Monday, October 1, 2012
2:30 PM - 4:00 PM

602 – Drafting Considerations for International Contracts: Using Choice of Law and Other Contract Terms to Maximize Profit and Minimize Risk

Sara Biro
Senior European Counsel
Fitch Ratings

Patrick De Ridder
Partner
McGuireWoods LLP

Franco Ferrari
Director, Center for Transnational Litigation and Commercial Law
New York University

Mike Kolloway
Corporate Vice President & Assistant General Counsel
AECOM Technology Corporation

Faculty Biographies

Sara Biro

Sara A. Biro is senior European counsel at Fitch Ratings and is based in Fitch's London office. In this role, Ms. Biro provides legal/commercial advice and guidance in connection with the ratings and non-ratings business activities of the Fitch group of companies in Europe, Latin America, Africa, the Middle East and the Far East. The business lines she supports include structured finance, corporates, global infrastructure, leveraged finance and sovereigns/international public finance.

Prior to joining Fitch, Ms. Biro was senior counsel in Bechtel Corporation's civil global business unit. In this role, Ms. Biro led all aspects of the company's legal work on major rail, road, infrastructure, aviation, and telecommunications bids and projects in Europe, Turkey, the Middle East, Russia, Central Asia and North Africa.

Prior to joining Bechtel, Ms. Biro was a senior associate with Freshfields in its project finance practice in London and a senior associate with Mayer, Brown & Platt (now Mayer Brown) in its corporate, finance, and international practices in Chicago and London.

She is chair of the ACC's International Legal Affairs Committee and is a member of ACC's Corporate and Securities Law Committee and Financial Services Committee.

Ms. Biro received a BA, summa cum laude, from Georgetown University and a JD from The University of Chicago Law School.

Patrick De Ridder

Patrick A. De Ridder is a partner in the Richmond, VA, office of McGuireWoods LLP. He currently serves as co-chair of the corporate department. His practice focuses on international business transactions, including mergers and acquisitions, joint ventures, corporate restructurings and reorganizations, business law and supply chain matters. Fluent in several languages, he advises U.S. and European companies on general corporate and business law matters. Recent transactions have involved businesses headquartered throughout the United States, Europe, Asia and South America that have involved diverse industries.

Mr. De Ridder is a key member of the firm's international supply chain management practice, covering the full supply chain product life cycle: process planning, the development of boilerplate and other contract terms, negotiation with counterparties, assisting with closing procedures and post-execution follow-up relationship management. In addition, as a member of the life sciences industry group, he helps pharmaceutical and medical device companies develop business strategies for joint ventures and other development programs.

Born in Belgium, Mr. De Ridder previously was affiliated with the firm of DeBandt, Van Hecke & Lagae in Brussels, Belgium, and served as legal counsel to the Secretary of State of the Brussels region (Belgium). He received a JD, magna cum laude, from the University of Leuven School of Law in Belgium, and he received an LLM from the University of Virginia School of Law in Charlottesville, VA.

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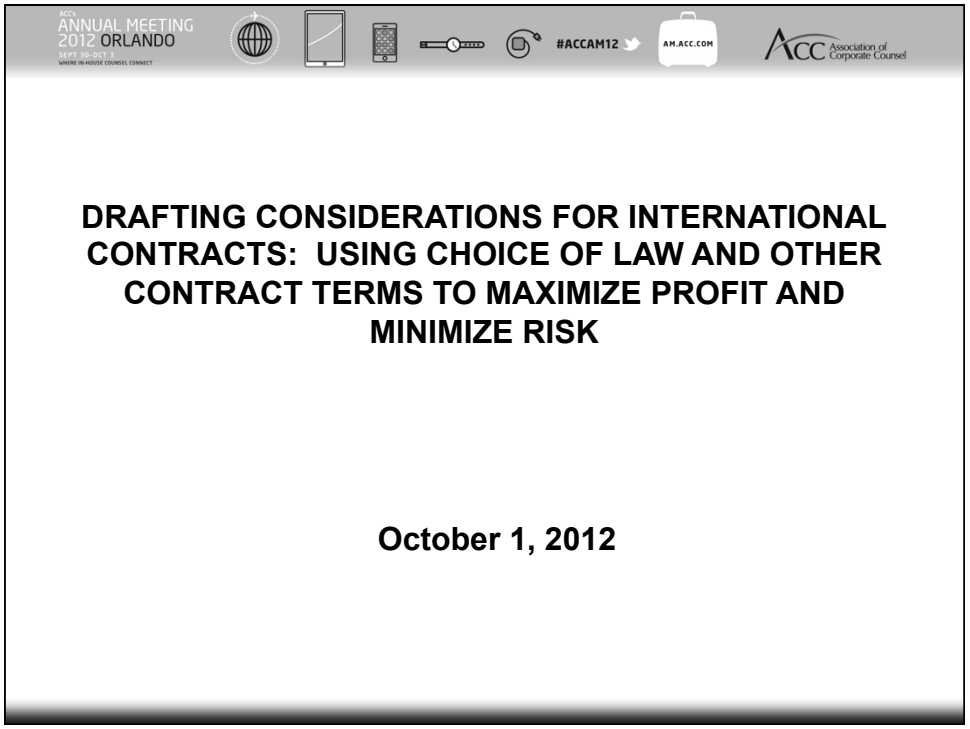
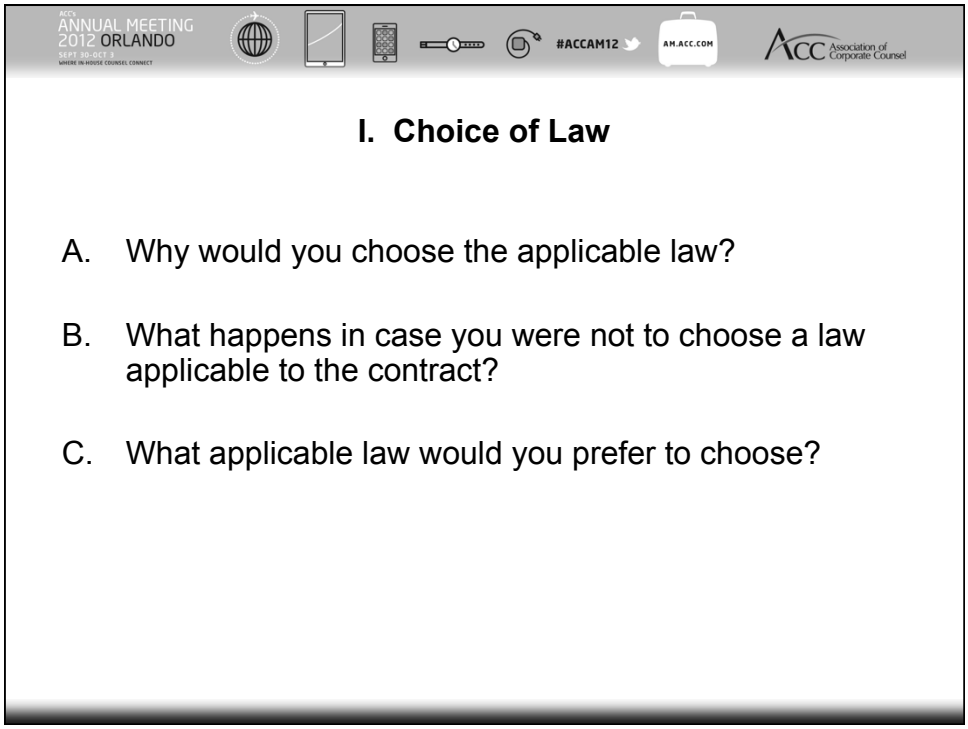
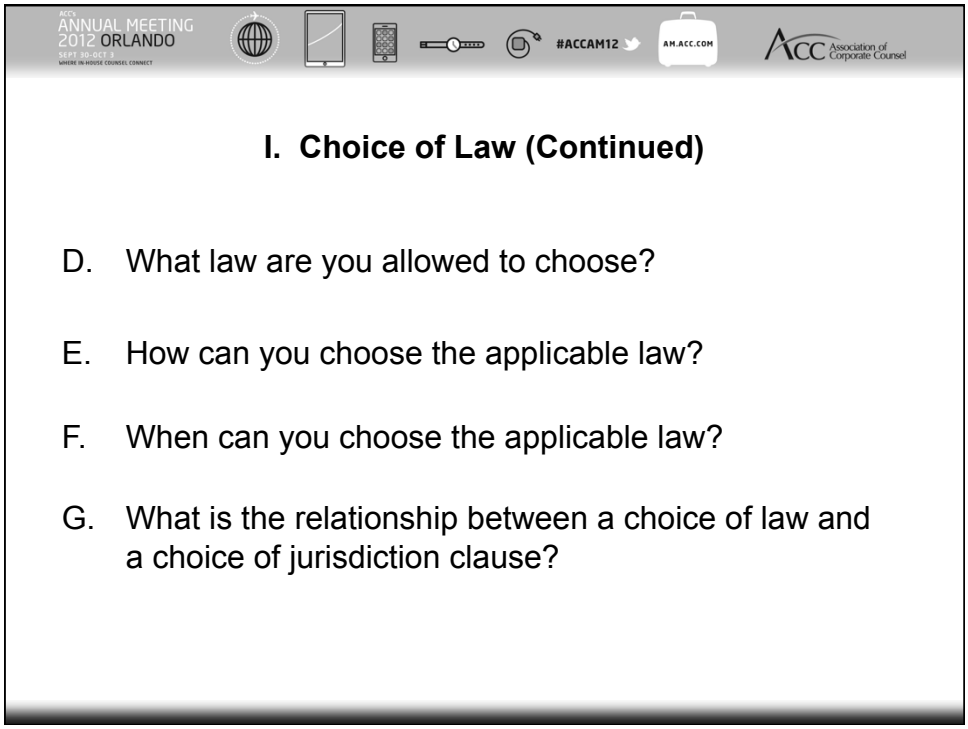
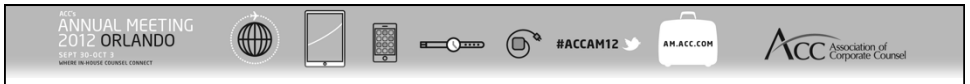






