribunal would look not only to the domestic law itself, but also to the international context in which the question of initial impossibility arises.

6. *Illegality and Immorality*

There is no disagreement that CISG, article 4(a) preserves the effect of domestic rules avoiding illegal or immoral contracts.³²⁴ These are the classic "regulations of a police character or for the protection of persons" which the drafters intended to leave untouched by the uniform law.³²⁵ In this area, it is practically impossible to draw a line between validity and public policy (*ordre public*).³²⁶ As such, no degree of unification seems possible. The categories of illegal and immoral contracts are too extensive to discuss here, beyond reference to a few commercially important issues.³²⁷

International contracts frequently "contain clauses which provide for the payment of a specific or ascertainable sum of money in the event a party is late or otherwise fails to comply with his contractual obligations."³²⁸ CISG, article 6 permits such liquidated damages clauses, subject to any domestic law prohibiting penalty clauses that are applicable by virtue of article 4(a).³²⁹ For example, U.C.C. § 2-718(1) contains a "condemnation of penalty clauses . . . rooted in public policy . . . [that] is untouched by the [CISG]."³³⁰ Not all countries prohibit such clauses, however.³³¹ Some efforts have been

324. See, e.g., HONNOLD, *UNIFORM LAW*, *supra* note 1, at 114; MURRAY, *supra* note 280, at § 151(B); Bonell, *supra* note 22, at 59; Herber, *Article 7*, *supra* note 187, at 71 (*Gesetzwidrigkeit, Verstoß gegen gute Sitten*); Schlechtriem, *Convention*, *supra* note 323, at 279; Ernst von Caemmerer, *Internationale Vereinheitlichung des Kaufrechts*, 77 *SCHWEIZERISCHE JURISTEN-ZEITUNG* 257, 262 (1981) [hereinafter von Caemmerer, *Vereinheitlichung*]; Winship, *Scope*, *supra* note 34, at 1-37; see also Drobnič, *General Principles*, *supra* note 4, at 316 ("Most legal systems deal with illegal and immoral contracts *rel quel*, that is, under the heads of illegality and immorality. Not so the Romanic countries. There, the peculiar institution of *cause* fulfills also the function of invalidating illegal and immoral contracts. The method by which this is achieved is well demonstrated by French law . . . [under which] a contract with an illegal or immoral cause is treated, in effect, in the same way as an illegal or immoral contract.").

325. Tunc, *Commentary*, *supra* note 14, at 363. These issues have also been excluded from the scope of the Draft UNIDROIT Principles, *supra* note 165, by article 3.19(c).

326. See, e.g., ZIEGEL & SAMSON, *supra* note 249, at 42 ("contracts contrary to public policy"); von Mehren, *Contract*, *supra* note 31, at 29 ("Promises may be held unenforceable in whole or in part on grounds of public policy; in such cases one can speak of illegal or immoral agreements.").

327. See generally WILLISTON, *supra* note 279, ch. 49 (wagering agreements), ch. 50 (illegal bargains; agreements made on Sunday or holidays), ch. 50A (bargains obstructing administration of justice), ch. 51 (agreements tending to corruption or immorality), ch. 52 (miscellaneous illegal agreements).

328. KRITZER, *supra* note 27, at 84.

329. See *id.* at 84-86; MURRAY, *supra* note 280, at § 151(B); E. Allan Farnsworth, *Damages and Specific Relief*, 27 *AM. J. COMP. L.* 247 (1979) [hereinafter Farnsworth, *Damages*]; Hans Stoll, *Internationalprivatrechtliche Fragen bei der landesrechtlichen Ergänzung des Einheitlichen Kaufrechts*, in *FESTSCHRIFT FÜR MURAD FERID* 495, 511 (1988).

330. Farnsworth, *Damages*, *supra* note 329, at 248.

331. *Id.* at 248 (noting "polar views on the validity of such penalty clauses. Many legal systems find nothing inherently objectionable in them. Others, notably those based on the common law, draw a

undertaken to unify the law governing such clauses, but they have not been successful to date.³³²

Excluding domestic laws invalidating illegal contracts from the Convention's scope guarantees the applicability of many mandatory rules of public policy to contracts for the international sale of goods. Article 4(a) preserves national laws setting maximum interest rates.³³³ Domestic market regulatory rules,³³⁴ such as rules prohibiting restraints of trade,³³⁵ import-export and boycott regulations,³³⁶ and foreign exchange control laws³³⁷ also remain applicable. The applicability of other protective laws is considered below.

7. Unconscionability

It is important to examine whether domestic rules through which courts control unfair, unreasonable, or unconscionable terms apply to contracts for the international sale of goods. The judicial and legislative control of onerous contracts has grown significantly during this century. Efforts to control

distinction between a provision for a 'penalty,' which is not valid, and a provision for 'liquidated damages,' which is valid."); see also KRITZER, *supra* note 27, at 84-86 (summarizing laws of Soviet Union, Federal Republic of Germany, England, and France on penalty clauses); MURRAY, *supra* note 280, § 151(B); Peter Benjamin, *Penalties, Liquidated Damages and Penal Clauses in Commercial Contracts: A Comparative Study of English and Continental Law*, 9 INT'L & COMP. L.Q. 600 (1960).

332. See, e.g., G.A. Res. 127, U.N. GAOR, 38th Sess., at 273, U.N. Doc. A/38/135 (1983) (Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance). Draft UNIDROIT Principles, *supra* note 165, article 6.4.14, provides that the aggrieved party is entitled, "irrespective of its actual harm," to the sum specified in the contract for such non-performance, but adds that the court may reduce the specified amount if it is "grossly excessive in relation to the harm resulting from the non-performance and the other circumstances."

333. See ENDERLEIN, *supra* note 187, at 41; see also 1977 Draft Report, *supra* note 146, at 60 (proposal to delete provision that fixed interest rate "arose from the fact that many countries had mandatory rules of public policy prohibiting interest rates to exceed a specified maximum"). See generally WILLISTON, *supra* note 279, ch. 49A (usury).

