

Private International Law and the U.N. Sales Convention

Proposals to unify or harmonize the private law of different countries have adopted two principal techniques: unification of choice-of-law rules,¹ and unification or harmonization of substantive rules.² The former technique assures a business entering into a contract with a foreign enterprise that no matter what forum a dispute is brought before, the uniform choice-of-law rules will apply the same country's substantive law. When the substantive legal rules themselves are made uniform, on the other hand, the business is assured further that courts will apply the same legal rules no matter where the parties litigate the dispute. If all states adopted uniform rules, of course, there would be no need for choice-of-law rules, except perhaps where states adopt divergent readings of the uniform rules. Commentators who espouse this universalism

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1. This article uses the phrases "choice-of-law" and "private international law" interchangeably. Continental scholars use the phrase "private international law" when referring to issues usually discussed under the rubric of "conflict of laws" or "choice-of-law" in the U.S. legal literature. The scope of the two phrases, however, is not identical. For further discussion of their meaning, see E. SCOLES & P. HAY, *CONFLICT OF LAWS* 1-2 (1984).

2. See *Report of the Secretary-General, Progressive Development of the Law of International Trade*, Official Records of the General Assembly, Twenty-first Session, Annexes, (Agenda Item 88), U.N. Doc. A/6396, reprinted in [1968-1970] 1 Y.B. UNCITRAL 18, 21-22:

In order to reduce such conflicts and divergencies [arising from the laws of different States in matters relating to international trade] two basic techniques have been followed, which are different but complementary: the first relates to the choice of law rules within the framework of private international law, and the second relates to the progressive unification and harmonization of substantive rules.

Id. See also *Note by the Secretariat, Unification of the Law of International Trade*, Official Records of the General Assembly, Twentieth Session, Annexes, (Agenda Item) at 92, U.N. Doc. A/C.6/L.572, reprinted in [1968-1970] 1 Y.B. UNCITRAL 13, 14 at para. 7 (Suggests that three methods have been mainly used: "(a) uniform or 'model' national laws, (b) international conventions, (c) unification of practices in international trade, particularly standard contract provisions and general conditions of sale"). See generally David, *The International Unification of Private Law*, 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, ch. 5 (1973).

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consequently refer to the latter technique as "superior."³

The two techniques are not incompatible.⁴ Indeed, until states universally adopt uniform substantive rules, there will always be room for both techniques. The relation between the two techniques can, however, be complex. A French scholar has recently suggested, for example, that uniform rules may be subject to choice-of-law rules, indifferent to them, or reject them altogether.⁵ In the first case, the uniform rules only apply if choice-of-law rules point to a jurisdiction that has adopted the uniform rules. In the second case, the uniform rules themselves define their sphere of application without regard to choice-of-law rules but in a way that ensures some connection between the transaction and a jurisdiction that has adopted the uniform rules. Rejection of the choice-of-law rules, on the other hand, makes the uniform rules applicable without the need to show any link between the transaction and such a jurisdiction.

This complexity is exacerbated by competition between several different international institutions traditionally associated with one technique or the other. The Hague Conference on Private International Law is, despite its name,⁶ a permanent body made up of governmental members and charged with preparing texts unifying conflict-of-laws rules.⁷ Another permanent institution with governmental membership

3. See, e. g., David, *supra* note 2, at 54:

From a practical point of view, the second method [unification of substantive rules] is clearly superior: relieving lawyers of the necessity of finding out the provisions, often difficult to discover, of a great diversity of foreign systems, and requiring the judge in every case to apply a system of law which may well be called "uniform law," but which has been approved by the national legislature.

Eörsi, *The Hague Conventions of 1964 and the International Sale of Goods*, 11 ACTA JURIDICA ACADEMIAE SCIENTIARUM HUNGARICAE 321, 324 (1969) ("unification of substantive [law] is a unification of a higher level"); Oliver, *Standardization of Choice-of-Law Rules for International Contracts: Should There be a New Beginning?*, 53 AM. J. INT'L L. 385, 386 (1959) ("The improvement of predictability with respect to legal relationships under international contracts takes . . . two major lines of approach: (1) the unification of the applicable substantive law, and (2) the improvement of conflict of law rules. The latter is here admitted to be only a 'second best' solution").

4. For a comparison of the two techniques, see David, *supra* note 2, at 37-41. After asking whether efforts should be directed exclusively at one or the other of the techniques, Professor David concludes that "[i]t seems clear that the two methods should be combined, and that each must have its particular field of application." *Id.* at 54. See also Matteucci, *Unification of Conflicts Rules in Relation to International Unification of Private Law*, in LECTURES ON THE CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS 150, 156 (1951) ("Indeed, it is thought that the unification of the rules of private international law—that is, the conflicts rules—should proceed side by side with the unification of the rules of substantive law, in order to bridge the gaps that will inevitably occur in the latter").

5. Borysewicz, *Conventions et projets de convention sur la vente internationale de marchandises*, in LES VENTES INTERNATIONALES DE MARCHANDISES 16, 21 (1981).

6. See *supra* note 1.

7. For an introduction to the Hague Conference on Private International Law, see Droz & Dyer, *The Hague Conference and the Main Issues of Private International Law for the Eighties*, 3 NW. J. INT'L L. & BUS. 155 (1981).

is the International Institute for the Unification of Private Law in Rome, which sponsors studies and prepares legal texts setting out uniform substantive rules.⁸ More recently, the U.N. Commission on International Trade Law has approached unification work more eclectically.⁹ While the U.N. Commission has coordinated its work with that of the Hague Conference and the Rome Institute, the Commission has the advantages of more significant funding and broader membership to support its undertakings.¹⁰

The long and convoluted history of the unification of the law governing the international sale of goods offers insight into the complex relationship between the two techniques for harmonizing the private law of different countries.

Modern attempts to unify the law of sales began in 1924, when the International Law Association appointed a committee to prepare a draft text on choice-of-law.¹¹ The Hague Conference took up this work in 1928, and its committee of experts completed a draft in 1931. The Conference itself, however, did not approve the draft until 1951. The members of the Conference signed the resulting international convention in 1955 and it came into force in 1964 upon the ratification of five states. It is now in effect in nine states.¹²

As this choice-of-law text wound its way through the Hague Conference, the Rome Institute commenced work on texts unifying the substantive rules governing contracts for international sales and their formation. This work also culminated in 1964, when a diplomatic conference held at The Hague¹³ adopted two conventions to which were appended uniform sales laws which states adhering to the Convention

8. The Rome Institute is usually known by the acronym, UNIDROIT. For an introduction to the work of the Rome Institute, see Matteucci, *UNIDROIT, The First Fifty Years*, 1 *NEW DIRECTIONS IN INTERNATIONAL TRADE LAW* xvii (1976).

9. The U.N. Commission is usually known by its acronym, UNCITRAL. The Commission is a "subsidiary organ" of the General Assembly created by a 1966 resolution of the Assembly in accordance with article 22 of the United Nations Charter. The 36 member states are elected by the General Assembly by a formula designed to ensure representation of all geographic, political, and economic sectors. For an introduction to the work of the Commission, see Herrmann, *The Contribution of UNCITRAL to the Development of International Trade Law*, in *TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS* 35 (N. Horn & C. Schmitthoff eds.1982) (hereinafter *TRANSNATIONAL LAW*).

10. For an assessment of the work of the international bodies noted in the text, see Dolzer, *International Agencies for the Formulation of Transnational Economic Law*, in *TRANSNATIONAL LAW*, *supra* note 9, at 61.

11. Nadelmann, *The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglia*, 74 *YALE L.J.* 449, 450-51 (1965).

12. Convention on the Law Applicable to International Sales of Goods, June 15, 1955, 510 U.N.T.S. 149. Although adopted in 1951, the convention was first signed in 1955 and therefore bears that official date. The following states are parties: Belgium, Denmark, Finland, France, Italy, Niger, Norway, Sweden, and Switzerland. On the progress of the draft convention through the Hague Conference, see Nadelmann, *supra* note 11, at 451-52.

13. Although the resulting conventions are sometimes referred to as "The 1964 Hague Sales Conventions" they should not be confused with the work of the Hague

agreed to enact. The first, a convention relating to a Uniform Law on the International Sale of Goods, governed the rights and obligations of parties to contracts for international sales. The second, a convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, governed the formation of international sales contracts. These conventions came into force in 1972 and are now in force in seven states, with only Belgium having also adopted the choice-of-law convention.¹⁴

Noting the limited success of these conventions, the U.N. Commission on International Trade Law prepared a revised, consolidated treaty which was approved with amendments at a Vienna diplomatic conference in 1980. It came into force on January 1, 1988.¹⁵ In response to the Vienna Sales Convention, the Hague Conference prepared a revision of the 1955 Conflict Convention. A 1985 diplomatic conference, convened under the auspices of the Hague Conference but open to non-members, adopted this revised text with some amendments. This convention has not yet come into force.¹⁶

Conference on Private International Law, whose officials frowned on the conventions. See Nadelmann, *supra* note 11, at 449 n.1.

14. Convention relating to a Uniform Law on the International Sale of Goods, 834 U.N.T.S. 107 (1972) [hereinafter 1964 Sales Convention]; Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, 834 U.N.T.S. 169 (1972) [hereinafter 1964 Formation Convention]. The uniform laws appended to these conventions are usually known by the acronym "ULIS" and "ULF" respectively. Subsequent citations to the uniform laws will use the relevant acronym. (Note also that articles in the conventions are numbered using Roman numerals, while those in the uniform laws use arabic numerals.)

The following states are parties to these conventions: Belgium, The Gambia, Federal Republic of Germany, Israel, the Netherlands, San Marino, and the United Kingdom. (Italy was a party to the convention but denounced it pursuant to her obligation under article 99(3)-(6) of the United Nations Convention on Contracts for the International Sale of Goods, 1980). For a history of these texts up to and including the 1964 Convention, see Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in *INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* § 1.01[1]-[3] (N. Galston & H. Smit eds. 1984) (hereinafter *INTERNATIONAL SALES*).

15. U.N. Doc. A/CONF.97/18, Annex I (1980), *reprinted in* United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 178 (A/CONF.97/19) (1981) [hereinafter *CISG*]. As of January 1, 1989 the following states are parties to the convention: Argentina, Australia, Austria, China, Egypt, Finland, France, Hungary, Italy, Lesotho, Mexico, Norway, Sweden, Syria, U.S.A., Yugoslavia, and Zambia. For commentary on the 1980 convention, see J. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* (1982); *COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION* (C. Bianco & M. Bonell eds. 1987) [hereinafter *COMMENTARY ON THE INTERNATIONAL SALES LAW*].

16. Convention on the Law Applicable to Contracts for the International Sale of Goods, *reprinted in* Proceedings of the Extraordinary Session of October 1985—Diplomatic Conference on the Law Applicable to Sales Contracts 2 (1987) and 24 I.L.M. 1573 (1985). Although adopted in 1985, the convention was first signed in 1986 and therefore bears that official date. For commentary on the 1985 convention, see Gabor, *Emerging Unification of Conflict of Laws Rules Applicable to the International Sale of Goods: UNCITRAL and the New Hague Conference on Private International Law*, 7 Nw. J.

At each stage in the evolution of these texts the drafters of the uniform substantive rules faced three important issues: (1) whether choice-of-law rules are to play any role in determining when the uniform rules are applicable; (2) whether courts should use these rules to fill gaps in the coverage of the uniform rules; and (3) where there are separate texts on uniform substantive rules and choice-of-law rules, which text has precedence. The 1964 uniform sales laws bluntly responded to the first two issues by specifically excluding reference to rules of private international law.¹⁷ As to the third issue, the 1964 Sales Conventions provided that states that were already parties to a conflicts convention and wished to become parties to the sales conventions could declare that the uniform sales laws would apply only if the choice-of-law rules in the conflicts convention pointed to a uniform law jurisdiction.¹⁸

The 1980 Sales Convention, on the other hand, explicitly refers to the rules of private international law when it addresses the first two issues. Thus, the 1980 Convention may be applicable "when the rules of private international law lead to the application of the law of a Contracting State."¹⁹ In addition, the 1980 Sales Convention refers to "the law applicable by virtue of the rules of private international law" to fill gaps.²⁰ As for its relation to choice-of-law conventions, the 1980 Convention is deferential but cryptic.²¹

The following essay explores this complex evolution. Part I examines the history leading up to 1964 uniform sales laws, while Part II focuses on the background to the 1980 U.N. Sales Convention. The essay then turns in Part III to an analysis of the problems raised by the 1980 Convention in its relation to rules of private international law.

I. Private International Law and the 1964 Uniform Sales Laws

The 1964 Uniform Law on the International Sale of Goods explicitly rejects reference to rules of private international law. Article 2 of the Uniform Law states that "[r]ules of private international law shall be excluded for the purposes of the application of the present Law, subject to any provision to the contrary in the said Law."²² As Professor Tunc

INT'L L. & BUS. 696 (1986); McLachlan, *The New Hague Sales Convention and the Limits of the Choice of Law Process*, 102 LAW Q. REV. 591 (1986).

17. ULIS, *supra* note 14, art. 2; ULF, *supra* note 14, art. 1(9).

18. 1964 Sales Convention, *supra* note 14, art. IV; 1964 Formation Convention, *supra* note 14, art. IV. See *infra* note 23.

19. CISG, *supra* note 15, art. 1(1)(b). Article 95 authorizes states to declare that they will not be bound by article 1(1)(b). China and the United States have made such declarations. Note by the Secretariat, *Status of Conventions* at 4-5 (A/CN.9/304) (1988). For discussion of this article, see *infra* Section III.A.3.

20. CISG, *supra* note 15, art. 7(2).

21. CISG, *supra* note 15, art. 90. For discussion of this article, see *infra* Section III.C.

22. ULIS, *supra* note 14, art. 2. ULF, *supra* note 14, art. 1(9) is virtually identical, although pedants will note that there are slight variances in the English, but not the French, texts.

noted in his unofficial Commentary,

It seemed advisable, in order to prevent any theoretical discussion which might find an echo in the courts, to exclude the rules of private international law from the sphere of the Uniform Law and to declare that it was simply and directly applicable in accordance with the criteria which it laid down.²³

A closely related provision, article 17, provides that the general principles underlying the Uniform Law are to be used to fill the law's gaps. This has the intended negative implication that courts may not refer to the domestic law of the country whose law would otherwise apply under the rules of private international law.²⁴ Neither of these articles was noncontroversial. Both the 1964 conventions had to authorize states that had already become a party to a choice-of-law convention to declare that they would not be bound to apply the uniform laws unless the choice-of-law convention made the law of a uniform law jurisdiction applicable.²⁵

From the beginning of its work on sales, the Rome Institute acknowledged that it sought to substitute uniform rules for choice-of-law rules.²⁶ The Report printed with the 1935 draft text states that "[t]he Institute is of opinion that the utility of international law rests

23. A. Tunc, *Commentary on the Hague Conventions of the 1st of July 1964 on International Sale of Goods and the Formation of the Contract of Sale*, in I DIPLOMATIC CONFERENCE ON THE UNIFICATION OF LAW GOVERNING THE INTERNATIONAL LAW OF SALE OF GOODS—RECORDS 355, 368 (1966) [hereinafter 1964 Diplomatic Conference—Records].

24. ULIS, *supra* note 14, art. 17. This article provides: "Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based." There is no comparable provision in the Uniform Law on the Formation of Contracts for the International Sale of Goods. In his unofficial Commentary, Professor Tunc states that article 17 was adopted to avoid the "abuses" of having a party claim application of an advantageous national law because of an alleged ambiguity or omission. 1964 Diplomatic Conference—Records, *supra* note 23, at 355, 371.

25. 1964 Sales Convention, *supra* note 14, art. IV; 1964 Formation Convention, *supra* note 14, art. IV. For the text of art. IV(1) of the former convention, see *infra* note 61.