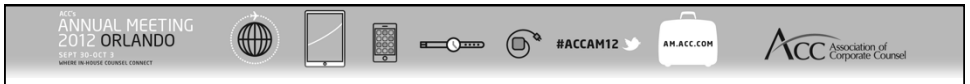


I. Choice of Law (Continued)

Fact Pattern

Company S, incorporated under the laws of the State of New York, is in the business of producing and selling machines used for drying timber; as it dominates the US market, it has decided to start selling its products abroad.

After weeks of bargaining with a German company, it agrees to sell 6 machines to the German company, to be delivered by a given date; payment of the purchase price has to occur within 120 days from the date of delivery.

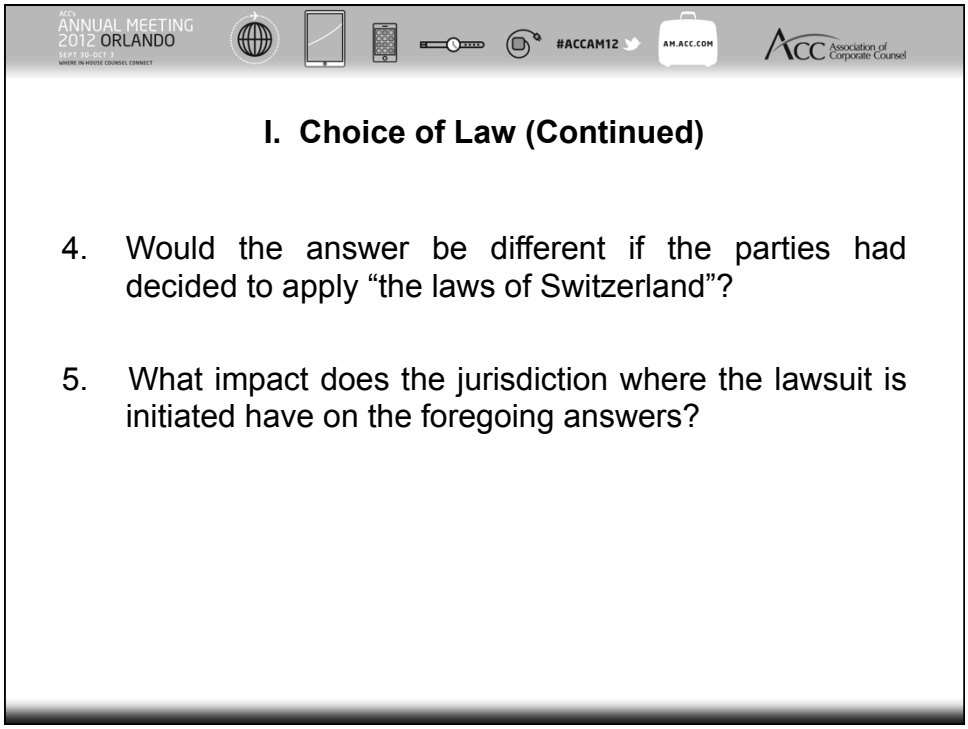


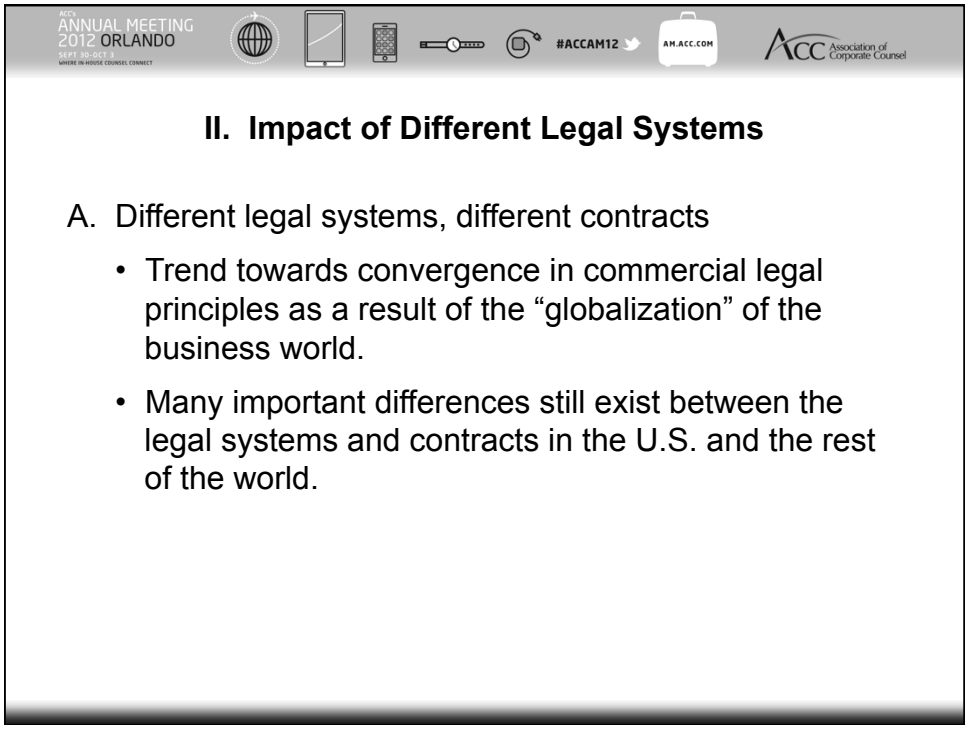
I. Choice of Law (Continued)

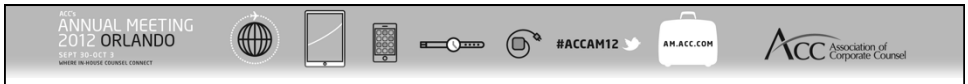
1. What rules on damages, warranties, specific performance, transfer of risk, etc., would apply if the parties had decided to make applicable “US law” to their relationship?