334. See generally Herber, *Article 7*, *supra* note 187, at 71; von Caemmerer, *Vereinheitlichung*, *supra* note 324, at 262-63.

335. Von Caemmerer, *Vereinheitlichung*, *supra* note 324, at 262-63. See generally WILLISTON, *supra* note 279, chs. 48, 48A & 48B (illegal agreements as restraints of trade).

336. Von Caemmerer, *Vereinheitlichung*, *supra* note 324, at 262; see also DICEY & MORRIS, *supra* note 56, at 22-23 (contracts involving trading with enemy or breaking laws of friendly foreign country).

337. Herber, *Article 7*, *supra* note 187, at 71; von Caemmerer, *Vereinheitlichung*, *supra* note 324, at 262. For example, CISG does not govern the enforceability of "[e]xchange contracts which involve the currency of any [International Monetary Fund] member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with [the Bretton Woods] Agreement" Bretton Woods Agreement, art. VIII, § 2(b), Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39, amended by 20 U.S.T. 2775, 726 U.N.T.S. 266 (1968), amended by 29 U.S.T. 2203 (1976) (Such exchange contracts "shall be unenforceable in the territories of any member."). See generally GILES, *supra* note 91, at 65, 191-92; F.A. MANN, *THE LEGAL ASPECTS OF MONEY* 377 (4th ed. 1982) (discussing whether this provision of Bretton Woods Agreement is concerned with "the effectiveness of contracts, that is to say, with their initial 'validity,'" or merely with their "legality or the possibility of their performance"); Ronald Brand, *Nonconvention Issues in the Preparation of Transnational Sales Contracts*, 8 U. PITT. J.L. & COMM. 145, 170-86 (1988); J.E.S. Fawcett, *The IMF and International Law*, 40 BRIT. Y.B. INT'L L. 32 (1964).

contractual fairness may be aimed at procedural defects in the bargaining process,³³⁸ which often inhere in standard forms,³³⁹ or at the substantive allocation of risks in the agreement itself.³⁴⁰

Although the techniques of control differ, their underlying purposes are basically the same, i.e., to guard the party having a weak bargaining position from disadvantage.³⁴¹ Such rules may be found in case law, in general statutory principles, or in special protective legislation. Of special interest here are provisions found in modern sales legislation, such as § 2-302 of the Uniform Commercial Code³⁴² and § 36 of the Uniform Nordic Contract Act,³⁴³ and in statutes expressly regulating the use of standard form con-

338. "Covert control" refers to techniques employed to remedy "procedural injustice" resulting from defects in the bargaining process, including those inherent in the use of standard forms. Common examples include judicial construction techniques, traditional doctrines used to police the contracting process, and special protection for certain types of contracts where the contracting process is especially vulnerable. See von Mehren, *Contract*, *supra* note 31, at 64-65; see also ZWEIGERT & KÖTZ, *supra* note 4, at 22.

339. "Contract of adhesion" signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or to reject it." 17 C.J.S. *Contracts* § 10 (1963). The term was coined by the French jurist, Saleilles, who emphasized the unilateral character of such contracts and advocated new legal rules for dealing with them long before the consumer protection movement took shape. See generally A. BOGGIANO, *INTERNATIONAL STANDARD CONTRACTS: THE PRICE OF FAIRNESS* (1991); ZWEIGERT & KÖTZ, *supra* note 4, at 10-25 (comparative analysis of techniques used to control terms contained in standard forms); Hellner, *Standard Form Contracts*, *supra* note 7, at 357-60; Hondius, *Unfair Contract Terms: New Control Systems*, 26 AM. J. COMP. L. 525 (1978); von Hippel, *supra* note 4.

340. In more recent times, tribunals have moved towards overt control of contracts, and departed from the "comfortable proposition that a transaction's substantive justice is guaranteed if the contract results from a procedurally fair process of contracting." von Mehren, *Contract*, *supra* note 31, at 67 (including general discussion of "substantive" or "exchange" justice).

341. Draft UNIDROIT Principles, *supra* note 165, article 3.8(1) provides that "[a] party may avoid a contract or an individual term if at the time of the making of the contract the contract or term unjustifiably gives the other party an excessive advantage. Regard is to be had to, among other things, (a) the fact that the other party has taken unfair advantage of the avoiding party's dependence, economic distress or urgent needs, or of his improvidence, ignorance, inexperience or lack of bargaining skill, and (b) the commercial setting and purpose of the contract." See also Jean-Louis Baudouin, *Oppressive and Unequal Contracts: The Unconscionability Problem in Louisiana and Comparative Law*, 60 TUL. L. REV. 1119 (1986); Spencer N. Thal, *The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness*, 8 OXFORD J. LEGAL STUD. 17 (1988); cf. 1989 UNIDROIT Validity Study, *supra* note 165, at 11-13 (explaining origins of principle and emphasizing that there must be unjustifiable "gross disparity between the obligations of the parties" or "contract clauses grossly upsetting the contractual equilibrium").

342. U.C.C. § 2-302 (1991) provides that:

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

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

In the United States, there has been no special legislative enactment to deal with the problems of standard terms, as there has been in Germany and England, but there has been a development toward overt control of contracts. U.C.C. § 2-302 "applies whether or not the terms in issue are standard ones, and whether or not the parties to the contract are both merchants: a sales contract made with a private individual is covered." ZWEIGERT & KÖTZ, *supra* note 4, at 21.

343. For a translation of that provision, see Joseph M. Lookofsky, *Loose Ends and Contours in*

tracts, such as the U.K. Unfair Contract Terms Act, 1977³⁴⁴ and the German Act for the Control of the Law of General Conditions of Business (AGB Law).³⁴⁵ As a practical matter, these domestic rules will most often come into play when a contract for the international sale of goods contains an exculpatory clause (disclaimer), i.e., a clause which modifies, limits, or excludes the warranty that would otherwise be provided by law, or that limits or excludes the available remedies.³⁴⁶

International Sales: Problems in the Harmonization of Private Law Rules, 39 AM. J. COMP. L. 403, 411 (1991) (court may "set aside an agreement in whole or part because it would be unreasonable or against good standards of dealing to enforce it, [taking into account] conditions at the time of contracting, subsequent developments and the content of the contract").