26. Professor Réczi suggests that the pre-1964 drafts made the Uniform Law applicable only when choice-of-law rules pointed to the law of a country that had adopted the Uniform Law. He notes that the 1964 diplomatic conference rejected this approach, when it adopted the German recommendation. Réczi, *The Area of Operation of the International Sales Conventions*, 29 AM. J. COMP. L. 513, 514 (1981). See also Réczi, *The Field of Application and the Rules of Interpretation of ULIS and UNCITRAL Conventions*, 24 ACTA JURIDICA ACADEMIAE SCIENTIARUM HUNGARICAE 157, 163-64 (1982). When reporting on the 1951 conference Professor Nadelmann is somewhat more enigmatic, observing that the 1951 draft "had no provision forbidding recourse to conflicts rules." Nadelmann, *The Conflicts Problems of the Uniform Law on the International Sale of Goods*, 14 AM. J. COMP. L. 236, 237 (1965). The analysis in the text of the pre-1964 drafts is supported, however, by Professor John Honnold, who writes that the approach of articles 1 and 2 of the final text "was deliberately chosen at an early stage of the drafting process and was defended stoutly at the diplomatic conference as a means to extend the benefits of ULIS and escape the chaos of conflicts rules." Honnold, *The Uniform Law for the International Sale of Goods: The Hague Convention of 1964*, 30 LAW & CONTEMP. PROBS. 326, 333 (1965) (emphasis added).

largely on the fact that it furnishes within the sphere of its application a definite law which will eliminate the difficulties arising from the conflict of laws."²⁷ Commenting on the text, Professor Ernst Rabel wrote that "[o]ur draft . . . is designed to spare the conflict of laws its own astonishing *quodlibets*."²⁸ It comes as no surprise, therefore, that rules of private international law play a negligible role in the 1935 draft. The 1935 text ignores choice-of-law rules, directing a judge sitting in a jurisdiction that had adopted the text to apply its provisions without regard to what country's laws would be chosen by application of the forum's choice-of-law rules. A contract is international when the parties have their places of business in different countries and the goods sold are to be transported across national borders.²⁹

Choice-of-law rules do, however, have a limited role to play when filling gaps in the text. The accompanying Report states boldly that to the problem of maintaining uniform interpretation only two solutions are possible: (1) recourse to national law or (2) recourse to "the general principles by which the present law is inspired."³⁰ The Report settles without hesitation for the latter solution. Only where the drafters conclude that they cannot unify local usages do they provide for reference to the national law applicable by virtue of the rules of private international law. In the absence of such an express reference to national law, the reader faced with gaps in the text is directed to refer to the general principles.³¹

In its second draft, published in 1939, the UNIDROIT committee made no significant changes to these provisions. Although the commit-

27. *Projet d'une loi internationale sur la vente* (S.d.N. 1935 U.D.P. *Projet I*), at 23 (English trans.) [hereinafter 1935 draft].

28. Rabel, *A Draft of An International Law of Sales*, 5 U. CHI. L. REV. 543, 545 (1938). Professor Rabel was a member of the UNIDROIT committee charged with preparing the draft text and it was his report to the Council of UNIDROIT in 1929 that was the catalyst for appointment of the committee in 1930. Rabel, *Observations sur l'utilité d'une unification du droit de la vente au point de vue des besoins du commerce international* (1929), reprinted in 22 *RABELSZEITSCHRIFT* 117 (1957).

29. Article 6 of the 1935 draft provides:

The present law shall apply where the parties have their business establishment or, in default thereof, their habitual residence in the territory of countries in which sales of goods are not governed by the same rules of law, and the goods are destined by virtue of the contract to become or are at the time of the conclusion of the contract the subject of international transport. International transport means transport from the territory of one State to the territory of another.

1935 draft, *supra* note 27, at 79-80.

30. 1935 draft, *supra* note 27, at 25-26.

31. Article 11 of the 1935 draft states:

If a question arises which is not expressly covered by the provisions of the present law, and the present law does not expressly refer such question to the provisions of the national law, the Court shall apply the general principles by which the present law is inspired.

1935 draft, *supra* note 27, at 81 (art. 11). This provision is supplemented by article 14, which states that "National law, within the meaning of the present law, is the law of the country which is applicable according to the rules of private international law." *Id.* art. 14.

tee refined the rules on when the law is applicable, the law applies by its own force and makes no reference to choice-of-law rules.³² As for filling gaps, the second draft emphatically excludes application of any national law except when the draft itself refers to such law: "This law excludes the application of any municipal law on the matters governed by it, except where it expressly so provides."³³ The general principles underlying the uniform law, rather than domestic sales law, continue to be the principal source for filling gaps in the text.³⁴

Formal consideration of this second draft was delayed until the government of the Netherlands convened a conference at The Hague in November, 1951 to study it.³⁵ The conference met immediately following the seventh session of the Hague Conference on Private International Law and many of the same delegates attended both conferences. The earlier conference had approved the draft text on the law applicable to international sales of goods³⁶ and it is not surprising, therefore, that many of the delegates to the later conference urged reexamination of the law's sphere of application in the light of the debates at the earlier session.³⁷ The conference did not suggest, however, that the basic approach to when the law would be applicable should be changed. As for the gap-filling provision, the conference concluded that although such provision stated the obvious, the provision should be retained;

32. *Projet d'une loi uniforme sur la vente internationale des objets mobiliers corporels et rapport* (2^e rédaction) (S.d.N. 1939 U.D.P. *Projet I(2)*), arts. 6-9, *reprinted in* INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, UNIFICATION OF LAW, 1948, at 101, 104-07 (1948) (French and English texts) [hereinafter 1939 draft].

33. 1939 draft, *supra* note 32, art. 11 [para. 2].

34. *Id.* Art. 11 [para. 2] follows the sentence quoted in the text with the following statement: "Where within the matters covered by this law a problem is not expressly solved by this law, the court shall apply the general principles by which this law is inspired."

35. The Dutch Government convened the conference in response to a request of the Rome Institute. The proceedings are published in *ACTES DE LA CONFÉRENCE SUR UN PROJET DE CONVENTION RELATIF A UNE LOI UNIFORME SUR LA VENTE D'OBJETS MOBILIERS CORPORELS* (1952). The Final Act is published in INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, UNIFICATION OF LAW, 1947-1952, 282 (1954). The Memorandum convoking the meeting includes the following paragraph:

Il [le Gouvernement Royal] a constaté que la réglementation internationale de la vente peut être cherché dans l'unification des législations nationales sur la vente, aussi bien que dans la détermination de la loi à appliquer, ce dernier système faisant l'objet principal de la Conférence de Droit International Privé de La Haye. Ces deux tentatives de réglementation internationale peuvent procéder sur des voies parallèles, la solution des conflits de lois étant à la fois une première phase de l'unification et un complément indispensable de la loi uniforme pour combler les lacunes inévitables de cette dernière.

Quoted in de Winter, *Loi uniforme sur la vente internationale des objets mobiliers corporels et le droit international privé*, 11 *NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAL RECHT* 271, 274-75 (1964). For a brief summary of the positions taken at the 1951 conference, see Nadelmann, *supra* note 26, at 237.

36. See *supra* note 12 and accompanying text.

37. Final Act of the Conference on a Draft Convention Relative to a Uniform Law on the Sale of Goods, *in* INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, UNIFICATION OF LAW, 1947-1952, at 282, 298-301 (1954).

some delegates even urged that it should be highlighted.³⁸ To carry out these suggestions, among others, the conference appointed a special commission to prepare another draft. After circulating the revised text, the commission recommended that the government of the Netherlands convene a second conference.

The special commission appointed by the 1951 conference completed a new draft in 1956. Again the commission confirmed the intent to avoid reference to rules of private international law and emphasized this intent by setting it out in article 1. This article borrows language from the gap-filling provision in the earlier drafts and provides that:

The present law shall replace the municipal laws of the signatory States in the cases in which it is applicable and as regards the matters which it governs; if any questions relating to such matters have not been expressly settled by the present law they shall be settled according to the general principles on which the present law is based.³⁹

The Report accompanying the 1956 draft states that “[i]n placing the first rule at the head of the Draft the Commission wished to express one of the Draft’s essential aims, to put an end to conflicts of laws”⁴⁰

Despite the special commission’s statement of its intent, the Government of the Federal Republic of Germany suggested that the text was ambiguous. The Federal Government felt that the phrase “in the cases in which it is applicable” leaves open a reading that would direct a court first to use its choice-of-law rules to determine which country’s laws should govern, and then to apply the Uniform Law only if that country had adopted it. The Federal Republic recommended the deletion of this draft language so that the need to refer to rules of private international would be minimized.⁴¹

38. *Id.* at 296-97.

39. Draft Uniform Law on the International Sale of Goods, Prepared by the Special Commission and Report (1956), II Diplomatic Conference on the Unification of Law Governing the International Law of Sale of Goods—Documents 1, 7 (1966) [hereinafter 1964 Diplomatic Conference—Documents].

40. *Report of the Special Commission*, 1964 Diplomatic Conference, *supra* note 39, at 26, 45. The Report notes that the text of the 1956 Draft corresponds to the second paragraph of article 11 of the 1939 Draft. *See supra* note 32.

41. The comment of the Federal Republic of Germany states:

In full agreement with interested German commercial circles, the Federal Government thinks it expedient to delimit the scope of operation of the Uniform Law 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. The Federal Government is convinced that the 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, of ascertaining what is the municipal law applicable in accordance with the rules of private international law.

The Federal Government fears that the first proposition in Article 1 can be interpreted in a sense opposed to this fundamental idea

For this reason the Federal Government suggests that the first proposition of Article 1 be suppressed.

1964 Diplomatic Conference—Documents, *supra* note 39, at 82, 83.

Those countries that had recently become parties to the 1955 Hague Convention on the Law Applicable to the International Sales of Goods objected to the exclusion of choice-of-law analysis. The Swedish government, in particular, argued that the Uniform Law should not be applicable unless the rules of private international law led to the application of the law of a country that had incorporated the Uniform Law into its domestic legislation. This initial step in determining the Uniform Law's application should, the Swedish government urged, be made explicit in the Law itself.⁴²

Article 1's gap-filling clause was somewhat less controversial. The Federal Republic of Germany expressed concern that this clause might be read to give a judge discretion when there were no relevant general principles to fill a gap in the text of the uniform law. To guard against this, the Federal Republic recommended that the draft be amended to include a direction that if a judge could find no relevant general principles implicit in the uniform law the judge should apply municipal law.⁴³ The French government also doubted how effective a reference to general principles would be but nevertheless suggested an amendment that would make clear that the judge should not refer to municipal law.⁴⁴ Other governments proposed variations on the language of "general principles" to make the gap-filling provision more palatable.⁴⁵

After reviewing these proposed changes to the second clause of article 1, the special commission concluded that no change was necessary. The commission observed, in particular, that the German proposal would be "very dangerous."⁴⁶ "The Uniform Law should," the commission wrote, "as far as possible, be self sufficient. The amendment would introduce diversity into the 'uniform' law. Furthermore it would

42. *Id.* at 168.

43. *Id.* at 89. The Federal Republic of Germany later submitted the following text to implement this proposal:

If any questions relating to the matters governed by the present law have not been expressly settled by this law, they shall be settled in the first place according to the general principles on which this law is based. Only where a solution cannot be arrived at by applying these principles shall the municipal law that is competent according to the rules of Private International Law of the court seised, be alternatively applied.

Id. at 242 (proposed amendment to 1963 draft). The Government of the Hungarian Peoples Republic also suggested that the concept of "general principles" was too vague. "It would be more just," the Hungarian comment stated, "to declare that for questions which remain uncovered by an express rule the 'municipal law' is applicable." *Id.* at 123.

44. The French proposal provided:

[n]evertheless, questions relating to matters which have not been expressly settled will be governed, not by the application of municipal laws, but by reference to the totality of the provisions of the present Law.

Id. at 118.

45. The Italian government proposed an amendment that would refer to reasoning by analogy. *Id.* at 131. Referring to the first article of the Swiss Civil Code, the Swiss Government thought it sufficient to refer merely to "principles" rather than "general principles." *Id.* at 175.

46. *Id.* at 180.

expose the parties to the danger of seeing judges improperly considering a question not to be expressly settled in order to apply their municipal law."⁴⁷ The special commission consequently retained article 1 of the 1956 draft in its 1963 draft⁴⁸ and it was this text that was submitted to the diplomatic conference convened at The Hague in 1964.

Debate over the 1963 draft continued along much the same lines as in preceding commentary. To clarify the alleged ambiguity in the first clause of article 1, the Federal Republic of Germany submitted a proposed amendment prior to the conference.⁴⁹ The accompanying comment states in part:

The preliminary question whether according to the relevant principles of Private International Law there is reason to apply the law of a Contracting State to a contract of sale should not be decisive, this being a question which often causes uncertainty at law. To express this idea it is sufficient to lay down that independently of the principles of Private International Law, the Uniform Law should always (but only then) be applicable when the conditions set forth in articles 2 to 13 are satisfied. It seems desirable to alter the text to this effect since the present wording of this provision has tended to cause confusion; . . .⁵⁰

Norway, on the other hand, submitted an amendment to article 1 which expressly states that the uniform law "shall not override the rules of private international law."⁵¹

These wildly divergent approaches were summarized at the 1964 conference by M. Bellet of France.⁵² In support of the German solution,

47. *Id.* at 180-81.

48. *Id.* at 213. The special commission prepared the 1963 draft in the light of the comments made on the 1956 draft by governments and international organizations.

49. The proposed amendment to the first clause of article 1 provides:

The present law shall apply to contracts of sale in cases where it is applicable according to Article 2 to 13 below as regards the matters which it governs.

Id. at 242. According to the accompanying commentary, the proposal deletes the phrase "shall replace the municipal laws of the signatory States" because the uniform law itself would be part of the municipal law of countries that adopted it. *Id.* See also the Israeli proposed amendment, which provides:

In the matters to which it applies, this law shall replace any other law otherwise applicable. It shall also be applied to cases in which private international law might require the application of some foreign law, unless this law refers to private international law.

Id. at 243.

At the same time it was proposing to eliminate reference to rules of private international law, the Federal Republic of Germany also urged that the uniform laws only apply when parties to a sales contract have their places of business in different Contracting States (i.e., states that had adopted the uniform laws). *Id.* at 245-46. This latter proposal was ultimately rejected in a plenary session by an evenly-divided vote. 1964 Diplomatic Conference—Records, *supra* note 23, at 275.

50. 1964 Diplomatic Conference—Documents, *supra* note 39, at 242.

51. *Id.* at 242. During the conference the Swedish government proposed the same amendment. *Id.* at 243. (Although the Official Records give different English translations of these proposed amendments, the French texts are identical: "Elle [la présente loi] ne déroge pas aux règles du droit international privé").

52. 1964 Diplomatic Conference—Records, *supra* note 23, at 139-41.

he noted that the uniform laws were prepared to substitute substantive rules drafted with international transactions in mind for the rules of private international law, which require a determination first of which country's law applied and then application of that country's domestic sales law. He stated that the adoption of substantive rules would represent an advance in the evolution of the law. To apply the uniform laws only when choice-of-law rules pointed to a jurisdiction that had adopted the uniform laws could lead to difficulties of translation, interpretation, and verification. Such problems would be eliminated, Bellet noted, if the judge could apply the uniform laws without regard to choice-of-law rules.⁵³

In rebuttal of the German position, M. Bellet reported that the Swedish delegation argued that it would be unwise to exclude totally choice-of-law rules from the uniform law. The Swedes emphasized that it would be necessary to consult private international law rules in any event on matters not governed by the uniform laws, such as the capacity of parties to a sales transaction. In addition, making the uniform laws applicable only when choice-of-law rules lead to a jurisdiction that had adopted the laws would ensure some connection between the laws and the transaction. While choice-of-law rules might differ from country to country they were based on the same principles of equity and were gradually becoming more uniform. Finally, the Swedes noted that reference to choice-of-law rules to determine whether the laws were applicable would not necessarily limit their applicability if many states adopted the uniform laws.⁵⁴ M. Bellet concluded that if the convention failed to choose between these two approaches the resulting lacuna would mean that the rules of private international law would be excluded.⁵⁵

Following M. Bellet's presentation, the conference voted overwhelmingly that the Uniform Law was to override the rules of private

53. 1964 Diplomatic Conference—Records, *supra* note 23, at 140.

54. 1964 Diplomatic Conference—Records, *supra* note 23, at 140.

55. 1964 Diplomatic Conference—Records, *supra* note 23, at 140. Several commentators report that M. Bellet's presentation was a *tour de force* and the usually taciturn official records note that there was "lively applause" after his presentation. *Id.* at 143. Professor Honnold noted that "[t]he working party on the problem of scope worked throughout most of the Conference, and made its report to the assembly in an eloquent forty-minute *exposé* by M. Bellet—a performance rewarded by spontaneous applause and the successful vote described in the text." Honnold, *supra* note 26, at 333 n.22. Professor Tunc described the presentation as follows:

A judge of the Court of Appeal of Paris, M. Pierre Bellet, consulted on the matter with the various delegations for two weeks during the conference. His report to the conference was warmly received; the heads of some delegations which knew that the French delegation would vote for the text of Article I as it is finally drafted and which planned to vote against the French position expressed their satisfaction with the completeness, objectivity and clarity of the report.