2. Would the answer be different if the parties had decided to apply “the laws of the State of New York”?

3. Would the answer be different if the parties had decided to apply the “UCC”?



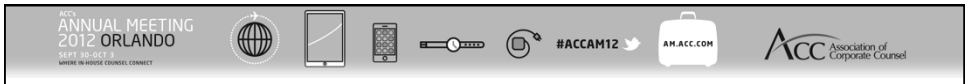




II. Impact of Different Legal Systems (Continued)

B. Other Legal Systems

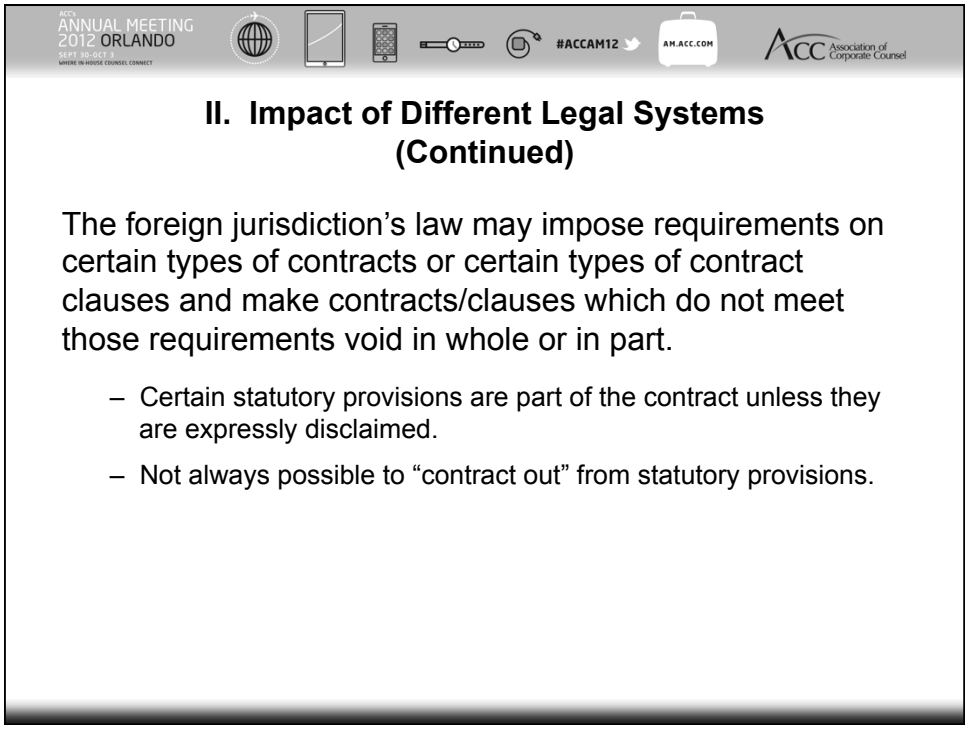
- Predominant form of legal system – Civil Law.
- Other types of legal systems.
- Characteristics of Civil Law Legal Systems:
  - Civil codes are the authoritative source of law.
  - Judges apply the legislative text of the codes.
  - Involvement of academic commentators in development of law.

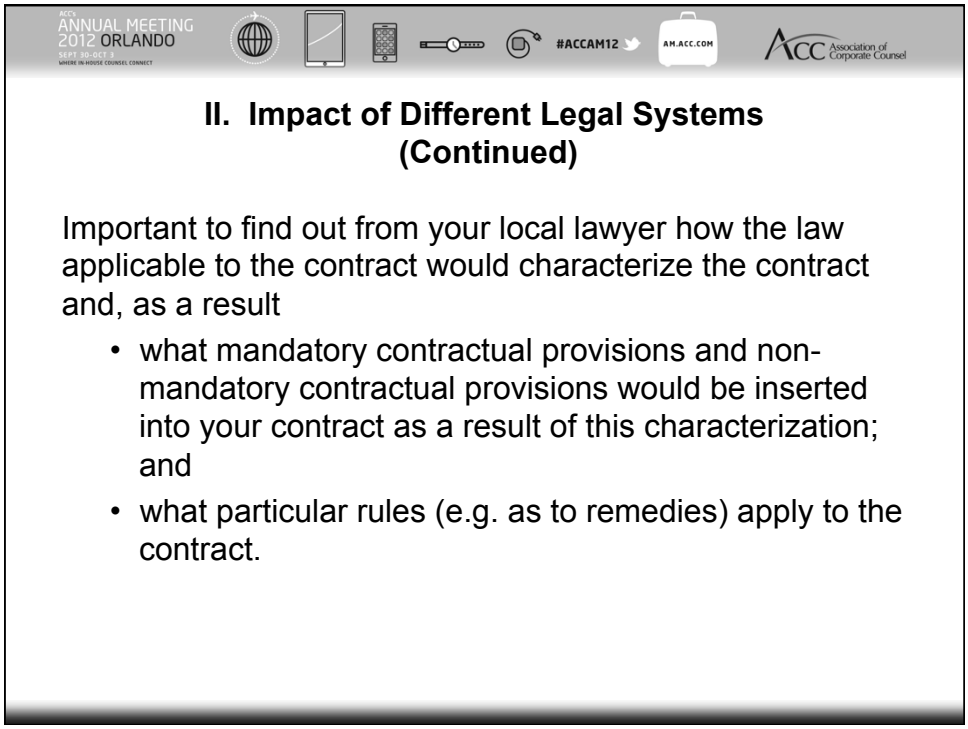


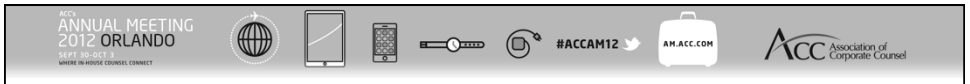
II. Impact of Different Legal Systems (Continued)

C. Applicable Law

- General codes with some rules applicable to all contracts and special codes with particular rules depending on the type of contract.
  - General duty of good faith in contract negotiations may impose disclosure obligations and may restrict a party's freedom to withdraw from negotiations.
  - Special rules, depending on the type of contract, may affect the formation of the contract, the obligations inserted in the contract as a matter of law and the remedies for non-performance.