344. Unfair Contract Terms Act, 1977, ch. 50, § 26 (Eng.) [hereinafter 1977 U.K. Act], reprinted in CHALMERS, *SALE OF GOODS ACT 1979*, at 346-71 (18th ed. 1981). See generally PATRICK S. ATIYAH, *THE SALE OF GOODS 183* (7th ed. 1985) (this Act introduced "more general control of exclusion clauses"); BENJAMIN'S *SALE OF GOODS* 3, 13-16, 543-605 (3d ed. 1987) [hereinafter BENJAMIN]; DICEY & MORRIS, *supra* note 56, at 24 (Act "crystallised rules of public policy [which] lay down mandatory rules which the parties cannot contract out of, directly or indirectly"); TREITEL, *supra* note 31, at 194-209; Ian Brown, *Business and Consumer Contracts*, 1988 J. BUS. L. 386.

Section 55 of the Sale of Goods Act, 1979, ch. 54 (Eng.) provides that "where a right, duty or liability would arise under a contract of sale of goods by implication of law, it may (subject to the Unfair Contract Terms Act, 1977) be negatived or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract." The 1977 U.K. Act incorporated amendments that had been made to the Sale of Goods Act of 1893 by the Supply of Goods (Implied Terms) Act of 1973. BENJAMIN, *supra*, at 13. Section 6(3) of the 1977 U.K. Act provides that, "[a]s against a person dealing otherwise than as a consumer," liability for breach of seller's implied warranties "can only be excluded or restricted by reference to a contract term, but only insofar as the term satisfies the requirement of reasonableness." The "requirement of reasonableness" also applies to certain exculpatory clauses in contracts where one of the parties "deals as a consumer or on the other's written standard terms of business." 1977 U.K. Act, *supra*, § 3. An exclusion of liability is "reasonable" when "the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made." *Id.* § 11(1).

345. The AGB Law entered into effect on April 1, 1977. It is "basically designed to protect consumers; however, transactions between merchants are covered in part." von Mehren, *Battle of the Forms*, *supra* note 44, at 74. The AGB Law permits tribunals to evaluate the fairness of standard terms that occur in transactions between merchants according to the standards embodied in the general clause, AGB Law, article 9, which provides that

such terms are without effect when they, contrary to the requirements of good faith, unreasonably disadvantage the other party; . . . in case of doubt, an unreasonable disadvantage shall be found to exist where a term is incompatible with the fundamental idea of the provision of the law from which it deviates or when a term so limits the essential rights and duties that flow from the nature of the contract that accomplishment of the contract's purpose is endangered.

(This version of the text of article 9 of the AGB Law is loosely rendered from Professor von Mehren's translation of that text. von Mehren, *Battle of the Forms*, *supra* note 44, at 74). Cf. ZWIEGERT & KÖTZ, *supra* note 4, at 13 ("[S]tandard terms are invalid when they 'unfairly' disadvantage the customer by modifying 'essential' rights or duties which arise from the 'nature of the contract' in such a manner 'as to imperil the achievement of the contractual purpose.'"). See generally John P. Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041 (1976).

346. See ZIEGEL & SAMSON, *supra* note 249, at 42 (noting that exclusion of such issues from scope of Convention would be "of particular importance where the contract contains a disclaimer clause restricting or excluding liability for breach of warranty or other obligation imposed on the seller under the Convention and the buyer invokes the doctrine of 'fundamental breach' or impeaches the clause on grounds of unconscionability").

Exculpatory clauses play an important role in commerce.³⁴⁷ The Convention itself does not restrict the parties' freedom to limit or exclude their liability under contracts within its scope.³⁴⁸ However, domestic laws invalidating unfair, unreasonable, or unconscionable clauses *do* limit the parties' autonomy.³⁴⁹ If such domestic rules apply to contracts for the international sale of goods pursuant to article 4(a), then there is an "unfortunate, if inevitable, conflict between the philosophy of freedom of contract generally enshrined in the Convention and a restriction on that freedom, governed by national law, which may proceed from much more protectionist sentiments."³⁵⁰ More concretely, the question is whether CISG, article 6 permits "the exclusion of obligations imposed under the Convention, however basic, even though such a disclaimer would be treated as unconscionable, and therefore unenforceable, under the applicable municipal law? Would this be a question of validity within article 4 or would article 6 take priority?"³⁵¹

The prevailing view is that domestic rules permitting courts to exercise control over unfair, unreasonable, or unconscionable contracts constitute rules of validity and thus apply to contracts for the international sale of goods pursuant to article 4(a).³⁵² In other words, the autonomy granted to the

347. See Jan Hellner, *Consequential Loss & Exemption Clauses*, 1981 OXFORD J. LEGAL STUD. 13; von Hippel, *supra* note 4, at 592; Manfred Wolf, *Auslegung und Inhaltskontrolle von AGB im internationalen kaufmännischen Verkehr*, 153 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 300, 301 (1989) (discussing control of standard terms under German, French, English, Italian, and Spanish law). See generally GABRIELE SCHMITZ, *HAFTUNGSAUSSCHLUSSKLAUSELN IN ALLGEMEINEN GESCHÄFTSBEDINGUNGEN NACH ENGLISCHEM UND INTERNATIONALEM PRIVATRECHT* (1977); YATES & HAWKINS, *supra* note 31.

348. CISG, article 6 permits the parties to "derogate from or vary the effect of any of its provisions." See Tiling, *supra* note 32, at 280 (analyzing liability provisions under ULIS, and concluding that uniform law itself did not restrict ability of parties to limit or exclude their liability under contract). See generally Bonell, *supra* note 22, at 54 ("Existing domestic laws grant the parties the same freedom of contract, provided they do not contravene rules of a mandatory character.").

349. See ZIEGEL & SAMSON, *supra* note 249, at 44 (contrasting principle of freedom of contract enshrined in CISG, article 6 with "modern sales legislation" that imposes restrictions on parties' freedom to exclude their obligations).