Tunc, *The Uniform Law on the International Sale of Goods: A Reply to Professor Nadelmann*, 74 YALE L.J. 1409, 1412 (1965).

international law.⁵⁶ To implement this decision, a German delegate suggested at a later meeting that an article be introduced specifically excluding rules of private international law.⁵⁷ This suggestion was subsequently adopted with the incorporation of article 2 into the convention.⁵⁸ At the same time, the conference agreed without debate to transfer the gap-filling clause to the general provisions of the Uniform Law, where it ultimately became article 17 of the convention.⁵⁹

The decision to exclude reference to rules of private international law came at the price of several compromise provisions allowing states to limit their adherence to the 1964 conventions.⁶⁰ Article IV of the sales convention provides that states who are already parties to a pre-existing conflicts convention may declare that they "will apply the Uniform Law in cases governed by one of those previous Conventions only if that Convention itself requires application of the Uniform Law."⁶¹

56. The vote was 18 to 1, with 5 abstentions. 1964 Diplomatic Conference—Records, *supra* note 23, at 146. How specific delegations voted is not recorded. See Nadelmann, *Uniform Legislation Versus International Conventions Revisited*, 16 AM. J. COMP. L. 28, 39 (1968).

57. 1964 Diplomatic Conference—Records, *supra* note 23, at 163.

58. The conference's drafting committee incorporated this request in draft article 5 *bis.*, the text of which is the same as article 2 of the official text. 1964 Diplomatic Conference—Documents, *supra* note 38 at 377. Finland submitted an amendment to this draft text which would have added an explicit reference to the reservation found in article IV of the convention. *Id.* at 397. This amendment was rejected by a vote of 8 to 11, with 4 abstentions, and the final text was approved with no recorded vote. 1964 Diplomatic Conference—Records, *supra* note 23, at 276.

59. 1964 Diplomatic Conference—Records, *supra* note 23, at 146. The conference's drafting committee transferred the text of the second clause of article 1 in the 1963 draft to article 19 *ter.* 1964 Diplomatic Conference—Documents, *supra* note 39, at 378. The Netherlands submitted an amendment that directed a judge who could not find the solution in the text or by application of the text's general principles to "decree according to the rules which it would establish if it had to perform an act of international legislation." *Id.* at 400. The conference rejected this proposal by a vote of 8 to 12, with 4 abstentions. 1964 Diplomatic Conference—Records, *supra* note 23, at 281. A Bulgarian proposal to substitute the phrase "all the provisions of the law taken as a whole" for "general principles on which the law is based" could garner only three votes and the original text was adopted without objection. *Id.*

60. In addition to the reservations mentioned the text, note should be taken of the reservations authorized by article II and article V of the Uniform Sales Convention. Article II permits states that have "the same or closely related legal rules" to continue to apply these rules when the parties to a sales contract each comes from these states. 1964 Formation Convention, *supra* note 14, arts. II, V. See also 1964 Sales Convention, *supra* note 14, art. II.

61. 1964 Sales Convention, *supra* note 14, art. IV. Paragraph 1 of article IV provides:

Any State which has previously ratified or acceded to one or more Conventions on conflict of laws in respect of the international sale of goods may, at the time of the deposit of its instrument of ratification of or accession to the present Convention, declare by a notification addressed to the Government of the Netherlands that it will apply the Uniform Law in cases governed by one of those previous Conventions only if that Convention itself requires the application of the Uniform Law.

See also 1964 Formation Convention, *supra* note 14, art. IV. For the debate on this reservation, see 1964 Diplomatic Conference—Records, *supra* note 23, at 146-47.

Article III permits states to declare that they will only apply the Uniform Law where the parties each have their places of business in different Contracting States.⁶² The most startling reservation, however, appears in article V, which provides that a state may declare that the Uniform Law applies only when the parties to a sales contract have agreed to have the convention apply.⁶³

The situation as of 1964 is aptly summarized by a later report of the United Nations' Secretary General.

ULIS directed the *fora* of Contracting States to apply the Law to all international sales even though neither the seller nor the buyer (nor the sales transaction) had any contact with any Contracting State (ULIS article 1(1), article 2 (exclusion of rules of private international law)). This broad rule of applicability of the Law (sometimes termed the 'universalist' approach) was subject to the possibility of reservations under articles III, IV and V of the 1964 Hague Sales Convention.⁶⁴

Italy and Belgium made a declaration pursuant to article IV. (Italy is no longer a party to the 1964 conventions; *see supra* note 14). H. DÖLLE, KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT 5 (1976).

It should be noted how limited this reservation is. First, only those countries who are already parties to the 1955 Convention may take advantage of article IV. This limitation was not lost on commentators. *See, e.g.*, Honnold, *supra* note 26, at 334 n. 25. Second, and more importantly, the conference rejected the possible solution that national choice of law rules other than those found in a treaty such as the 1955 Convention would also continue to apply. M. Bellet notes this possibility but dismisses it as "excessive." 1964 Diplomatic Conference—Records, *supra* note 23, at 141.

62. 1964 Sales Convention, *supra* note 14, art. III. Article III provides:

By way of derogation from article 1 of the Uniform Law, any State may, at the time of the deposit of its instrument of ratification of or accession to the present Convention declare . . . that it will apply the Uniform Law only if each of the parties to the contract of sale has his place of business or, if he has no place of business, his habitual residence in the territory of a different Contracting State, and in consequence may insert the word 'Contracting' before the word 'states' where the latter word first occurs in paragraph 1 of article 1 of the Uniform Law.

See also 1964 Formation Convention, *supra* note 14, art. III. The Federal Republic of Germany, the Netherlands, San Marino, and the United Kingdom have made declarations pursuant to article III. H. DÖLLE, KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT 4 (1976).

63. 1964 Sales Convention, *supra* note 14, art. V. Article V provides:

Any State may . . . declare . . . that it will apply the Uniform Law only to contracts in which the parties thereto have, by virtue of article 4 of the Uniform Law, chosen that Law as the law of the contract.

(There is no equivalent reservation to the formation convention). For discussion of the U.K. delegation's proposal, *see* 1964 Diplomatic Conference—Records, *supra* note 23, at 312-14; 1964 Diplomatic Conference—Documents, *supra* note 39, at 566. Gambia and the United Kingdom have made this declaration. H. DÖLLE, KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT 5 (1976).

64. *Report of the Secretary-General, Pending questions with respect to the revised text of a uniform law on the international sale of goods*, para. 10, U.N. Doc. A/CN.9/100, annex III, reprinted in [1975] 6 Y.B. UNCITRAL 88, 89.

II. Drafting the References to Private International Law in the 1980 U.N. Sales Convention

Complaints about the universalist approach of the uniform sales laws surfaced almost immediately after the 1964 Conference, especially in the United States.⁶⁵ Writing about the uniform laws, the late Professor Kurt Nadelmann described the situation as “a conflict of laws imbroglio” which could lead to “shocking” results. “Thus,” he wrote,

if a person in Canada sells goods to a person in the United States which goods must be shipped to the United States, in any subsequent disputes between the parties respecting the transaction either party can—notwithstanding the fact that neither the United States nor Canada has adopted the Uniform Law—take advantage of the law if its relevant provisions are more favorable to that party than the otherwise applicable law. The party merely brings suit in a ‘contracting’ state which will automatically apply the Uniform Law.⁶⁶

Even more sympathetic commentators questioned the wisdom of these scope provisions. Referring to an example similar to Professor Nadelmann’s hypothetical case, Professor John Honnold wrote that it was “remarkable” that a state would apply the uniform laws even though the parties or transaction had no relation to any Contracting State.⁶⁷ Professor de Winter of the Netherlands described the application of the law of the forum, no matter what connection the transaction in dispute has to the forum, as one of the most dangerous rules of private international law.⁶⁸

On the other hand, the universalist position taken by the 1964 conventions also had its eloquent supporters. In his Commentary to the conventions, Professor André Tunc noted that few courts took jurisdiction of cases that had no connection with the forum, suggesting that there would be few “shocking” cases of the kind presented by Professor Nadelmann.⁶⁹ Moreover, parties could freely agree that the uniform laws would not govern their transaction. Even if the parties had not chosen the uniform laws, these laws were preferable to domestic sales laws which would otherwise apply. The uniform laws had been drafted with the problems of international trade in mind, whereas domestic laws include “eccentricities and injustices inherent in any municipal

65. For a bibliography of commentary on the exclusion of private international law, see Nadelmann, *supra* note 56, at 37 n.60.

66. Nadelmann, *supra* note 11, at 457. See also Nadelmann, *supra* note 26, at 236 (“The result would be a clear violation of what we call due process of law.”). See also Berman, *The Uniform Law on International Sale of Goods: A Constructive Critique*, 30 *LAW & CONTEMP. PROBS.* 354, 355 n. 2 (1965) (“The exclusion of private international law is convincingly criticized from the point of view of conflict of laws by Nadelmann”).

67. Honnold, *supra* note 26, at 333.

68. de Winter, *Loi uniforme sur la vente internationale des objets mobiliers corporels et le droit international privé*, 11 *NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT* 271, 273-74 (1964).

69. A. Tunc, *Commentary on the Hague Conventions of the 1st of July 1964 on International Sale of Goods and the Formation of the Contract of Sale*, in 1964 *Diplomatic Conference—Records*, *supra* note 23, at 355, 362-63.

system."⁷⁰

Commentary by governments reflected the same divisions as the scholarly literature. Creation of the United Nations Commission on International Trade Law (UNCITRAL) in 1966 provided a new forum for official debate and governments picked up where they left off at the 1964 Conference.

At its first session in 1968, the Commission decided to give priority to a review of the 1955 and 1964 Sales Conventions.⁷¹ The Commission directed the Secretary General to conduct a survey to determine the attitude of governments to these conventions. At the Commission's third session in 1970, the Secretary-General reported that these Conventions had received a mixed reception. Although there were seven Contracting States to the 1955 Convention at the time of the report, only three states had ratified the 1964 Conventions at this time. While a number of other states indicated that they intended to become parties to the conventions or had the question under consideration, 17 states replied that they did not intend to become a party to the 1955 Convention. Ten gave the same response as to the 1964 Conventions, including the United States, the U.S.S.R., and China.⁷²

Included in the Secretary-General's report was a summary of the governments' assessment of the relation between the uniform laws and private international law.⁷³ Picking up where it had left off at the 1964 Conference, the Federal Republic of Germany observed that the uniform laws would put an end to the uncertainties involved in application of the rules of private international law, and therefore reservations under article IV should be discouraged.⁷⁴ Belgium and the Netherlands supported this position. On the other hand, the United States, Czechoslovakia and Norway thought that the exclusion of private international law rules under article 2 was a deterrent to adoption of the laws because they could become applicable to parties who had no expectation that the uniform laws might apply.⁷⁵ Norway recommended the deletion of article 2 and the addition of a provision making the uniform laws applicable

70. *Id.* See also Tunc, *The Uniform Law on the International Sale of Goods: A Reply to Professor Nadelmann*, 74 YALE L.J. 1409, 1411-13 (1965).

71. *Report of the United Nations Commission on International Trade Law on the Work of its First Session*, para. 40, in Official Records of the General Assembly, Twenty-third Session, Supplement No. 16, U.N. Doc. A/7216, reprinted in [1968-1970] 1 Y.B. UNCITRAL 71, 77.

72. *Report of the Secretary-General, Analysis of Replies and Comments by Governments on the Hague Conventions of 1964*, paras. 6-7, U.N. Doc. A/CN.9/31, reprinted in [1968-1970] 1 Y.B. UNCITRAL 159, 161-62 [hereinafter *Analysis of Replies to 1964 Conventions*]; *Report of the Secretary-General, Analysis of Replies and Comments by Governments on the Hague Convention of 1955*, paras. 6-7, U.N. Doc. A/CN.9/33, reprinted in [1968-1970] 1 Y.B. UNCITRAL 202, 203 [hereinafter *Analysis of Replies to 1955 Convention*].

73. *Analysis of Replies to 1964 Conventions*, *supra* note 72, (paras. 28-40) at 164-65.

74. *Id.* at 164 (para. 29). See also *Analysis of Replies to 1955 Convention*, *supra* note 72, at 204 (para. 9) (inconsistencies between 1955 and 1964 Conventions make coexistence difficult).

75. *Analysis of Replies to 1964 Conventions*, *supra* note 72, at 164-65 (paras. 32-33). See also *Analysis of Replies to 1955 Conventions*, *supra* note 72, at 204 (paras. 11& 13).

only when rules of private international law pointed to a uniform law jurisdiction.⁷⁶ From a different perspective the U.S.S.R. and Hungary objected to article 2 because private international law should be used to fill gaps in the uniform laws.⁷⁷

Concluding that the 1964 Conventions were unlikely to be widely adopted, the U.N. Commission appointed a Working Group on the International Sale of Goods in 1969 to consider what changes might make the 1964 uniform laws more acceptable.⁷⁸ Given the history of the 1964 uniform laws, one of the more difficult issues that initially faced the Working Group was how the revised convention should relate to private international law rules. By a carefully considered compromise which limited the universalist approach and eliminated article 2, the Working Group relatively quickly adopted a formula on the appropriate sphere of application of the uniform law. The Commission approved the formula knowing it was a compromise and successfully protected it from attack. Only in the last gasp of the 1980 Vienna Conference was there any change to the compromise.

The Working Group and Commission were less successful with the revision of the gap-filling formula in article 17. Consideration of this article was kicked back and forth between the two groups until a final text was adopted by the Commission, only to be amended by the Vienna Conference.

As for the relation of the new convention to earlier or later conflicts conventions, the Commission had not adopted a draft text and the question was left to the 1980 Conference. The Vienna Conference ultimately approved a formula which states that the 1980 Convention "does not prevail over" any international agreement that covers the same matters.

A. Private International Law and the Sphere of Application

The Working Group quickly agreed to the basic contours of a compromise on the revised uniform law's sphere of application. At its first meeting the Working Group focused on four alternatives: (1) make no change to the solution found in articles 1 and 2 of the uniform law; (2) include choice-of-law provisions, such as those in the 1955 Conflicts Convention, and make the uniform law applicable when these choice-of-law rules point to the law of a Contracting State; (3) make the uniform law applicable only when the parties to a sales contract have their places of business in two different Contracting States; and (4) omit any choice-

76. *Analysis of Replies to 1964 Conventions*, *supra* note 72, at 165 (para. 39). See also *Analysis of Replies to 1955 Conventions*, *supra* note 72, at 204 (para. 11). Czechoslovakia also "expressed the view that uniform rules should only be applied if the conflict norms of the *forum* referred to the substantive law of a State which had enacted those uniform rules." *Id.* at para. 13.

77. *Analysis of Replies to 1964 Conventions*, *supra* note 72, at 165 (para. 34).

78. *Report of the United Nations Commission on International Trade Law on the Work of its Second Session* (1969), para. 38, Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18, U.N. Doc. A/7618, reprinted in [1968-1970] I Y.B. UNCITRAL 95, 99-100.

of-law rule and leave the question to the forum's choice-of-law rules.⁷⁹

After debate, the Working Group established a Working Party to examine the issue. With some minor stylistic changes, a majority of the Working Group adopted the following text proposed by the Working Party:

1. The Law shall apply where the places of business of the contracting parties are in the territory of States that are parties to the Convention and the law of both these States makes the Uniform Law applicable to the contract;
2. The Law shall also apply where the rules of private international law indicate that the applicable law is the law of a contracting State and the Uniform Law is applicable to the contract according to this law.⁸⁰

At this stage a significant minority of the representatives dissented, voicing positions expressed from the beginning of consideration of uniform sales rules. The Working Group's Report notes that three representatives wished to continue to exclude rules of private international law and to recommend instead that states make the reservation that limited application of the uniform law to contracts where the parties had their places of business in different Contracting States. To reintroduce private international law rules would, in the opinion of these representatives, detract from unification and lead to uncertainty as to when the uniform law would apply.⁸¹ Another representative thought that article 2 should be deleted but that the uniform law should apply only when required by choice-of-law rules. Yet another representative thought that the uniform law should apply only when enterprises have their places of business in different Contracting States.⁸²

The Commission took up the Working Group's report at its third session. Representatives reviewed the same array of solutions considered by the Working Group, and submitted the issue to a Working Party. The Working Party reported out the following text at this session:

The present Law is applicable (a) irrespective of any rules of private international law when the place of business of each of the contracting parties is in the territory of a Contracting State which has adopted the present Law without any reservation which would preclude its application to the contract; (b) when the rules of private international law indicate that the applicable law is the law of a Contracting State which has adopted the present Law without any reservation which would preclude its application to the contract.⁸³

79. *Report of the Working Group on the International Sale of Goods, First Session*, para. 11, U.N. Doc. A/CN.9/35, reprinted in [1968-1970] 1 Y.B. UNCITRAL 176, 178.