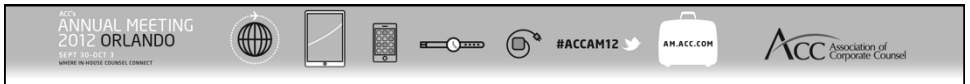




II. Impact of Different Legal Systems (Continued)

D. Effect of Foreign Governing Law on Contract Clauses

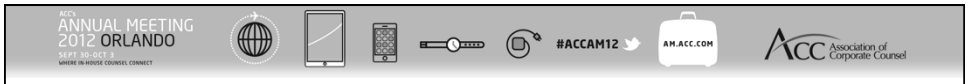
- Pre-contractual obligations – "agreements to agree"
- Unfair/unequal contract terms
  - Consideration/Price – limitations on "freedom of contract"
  - Penalty clauses
- Third party rights



II. Impact of Different Legal Systems (Continued)

E. Other Considerations

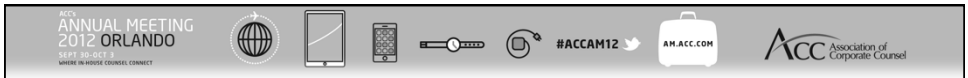
- Special Types of Contract Parties
  - Consumers
  - Government Bodies
- Contract styles
  - In Civil Law countries and countries whose laws are based on Civil Codes, contracts are often shorter than in the U.S.
  - Approaches to construction/interpretation of contracts.



II. Impact of Different Legal Systems (Continued)

F. Language issues

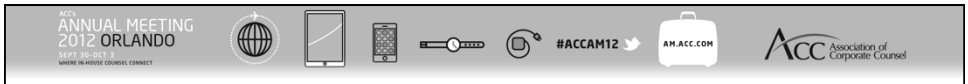
- Terms understood in a particular way in the U.S. may have a different meaning in the other jurisdiction.
  - "Consequential"/Indirect Damages
  - Issues/risks if include foreign legal terms in the contract.
- Importance of Accurate Translation



III. Enforceability of Contractual Terms and Conditions

A. Key Terms and Conditions

1. Limitation of Liability
2. Standard of Care
3. Enforceability of Waivers and Exclusions
4. Third Party Reliance and related issues

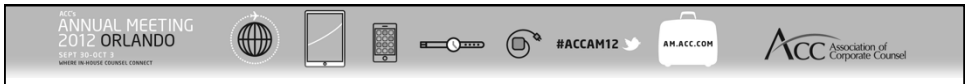


III. Enforceability of Contractual Terms and Conditions (Continued)

B. Statutory and Civil Laws Affecting Enforceability of Contracts

1. Hardship provisions under Islamic law and various Civil Codes

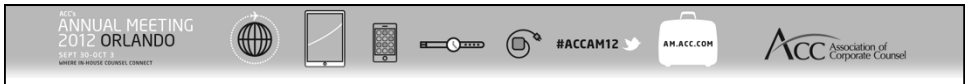
2. Trade Practices Act in Australia (concept of statutory negligence)



III. Enforceability of Contractual Terms and Conditions (Continued)

3. Enforceability of Alliance Agreements

4. Decennial Liability (Strict Liability)



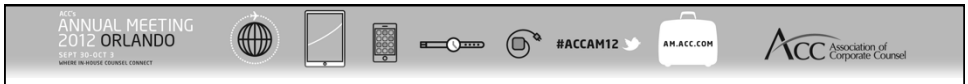
III. Enforceability of Contractual Terms and Conditions (Continued)

C. Insurance

1. Local Cover required in many countries

2. In certain countries, it is not common for companies to have large insurance programs

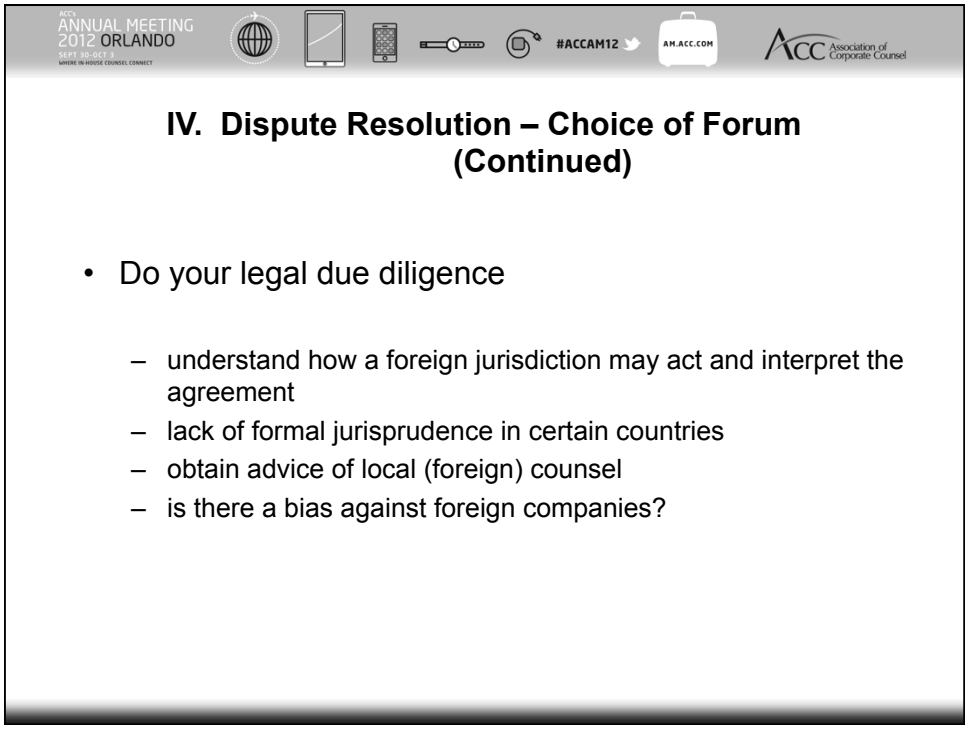
3. How to develop teams and programs for large international projects with project specific insurance programs