350. Ziegel, *Remedial Provisions*, *supra* note 27, at 9-39; see also KRITZER, *supra* note 27, at 114.

351. ZIEGEL & SAMSON, *supra* note 249, at 44; Bonell, *supra* note 22, at 51-64.

352. See HONNOLD, *UNIFORM LAW*, *supra* note 1, at 166 (CISG, article 4(a) preserves effect of domestic legislation which "denies effect to contract terms on the ground that they impose excessively harsh consequences even though these contract terms were (or should have been) understood by the other party," and to legislation which restricts "the effect of standard terms or forms on the ground that their use is so widespread that they deny contractual freedom to the other party"); *id.* at 314 (noting that "most of the . . . provisions of the [German AGB Law], expressly and clearly, establish rules of 'validity' of a provision of a contract, and thus could apply to international sales governed by the Convention"); MURRAY, *supra* note 280, § 151(B); Bonell, *supra* note 22, at 60 (applicable domestic law "determines not only whether the agreement between the parties is affected by a defect of consent, but also whether the contractual clauses in derogation of the Convention are consistent with the limitations imposed by that domestic law on the parties' freedom of contract"); Hellner, *Standard Form Contracts*, *supra* note 7, at 355, 357-59 (arguing that CISG, article 4(a) excludes control of standard terms from scope of Convention, and providing examples under English, German, and Swedish law); Kastely, *supra* note 8, at 590; Lookofsky, *supra* note 343, at 412-15; Schlechtriem, *Convention*, *supra* note 323, at 279 (German AGB Law will apply to contracts under CISG); Stoll, *supra* note 329, at 511-12; Tiling, *supra* note 32, at 280-

parties under article 6 is subject to the limits imposed by the applicable domestic law. Thus, the question "whether the parties have validly . . . derogated from any of [the Convention's] provisions falls outside the Convention and has to be solved by reference to a particular domestic law."³⁵³ This means that both U.C.C. § 2-302 and U.C.C. § 2-719(3), which permits parties to limit or exclude consequential damages unless the limitation or exclusion is unconscionable, constitute rules of validity, and therefore apply to contracts for the international sale of goods when the Uniform Commercial Code is the proper law to govern issues not governed by the Convention.

Whether article 4(a) also preserves the application of U.C.C. § 2-719(2), which limits the parties' freedom to modify or limit the remedy "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose," is less clear. Professor Murray doubts that this limitation on the parties' autonomy raises a question of validity "since the circumstances giving rise to 'failure of essential purpose' arise after the contract is formed."³⁵⁴ Although technically correct, this narrow reading of subsection (2) is not justified when the policies behind U.C.C. § 2-719 are viewed in the context of CISG, article 4(a). The overriding purpose of U.C.C. § 2-719 is to permit a tribunal to evaluate the fairness of a limitation of liability clause in accordance with vague standards that embody public policy. The mere fact that U.C.C. § 2-719 provides two different standards to judge the effectiveness of contractual provisions excluding consequential damages or otherwise modifying the buyer's remedy — i.e., unconscionability (subsection 3) and failure of essential purpose (subsection 2) — does not detract from this underlying purpose,³⁵⁵ which is entirely consistent with the spirit of CISG, article 4(a).

However, not all commentators subscribe wholeheartedly to the view that such domestic laws apply to exculpatory clauses in contracts for the international sale of goods. Here, as elsewhere, some argue that the provisions of the Convention may displace rules of domestic law, such as where operative facts that trigger U.C.C. § 2-302 also invoke a rule of the

81 (under ULIS, article 8, effect of exculpatory clauses is to be governed by domestic law); Winship, *Scope*, *supra* note 34, at 37 (unconscionability and gross unfairness); Tiggey, *supra* note 26, at 546 (referring to unconscionable usages). See also Bonell, *supra* note 22, at 59 (consent of party may be vitiated by defect such as abuse of unequal bargaining power); Farnsworth, *Standard Forms*, *supra* note 27.

353. Bonell, *supra* note 22, at 60.

354. MURRAY, *supra* note 280, § 151(B) n. 21.

355. U.C.C. § 2-719 cmt. 1 seems to bear this out. It states that "any clause purporting to modify or limit the remedial provisions of [U.C.C. article 2] in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed."

Convention.³⁵⁶ Professor Honnold states that, "Domestic rules on validity — such as requirements of 'good faith,' 'Treu und Glauben,' 'conscientiousness,' or rules controlling contract clauses restricting responsibility for defective goods — may become inapplicable in certain cases."³⁵⁷

The controversy revolves around the standards for evaluating a clause excluding or modifying a warranty, that is, an exculpatory clause limiting duties undertaken. CISG, article 35(2) states that the seller must deliver goods that conform with designated criteria, "[e]xcept where the parties have agreed otherwise."³⁵⁸

The key question, therefore, is whether domestic laws regulating the manner of exclusion or modification of such obligations, such as U.C.C. § 2-316,³⁵⁹ are rules of validity that are preserved by CISG, article 4(a).³⁶⁰ Professor Honnold argues that U.C.C. § 2-316 is a law which "denies full effect to standard terms and form contracts prepared by one party on the ground that the other party may not grasp their full import."³⁶¹ In his view, U.C.C. § 2-316 is a rule of *interpretation*, rather than a rule of validity, and is thus displaced by CISG, article 8(2) concerning interpretation of statements made by a party.³⁶² He concludes that applying domestic rules "controlling

356. KRITZER, *supra* note 27, at 82 (with examples).

357. HONNOLD, *UNIFORM LAW, supra* note 1, at 116.

358. *Cf.* U.C.C. § 2-314 (1990) (implied warranty of merchantability); U.C.C. § 2-315 (1991) (implied warranty of fitness for particular purpose).

359. The pertinent subsections of U.C.C. § 2-316 (1991) provide that

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2),

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty

. . . .

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

360. *See* HONNOLD, *UNIFORM LAW, supra* note 1, at 309-12; KRITZER, *supra* note 27, at 27, 81-82; Farnsworth, *Standard Forms, supra* note 27, at 443-44; Longobardi, *Disclaimers, supra* note 27, at 874-75.