80. *Report of the Working Group on the International Sale of Goods, First Session*, para. 19, U.N. Doc. A/CN.9/35, reprinted in [1968-1970] 1 Y.B. UNCITRAL 176, 179.

81. *Id.* at para. 24.

82. *Id.* at para. 25.

83. *Report of the United Nations Commission on International Trade Law on the Work of its Third Session*, para. 26, U.N. Doc. A/8017, reprinted in [1968-1970] 1 Y.B. UNCITRAL 129, 133.

The Working Party also recommended that Contracting States be permitted to extend application of the uniform law to all contracts for the sale of goods. After reviewing this draft, the Commission agreed that the substance of the Working Party's draft should be the basis for the further work of the Working Group.⁸⁴

In the light of the Commission's debate, the Working Group adopted the following text at its second meeting in December, 1970:

1. The present Law shall apply to contracts of sale of goods entered into by parties whose places of business are in different States:
 - (a) When the States are both Contracting States; or
 - (b) When the rules of private international law lead to the application of the law of a Contracting State.⁸⁵

Gone is the explicit statement that subparagraph (a) applies "irrespective of any rules of private international law." Gone, too, are the explicit references to possible reservations that a Contracting State may make. Nevertheless, the Commission approved the Working Group's approach at its fourth session in 1971⁸⁶ and it was this text that, with minor stylistic changes, was ultimately submitted by the Commission to the 1980 Vienna Conference.

The compromise represented by subparagraph (1)(b) did not go uncriticized and there were continuing efforts to delete it.⁸⁷ Critics brought forward several new considerations. It was pointed out, for example, that some states applied different choice-of-law rules to the

84. *Id.* at para. 30.

85. *Report of the Working Group on the International Sale of Goods, Second Session, Annex II, U.N. Doc. A/CN.9/52, reprinted in [1971] 2 Y.B. UNCITRAL 50, 64.* For a report of the Working Group's debate, see *Report of the Working Group on the International Sale of Goods, Second Session, paras. 32-35, U.N. Doc. A/CN.9/52, reprinted in [1971] 2 Y.B. UNCITRAL 50, 54.*

86. *Report of the United Nations Commission on International Trade Law on the Work of its Fourth Session, para. 69, U.N. Doc. A/8417, reprinted in [1971] 2 Y.B. UNCITRAL 9, 20.* At its third meeting the Working Group reconsidered some aspects of draft article 1, but these aspects do not relate directly to subparagraph (1)(b). *Report of the Working Group on the International Sale of Goods, Third Session, Annex II, paras. 1-14, U.N. Doc. A/CN.9/62, reprinted in [1972] 3 Y.B. UNCITRAL 77, 82-83.*

87. The Working Group itself thoroughly reviewed the subparagraph at its sixth meeting in 1975. *Report of the Working Group on the International Sale of Goods on the Work of its Sixth Session, paras. 17-19, U.N. Doc. A/CN.9/100, reprinted in [1975] 6 Y.B. UNCITRAL 49, 50.* At its tenth session in 1977, the Commission, meeting as a Committee of the Whole, considered proposals to delete subparagraph (1)(b) or to make the convention applicable only when rules of private international law made the law of a Contracting State applicable. Neither proposal received support. *Report of the United Nations Commission on International Trade Law on the Work of its Tenth Session, Annex I, paras. 18-20, U.N. Doc. A/32/17, reprinted in [1977] 8 Y.B. UNCITRAL 11, 26.* See also *Comments by Governments and International Organizations on the Draft Convention on the International Sale of Goods, Federal Republic of Germany, para. 4, U.N. Doc. A/CN.9/125, reprinted in [1977] 8 Y.B. UNCITRAL 109, 116; Text of Comments and Proposals of Representatives on the Revised Text of a Uniform Law on the International Sale of Goods as Approved or Deferred for Further Consideration by the Working Group at its First Five Sessions, U.N. Doc. A/CN.9/100, annex I, reprinted in [1975] 6 Y.B. UNCITRAL 70 (Austrian comment).*

obligations of the seller and the buyer, particularly with respect to the contract formation process. If these rules point to different states and only one of these states is a Contracting State it would be difficult to determine whether the Convention applied.⁸⁸ When it turned to the formation provisions at its eleventh session, the Commission considered a proposal by the Australian Government to amend subparagraph (1)(b) to deal with this problem. The proposal provided separate rules on when the Convention would apply depending on whether the legal issue involved an offer, an acceptance, or contract formation.⁸⁹ The Australian Government was prevailed upon to withdraw the proposal, however, because a number of representatives thought that a few provisions could not capture the complexity of private international law rules. Representatives pointed out practical difficulties as well. Integration of the formation convention with the sales convention, they noted, would require extensive revision of the draft text of the latter, which the Commission had already approved in 1977. Finally, and perhaps most importantly, some representatives thought it inappropriate to reopen the carefully worked out compromise on article 1(1).⁹⁰ However, the point raised by Australia did not disappear. At the 1980 conference the Federal Republic of Germany unsuccessfully argued that article 1(1)(b) should be deleted because rules of private international law may lead to application of the law of a Contracting State for only part of the

88. *Report of the Working Group on the International Sale of Goods on the Work of its Sixth Session*, para. 17(i), U.N. Doc. A/CN.9/100, reprinted in [1975] 6 Y.B. UNCITRAL 49, 50. See also the Secretary-General's unofficial commentary on the draft formation text. *Report of the Secretary-General, Commentary on the Draft Convention on the Formation of Contracts for the International Sale of Goods*, Article 1, paras. 5-6, U.N. Doc. A/CN.9/144, reprinted in [1978] 9 Y.B. UNCITRAL 106, 108. Paragraph 5 states:

Some legal systems apply the law of different States to different elements of the formation process such as the offer, the acceptance and the required form. In these States, it may not be possible to say that the rules of private international law would designate the law of any single state as the law governing the formation of the contract.

Id.

89. Drafting history of the eleventh session of UNCITRAL of the draft Convention on Contracts for the International Sale of Goods, [1978] 9 Y.B. UNCITRAL 46. The Australian proposed amendment called for the renumbering of subparagraph (1)(b) as subparagraph (1)(b)(1) and adding the following additional subparagraphs:

(b)(2) In cases in which the only question is whether this Convention applies to an offer, it so applies where the rules of private international law lead to the application to the offer of the law of a Contracting State.

(3) In cases in which the only question is whether this Convention applies to an acceptance, it so applies where the rules of private international law lead to the application to the acceptance of the law of a Contracting State.

(4) In cases in which the rules of private international law lead to the application of the law of a Contracting State to one or some only of the events which together constitute the formation of a contract under this Convention, the law of the Contracting State applies to all of those events.

Id.

90. *Report of the United Nations Commission on International Trade Law on the Work of its Eleventh Session*, Annex I, paras. 2-4, U.N. Doc. A/33/17, reprinted in [1978] 9 Y.B. UNCITRAL 11, 31.

transaction.⁹¹

Critics of subparagraph (1)(b) also pointed to potential conflicts with an earlier UNCITRAL Convention, the 1974 Convention on the Limitation Period in the International Sale of Goods.⁹² Although the text of this earlier Convention had been drafted by a different Working Group, there was some pressure on the Commission and the Working Group on Sales to accept the compromises reached upon approval of the earlier Convention.⁹³ Critics of subparagraph (1)(b) pointed out that the Limitation Convention had no counterpart to the subparagraph in its definition of its sphere of application.⁹⁴ The response given these critics was that the rules of private international law applicable to limitation periods are too unsettled to be a reliable basis for application of the 1974 Convention.⁹⁵ There was also the inevitable reference to the need

91. *First Meeting of the First Committee*, para. 11, U.N. Doc. A/CONF.97/C.1/SR.1, reprinted in United Nations Conference on Contracts for the International Sale of Goods, *Official Records*, 236, 236-37 (1981). Committee I rejected the proposal by a vote of 25 to 7, with 10 abstentions. *First meeting of the First Committee*, para. 29 U.N. Doc. A/CONF.97/C.1/SR.1, reprinted in United Nations Conference on Contracts for the International Sale of Goods, *Official Records*, 236, 238 (1981).

92. See *Report of the Working Group on the International Sale of Goods on the Work of its Sixth Session*, para. 17(iv), U.N. Doc. A/CN.9/100, reprinted in [1975] 6 Y.B. UNCITRAL 49, 50. See generally Smit, *The Convention on the Limitation Period in the International Sale of Goods: UNCITRAL's First Born*, 23 AM. COMP. L. 337 (1975).

93. The Working Group agreed that the limitations convention should be followed to the largest extent possible except where differences between issues arising under the two conventions made it inappropriate to do so. *Report of the Working Group on the International Sale of Goods on the Work of its Sixth Session*, para. 16, U.N. Doc. A/CN.9/100, reprinted in [1975] 6 Y.B. UNCITRAL 49, 50.

94. See *Report of the Working Group on the International Sale of Goods on the Work of its Sixth Session*, para. 17(iv), U.N. Doc. A/CN.9/100, reprinted in [1975] 6 Y.B. UNCITRAL 49, 50.

Prior to amendment by a Protocol adopted at the 1980 Vienna Conference, Article 3(1) of this convention provided:

This Convention shall apply only if, at the time of the conclusion of the contract, the places of business of the parties to a contract of international sale of goods are in Contracting States.

A Protocol adopted at the 1980 Vienna Conference now brings the 1974 provision into conformity with article 1(1) of the 1980 sales convention. *Protocol Amending the Convention on the Limitation Period in the International Sale of Goods*, Article I, U.N. Doc. A/CONF.97/18, Annex II, reprinted in United Nations Conference on Contracts for the International Sale of Goods, *Official Records*, 191, U.N. Doc. A/CONF.97/19 1981. Article 3(2) of the 1974 text provided:

Unless this Convention provides otherwise, it shall apply irrespective of the law which would otherwise be applicable by virtue of the rules of private international law.

The 1980 Protocol deletes this sub-article. *Id.*

95. *Report of the Working Group on the International Sale of Goods on the Work of its Sixth Session*, para. 18, U.N. Doc. A/CN.9/100, reprinted in [1975] 6 Y.B. UNCITRAL 49, 50; *Report of the Secretary-General, Pending Questions with Respect to the Revised Text of a Uniform Law on the International Sale of Goods*, Annex III, U.N. Doc. A/CN.9/100, reprinted in [1975] 6 Y.B. UNCITRAL 88, 89 n.15; *Comments by Governments and International Organizations on the Draft Convention on the International Sale of Goods*, Federal Republic of Germany, para. 4 U.N. Doc. A/CN.9/125, reprinted in [1977] 8 Y.B. UNCITRAL 109, 116. See also *Commentary on the Convention on the Limitation Period in the International Sale of Goods*, article 3, paras. 4-6, U.N. Doc. A/CONF.63/17, reprinted in [1979] 10 Y.B.

to preserve the compromise reached on article 1(1).⁹⁶

The Commission ultimately made no substantive changes to the text it had already approved when it adopted the final draft convention at its eleventh session.⁹⁷ At the 1980 Vienna Conference, however, subparagraph (1)(b) came under renewed attack from a different perspective. Interested in preserving their domestically-adopted international trade laws, Czechoslovakia and the German Democratic Republic supported the Federal Republic of Germany's previous proposal to delete subparagraph (1)(b).⁹⁸ Notwithstanding the first Committee's rejection of the Federal Republic's proposal, the Czechoslovak delegation persisted. It proposed that the plenary session consider separately each subparagraph of article 1(1), but the proposal received no support.⁹⁹ The Czechoslovak delegation then proposed two alternative reservations pursuant to which a Contracting State could declare that it would not be bound by subparagraph (1)(b).¹⁰⁰ The Czechoslovak representative again explained that his government submitted this proposal so that its special law governing international trade would continue to be applicable in situations where one of the parties to an international sales contract did not have its place of business in a Contracting State. To the surprise of some observers, the Conference accepted this proposal in one of its last sessions with little debate or opposition.¹⁰¹ The final text of the 1980 Convention therefore includes both article 1(1) intact and a reservation set out in article 95 by which a state may declare that it will not be bound by subparagraph (1)(b).¹⁰²

UNCITRAL 145, 151 ("If the applicability of this Convention were linked to the rules of private international law, special difficulties would have been presented because of the unusually divergent approaches in different legal systems to the characterization of the subject-matter of this Convention").

96. *Report of the Working Group on the International Sale of Goods on the Work of its Sixth Session*, para. 18, U.N. Doc. A/CN.9/100, reprinted in [1975] 6 Y.B. UNCITRAL 49, 50.

97. *Report of the United Nations Commission on International Trade Law on the Work of its Eleventh Session*, para. 28, U.N. Doc. A/33/17, reprinted in [1978] 9 Y.B. UNCITRAL 11, 14.

98. *First Meeting of the First Committee*, paras. 13, 24, U.N. Doc. A/CONF.97/C.1/SR.1, reprinted in United Nations Conference on Contracts for the International Sale of Goods, *Official Records*, 236, 237-38 (1981).

99. The plenary session adopted article 1 by a vote of 42 votes to none, with one abstention. *Sixth Plenary Meeting*, paras. 9-10, U.N. Doc. A/CONF.97/SR.6, reprinted in United Nations Conference on Contracts for the International Sale of Goods, *Official Records*, 199, 200 (1981).

100. A/CONF.97/L.4, Alternative I, reprinted in United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 170 (1981).

101. The Conference adopted the proposal by a vote of 24 votes to 7, with 16 abstentions. *Eleventh Plenary Meeting*, paras. 78-93, U.N. Doc. A/CONF.97/SR.11, reprinted in United Nations Conference on Contracts for the International Sale of Goods, *Official Records*, 225, 229-30 (1981). As for the surprise of observers, see, e.g., the remark of Professor Gyula Eörsi. Eörsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 AM. J. COMP. L. 333, 353 (1983).

102. CISG, *supra* note 15, art. 95.

B. Private International Law and Gap-filling

Perhaps because article 17 of the 1964 Uniform Law had inspired less criticism,¹⁰³ its transformation into article 7(2) of the 1980 Convention followed a more indirect route. As was discussed earlier, article 17 of the ULIS directed readers to look to the "general principles" upon which the law was based to fill gaps.¹⁰⁴ Relatively early in their deliberations, the Commission and its Working Group substituted a direction that readers were to consider the uniform law's international character and the need to maintain uniformity when interpreting the law.¹⁰⁵ Concerned that this new formula did not provide sufficient guidance, representatives proposed a variety of gap-filling formulas ranging from retaining article 17 to referring to private international law rules. A proposal to add the sentence "Private international law shall apply to questions not settled by ULIS" was made at the first meeting of the Working Group¹⁰⁶ and was pending throughout most of the deliberations of the Commission.¹⁰⁷ The proposal was nevertheless submitted to the 1980

103. Only Austria commented on article 17 when responding to the U.N. Secretary-General's survey of governments. See *infra* note 111. On the unofficial commentaries, see Berman & Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 HARV. J. INT'L L. 221, 265-66 (1978) (to resolve matters of detail it would be useful to refer to large body of international customary law that has been incorporated into national law but art. 17 excludes this possibility).

104. See *supra* notes 22-48 and accompanying text.

105. The substitute text adopted by the Commission stated:

In interpreting and applying the provisions of this Law, regard shall be had to its international character and to the need to promote uniformity [in its interpretation and application].