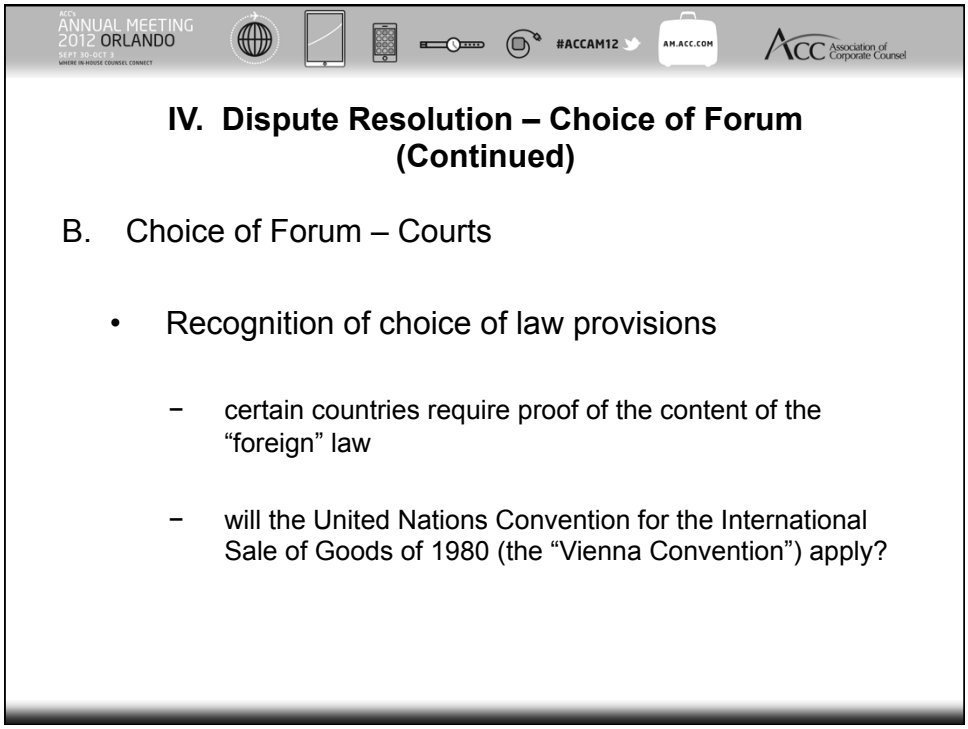


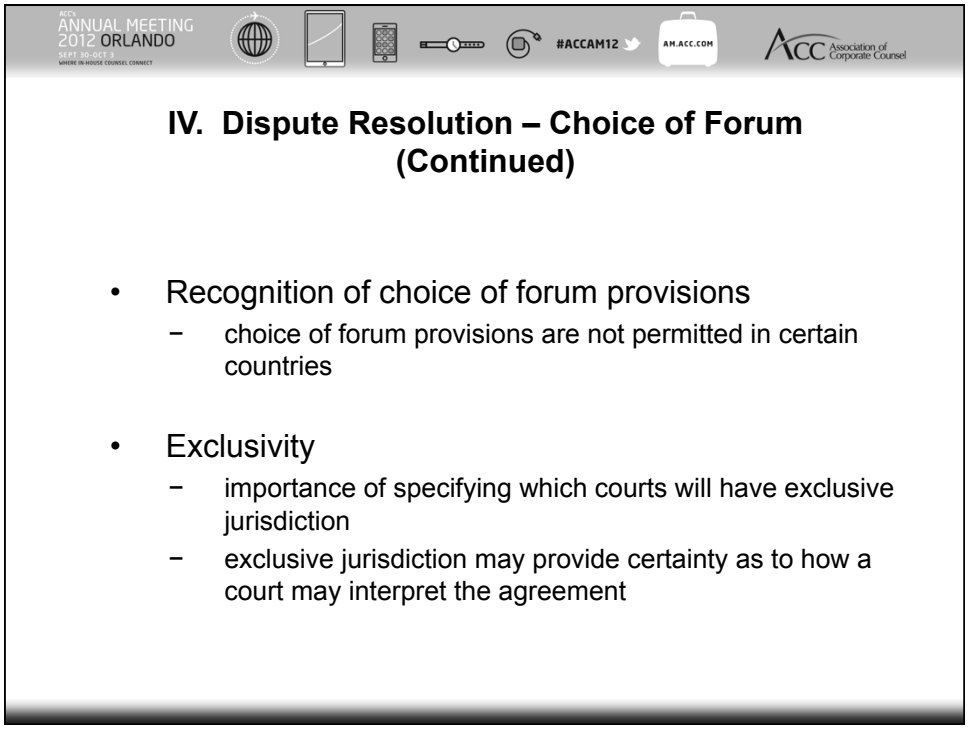
IV. Dispute Resolution – Choice of Forum

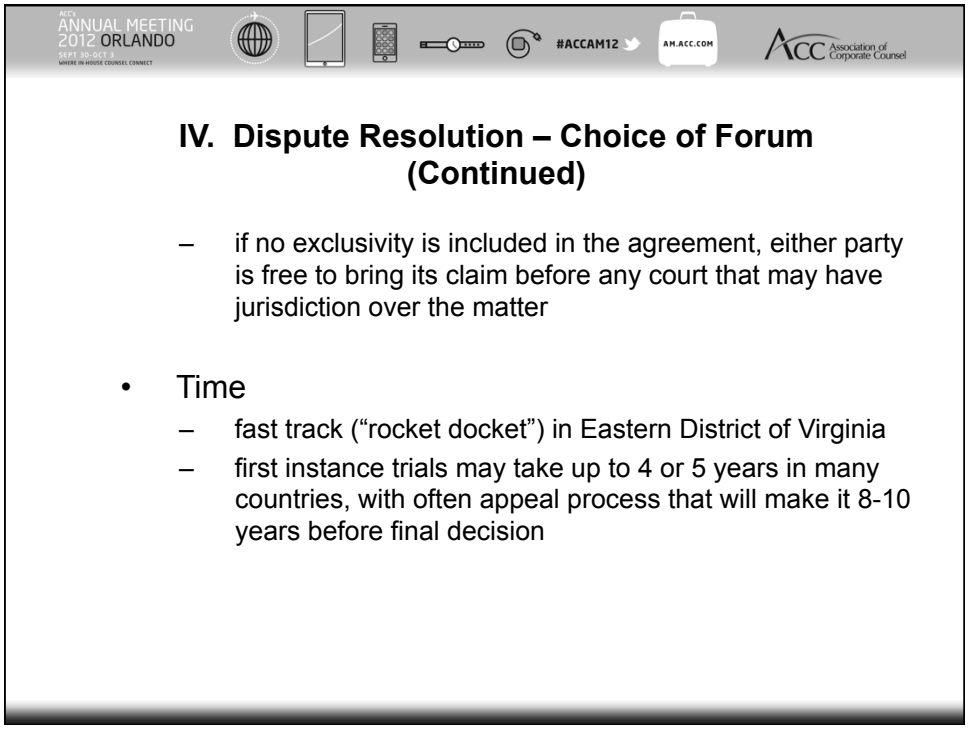
A. Introduction

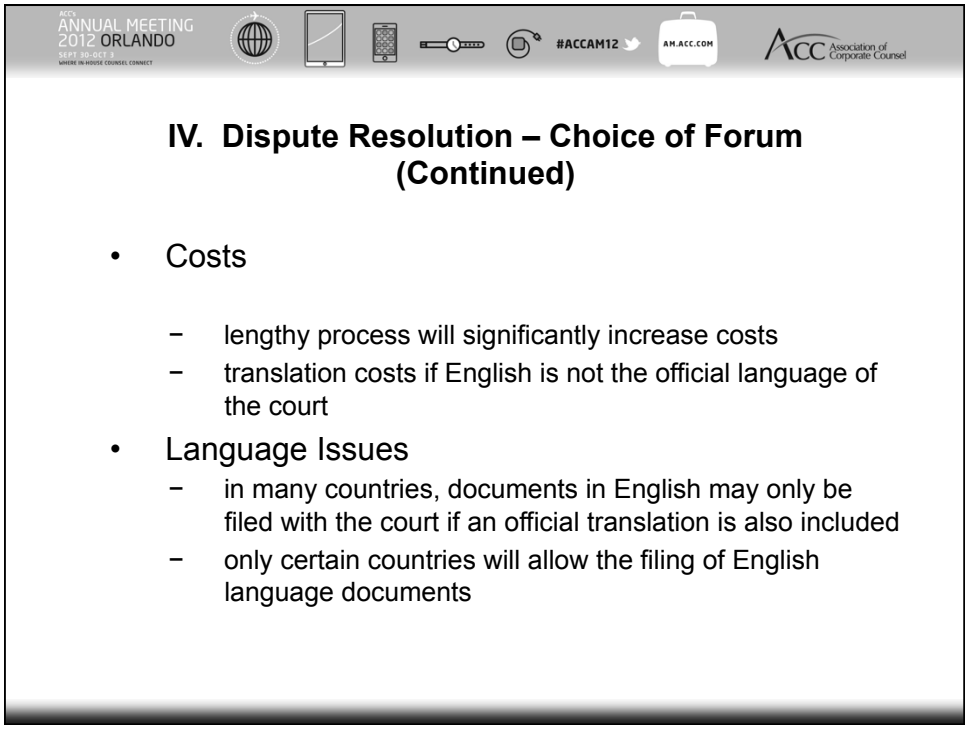
- Choice of forum clause is not a boilerplate provision
  - it is critical in satisfying the Company's enforcement of its rights if a foreign party breaches the agreement
  - Interaction with the choice of law provisions