361. HONNOLD, *UNIFORM LAW, supra* note 1, at 166.

362. CISG, article 8(2) provides that "statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances." According to Professor Honnold, this provision "has roots in the classic rule that doubts are to be resolved against the drafter (*contra proferentum*)."³⁶¹ HONNOLD, *UNIFORM LAW, supra* note 1, at 165; *see also* KRITZER, *supra* note 27, at 27 (this is "better point of view"). This view seems to have its origins in the *Report of the Working Group, Working Paper Prepared by the Secretariat*, U.N. Doc. A/CN.9/35 (1970), *reprinted in* [1968-1970] 1 UNCITRAL Y.B. 192, U.N. Doc. A/CN.9/SER.A/1970, and in HONNOLD, *DOCUMENTARY HISTORY, supra* note 1, at 26, 30 ("A closely related question concerns local rules designed to protect unwary buyers from clauses limiting their

contract clauses restricting responsibility for defective goods" without turning first to CISG, article 8(2) "would restrict the scope of the uniform law in violation of the rule of Article 7(1) that the Convention shall be interpreted with regard 'to the need to promote uniformity in its application. . . .'"³⁶³

Professor Honnold's view has met with resistance. Those authors who contend that U.C.C. § 2-316 sets forth requirements for validity preserved to domestic law emphasize the mandatory nature of the provision and its public policy purpose.³⁶⁴ The connection between U.C.C. §§ 2-316 and 2-302 may help to resolve the debate over U.C.C. § 2-316. The gist of unconscionability is the "prevention of oppression and unfair surprise."³⁶⁵ U.C.C. § 2-316 also "seeks to protect a buyer from unexpected and unbargained language of disclaimer."³⁶⁶ Thus, the subsections of U.C.C. § 2-316 dealing with the exclusion or modification of implied warranties are primarily aimed at the prevention of unfair surprise, even though couched in interpretive terms. It is therefore difficult to sustain a neat distinction between U.C.C. § 2-302, which permits a court to invalidate exculpatory clauses because they are unconscionable, and the provisions of U.C.C. § 2-316 on implied warranties, which similarly permit a court to invalidate an attempted disclaimer. The conclusion that U.C.C. § 2-316 constitutes a rule of validity is warranted.

Therefore, the legal effect of most exculpatory clauses, if not all, will be left up to the domestic law that is otherwise applicable, and will not be evaluated under international standards developed within the framework of the CISG. This conclusion with regard to an important issue in international commerce would not appear to bode well for the goal of unification. However, the prospects are good that international standards to govern exculpatory clauses will evolve. Even in the absence of international unification, the rules governing exculpatory clauses lend themselves well to the balanced approach described in part III. This is an area in which much common ground can be found and in which adjudicators can accommodate the needs of international commerce by reading domestic public policy narrowly.

rights (e.g., by printed form clauses or technical language not likely to be understood by ordinary consumers). If such a domestic rule is stated in terms of "validity," presumably it would be preserved under [CISG, article 4]; but if the rule is one of interpretation, the impact of the uniform laws may be more doubtful."

363. HONNOLD, *UNIFORM LAW*, *supra* note 1, at 116-17.

364. *See* Audit, *supra* note 25, at 157 ("[D]omestic restrictions on disclaimers [such as U.C.C. § 2-316] are adopted for reasons of public policy and, therefore, might be held applicable to international contracts as mandatory norms."); Longobardi, *Disclaimers*, *supra* note 27, at 878-79. Professor Audit offers the further example of the rule under French law that "a disclaimer may be enforceable only if the buyer belongs 'to the same trade' as the seller. This is to be understood as meaning that he has the necessary technical expertise concerning the goods sold." Audit, *supra* note 25, at 157 n.78; *see also* Schlechtriem, *Seller's Obligations*, *supra* note 312, at 6-24 (indicating that such rules constitute rules of validity under German law).

365. U.C.C. § 2-302 cmt. 1 (1990).

366. U.C.C. § 2-316 cmt. 1 (1990).

B. Consequences of Validity Exclusions

Most of the validity issues excluded from the scope of the Convention — duress, fraud, misrepresentation, mistake, initial impossibility, illegality, and immorality — are issues that do not figure largely in the process of planning contracts for the international sale of goods. Although the exclusion of such issues from the Convention's scope will present uncertainties as to applicable law when a contract dispute does arise, it does not significantly endanger the goal of promoting predictability through unification. Indeed, when UNCITRAL considered whether to incorporate provisions from the LUV into the CISG, it recognized that these problems were relatively insignificant in international trade.

Other excluded issues, however, such as exculpatory clauses, constitute a more serious flaw in the scheme of the CISG. Exculpatory clauses are vital to the parties' exercise of their contractual freedom to allocate risks. A party who wishes to include exculpatory language in a contract must be able to ascertain which steps need to be taken and what standards must be observed in order to effectuate that wish. Relinquishing the control of exculpatory clauses to national standards reintroduces the vagaries of the conflict of laws into an important area of contracts for the international sale of goods. These problems can be largely eliminated by including a choice of law clause in the contract. However, this solution is not foolproof when the Convention's "battle of the forms" rules govern contract formation.³⁶⁷

Consider the position of a seller (or seller's counsel) who wishes to prepare a set of standard terms for use in export transactions. Although modern conflict of laws rules point toward application of the seller's law to contract disputes,³⁶⁸ a tribunal — particularly one in the buyer's jurisdiction — might instead apply the buyer's law to the case. If, absent an effective choice of law clause in the contract, a U.S. buyer were to bring suit in a U.S. court against a foreign seller for damages arising out of a breach of implied warranty, a U.S. court could well find that the sales transaction bears "an appropriate relation"³⁶⁹ to the forum, and therefore apply the Uniform Commercial Code to issues not governed by the Convention. Further, the fact that the issue presented to the tribunal, i.e., the effect of a disclaimer, is often deemed to involve some mandatory measure of public policy might well tip the tribunal's choice of law analysis in favor of the law of the forum, which in this case is the buyer's law. Indeed, one scholar argues that the law of the person to be protected should apply to such questions, in order to protect that

367. See discussion *supra* in text accompanying notes 44-47.

368. See *supra* note 58 and accompanying text.

369. U.C.C. § 1-105(1) (1990).

party's reasonable expectations.³⁷⁰ While by no means assured, therefore, it is possible that exculpatory terms in a contract prepared by a foreign seller would be judged under the Uniform Commercial Code if an injured buyer brings suit in the United States. Needless to say, U.S. sellers could suffer the same fate abroad.