Report of the Working Group on the International Sale of Goods, Second Session, Annex II, U.N. Doc. A/CN.9/52, reprinted in [1971] 2 Y.B. UNCITRAL 50, 65. By the time the Working Group on Sales began to study article 17 in detail, the Commission's Working Group on Time-limits and Prescription had adopted this new formula. *Report of the Working Group on the International Sale of Goods, Second Session, para. 128, U.N. Doc. A/CN.9/52, reprinted in [1971] 2 Y.B. UNCITRAL 50, 62.*

106. *Report of the Working Group on the International Sale of Goods, First Session, para. 66, U.N. Doc. A/CN.9/35, reprinted in [1968-1970] 1 Y.B. UNCITRAL 176, 182.*

107. Unable to come to a conclusion at its first meeting, the Working Group decided to refer the issues to the Commission. *Report of the Working Group on the International Sale of Goods, First Session, para. 72, U.N. Doc. A/CN.9/35, reprinted in [1968-1970] 1 Y.B. UNCITRAL 176, 183.* At its next session the Commission referred the matter back to the Working Group for consideration in light of the debate within the Commission. *Report of the United Nations Commission on International Trade Law on the Work of its Third Session, para. 54, U.N. Doc. A/8017, reprinted in [1968-1970] 1 Y.B. UNCITRAL 129, 136.* The Working Group, in turn, promptly returned the issue to the Commission. *Report of the Working Group on the International Sale of Goods, Second Session, para. 133, U.N. Doc. A/CN.9/52, reprinted in [1971] 2 Y.B. UNCITRAL 50, 62.* Following debate at its fourth session the Commission again submitted the text to the Working Group for reconsideration in light of the revision as a whole. *Report of the United Nations Commission on International Trade Law on the Work of its Fourth Session (1971), para. 91, Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17, U.N. Doc. A/8417, reprinted in [1971] 2 Y.B. UNCITRAL 9, 22.* In 1975, the Secretary-General reported that the issue was still pending. *Report of the Secretary-General (addendum), Pending Questions with Respect to the Revised Text of a Uniform Law on the International Sale of Goods, paras. 20-21, Annex IV, U.N. Doc. A/CN.9/100,*

conference and accepted in the compromise formula now set out in article 7(2) of the final text.

The principal criticism of article 17 was its vagueness.¹⁰⁸ Reporting on the debate at its first meeting, for example, the Working Group on Sales noted that

it is difficult or impossible to identify such general principles particularly due to the fact that ULIS has no domestic legal background. There might also be a danger that lacking such a legal background the courts might in fact fall back on the *lex fori*. This reference to unidentified general principles therefore gives rise to ambiguity and uncertainty.¹⁰⁹

As the representative of the U.S.S.R. bluntly stated, the article is "another vague concept which would give rise to difficulties of interpretation."¹¹⁰ The Austrian Government also questioned whether article 17 would have any practical effect. Because many terms in the uniform laws are also found in national laws, the Austrians predicted that in the absence of definitions, these terms would be interpreted as they were understood in these national laws.¹¹¹

Proposals to use rules of private international law to fill gaps in the uniform law were made from the beginning of the debates within UNCITRAL. Most proponents stressed the difficulties of determining the law's general principles or the dangers of leaving gap-filling to judicial discretion. Proponents also noted that sellers and buyers would have to refer to private international law for the applicable law for issues, such as prescription, completely excluded from coverage of the sales law. To use private international law to fill gaps, therefore, would be consistent with this approach.¹¹²

Not all supporters of a reference to private international law rules thought that it was necessary to include express language to this effect.

reprinted in [1975] 6 Y.B. UNCITRAL 110, 112. The proposal then disappears from the record.

108. There were other criticisms as well. The Norwegian Government noted that the specific reference to general principles had the negative implication that other sources of principles could not be considered. *Analysis of Replies to 1964 Conventions*, *supra* note 72, at 159, 170.

109. *Report of the Working Group on the International Sale of Goods, First Session*, para. 57, U.N. Doc. A/CN.9/35, reprinted in [1968-1970] 1 Y.B. UNCITRAL 176, 182. The Working Group made a similar report of debates at its second meeting.

This provision was criticized by several representatives on the ground that it was vague and illusory, since the Law did not specify or indicate the general principles on which it was based; such a reference would lead to uncertainty and possibly to a Court's use of its own national rules on the assumption that these were the general principles underlying the Uniform Law.

Report of the Working Group on the International Sale of Goods, Second Session, para. 129, U.N. Doc. A/CN.9/52, reprinted in [1971] 2 Y.B. UNCITRAL 50, 62.

110. *Report of the United Nations Commission on International Trade Law on the Work of its Second Session* (1969), para. 73, Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18, U.N. Doc. A/7618 at 85.

111. *Analysis of Replies to 1964 Convention*, *supra* note 72, at 159, 170.

112. *Report of the Working Group on the International Sale of Goods, First Session*, para. 67, U.N. Doc. A/CN.9/35, reprinted in [1968-1970] 1 Y.B. UNCITRAL 176, 182.

Some representatives suggested that it was generally assumed that, even without an express provision, courts could always refer to the national law, as determined by the forum's rules of private international law.¹¹³ Others suggested that gaps would be filled by contract terms or by usage of trade.¹¹⁴ Given the great variety of potential private international law solutions, Norway suggested that it might be best to leave the matter to national law.¹¹⁵ The representative from the U.S.S.R. suggested that, if it was necessary to have an explicit reference, the Commission's report could record a consensus that private international law should apply rather than include an express reference in the convention.¹¹⁶

There was also some support not only for referring generally to private international law rules, but also for explicitly including certain rules of private international law in the uniform law itself.¹¹⁷ Representatives

113. *Report of the United Nations Commission on International Trade Law on the Work of its Fourth Session*, para. 89, U.N. Doc. A/8417, reprinted in [1971] 2 Y.B. UNCITRAL 9, 22; *Report of the Working Group on the International Sale of Goods, Second Session*, para. 136 U.N. Doc. A/CN.9/52, reprinted in [1971] 2 Y.B. UNCITRAL 50, 62. This position was stated most directly by Mr. R. Loewe of Austria at the 1980 conference.

[Mr. Loewe] said that many unification conventions made no mention of the gaps in their provisions since it was generally understood that national law should be applied to fill them, the answer to the question which national law was applicable being usually that designated by the rules of private international law.

A/CONF.97/C.1/SR.5, para. 20, United Nations Conference on Contracts for the International Sale of Goods, *Official Records*, 254, 256. See also the reported statement by the observer of UNIDROIT at the second session of UNCITRAL:

[T]he observer of UNIDROIT specified that the purpose of Article 2 was to give the Uniform Law an autonomous character, and to make it unnecessary for courts to determine the applicable law in each case. However, it would not be possible to exclude totally the application of conflict rules since there were matters (e.g., prescription) that were not dealt with in the Uniform Law and which could not be settled by reference to the general principles on which Uniform Law was based. Hence, in some cases recourse should be had to rules of private international law.

Analysis of Replies to 1964 Convention, supra note 72, at 159, 165.

114. *Note by the Secretary-General, Analysis of Comments and Proposals Relating to Articles 1-17 of the Uniform Law on the International Sale of Goods (ULIS)*, para. 54, U.N. Doc. A/CN.9/WG.2/WP.11, reprinted in [1972] 3 Y.B. UNCITRAL 69, 76.

115. The Norwegian comment was made in connection with the issue of whether a states' mandatory domestic law rules should limit the parties' freedom to agree to make the convention applicable. *Comments by Governments and International Organizations on the Draft Convention on the International Sale of Goods*, paras. 8-12, U.N. Doc. A/CN.9/125, reprinted in [1977] 8 Y.B. UNCITRAL 109, 120-121. (The specific provision addressed by the Norwegian comment does not appear in the final text of the convention.)

116. *Note by the Secretary-General, Analysis of Comments and Proposals Relating to Articles 1-17 of the Uniform Law on the International Sale of Goods (ULIS)*, para. 56, U.N. Doc. A/CN.9/WG.2/WP.11, reprinted in [1972] 3 Y.B. UNCITRAL 69, 76.

117. *Report of the United Nations Commission on International Trade Law on the Work of its Fourth Session*, para. 90, U.N. Doc. A/8417, reprinted in [1971] 2 Y.B. UNCITRAL 9, 22. In the earliest debates within the Commission, some representatives proposed combining the 1955 and 1964 Conventions in a single text. *Report of the United Nations Commission on International Trade Law on the Work of its Second Session* (1969), para. 17, *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18*, U.N. Doc. A/7618, reprinted in [1968-1970] 1 Y.B. UNCITRAL 94, 97.

from countries which are members of the Council for Mutual Economic Assistance recommended a rule making the law of the seller's place of business applicable when gaps needed to be filled.¹¹⁸ At its tenth session in 1977, for example, the Commission considered the following proposal:

With regard to matters pertaining to the relations between the parties to a contract of sale which are not covered by this Convention, the substantive rules of the State where the seller has his place of business shall apply.¹¹⁹

Supporters of this proposal noted that it was not only the rule found in the C.M.E.A.'s General Conditions of Delivery of Goods¹²⁰ but also the one generally applicable in international trade, including the 1955 Convention.¹²¹ The Commission, however, rejected the proposal, finding that the rules of private international law were out of place in a convention devoted to substantive law rules. It was also pointed out that the proposed rule would actually be inconsistent with the 1955 Convention, which provided some exceptions to having the seller's place of business apply. This inconsistency would make it difficult for those states that had already adopted the 1955 Convention to become a party to the substantive sales convention.¹²²

The Commission also considered variations on the proposed reference to the seller's place of business. Poland, for example, suggested

118. Both Poland and the U.S.S.R. suggested that gaps should be filled by reference to the law of the seller's country. *Comments by Governments and International Organizations on the Draft Convention on the International Sale of Goods*, paras. 9 and 17 U.N. Doc. A/CN.9/125, reprinted in [1977] 8 Y.B. UNCITRAL 109, 128, 131. At the same time, Pakistan recommended the inclusion of a residual rule, such as that found in the General Conditions of Delivery of Goods. *Note by the Secretary-General, Analysis of Comments and Proposals Relating to Articles 1-17 of the Uniform Law on the International Sale of Goods (ULIS)*, para. 56, U.N. Doc. A/CN.9/WG.2/WP.11, reprinted in [1972] 3 Y.B. UNCITRAL 69, 76.

119. *Report of the United Nations Commission on International Trade Law on the Work of its Tenth Session*, Annex I, para. 141, U.N. Doc. A/32/17, reprinted in [1977] 8 Y.B. UNCITRAL 11, 34.

120. General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance, § 110, reprinted in I REGISTER OF TEXTS OF CONVENTIONS AND OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW 72 (1971). See generally I. Szász, THE CMEA UNIFORM LAW FOR INTERNATIONAL SALES (1985). Section 110 states:

1. Relations of the parties concerning delivery of goods, in so far as they are not regulated or not fully regulated by contracts or by the present General Conditions of Delivery, shall be governed by the substantive law of the seller's country.

2. By the substantive law of the seller's country are meant the general provisions of civil law, and not the special provisions laid down to govern relationships among socialist organizations and enterprises of the seller's country.

121. *Comments by Governments and International Organizations on the Draft Convention on the International Sale of Goods*, para. 9, U.N. Doc. A/CN.9/125, reprinted in [1977] 8 Y.B. UNCITRAL 109, 128.

122. *Report of the United Nations Commission on International Trade Law on the Work of its Tenth Session*, Annex I, paras. 142-43, U.N. Doc. A/32/17, reprinted in [1977] 8 Y.B. UNCITRAL 11, 34-35.

including different choice-of-law rules for different issues.¹²³ Equally cryptic was the Ghanaian Government's proposal that there should be either recourse to the rules of private international law or to "a descending scale of norms" drawn up by the Working Group.¹²⁴ Alternatively, Spain submitted a draft text that would have directed tribunals to look to the *lex fori* to fill gaps.¹²⁵

There was considerable opposition to these various gap-filling proposals within the Commission. Some representatives feared that reference to private international law rules would encourage tribunals to find gaps so that they could apply familiar domestic law. These representatives also argued that the proposed gap-filling measures would inevitably result in increased uncertainty and litigation over applicable conflicts rules and foreign law.¹²⁶ Professor Tunc, a principal architect of article 17, spelled out these points in a report to the Working Group that is summarized as follows:

In the view of the author of the study the application of domestic law or of the law indicated by the conflict rules of law or of the law indicated by the conflict rules of the *lex fori* would amount to precluding the application of the Uniform Law in many cases which the legislator and the parties themselves had wanted the law to cover. The application of the national law of the court hearing the case, as suggested at the previous session of the Working Group, would also render unachievable the desire that the rights and obligations of the parties be defined without recourse to a court, even a court of arbitration. Recourse to the law designated by the rules of private international law would have the same effect and would introduce an additional element of uncertainty.¹²⁷

Echoing this analysis, the Mexican representative later wrote that reference to conflicts rules "would be prejudicial to the uniformity and the international character of the Law."¹²⁸

123. Note by the Secretary-General, *Analysis of Comments and Proposals Relating to Articles 1-17 of the Uniform Law on the International Sale of Goods (ULIS)*, para. 58, U.N. Doc. A/CN.9/WG.2/WP.11, reprinted in [1972] 3 Y.B. UNCITRAL 69, 76. What these specific rules and issues were was left for further deliberation of the Commission. No such deliberation ever took place, however, because there was no interest in the Commission to pursue the Polish proposal.

124. *Id.* at para. 56.

125. The Spanish proposal provided:

Questions concerning matters governed by the present Law which are not expressly settled therein and which cannot be settled by means of the analogous application of its own rules shall be subject to the system indicated by the *lex fori* for the case of gaps in the Law.

Id. at para. 57.

126. Report of the Working Group on the International Sale of Goods, Second Session, para. 135, U.N. Doc. A/CN.9/52, reprinted in [1971] 2 Y.B. UNCITRAL 50, 62.

127. Note by the Secretary-General, *Analysis of Comments and Proposals Relating to Articles 1-17 of the Uniform Law on International Sale of Goods (ULIS) 1964*, para. 87, U.N. Doc. A/CN.9/WG.2/WP.6, reprinted in [1971] 2 Y.B. UNCITRAL 37, 49. Professor Tunc's report appears as Annex XIV to A/CN.9/WG.2/WP.6/Add.1 but is not reprinted in the Yearbook. *Id.* at 38-39 (para. 3).

128. Text of comments and proposals of representatives on the revised text of a uniform law on the international sale of goods as approved or deferred for further

None of these proposals persuaded the Commission to include an express gap-filling provision and the Commission submitted the following text to the 1980 Vienna Conference:

In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity and the observance of good faith in international trade.¹²⁹

At the 1980 diplomatic conference delegates proposed three relevant amendments, two of which had already been considered within UNCITRAL. The Bulgarian delegation submitted a proposal to make the law of the seller's place of business serve as the gap-filling law.¹³⁰ The Bulgarian representative argued that the *lex venditori* rule was steadily gaining ground in international trade practice.¹³¹ A proposal submitted by the Italian delegation would have amended article 17 by directing the reader to fill gaps first by looking to the convention's general principles and then "by taking account of the national law of each of the parties."¹³² The Italian delegate noted that this proposal would minimize the possibility that the law of the stronger party would always prevail.¹³³ A Czechoslovak amendment provided that gaps in the Convention were to be filled "in conformity with the law applicable by virtue of the rules of private international law."¹³⁴ The Czechoslovak representative suggested that his amendment was presented as a compromise.

consideration by the Working Group at its first five sessions, *Comments and Proposals of the Representative of Mexico*, para. 55, U.N. Doc. A/CN.9/100, Annex II, reprinted in [1975] 6 Y.B. UNCITRAL 70, 79.

129. *Text of the Draft Convention on Contracts for the International Sale of Goods, Art. 6*, U.N. Doc. A/CONF.97/5, reprinted in United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 5.

130. *Bulgarian proposal*, U.N. Doc. A/CONF.97/C.1/L.16, *Report of the First Committee, Article 6*, para. 3(i), U.N. Doc. A/CONF.97/11, reprinted in United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 82, 87 (1981). The proposal would have added the following second paragraph:

(2) Questions which cannot be solved according to the paragraph (1) of this Article shall be settled according to the law of the seller's place of business.

The same applies to the questions mentioned in Article 4, paragraph (a), as well as to other questions, governed by the law proper to the contract.

131. U.N. Doc. A/CONF.97/C.1/SR.5, para. 9, reprinted in United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 254, 255 (1981).

132. *Italian proposal*, U.N. Doc. A/CONF.97/C.1/L.59; *Report of the First Committee, Article 6*, para. 3(iii), U.N. Doc. A/CONF.97/11, reprinted in United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 82, 87. The full text of the Italian proposal provided:

Questions concerning matters governed by this Convention which are not expressly settled therein shall be settled in conformity with the general principles on which this Convention is based or, in the absence of such principles, by taking account of the national law of each of the parties.

133. U.N. Doc. A/CONF.97/C.1/SR.5; para. 17, reprinted in United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 254, 256 (1981).