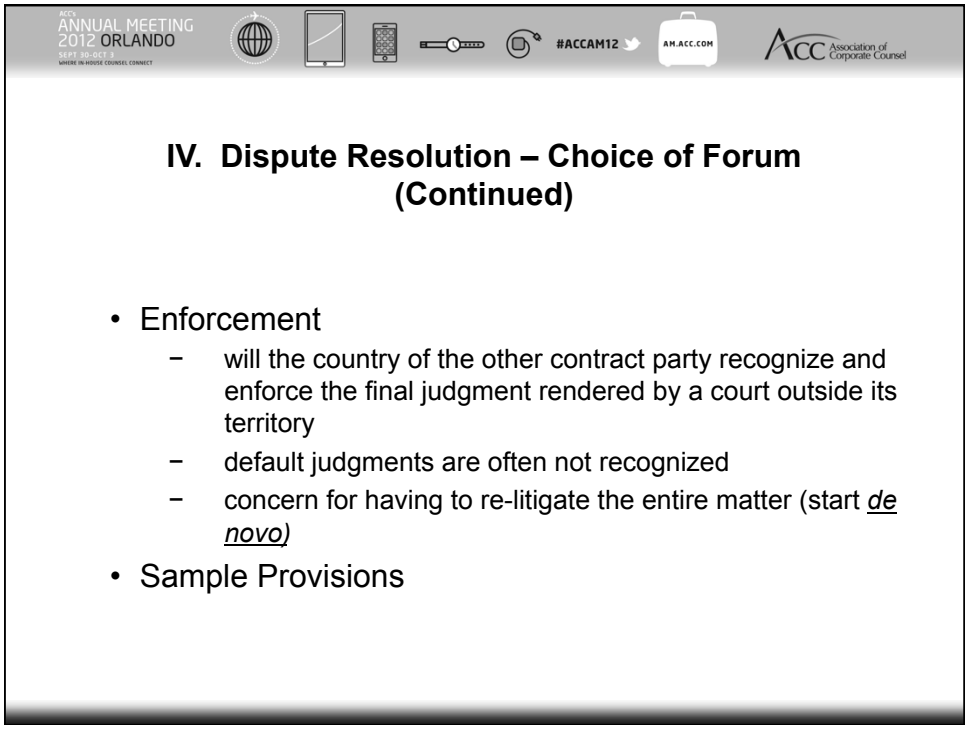


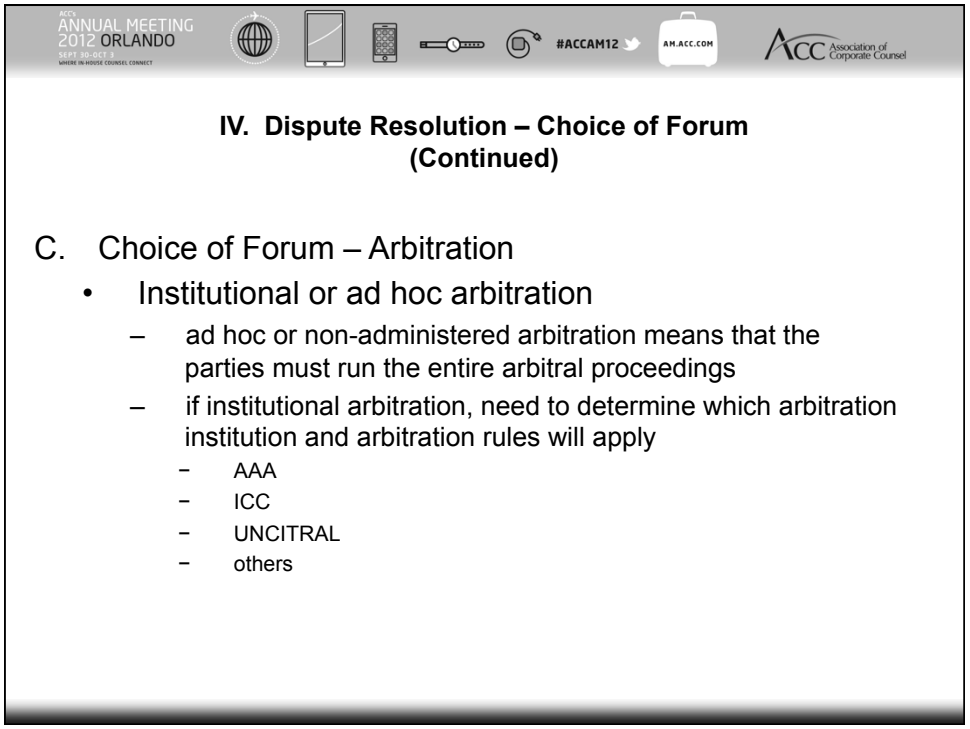


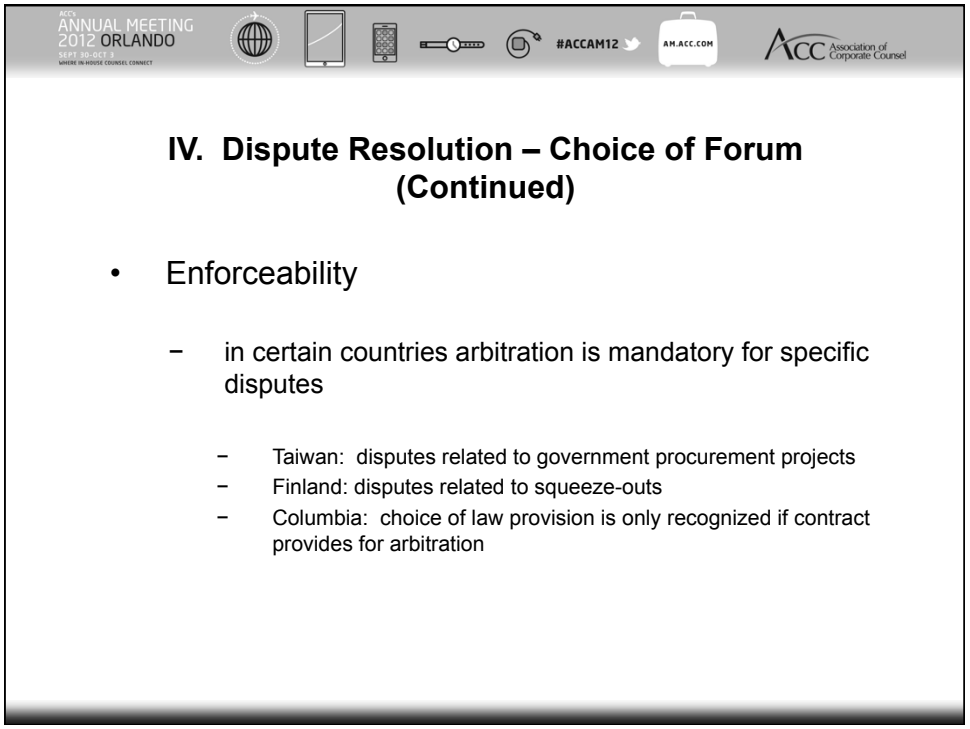


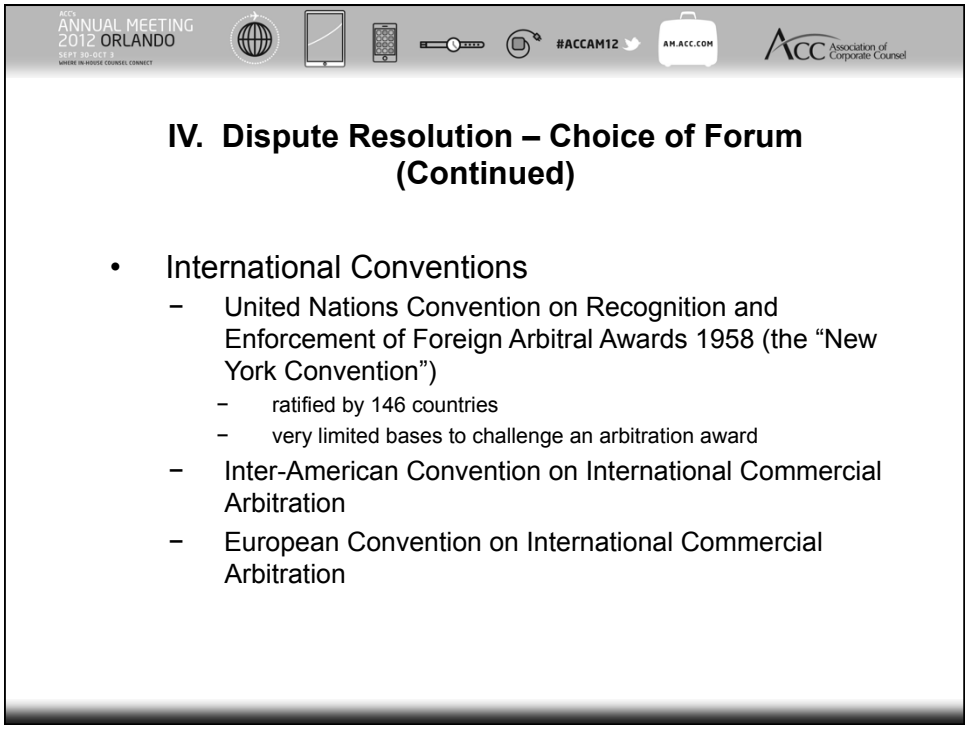


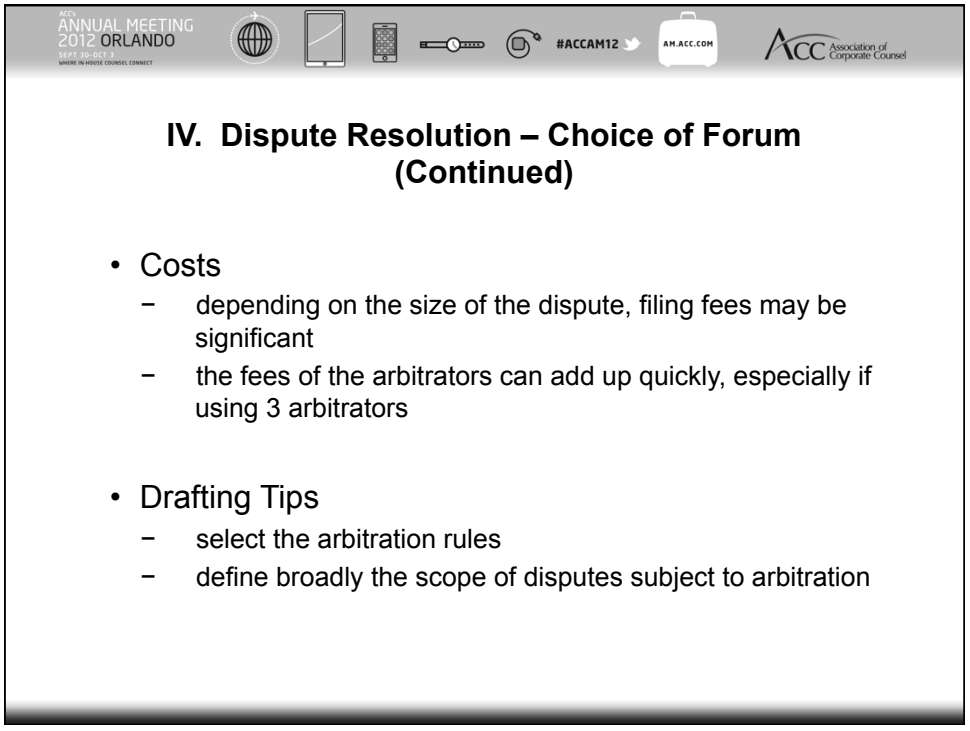


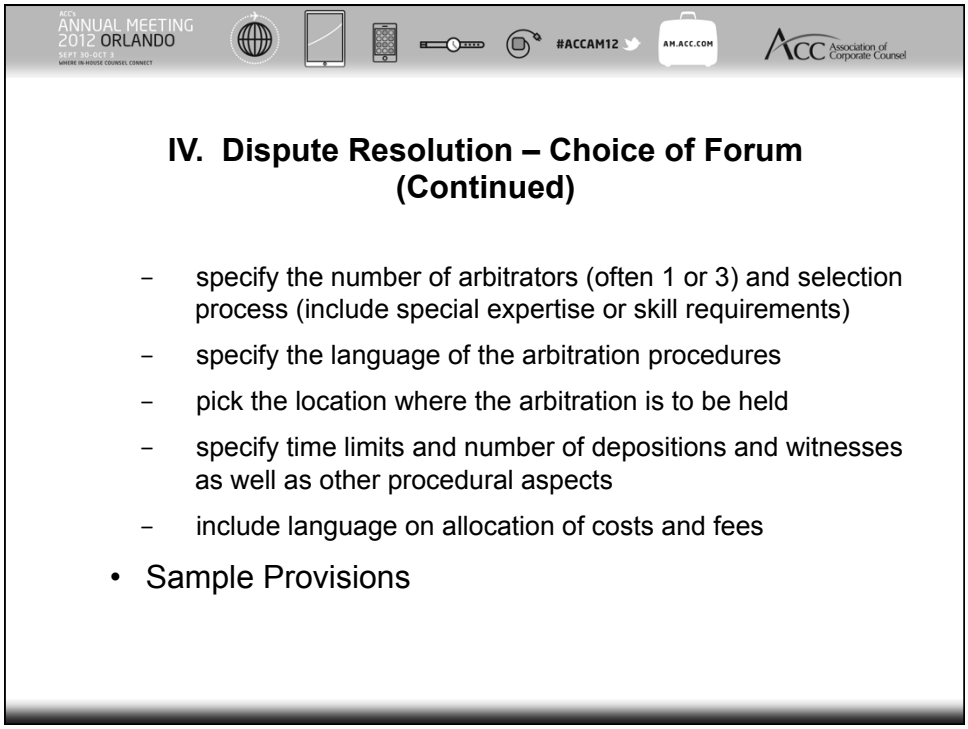








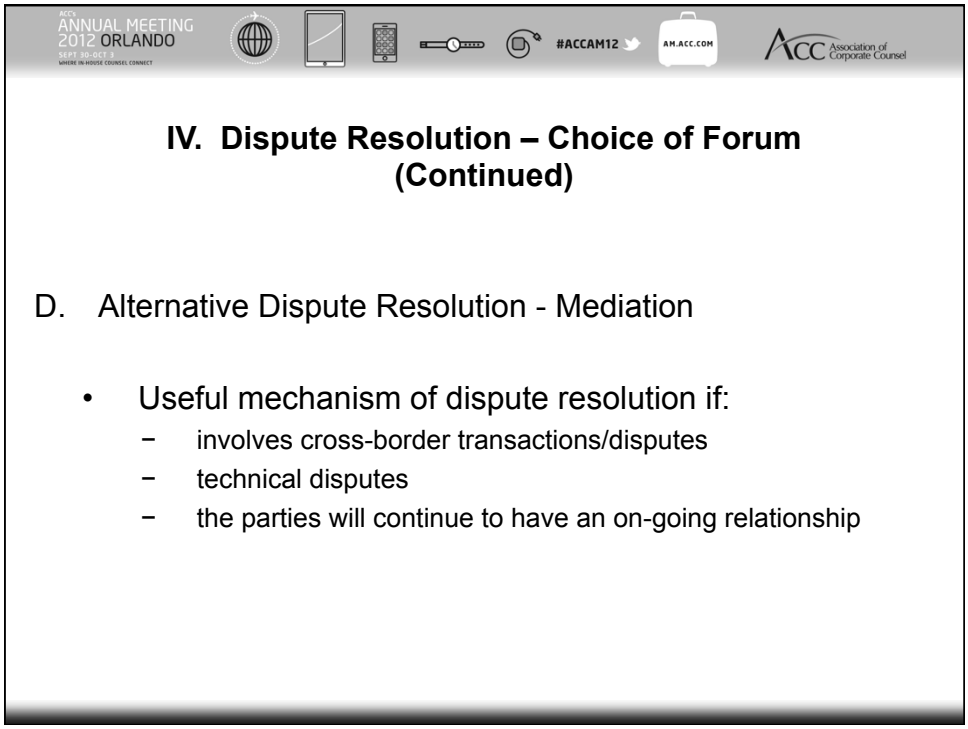




IV. Dispute Resolution – Choice of Forum (Continued)

- specify the number of arbitrators (often 1 or 3) and selection process (include special expertise or skill requirements)