The possibility that a tribunal will apply the buyer's law to determine the validity of an exculpatory clause raises the specter of absurd results. Since the legal standard that will be applied to determine the validity of the exculpatory clause is indeterminate, the drafter will have to choose between drafting to comply either with familiar domestic standards or with standards that are recognized abroad. The practical difficulties of ascertaining the standards recognized in *one* other country — much less in *all* other countries — where buyers may be located suggests that a seller will draft its standard export terms to comply with the standards prescribed by the seller's law. It is conceivable, therefore, that a U.S. tribunal would strike down a foreign seller's warranty disclaimer, because it fails to comply with the technical guidelines set forth in U.C.C. § 2-316(2).³⁷¹ Similarly, the laws of Belarus, Lesotho, or Syria might be applied to evaluate the validity of an exculpatory clause drafted by a U.S. exporter according to the standards of the Uniform Commercial Code. The dilemma faced by drafters and the importance of such clauses in contracts for the international sale of goods mandates that serious consideration be given to developing international standards for evaluating the validity of exculpatory clauses. There are two ways to reach this end: first, through international efforts to achieve a measure of unification in this field, and second, absent international standards, then by way of a balanced approach to article 4(a). Under the balanced approach, a tribunal would read domestic public policy narrowly to determine whether a domestic rule applied to an exculpatory clause contained in a contract for the international sale of goods and would then interpret any such domestic standard in a manner consistent with the international nature of the transaction.

A number of commentators have regretted the exclusion of these vital issues from the ULIS and the CISG.³⁷² Historically, good reasons existed

370. See Stoll, *supra* note 329, at 511-12.

371. For example, U.C.C. § 2-316(2) (1990) requires *inter alia* that a disclaimer of the implied warranty of merchantability must mention merchantability. Professor Honnold argues, however, that U.C.C. § 2-316(2) does not apply to contracts to which the CISG applies, since that provision is inextricably tied to the U.C.C. scheme of implied warranties. HONNOLD, *UNIFORM LAW*, *supra* note 1, at 311; see also Farnsworth, *Standard Forms*, *supra* note 27, at 443-44.

372. See, e.g., ZIEGEL & SAMSON, *supra* note 249, at 42 (these exclusions are "a debilitating if unavoidable weakness"); Hellner, *Standard Form Contracts*, *supra* note 7, at 360-61 ("It is perhaps also to be regretted that the Convention does not deal with the problem of control of standard terms in contracts."); Maskow, *supra* note 215, at 45 (expressing regret that no measures were taken in the CISG to "secure certain fundamental prerequisites" to prevent "grossly unfair contract practices," and noting that including such measures would have had effect of counteracting urge to resort to domestic laws to find remedy for such injustices); Tiling, *supra* note 32, at 281 ("regrettable that the ULIS contains no rules on

for excluding this field from unification efforts. One early commentator noted the "insurmountable difficulties" to achieving unification in this field, which he attributed to the different policies enshrined in the laws of different nations and to the rapid change that was then underway in the degree and manner in which courts exercised control over the terms of the parties' bargains.³⁷³

While the historical reasons for excluding exculpatory clauses from the realm of the uniform law of sales are understandable, they are no longer convincing. The fact that a topic was too controversial to be unified at an earlier time does not mean that it would not lend itself to unification by means of a special convention; indeed, there are numerous examples of successful unification of issues that were considered "too hot to handle" in earlier days.³⁷⁴

the illegality or immorality of exculpatory clauses") (author's translation); Wolf, *supra* note 347, at 354.

373. Tiling, *supra* note 32, at 281-82; see also Hellner, *Standard Form Contracts*, *supra* note 7, at 360 (observing that "main reason for [excluding these issues] is simple. At the time when work on the Convention began, the discussion on such control for contracts of sale had hardly started. But during the long period of preparation, this discussion has become vivid, and a number of countries have introduced such control, both by legislation and by various devices. Considering the prevalence of exculpatory clauses and the need for the bargaining parties (or their counsel) to have knowledge about the standard which must be met, it appears to this author that an international standard would be preferable in this context. However, it must be admitted that attaining agreement on such a subject would probably have been even more difficult than reaching the unity that has just now been achieved.").

374. See Diamond, *supra* note 20, at 51-57 (citing example of consumer protection as area which could not satisfactorily be incorporated in scope of "main" convention, and which was thus singled out for special convention). Another example is prescription. UNIDROIT had reported that

Interruptions and suspensions of prescription are the subject of very varying rules in different national systems, and the [Special] Commission does not think that it can suggest their unification. It will be seen that in [ULIS, article] 58 a period of prescription would therefore necessitate a reference to municipal laws. At this point the Draft would then cease to yield uniform law: it would reintroduce all the difficulties of private international law, aggravated in the present case by the difficulty of characterising rules of prescription as procedural or substantive law.

Special Commission Note, *supra* note 62, at 195. The Special Commission studied the matter of prescription, and "put to the Conference the questions whether the topic of prescription can be profitably treated in the Uniform Law on Sale, or if it could be hoped that unification in a wider field could be achieved on this subject." *Id.* at 180. There was a strong sentiment that "[t]he endeavour to achieve a unification of law in this respect would go beyond the aims pursued by the Uniform Law." *F.R.G. Government Observations*, *supra* note 18, at 100. Despite these initial misgivings, the U.N. Convention on the Limitation Period in the International Sale of Goods, done on June 14, 1974, amended by 1980 Protocol, has been signed by *inter alia* the United States and is pending before the Congress for advice and consent.