134. *Czechoslovak proposal*, U.N. Doc. A/CONF.97/C.1/L.15; *Report of the First Committee, Article 6*, para. 3(ii), U.N. Doc. A/CONF.97/11, reprinted in United Nations Con-

He argued that the Italian proposal would be very difficult to apply in practice.¹³⁵ Mr. Loewe of Austria, who chaired the meeting of the First Committee at which these proposals were considered, suggested that it was unclear whether the reference to the national laws of each party referred to the solely domestic law of that party or the law applicable through operation of that party's choice-of-law rules.¹³⁶ The First Committee ultimately agreed by a close vote to combine the Czechoslovak and Italian amendments.¹³⁷ At the plenary meeting, the Conference adopted the text with no debate and without dissent.¹³⁸ The final text of article 7(2), therefore, fills gaps first by reference to the general principles on which the convention is based (i.e., the principle of article 17), and then, if there are no relevant principles, by reference to the domestic law of the state whose law is applicable by virtue of the rules of private international law.¹³⁹

C. Uniform International Rules and Private International Law Conventions

The final provisions in Part IV of the 1980 Sales Convention did not go through the same extensive debate within UNCITRAL as the substantive sales and contract formation provisions. The Secretariat, rather than the Working Group on Sales, prepared the draft final provisions. The Commission itself decided to take no position on these provisions.¹⁴⁰ The text of what became article 90 is a partial exception to this procedure. At its tenth session in 1977, the Commission held a brief preliminary discussion of the final provisions and directed the Secretariat to take note of a proposed draft text submitted by one of the repre-

ference on Contracts for the International Sale of Goods, *Official Records* 82, 87 (1981). The full text of the Czechoslovak proposal stated:

(2) Questions concerning matters governed by this Convention which are not settled therein shall be settled in conformity with the law applicable by virtue of the rules of private international law.

135. U.N. Doc. A/CONF.97/C.1/SR.5, paras. 10, 13, *reprinted in* United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 254, 255 (1981).

136. U.N. Doc. A/CONF.97/C.1/SR.5, para. 21, *reprinted in* United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 254, 256 (1981).

137. U.N. Doc. A/CONF.97/C.1/SR.5, paras. 7-37, *reprinted in* United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 254, 255-57 (1981). Committee I approved the compromise provision by a vote of 17 to 14, with 11 abstentions. *Id.* at para. 35.

138. U.N. Doc. A/CONF.97/SR.6, paras. 37-44, *reprinted in* United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 199, 202 (1981). Article 7 [then numbered 6] was approved by a vote of 45 votes to none. *Id.* at para. 42.

139. CISG, *supra* note 15, art. 7(2).

140. *Secretary-General, Draft Articles Concerning Implementation, Declarations, Reservations and Other Final Clauses*, para. 2 n.2, *reprinted in* United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 66, 67 n. 2 (1981).

sentatives.¹⁴¹ The proposal was made again at the 1978 session¹⁴² and incorporated as draft article D in the draft final provisions submitted to the 1980 Conference.¹⁴³

Debate on this proposed text at the 1980 Conference was brief. The Soviet representative proposed that the phrase "international convention" be changed to "international agreement" to take into account differing nomenclature. The Second Committee adopted the draft with the amendment.¹⁴⁴ In the plenary session, there was no recorded debate and article 90 was adopted unanimously.¹⁴⁵ The final text of article 90, therefore, provides that the 1980 Convention "does not prevail over" any international agreement covering the same subject matter to which a state is or may become a party.¹⁴⁶

In the course of debate there was no explicit reference to how article 90 relates to the 1955 Convention. Immediately following adoption of article D by the Second Committee, however, the Observer from the Hague Conference on Private International Law asked to make a statement for the record. Noting that there is no provision similar to article IV of the 1964 Sales Convention in the 1980 Convention, the Observer stated that certain delegations feared that they would be obliged to denounce the 1955 Convention if they adhered to the new convention.¹⁴⁷ The Observer then explained that in his opinion this conclusion was wrong:

The provisions of article IV of the 1964 Convention were indispensable because article 2 of the Uniform Law excluded the rules of private international law for purposes of its application. Consequently, without the

141. *Report of the United Nations Commission on International Trade Law on the Work of its Tenth Session*, Annex I, para. 559(a), U.N. Doc. A/32/17, reprinted in [1977] 8 Y.B. UNCITRAL 11, 64.

142. *Report of the United Nations Commission on International Trade Law on the Work of its Eleventh Session*, Annex I, para. 197, U.N. Doc. A/33/17, reprinted in [1978] 9 Y.B. UNCITRAL 31, 45.

143. Article D provided:

This Convention shall not prevail over conventions already entered into or which may be entered into, and which contain provisions concerning the matters governed by this Convention, provided that the offeror and offeree or seller and buyer as the case may be have their places of business in States parties to such a convention.

Secretary-General, Draft Articles Concerning Implementation, Declarations, Reservations and Other Final Clauses, Article D, reprinted in *United Nations Conference on Contracts for the International Sale of Goods, Official Records* 66, 68 (1981).

144. U.N. Doc. A/CONF.97/C.2/SR.2, paras. 21-31, reprinted in *United Nations Conference on Contracts for the International Sale of Goods, Official Records* 438, 439-40 (1981).

145. U.N. Doc. A/CONF.97/SR.II, para. 73, reprinted in *United Nations Conference on Contracts for the International Sale of Goods, Official Records* 225, 229 (1981). Article D, later designated as article 90, was adopted by a vote of 38 votes to none, with no abstentions.

146. CISG, *supra* note 15, art. 90.

147. U.N. Doc. A/CONF.97/C.2/SR.2, para. 32, reprinted in *United Nations Conference on Contracts for the International Sale of Goods, Official Records* 438, 440 (1981). For the text of article IV(1), see *supra* note 60.

reservation in article IV, the States Parties to the 1955 Convention on the Conflicts of Laws would have had to denounce it in order to accede to the 1964 Convention. However, the structure of the present Convention was completely different from that of the 1964 Convention in that its article I left the question of conflict of laws open and referred expressly to the application of the rules of private international law. There was thus no contradiction between the present Convention and the 1955 Hague Convention, and it was therefore unnecessary for the former to include a provision on the lines of article IV of the 1964 Convention. The absence of a provision of that kind would not prevent a State Party to the 1955 Hague Convention from acceding to the new instrument.¹⁴⁸

There was no comment on this statement, and the chair indicated that it would be recorded in the minutes.¹⁴⁹

III. Private International Law and the 1980 U.N. Sales Convention

The 1980 Sales Convention retreats significantly from the 'universalist' position taken in the 1964 Conventions. The 1964 Convention explicitly rejected all reference to private international law rules, while the 1980 Convention expressly incorporates such rules to determine the convention's sphere of application and to fill gaps in the text. From a grudging recognition of the international obligations of states that had already become parties to conflicts treaties, the new convention takes a more deferential stance. Thus, notwithstanding the declaration in the unofficial Commentary to the 1978 UNCITRAL draft that a principal objective of the convention is to reduce the need to resort to rules of private international law,¹⁵⁰ the 1980 Convention ultimately adopted an accommodationist posture.

Yet problems remain. As with many untried texts, there will be questions of interpretation, some of them significant. Several of these questions will involve the 1980 Convention's often ambiguous relationship to private international law. The following analysis introduces some of these problems, raises some questions, and suggests some answers.¹⁵¹

148. U.N. Doc. A/CONF.97/C.2/SR.2, para. 33, *reprinted in* United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 438, 440 (1981).

149. U.N. Doc. A/CONF.97/C.2/SR.2, para. 34, *reprinted in* United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 438, 440 (1981).

150. *Secretariat, Commentary on the Draft Convention on Contracts for the International Sale of Goods*, art. 1, para. 4(2), U.N. Doc. A/CONF.97/5 (1979), *reprinted in* United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 14, 15 (1981).

151. For some other analyses, *see* Dore, *Choice of Law Under the International Sales Convention: A U.S. Perspective*, 77 AM. J. INT'L L. 523 (1983); Réczai, *The Area of Operation of the International Sales Conventions*, 29 AM. J. COMP. L. 513 (1981); Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in INTERNATIONAL SALES LAW, *supra* note 14, at § 1.02[4].

A. Private International Law and the Sphere of Application

Article 1 of the 1980 Convention defines the convention's sphere of application and thus replaces articles 1 and 2 of the 1964 Uniform Sales Law. Subparagraph (1)(a) makes the convention applicable when the seller and the buyer have their places of business in different Contracting States; and subparagraph (1)(b) goes on to state that the convention is also applicable "[w]hen the rules of private international law lead to the application of the law of a Contracting State." Subsequent articles provide a gloss on this text. Article 1(2) protects parties from surprise by requiring that both parties be on notice that their businesses are in different countries, while article 10 provides rules of thumb for determining which place of business is the relevant one. Article 95 authorizes states to declare that they will not be bound by article 1(1)(b). Gone, however, are the reservations set out in articles 3, 4, and 5 of the 1964 uniform laws.

1. Article 1(1)(a) and Private International Law Analysis

If Seller has its place of business in France and Buyer has its place of business in New York, will the 1980 Convention govern their contract for the sale of goods? Since both France and the United States are Contracting States, commentators have generally assumed that the answer to this question is easy: the Convention applies by virtue of subparagraph (1)(a).¹⁵² The Convention dictates this result even if a forum's choice-of-law rules would normally apply the law of a non-Contracting State.¹⁵³

Professor Arthur von Mehren, however, has recently suggested that subparagraph (1)(a) could be read as itself an incomplete choice-of-law rule. Professor von Mehren argues that the "[b]asic function of article 1(1) is clearly to determine, *when the sales law of a State Party to the Vienna Convention is in question*, whether the relevant body of rules is found in that State's domestic (or internal) sales law or in the Convention."¹⁵⁴ He offers the following reading:

Article 1(1)(a) can be seen as including a kind of choice-of-law rule, one which makes the Vienna Convention as adopted and interpreted by *either* the buyer's State *or* the seller's State applicable where both States are Parties to the Vienna Convention. (The choice between the buyer's and seller's State is clearly not regulated by the Vienna Convention and would

152. CISG, *supra* note 15, art. 1(1)(a). Subparagraph 1(a) provides: "This Convention applies to contracts for sale of goods between parties whose places of business are in different states: (a) when the states are Contracting States."

153. See, e.g., Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in *INTERNATIONAL SALES*, *supra* note 14, at § 1.02[4][a].

154. von Mehren, *Explanatory Report, Convention on the Law Applicable to Contracts for the International Sale of Goods*, para. 191 (1987) (emphasis added) *reprinted in* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAWS, PROCEEDINGS OF THE EXTRAORDINARY SESSION OF OCTOBER 1985: DIPLOMATIC CONFERENCE ON THE LAW APPLICABLE TO SALES CONTRACTS 709, 755 (1987) [hereinafter *Proceedings of 1985 Diplomatic Conference*].

be made under the forum's relevant conflicts rules.) Thus one reading of Article 1(1)(a) treats the provision not only as a delimitation of the boundary between a State's law respecting non-domestic sales (the Vienna Convention) and its law for internal sales (its domestic sales law) but also an incomplete *provision respecting choice of law*.¹⁵⁵

After suggesting this reading, however, Professor von Mehren concludes that it is "both unnecessary and undesirable."¹⁵⁶

This proposed reading of subparagraph (1)(a) differs from other commentaries by suggesting that, notwithstanding the Convention, one should always go through a two-step analysis: first determine what country's law applies, and then, if the law of a Contracting State applies, determine whether the relevant law is the convention or domestic sales law.¹⁵⁷ Von Mehren's two-step approach would often lead to different outcomes than the traditional interpretation of subparagraph 1(1)(a). For example, if a forum sitting in a Contracting State would normally apply the law of a non-Contracting State, the two-step approach would suggest that it should continue to do so even though the parties both have their places of business in Contracting States. Thus, in the hypothetical set out above, if a New York court hearing a dispute between the French Seller and the New York Buyer would normally apply the law of the United Kingdom (because, *e.g.*, the contract was entered into in London), the court should continue to apply U.K. law rather than the convention.¹⁵⁸

The drafting history suggests that the drafters of the 1980 Convention assumed that subparagraph 1(1)(b) would make unnecessary the two-step analysis suggested by Professor von Mehren. When first introducing the compromise formula of article 1(1), the Working Party of the Commission's Working Group on Sales gave the following illustration of how the proposed text of the first subparagraph¹⁵⁹ would work:

State X and State Y are both parties to the 1964 Hague Convention [amended as proposed by the Working Party] without reservations. S and

155. *Id.* at para. 192 (emphasis added).

156. *Id.* at para. 193.

157. Alternative readings of Professor von Mehren's analysis are less drastic, but also less plausible. One could argue that he suggests subparagraph (1)(a) limits the forum's choice-of-law rules to a choice between either the law of seller's state or buyer's state, all other possibilities being excluded by the subparagraph. This alternate interpretation assumes that one reads and applies the convention *before* considering choice-of-law analysis. It also assumes that subparagraph (1)(a) is satisfied. Subparagraph (1)(b) is therefore irrelevant and the only application of this alternate reading would be for the purposes of filling gaps pursuant to article 7(2). Since Contracting States are more likely to modify their domestic sales law to complement the convention, this alternate reading has the attraction of being more likely to lead to carefully thought out results.

158. These cases will be relatively few. If a transaction has sufficient contacts with the United Kingdom that its law is applicable, one or the other parties may be deemed to have its relevant place of business in London rather than New York or Paris. See CISG, *supra* note 15, art. 10(a).

159. The Working Party's proposed text stated:
The law shall apply

B are parties to the contract; S has its place of business in State X, and B has its place of business in State Y. . . . If litigation is brought before the courts of either X or Y, the courts of both States shall always apply the Uniform Law *without looking into rules of private international law*.¹⁶⁰

Neither the Working Group nor the Commission questioned this example. This drafting history appears to be the basis of Comment 6 of the Commentary on article 1 prepared by the Secretariat for the 1980 conference:

If the two States in which the parties have their places of business are Contracting States this Convention applies *even if the rules of private international law of the forum would normally designate the law of a third country, such as the law of the State in which the contract was concluded*. This result could be defeated only if the litigation took place in a third non contracting State, and the rules of private international law of that State would apply the law of the forum, i.e., its own law, or the law of a fourth non-Contracting State to the contract.¹⁶¹

There is no record of any objection to this unofficial interpretation of subparagraph (1)(a).

This drafting history appears partly to rebut Professor von Mehren's proposed reading. For tribunals sitting in Contracting States, therefore, the purpose of subparagraph (1)(a) is to eliminate the need to go through a conflicts analysis to determine whether the Convention applies. In a sense the subparagraph adopts a *lex fori* conflicts rule, at least as to the question of the convention's sphere of application if not as to gap-filling.¹⁶² Tribunals sitting in non-Contracting States would not be bound by this conflicts rule. For them, subparagraph (1)(a) will determine whether the Convention or domestic sales law is the relevant law when their conflicts rules lead them to the law of a Contracting State. This was the function which Professor von Mehren suggested was the basic purpose of subparagraph 1(1)(a).

1. Where the places of business of the contracting parties are in the territory of States that are parties to the Convention and the law of both these States makes the Uniform Law applicable to the contract

Report of the Working Group on the International Sale of Goods, First Session, Annex III, para. 5, U.N. Doc. A/CN.9/35, reprinted in [1968-1970] 1 Y.B. UNCITRAL 198, 199. The Working Group made non-substantive amendments to this text. *Report of the Working Group on the International Sale of Goods, First Session, para. 19, U.N. Doc. A/CN.9/35, reprinted in [1968-1970] 1 Y.B. UNCITRAL 176, 179.*

160. *Report of the Working Group on the International Sale of Goods, First Session, Annex III, para. 7(a), U.N. Doc. A/CN.9/35, reprinted in [1968-1970] 1 Y.B. UNCITRAL 198, 199 (emphasis added).*

161. *Secretariat, Commentary on the Draft Convention on Contracts for the International Sale of Goods, article 1, para. 6, U.N. Doc. A/CONF.97/5, reprinted in United Nations Conference on Contracts for the International Sale of Goods, Official Records 14, 15 (1981) (emphasis added).* An earlier version of this comment had been circulated in 1976. *Commentary on the Draft Convention on the International Sale of Goods, article 1, para. 6, Annex II, U.N. Doc. A/CN.9/116, reprinted in [1976] 7 Y.B. UNCITRAL 96, 97.*

162. *Cf.* the comment of Professor de Winter regarding the effect of articles 1 and 2 of the 1964 Uniform Law, *supra* note 68.

2. The Operation of Article 1(1)(b)

If a French Seller enters into an international sales contract with an English Buyer, the Convention would not be applicable by virtue of subparagraph (1)(a) because the United Kingdom is not yet a Contracting State. The Convention may, however, be applicable by virtue of subparagraph (1)(b).¹⁶³ If a dispute is brought before a forum sitting in France, for example, the Convention is very likely to be applicable because its rules of private international law would probably lead to the application of the law of Seller's place of business, France, and the Convention is the relevant sales law in France.¹⁶⁴

It is less clear what the result would be if the same dispute was brought before a forum sitting in a non-Contracting State. If that forum's conflicts rules also pointed to France, the forum would have to (1) consider whether to apply the convention because *its* rules of private international law rules pointed to a Contracting State, or (2) make a further inquiry into *France's* rules of private international law. Professor László Réczei suggests that the forum may have to make this further inquiry.¹⁶⁵ M. Pelichet of the Hague Conference on Private International Law, on the other hand, concludes that the drafters did not intend to require tribunals to make this further inquiry.¹⁶⁶ Professor Harold Berman cites this uncertainty as yet another reason for his uneasiness with the 1980 Convention.¹⁶⁷

As I have suggested elsewhere,¹⁶⁸ both the Convention's general

163. CISG, *supra* note 14, art. 1(1)(b). Article 1(1)(b) provides that: "This Convention applies, to contracts of sale of goods between parties whose places of business are in different states: . . . (b) when the rules of private international law lead to the application of the law of a Contracting State."

164. France is a party to the 1955 conflicts convention and that convention would point to Seller's law, *i.e.* France in this hypothetical. Convention on the Law Applicable to International Sale of Goods, art. 3. See *supra* note 12. For another hypothetical raising the spectre of "a conflict of laws imbroglio," see Note, *Contracts for the International Sale of Goods: Applicability of the United Nations Convention*, 69 IOWA L. REV. 209, 222-23 (1983).

165. Réczei, *The Area of Operation of the International Sales Conventions*, 29 AM. J. COMP. L. 513, 518-19 (1981). Professor Réczei writes:

And what will happen when under the conflicts rule of a signatory state the law of some other state will prevail, as in the case of *renvoi*? Yet if the forum of the non-contracting state ignores the *renvoi*, it would not determine the case as would the judge of the foreign forum. On the other hand, if this forum were to take account of the *renvoi* it would infringe its own law.

Id. at 519.

166. M. Pelichet, Report on the Law Applicable to International Sale of Goods, ch. 1, sec. I.C.2 (Prel. Doc. No. 1, Sept. 1982) reprinted in Proceedings of 1985 Diplomatic Conference, *supra* note 154, at 17, 31-37.

167. Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, in A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS, Part III, Folio 3, at 44 (2d ed. 1983) ("the Convention gives no definition of 'the rules of private international law,' nor does it indicate whether the conflicts rules of the buyer's state, the seller's state, or the forum state should apply").

168. Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in INTERNATIONAL SALES, *supra* note 14, at § 1.02[4] at I-28—I-29. On *renvoi*, see E. SCOLES & P. HAY, CONFLICT OF LAWS 67-72 (1982).

reluctance to inquire into the conflicts rules of another jurisdiction and its drafting history suggest that M. Pelichet's conclusion is correct. Determining the Convention's sphere of application should be simple unless compelling public interests make a more complex analysis necessary. Moreover, the determination of a foreign jurisdiction's rules of private international law will be difficult, and since these rules are not yet uniform there is always the possibility that the inquiry will be circular. Nor is it clear that there are important policies of the Contracting State which would be subverted by the simpler reading.¹⁶⁹ On the contrary, by becoming a party to the convention the Contracting State can be said to have expressed a desire to have the convention apply as broadly as possible.

Although the drafting history does not spell out the reasons behind subparagraph (1)(b), original illustrations of how it is to operate support the theory that it was meant to refer to the forum's rules of private international law.

[Illustration 1] State X is a party to the 1964 Hague Convention. State Y is not. Suit is brought in State Y. (i) If the *rules of private international law of State Y* point to the law of X, ULIS will apply. . . . (ii) Assume that the *rules of private international law of State Y* point to the law of Z and Z is a party to the Convention: ULIS will apply. . . .

[Illustration 2] State X is a party to the 1964 Hague Convention. State Y is not. Suit is brought in State Z. (i) Assume the *rules of private international law of State Z* point to the law of X or any other State that is party to the Convention. The result is [that ULIS will apply]. . . .¹⁷⁰

This understanding is also supported by the unofficial commentary to the 1978 UNCITRAL draft.

Even if one or both of the parties to the contract have their places of business in a State which is not a Contracting State, the Convention is applicable if the *rules of private international law of the forum* lead to the application of a Contracting State. In such a situation the question is then which law of sales of that State shall apply. If the parties to the contract are from different States, the appropriate law of sales is this

169. It is possible that a Contracting State might argue that its choice-of-law rules of private international law should be consulted in the interest of developing uniform rules of private international law. Article 7(1) enjoins the reader to interpret the Convention in ways that will promote uniformity of application. Query, however, whether this injunction is to interpret article 1(1)(b) in a uniform manner (*i.e.*, whose rules of private international law should govern) or to develop uniform rules of private international law. Professor Naón rejects the latter possibility. Naón, *The UN Convention on Contracts for the International Sale of Goods*, in *THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS*, *supra* note 9 at 89, 98 n.40 ("The precept of uniform interpretation of the Convention, as defined in art. [7(1)] cannot be extended to national conflict rules to which the Convention has made a '*renvoi*' pursuant to art. 1(1)(b)").

170. *Report of the Working Group on the International Sale of Goods, First Session*, Annex III, para. 8(c)-(d), U.N. Doc. A/CN.9/35, reprinted in [1968-1970] 1 Y.B. UNCITRAL 198, 199 (emphasis added).

Convention.¹⁷¹

As with subparagraph (1)(a), there is no record of this understanding being questioned.

3. Article 1(1)(b) and the Article 95 reservation

Article 95 provides that a Contracting State “may declare . . . that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.”¹⁷² As explained above,¹⁷³ article 95 was added at the last minute to satisfy the interest of Czechoslovakia in retaining some application of its international trade law. Of the present Contracting States, only China and the United States have made a declaration pursuant to article 95.¹⁷⁴

Explaining its recommendation to exclude applicability of article 1(1)(b), the U.S. State Department stressed that rules of private international law are the subject of “uncertainty and international disharmony.”¹⁷⁵ The State Department analysis also pointed out that subparagraph (1)(b) would displace the Uniform Commercial Code more frequently than foreign law. When the rules of private international law point to the law of a non-Contracting State that state’s domestic law would apply rather than the Convention. If the same rules point to the United States, on the other hand, the convention rather than the U.C.C. would be applicable by virtue of subparagraph (1)(b). Given that parties may agree to have the convention apply to their international sales contract, it was thought undesirable to displace the familiar U.C.C. which itself has relatively modern provisions.

It is not clear, however, that states making an article 95 reservation will avoid the complexity of a world of non-uniform rules of private international law—or avoid application of the Convention in cases where both parties are not from Contracting States. Consider, for example, the following illustration:

171. *Secretariat, Commentary on the Draft Convention on Contracts for the International Sale of Goods*, art. 1, para. 7, U.N. Doc. A/CONF.97/5, reprinted in United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 14, 15 (1981). An earlier version of this comment had been circulated in 1976. *Commentary on the Draft Convention on the International Sale of Goods*, art. 1, para. 7, U.N. Doc. A/CN.9/116, annex II, reprinted in [1976] 7 Y.B. UNCITRAL 96, 97.

172. CISG, *supra* note 15, at art. 95. Unlike the other authorized reservations, the declaration is to be made “at the time of the deposit of its instrument of ratification, acceptance, approval or accession” with the U.N. Secretary-General. Query whether this limitation was intended.

173. See *supra* notes 101-02 and accompanying text.

174. Note by the Secretariat, *Status of Conventions* at 4-5, U.N. Doc. A/CN.9/304 (1988).

175. *Legal Analysis of the United Nations Convention on Contracts for the International Sale of Goods (1980)*, Message from the President of the United States, TREATY DOC. No. 9, 98th Cong., 1st Sess. at 21-22 (Appendix B) (1983). The decision of the U.S. Government to make an article 95 declaration was based on an analysis presented to the Secretary of State’s Advisory Committee on Private International Law by Professor John O. Honnold and a subcommittee of the American Bar Association. See *American Bar Association Report to the House of Delegates*, 18 INT’L LAW. 39, 42 (1984) (“avoid the uncertainties which article 1(1)(b) would introduce”).

Assume a United Kingdom company agrees to sell widgets to a New York corporation, that there are no contacts with any other country, and that the parties do not agree on the law governing their contract. The United States is a Contracting State that has declared that it will not be bound by article 1(1)(b) and the United Kingdom is not yet a party to the U.N. sales convention. A dispute subsequently arises between the parties to the sales contract.

If legal proceedings are brought in the United States the U.S. court will not apply the convention. Subparagraph (1)(a) does not apply because the parties do not have their places of business in different Contracting States. The court need not consider subparagraph (1)(b) because of the U.S. declaration pursuant to article 95. Because the transaction is international, the court will apply its own choice-of-law rules to determine what country's law will govern. Assuming that there are no contacts with a third country, the court would presumably choose the domestic sales law of either New York or the U.K.¹⁷⁶

If, on the other hand, the seller or buyer commenced the legal proceedings in the United Kingdom, the U.K. court would not consider whether the Convention governs and would instead move directly to the choice-of-law issue. Again, given that this transaction has no contacts with a third country, the court would presumably choose the domestic sales law of either New York or the United Kingdom.

It is possible, however, that a party may be able to obtain jurisdiction in a third country notwithstanding its lack of contact with the transaction. If this third country has not become a party to the Sales Convention or has become a party with an article 95 declaration, then the court would begin with a choice-of-law analysis. Given the assumption that the transaction has contacts only with New York and the U.K., this analysis should again lead to application of the domestic sales law of either New York or the U.K.

A more difficult question is presented if the forum country has become a party to the Sales Convention without the article 95 declaration. If its rules of private international law point to the United States, the court must then decide if the United States remains a "Contracting

176. New York courts would presumably apply the law of the jurisdiction most closely related to the transaction. See Gruson, *Contractual Choice of Law and Choice of Forum: Unresolved Issues*, in JUDICIAL ENFORCEMENT OF INTERNATIONAL DEBT OBLIGATIONS 1, 1-9 (Sassoon & Bradlow eds. 1987).

The Restatement (Second) of Conflict of Laws provides that the law of the place where delivery takes place is the applicable law for a sales transaction. Section 191 of the Restatement provides:

The validity of a contract for the sale of an interest in a chattel and the rights created thereby are determined, in the absence of an effective choice of law by the parties, 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 under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 191 (1969).

State" within the meaning of article 1(1)(b), *as in force in the forum country*, notwithstanding the U.S. declaration that it will not be bound by this provision. I have argued elsewhere that a literal reading of subparagraph (1)(b) should not be adopted because it would lead to erratic results. This would undermine the Convention's goal of having similar outcomes no matter where the forum.¹⁷⁷ In other words, the court should come to the same result as a U.S. court if it found that New York law applied.¹⁷⁸ In the earlier analysis we concluded that in these circumstances a U.S. court would apply domestic law rather than the Convention.

There is, however, some drafting history that might be cited against this argument. The Czechoslovak amendment introducing article 95 before the plenary session of the 1980 Vienna conference had a paragraph that addresses the issue directly. The paragraph stated:

This Convention does not apply if the rules of private international law lead to the application of the law of a State making a declaration under the preceding paragraph [which ultimately became the text of article 95] unless places of business of the parties to the contract are in different Contracting States.¹⁷⁹

The plenary session did not adopt this paragraph and the inference could be drawn that a declaring State should be considered a Contracting State. The debates, however, suggest that the session rejected the paragraph less on its content than its complexity. It should be recalled that article 95 was, after all, a last-minute amendment.¹⁸⁰ If this analysis is accepted, the court in the third country Contracting State should apply New York domestic law rather than the convention.¹⁸¹

The analysis becomes more complex if contact with a third country is introduced as in the following variation on the above illustration.

Assume that the U.K. company agrees to sell widgets to the New York corporation but they do not agree on the law governing their contract. The U.K. company distributes the widgets from a warehouse in France. The widgets are to be delivered by air from France to New York where the buyer plans to resell them. France is a Contracting State, the United

177. Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in *INTERNATIONAL SALES*, *supra* note 14, at § 1.02. Reference to a policy of similar outcomes suggests an inconsistency with the earlier analysis of whether subparagraph (1)(b) refers to the forum's rules of private international law. *See supra* the text accompanying note 170. The difference would be that there is an explicit public policy statement addressing the specific problem by the state whose law is applicable.

178. Because choice-of-law rules are not uniform, it is conceivable that a U.S. court would determine that some law other than United States law is applicable so that the ultimate result of the analysis may not be the same for the third country court and the U.S. court in the problem discussed in the text.

179. U.N. Doc. A/CONF.97/L.4, Alternative I, *reprinted in* United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 170 (1981).

180. U.N. Doc. A/CONF.97/SR.II, paras. 78-93, *reprinted in* United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 229-30 (1981).

181. For the possible complexities of not accepting this analysis, see *infra* note 187 and accompanying text.

States is a Contracting State that has declared that it will not be bound by article 1(1)(b), and the United Kingdom is not yet a party to the U.N. sales convention.

If the buyer commences legal proceedings in New York, the New York court must first determine the U.K. seller's relevant place of business. If the warehouse in France is considered a place of business, and if it has "the closest relationship to the contract and its performance,"¹⁸² then the convention will apply by virtue of subparagraph (1). If, however, the court determines that the U.K. company's place of business remains in the United Kingdom, subparagraph (1)(a) is not applicable and the court need not consider subparagraph (1)(b) because of the U.S. declaration pursuant to article 95.

Having decided that the convention does not apply by its own terms, the New York court must proceed to apply some law. But which law? Since the transaction has contacts with more than one jurisdiction, the court should not automatically apply New York domestic law. Rather, it should go through a choice-of-law analysis just as it would if the United States had not ratified the convention. If these choice-of-law rules lead to application of New York or U.K. law, the court will not apply the convention.¹⁸³ But if the rules make French law applicable, will the court apply French domestic sales law or the convention? French law makes the convention applicable if subparagraph (1)(b) is satisfied, *i.e.*, if "rules of private international law lead to the application of the law of a Contracting State." If the New York court accepts the earlier analysis of subparagraph (1)(b),¹⁸⁴ and concludes that its choice-of-law rules are the relevant "rules of private international law,"¹⁸⁵ then the court should apply the convention to the dispute. If, on the other hand, the court concludes that French choice-of-law rules are the relevant "rules of private international law," then the court must determine what those French rules are before it can determine whether the convention is applicable.

At this point in the analysis, the New York judge is likely to throw

182. CISG, *supra* note 15, art. 10.

183. In the situation outlined in the text, the court should look to the choice of law rules in the Uniform Commercial Code. U.C.C. § 1-105. Section 1-105(1) states that where the parties do not agree on the applicable law, the Code "applies to transactions bearing an *appropriate relation* to this state" (emphasis added). What is an appropriate relation is a matter of some contention. *See generally* Nordstrom & Ramerman, *The Uniform Commercial Code and the Choice of Law*, 1969 DUKE L.J. 623. In order to ensure that the Code would be given widespread effect, the drafters originally intended that courts in states that had adopted the Uniform Commercial Code should apply it to all transactions subject only to constitutional limitations. With the adoption of the Code in all jurisdictions except Louisiana, the purpose of section 1-105 has become moot—at least for intranational transactions. As a consequence, courts have begun to interpret the appropriate relation as a direction to apply the law of the jurisdiction which is appropriate under its choice of law rules. *See e.g.*, Boudreau v. Baughman, 322 N.C. 331, 368 S.E.2d 849 (1988).

184. *See supra* notes 169-72 and accompanying text.

185. Or if the New York court rules that French choice-of-law rules are presumed to be the same as New York rules unless the parties show otherwise.

up his hands.¹⁸⁶ As a logical exercise, he could defend a decision to apply the convention, the domestic sales law of France, the domestic sales law of the United Kingdom, or New York law. The French conflicts rules may point to the law of France,¹⁸⁷ in which case the convention should be applicable pursuant to article 1(1)(b). If the French rules lead to the law of the United Kingdom the convention should not be applicable. If, however, the French rules lead back to the law of the United States the court must ask whether, from the French perspective, the United States is a Contracting State notwithstanding its article 95 declaration. If so, subparagraph (1)(b) is literally satisfied and the convention may be applied. The court may, however, accept the earlier suggestion¹⁸⁸ that this literal analysis should be rejected and the court would then apply New York domestic law rather than the convention.