Consider also the problems caused by domestic laws governing the form of examination of the goods and notification of lack of conformity which showed "marked differences." *1956 ULIS Report*, *supra* note 34, at 59. To the UNIDROIT Special Commission, "it seemed . . . impossible to effect unification here." *Id.* ULIS, article 38(4) therefore provided that "[t]he methods of examination shall be governed by the agreement of the parties or, in the absence of such agreement, by the law or usage of the place where the examination is to be effected." This provision was a "choice of law rule" (*Kollisionsnorm*). Dölle, *EKG*, *supra* note 20, at 441. The CISG, however, contains no such rule. Indeed, CISG, article 38 provides unified rules on examination of goods "more flexible and consistent with current commercial practices" than the earlier "rigid" rules. HONNOLD, *UNIFORM LAW*, *supra* note 1, at 327-28. This example demonstrates that, in at least one area, the drafters were able to overcome their initial impulse to throw up their hands when confronted with "marked differences" and refer the question to domestic law; see also Commission Proposal for a Council Directive on Unfair Terms in Consumer Contracts, COM(90) 322 final, 1990 O.J. (C 243) 2; Amended Proposal, COM(92)66 final (Mar. 5, 1992) (EEC efforts to develop

Comparative scholars should examine the need for and feasibility of achieving some measure of unification with respect to the treatment of exculpatory clauses in a transnational setting. These can hardly be viewed as isolated questions. Feasibility depends largely on whether, "behind and beyond" the details engendered by different legal systems, there are "shared and connecting elements; [whether] these elements can be identified; and [whether] it should be possible, without resorting to mere generalities, to formulate these elements in normative terms."³⁷⁵ Some studies have gone so far as to suggest that despite the different methods adopted in different legal systems for controlling the terms of standard contracts, the "test of validity is the same."³⁷⁶ Yet it may be argued that the degree of similarity is inversely proportional to the need for unification: if there are practically no differences between the rules applied in different legal systems, then there are no practical problems to be resolved by unification.

Despite the existence of many similarities among the principles governing the validity of exculpatory clauses in various legal systems,³⁷⁷ traders still need an international standard. A uniform international standard — even a general one³⁷⁸ — would channel the development of jurisprudence and trade usages, which would in turn enhance predictability in planning transactions and drafting standard terms of business.³⁷⁹ If the standards for the validity

standard terms for consumer contracts).

375. Rudolf B. Schlesinger, *The Common Core of Legal Systems: An Emerging Subject of Comparative Study*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW (LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA) 65, 65 (Kurt H. Handelman et al. eds., 1961).

376. See, e.g., GILES, *supra* note 91, at 65-66 (comparing § 242 of German Civil Code with English law and concluding that "continental codes and the common law have adopted very different methods, but despite these differences the courts of the countries concerned have come to remarkably similar conclusions when applying those rules to standard contracts of the kind regulated by international conventions," and that "[h]owever wide that provision in the Civil Code, including as it does rewriting of contracts by the courts so alien to English judges, in its application to standard terms the German and common law practices tally. While it is debatable whether common law judges would have considered the particular clause [in a cited case] unfair and unusual, the test of validity is the same here and there."); see also Wolf, *supra* note 347, at 301.

377. The similarities need to be substantiated by further comparative research. See Schlesinger, *supra* note 375, at 66 ("[T]he answers to these questions can be found, not by speculation, but only by comparative research.").

378. There is certainly a risk that a general clause, such as one upholding exculpatory clauses unless they are unconscionable or unreasonable, would result in some inconsistent decisions in different jurisdictions. See Tiling, *supra* note 32, at 282 (noting with respect to ULIS that "maximum" degree of unification which might have been achieved was "small least common denominator," together with asserting of some "imprecise general clauses which would not be interpreted in a uniform manner anyway"); see also Draft UNIDROIT Principles, *supra* note 165, art. 6.4.13 ("Exemption Clauses") (providing that "a term which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expects may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract.").

379. See Goldstajn, *supra* note 4, at 172, citing Benjamin, *The ECE General Conditions of Sale and Standard Form of Contracts*, 1961 J. BUS. L. 114 ("The fact is that the unification of law is gradually being attained by means of the codification of trade usages . . . [B]y drawing up the General Conditions of Sale and Standard Forms of Contract the United Nations Economic Commission for Europe, established in 1947, has done very much to facilitate international trade through avoidance or reduction of uncertain-

of an exculpatory clause were governed by a uniform international standard, then the possibility of conflicting standards and uncertainty as to the applicable law would be reduced. The availability of such a norm for international sales would not only alleviate complexities of transnational dispute resolution, it would facilitate the process of negotiation as well. This would reduce transaction costs and remove one more "obstacle to the free exchange of goods."³⁸⁰ In addition, it would save parties the difficulties of investigating the peculiarities of foreign law, and braving its snares and traps. It would also provide a vehicle for promoting "the observance of good faith in international trade," required by CISG, article 7(1), in situations where parties to a contract for the international sale of goods occupy disparate bargaining positions.³⁸¹ Some cases involving exculpatory clauses will fall into this category. In such cases "[g]ood faith would require the parties' conduct to take this circumstance into account rather than have it exploited to the stronger party's advantage . . . [and] might require the more sophisticated party to comply with a stricter standard of conduct."³⁸²

Given that there is a need for an international standard to evaluate the validity of exculpatory clauses in contracts for the international sale of goods, the next question is how to fashion one. Some countries have demonstrated a willingness to dispense with applying their domestic public policy standards in an international case.³⁸³ At the very least, as was suggested in part III, tribunals should interpret article 4(a) in accordance with the internationalist spirit of the CISG and take care not to "impose a domestic public policy on the entire world. They should strive to give predominant consideration to the special needs of international transactions."³⁸⁴ As a practical matter, this

ty."). The German AGB Law, which contains a long, detailed list of clauses which are prohibited in consumer transactions, was largely a codification of case law. Article 9 of the AGB Law, the general clause applicable to commercial parties, has resulted in the development of an extensive body of case law. For a discussion of the AGB Law, see sources cited *supra* note 345.

380. *F.R.G. Government Observations*, *supra* note 18, at 82.