Complexity compounds if the forum is in a non-Contracting State, such as the United Kingdom, or a Contracting State, such as France.¹⁸⁹ If a U.K. court, for example, concluded French law applied it would have to determine whether the convention or domestic French law governed. It would have to consider whether the phrase "rules of private international law" in subparagraph (1)(b) referred to its own conflicts rules or the French rules but it would not be bound by the convention's injunction that it should interpret the convention to promote uniformity.¹⁹⁰

4. Article 1(1)(b) and *Dépeçage*

Article 1(1)(b) speaks simply about the rules of private international law leading to the law of a Contracting State. But what if the forum's rules of private international law apply the legal rules of different states to resolve different issues (*dépeçage*)?¹⁹¹ During the debates within UNCITRAL the Australian Government unsuccessfully raised this issue in connection with the debate about contract formation, where the problem is particularly acute.¹⁹² At the 1980 conference, the Federal Republic of Germany referred to the same difficulty in support of its proposal to delete subparagraph (1)(b).¹⁹³ Although the complexity was recog-

186. Query whether the court should reanalyze the question of where the seller's place of business is from the perspective of a French court.

187. France is a party to the 1955 Convention on the Law Applicable to International Sale of Goods. See *supra* note 164. Article 3 of the 1955 Convention speaks of the seller's "habitual residence." On the facts in this hypothetical it is not clear that the warehouse in France will be considered a habitual residence.

188. See *supra* notes 178-79 and accompanying text.

189. For a schematic summary of 54 possible permutations of forum, applicable law, and parties, see Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in *INTERNATIONAL SALES*, *supra* note 14, at App. 1-53.

190. CISG, *supra* note 15, art. 7(1).

191. On the phenomenon of *dépeçage*, see Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 *COLUM. L. REV.* 58 (1973).

192. See *supra* note 89 and accompanying text.

193. U.N. Doc. A/CONF.97/C.1/SR.1, para. 11, reprinted in United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 236, 237 (1981).

nized, the problem was never resolved during these deliberations.

The problem of *dépeçage* can be illustrated by an extreme hypothetical.

An English Seller agrees to sell goods to a Swedish Buyer. The parties do not agree on the applicable law. Seller is to ship the goods from England through France, where they will be inspected. The United Kingdom is not a Contracting State; Sweden is a Contracting State but has declared that it will not be bound by Part II on contract formation as it is authorized to do pursuant to article 92.¹⁹⁴ Disputes about whether an enforceable contract had been entered into and the inspection procedure are brought before a court in France.

French rules of private international law make French law applicable to the issue of the manner of inspection.¹⁹⁵ Reading subparagraph (1)(b) literally, a French court could apply the 1980 Convention to the contract formation issue as well as to the inspection issue. The result would appear to be absurd and contrary to the expectation of either of the contracting parties. An appropriate resolution would be to apply the inspection provision of the 1980 Convention¹⁹⁶ to the inspection issue and the national law selected in accordance with French rules of private international law to the formation issue. Surely common sense will prevail in these cases but given the variety of possible scenarios it is hard to generalize about appropriate solutions.

5. *Forum Shopping*

For the foreseeable future, international traders will be living in a world in which many states are not parties to the 1980 Convention or the conflicts conventions of 1955 or 1985. Some commentators have expressed fear that, given some of the complex questions of interpretation canvassed above, the convention may actually encourage forum shopping.¹⁹⁷ Adding the convention to the existing choice between many

194. *Note by the Secretariat, Status of Conventions*, U.N. Doc. A/CN.9/304, at 4 (1988).

195. France is a party to the 1955 Convention on the Law Applicable to International Sale of Goods. *See supra* note 164. Article 43 of the 1955 Convention makes the law of the place of inspection the applicable law for issues related to the inspection.

196. CISG, *supra* note 15, art. 39.

197. Dore, *Choice of Law Under the International Sales Convention: A U.S. Perspective*, 77 AM. J. INT'L L. 521 (1983); Naön, *The UN Convention on Contracts for the International Sale of Goods*, in THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS, *supra* note 9, at 89, 98; Comment, *Contract Formation Under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code*, 3 DICK. J. INT'L L. 107, 114-15 (1984) (giving illustration with irrevocable offer).

Some scholars reject the proposition that the convention will encourage forum shopping. *See* Schlechtriem, *From The Hague to Vienna—Progress in Unification of the Law of International Sales Contracts*, in THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS, *supra* note 9, at 125, 128. Professor Schlechtriem points out that [forum shopping] is caused primarily by divergencies of conflict of law rules, and it exists regardless of the UN Uniform Sales Law and its article 1(1)(b). The only difference caused by this provision is that the forum shopper instead of shopping among several domestic laws, can now choose between a

national laws increases existing incentives to choose a particular forum because it will apply an advantageous law. Incentives to shop for a forum exist today, however, and it is difficult to believe that the addition of the convention will significantly alter the transaction costs of bringing litigation. In the absence of any empirical data, one's evaluation of the dangers of forum shopping probably reflects one's predisposition to the convention itself. Those traders concerned about the problem may, of course, insist upon choice-of-law or choice-of-forum clauses in their contracts. Most jurisdictions now enforce such clauses with few limitations. Moreover, the 1980 Convention itself permits parties to exclude its application at any time.¹⁹⁸

B. Private International Law and Gap-filling

Article 7(2) of the 1980 Convention provides that "[q]uestions concerning matters governed by this Convention which are not expressly settled by 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."¹⁹⁹

Reference to private international law rules is the least problematic aspect of this provision. The true danger lies in courts unnecessarily resorting to these rules. The provision itself requires that before the rules are consulted, the reader must first find that there is a gap in the text, and then find that the Convention does not provide an answer through its underlying principles. A reader trained in the civil law will feel more comfortable with this approach than a common lawyer.²⁰⁰ A literal reading of the text will find many matters not *expressly* stated. Article 38, for example, does not expressly state who must bear the cost of the buyer's examination of goods.²⁰¹ It does not take much imagination, however, to conclude that if the buyer "must examine" he must pay for the examination.²⁰² A similar generous reading will be necessary to identify the Convention's underlying general principles and to use them to fill gaps.²⁰³ A persuasive case can be made, for example,

domestic sales law and a Uniform Sales Law. At least article 1(1)(b) should not tip the scale against the UN Sales Law, since it can be avoided by using the reservation clause in article 95.

198. CISG, *supra* note 15, art. 6.

199. CISG, *supra* note 15, art. 7(2).

200. See, e.g., Feltham, *The United Nations Convention on Contracts for the International Sale of Goods*, 1981 J. Bus. L. 346, 349 ("It certainly seems the case that the 'general principles' on which the Convention is based will not always be apparent or provide a clear solution where there are gaps in the Convention.")

201. CISG, *supra* note 15, art. 38.

202. CISG, *supra* note 15, art. 38(1). Similarly, if the goods turn out to be nonconforming, the buyer should be able to recover his reasonable expenses as a loss caused by the breach under article 74 notwithstanding article 38's silence on this point.

203. Professor Honnold suggests that these principles might include the duty to compensate a party who relies on the representations of the other party, the duty to communicate needed information, and the duty to mitigate losses. J. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* § 99 (1982).

that an obligation to act reasonably and in good faith is mandated by article 7(2).²⁰⁴ Thus, although article 38 is silent about the place and manner in which the buyer is to carry out his examination of the goods, it would not be difficult to supply the rule that the examination must be conducted in a reasonable place and manner given the particular circumstances of the transaction.

If the reader is generous in his approach to the convention text there should be little need to consult conflicts rules and then prove the applicable law—especially as the reader is also under the injunction in article 7(1) to promote uniformity in interpretation.

The final clause of article 7(2) presents several intriguing possibilities in an otherwise straight-forward text. Article 7(2) states that questions are to be settled “in conformity with” the applicable law. One need not, in other words, actually apply the law made applicable. One could, for example, read this language to require only that an answer—from wherever taken—may not contradict the applicable law. Moreover, the applicable law need not necessarily be national law. The final clause of article 7(2) refers merely to “the law applicable.” It has been suggested in another connection that in some jurisdictions, rules of private international law may refer to international uniform laws, such as uniform transportation laws, to fill gaps.²⁰⁵ It is also conceivable that particular jurisdictions may construe the rules of private international law to apply the rules of the *lex mercatoria* much discussed in Europe.²⁰⁶

C. Uniform International Rules and Private International Law Conventions

Article 90 of the 1980 Convention states that it “does not prevail over” any international agreement “which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.”²⁰⁷ Does this mean that the convention yields to the 1955 and 1985 Hague Conventions on the Law Applicable to International Sales of Goods?²⁰⁸

204. CISG, *supra* note 15, art. 7(2). Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, 8 Nw. J. INT'L L. & Bus. 574, 613 (1988); Winship, *Commentary on Professor Kastely's "Rhetorical Analysis"*, 8 Nw. J. INT'L L. & Bus. 621, 631-33 (1988).

205. COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* note 15, § 3.2 (Jayme).

206. Cremades & Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions*, 2 B.U. INT'L L.J. 317 (1984).

207. CISG, *supra* note 15, art. 90.

208. Convention on the Law Applicable to International Sales of Goods, 510 U.N.T.S. 149 (1964); Convention on the Law Applicable to Contracts for the International Sale of Goods, *reprinted in* Proceedings of the Extraordinary Session of October 1985—Diplomatic Conference on the Law Applicable to Sales Contracts 2 (1987) and 24 I.L.M. 1573 (1985). See *supra* notes 12 & 16. By contrast, the 1980 Convention does set out expressly what steps states that have adopted the 1964 uniform sales laws must take to become a party to the later convention. CISG, *supra* note 15, art. 99(3)(6).

At the 1980 Vienna Conference the delegates were aware of the 1955 Convention, but there was no debate about the relation between the two texts. After adoption of article 90, as has been noted,²⁰⁹ the Observer from the Hague Conference on Private International Law stated that he saw no need for parties to the 1955 Convention to denounce that convention if they chose to adopt the later convention. There was no contradiction between the two conventions, he observed, because the Vienna Convention “left the question of conflict of laws open and referred expressly to the application of the rules of private international law.”²¹⁰

Commentators, however, suggest complications. I have argued elsewhere that there may be cases where the 1955 and 1980 conventions lead to conflicting results.²¹¹ A tribunal sitting in a state that is a party to both conventions may be directed by the 1955 Convention to apply the law of a state that is not a party to either. The 1980 Convention may direct the same tribunal to apply its own provisions because the parties both have their places of business in Contracting States. This situation might result from different rules on determining the relevant place of business or from special conflicts rules for particular issues. Other commentators, including M. Pelichet of the Hague Conference, have also noted this potential conflict.²¹²

With the 1985 revision of the 1955 text, this specific issue becomes less pressing than determining how the 1985 revision relates to the 1980 Convention. Well aware of the 1980 Convention,²¹³ delegates at the 1985 Hague Conference approached this issue self-consciously. The conference adopted article 23, which specifically provides that “[t]his Convention does not prejudice the application—a) of the *United Nations Convention on Contracts for the International Sale of Goods* (Vienna, 11 April

209. See *supra* notes 147-48 and accompanying text.

210. U.N. Doc. A/CONF.97/C.2/SR.2, para. 33, reprinted in United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 440 (1981). Query whether the statement—made after article 90 was adopted—was made on the assumption that article 90 covered the 1955 Convention or on the assumption that it didn't and consequently a statement had to be read into the record.

211. Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in *INTERNATIONAL SALES*, *supra* note 14, § 1.03[3].

212. M. Pelichet, *Report on the Law Applicable to International Sale of Goods*, ch. 1, sec. I.C.I (Prel. Doc. No. 1, Sept. 1982) reprinted in Proceedings of 1985 Diplomatic Conference, *supra* note 154, at 17, 31-37. (Article 1(1)(a) “could lead to a conflict of conventions whenever a convention of conflict of laws designates a State other than the State of habitual residence of one of the parties to the sales contract”); Fadlallah, *Projet de convention sur la vente de marchandises*, 106 *JOURNAL DU DROIT INTERNATIONAL* 755, 759 n. 25 (1979) (similar illustration).

213. Writing as Reporter for the 1985 Conference, Professor Arthur Taylor von Mehren notes the great influence of the 1980 Convention. A. von Mehren, *Explanatory Report, Convention on the Law Applicable to Contracts for the International Sale of Goods*, para. 11-12 (1987), reprinted in Proceedings of the 1985 Diplomatic Conference, *supra* note 154, at 709, 715. Professor von Mehren appears skeptical about the need for parallelism in the language of the two conventions given the different functions they serve.

1980).”²¹⁴ Since article 90 of the earlier convention makes a similar disclaimer one has a standoff.

In his Explanatory Report to the 1985 convention, Professor von Mehren attempts to reconcile the two conventions. He construes the function of article 1 of the 1980 Convention as determining when the convention, rather than domestic sales law, should govern.²¹⁵ This reading gives effect to the 1985 Convention, which by its terms “determines the law applicable to contracts of sale of goods—a) between parties having their places of business in different States; b) in all other cases involving a choice between the laws of different States. . . .”²¹⁶ Following this reading, a tribunal first determines what country’s law applies and only then considers whether that country’s law is the domestic sales law or the convention. The latter step is then resolved by consulting article 1 of the 1980 Convention.

It was suggested earlier that the drafters of the 1980 Convention probably did not address this analysis.²¹⁷ One might come to a different reconciliation by suggesting that when article 23 of the 1985 Convention states that it does not prejudice “application of” the 1980 Convention, it expressly continues to give effect to article 1(1)(a). When properly read, subparagraph (1)(a) determines the convention’s sphere of application not only vis-a-vis national law but also by excluding reference to rules of private international law. Even if this reading is accepted, however, there remains the deference to other conventions in article 90 of the 1980 Convention. It is possible to argue that the later convention does not contain provisions on “matters governed by” the 1980 Convention. The latter convention does not include (“govern”) conflicts rules. One should not, on this reading, consider article 1(1)(a) as a conflicts rule even though it resolves choice-of-law questions by making the law of the forum the applicable law.

IV. Conclusion

Non-uniformity of substantive legal rules imposes transaction costs on businesses engaged in international trade. A business that wishes to know if it has entered into an enforceable contract with a foreign trading partner, for example, must first go through a choice-of-law analysis to determine which country’s laws govern contract formation. The business must then construe the applicable substantive legal rules, which well may be the rules of a foreign legal system. Both steps in this analy-

214. Convention on the Law Applicable to Contracts for the International Sale of Goods, 1985, art. 23.

215. A. von Mehren, *Explanatory Report, Convention on the Law Applicable to Contracts for the International Sale of Goods*, paras. 191-93 (1987), reprinted in *Proceedings of 1985 Diplomatic Conference*, *supra* note 154, at 709, 755-57.

216. Convention on the Law Applicable to Contracts for the International Sale of Goods, 1985, art. 1.

217. See Section III.A.3, *supra*.

sis are difficult and may involve greater risk of error than is present in a purely domestic transaction.

To reduce these transaction costs one could unify either the choice-of-law rules or the substantive legal rules themselves. These two techniques are not incompatible. If used together, however, the two techniques raise at least three issues: (1) whether the choice-of-law rules have any role in determining when the uniform substantive rules are applicable; (2) whether choice-of-law rules should be used to determine what national rules should be used to fill gaps in the uniform substantive rules; and (3) which rules prevail when application of choice-of-law rules and uniform substantive rules lead to different results.

International treaties dealing with sales contracts illustrate how these two legal techniques might relate to each other in practice. There has been a parallel evolution of international conventions unifying choice-of-law rules and substantive sales rules. Both a 1955 Convention on the law applicable to international sales contracts and two 1964 conventions setting out uniform sales laws are presently in force, although each has since been revised. The 1964 uniform laws attempt to restrict the role of private international law. No choice-of-law analysis, for example, is necessary to determine whether the laws are applicable. By contrast, the 1980 U.N. Sales Convention is far more accommodating to private international law. As a general rule, for example, a Contracting State will apply the 1980 Convention not only if the convention governs by its own terms but also if a choice-of-law analysis makes the law of a Contracting State applicable. The more recent 1985 revision of the 1955 Convention is also more self-conscious about its relation to the 1980 Sales Convention.

Analysis of the 1980 and 1985 conventions suggests that they have not completely worked out how the two legal techniques they embody should relate to each other. Some of the problems can be attributed to the difficulty of drafting any text in large groups and in many languages. Perhaps a more significant reason for continuing dissonance, however, is that the drafters and sponsoring organizations of these conventions come to their task with significantly different conceptual frameworks.