381. See *Audit*, *supra* note 25, at 155 (noting that CISG is "meant to apply to parties from countries with varying degrees of economic development" and drawing analogy to relationship between "professional seller and consumer, even though both of them are engaged in trade"); Bonell, *supra* note 22, at 87; see also *Summary of Deliberations of the Commission on the Draft on the Formation of Contracts for the International Sale of Goods*, U.N. Doc. A/33/17/Annex 1 (1978), reprinted in [1978] 9 UNCITRAL Y.B. 31, 35, U.N. Doc. A/CN.9/SER.A/1978, and in HONNOLD, *DOCUMENTARY HISTORY*, *supra* note 1, at 364, 369 (in support of proposal to include in CISG a general obligation of good faith and fair dealing — which proposal was ultimately defeated — it was argued that "[a]doption of the provision was also considered to be a modest implementation of some of the principles of the new international economic order and could have the practical effect of lessening undesirable or discriminatory trade practices").

382. *Audit*, *supra* note 25, at 155 ("A seller from an industrialized country . . . might have a special duty to describe clearly and thoroughly the character of the goods being offered.").

383. For example, article 24 of the 1977 U.K. Act provides that the Act's requirements do not apply to "international supply contracts." See Hellner, *Standard Form Contracts*, *supra* note 7, at 358 ("[T]his rule . . . seems to exclude most, if not all, contracts to which the Convention can apply."); see also *supra* note 245.

384. *Audit*, *supra* note 25, at 157-58.

means thinking twice about whether the application of a domestic rule which arguably concerns validity is compelling in a contract for the international sale of goods and then interpreting domestic rules which *do* apply to such contracts in a manner consistent with the transnational nature of the contract. It is not inconceivable that a tribunal would base its decision in an international case on principles derived from the uniform law, rather than from domestic law,³⁸⁵ since some public policy concerns will be weaker in an international commercial transaction than in a sale involving a domestic seller and an individual consumer.

A tribunal that decides to apply U.C.C. § 2-316 to a clause excluding or modifying implied warranties in a contract for the international sale of goods to which the Convention applies should focus its analysis on subsection (3) rather than on subsection (2). The general terms "covered by [U.C.C. § 2-316(3)(a)] are in fact *merely a particularization of [U.C.C. § 2-316(3)(c)] which provides for exclusion or modification of implied warranties by usage of trade.*"³⁸⁶ In such cases, the tribunal should focus its analysis on ascertaining the usage of trade. In this regard, it should not look to U.C.C. § 1-205(2) for the definition of "usage of trade," but rather to the definition of "usage" set forth in CISG, article 9. This method appears to be consistent with the analysis that would be appropriate in such cases under the German AGB Law, for instance.³⁸⁷

Finally, comparative scholars should continue to study the need for and feasibility of undertaking unification of the standards governing the validity of exculpatory clauses. This is an area in which unification appears to be appropriate, since the "development of uniform laws or rules will facilitate international trade or other transactions that are made difficult or uncertain by conflicting domestic laws and procedures."³⁸⁸ Comparative scholars should not shy away from studying the need for and feasibility of undertaking unification in this area on the ground that it involves public policy. The pioneering efforts of the UNIDROIT in the field of validity demonstrate that common ground does exist. It is also appropriate to remember Professor Tunc's observation during the Hague Diplomatic Conference in 1964 that "a certain anxiety had been shown in 1930 in the memory of Roman law, and

385. See, e.g., KRITZER, *supra* note 27, at 114 (citing Judgment of April 29, 1982, Court of Appeal of Hamm, 1983 IPRA 231 (Ger.), which held exculpatory clause unenforceable because it "violated the basic principles of ULIS." Kritzer suggests that CISG, article 7(1)'s directive to promote "the observance of good faith in international trade" restricts parties' freedom to alter obligations and remedies provided by Convention).

386. U.C.C. § 2-316, cmt. 7 (1990) (emphasis added).

387. See Schlechtriem, *Convention*, *supra* note 323, at 279 (international rather than domestic standard must be employed when article 9 of AGB Law is applied to international contracts); Wolf, *supra* note 347, at 310-320 (proposal to employ special international standard in cases which fall under AGB Law).

388. Peter Pfund, *Overview of the Codification Process*, 15 BROOKLYN J. INT'L L. 7, 9 (1989).

that this anxiety had been handed down from generation to generation without any reexamination of the problem."³⁸⁹ The problem that he was confronting — warranties for live animals — has long since been solved; now it is time to address the problem of exculpatory clauses.

V. CONCLUSION

Unification of the law governing the international sale of goods is an exercise in reconciling the necessary with the possible. At every step in the long process leading to the U.N. Convention on Contracts for the International Sale of Goods, there has been a tension between the needs of international commerce and the political willingness of states to relinquish control over cherished areas of contract law. The exclusion of issues of validity from the scope of the uniform sales law reflects a compromise enabling contracting states to continue to enforce traditional limitations on party autonomy.

The CISG's drafters considered the issues they excluded from the Convention too complex or too sensitive at that time to be unified. In many analogous instances, however, unification of issues originally viewed as "un-unifiable" has resulted from an increasing awareness that the needs of international commerce outweigh the traditional concerns over public policy.

Most of the issues that are excluded from the scope of the Convention by article 4(a) can safely be left out of the international legal order without endangering the Convention's primary purpose of achieving certainty and predictability through uniformity. However, the exclusion of issues that have an important effect on the exercise of the parties' autonomy, such as the validity of exculpatory clauses, weakens the international order. Further study is needed to ascertain the feasibility of unifying the standards that govern the validity of exculpatory clauses.

Meanwhile, tribunals should balance public policy with the needs of international commerce. In addition, tribunals should not allow the language of "mandatory law" to seduce them into thinking that the task of interpreting article 4(a) is nothing more than a conflict of laws problem. Determining which validity issues are preserved to domestic law requires a careful balancing between the international character of the Convention and the public policies which forced the political compromise embodied in article 4(a).

389. This statement referred to the seemingly endless debates prior to and at the Hague Diplomatic Conference concerning provisions in the 1935 and 1939 Draft ULIS affording special warranties in sales of live animals. *Third ULIS Meeting, supra* note 109, at 65.