- specify the language of the arbitration procedures
- pick the location where the arbitration is to be held
- specify time limits and number of depositions and witnesses as well as other procedural aspects
- include language on allocation of costs and fees

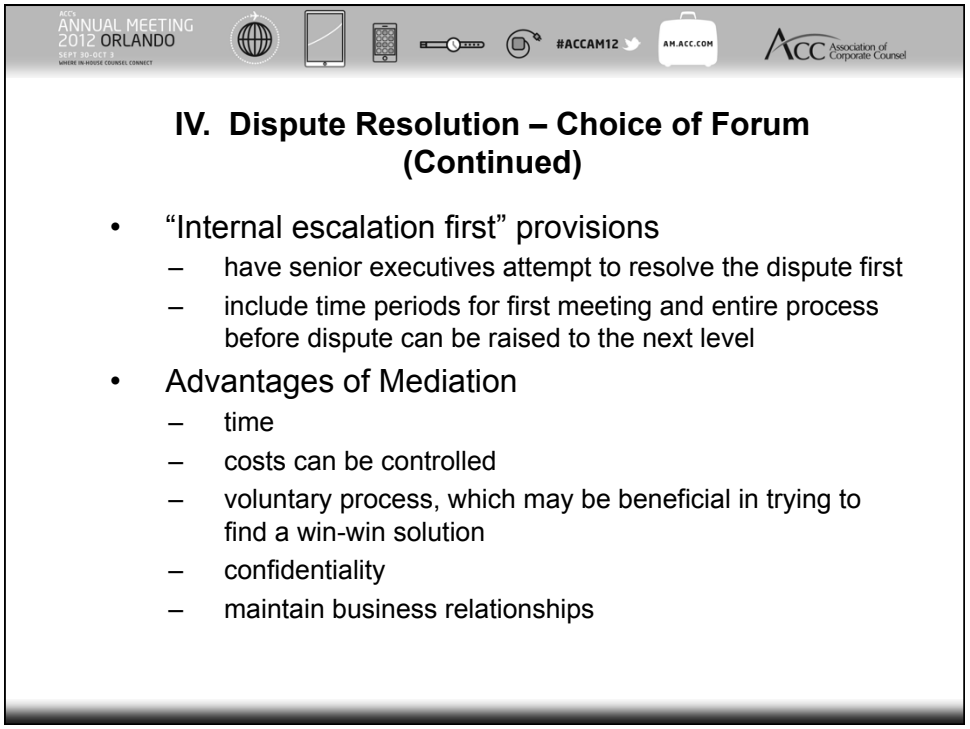
• Sample Provisions

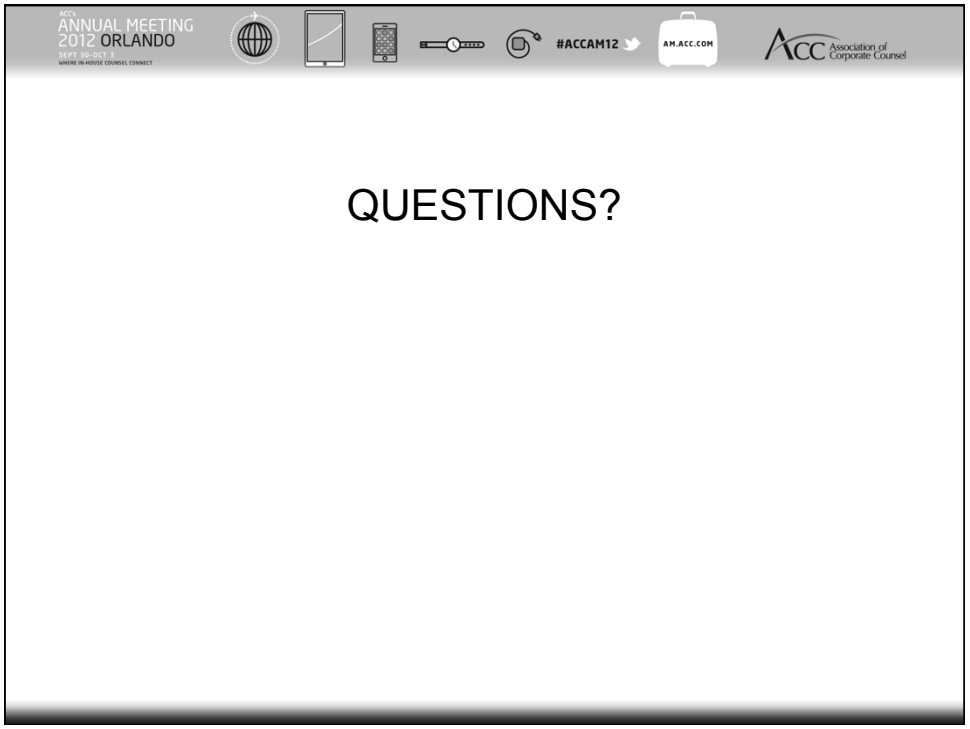


IV. Dispute Resolution – Choice of Forum (Continued)

D. Alternative Dispute Resolution - Mediation

• Useful mechanism of dispute resolution if:
  - involves cross-border transactions/disputes
  - technical disputes
  - the parties will continue to have an on-going relationship





DRAFTING CONSIDERATIONS FOR INTERNATIONAL CONTRACTS: USING CHOICE OF LAW AND OTHER CONTRACT TERMS TO MAXIMIZE PROFIT AND MINIMIZE RISK

SAMPLE PROVISIONS

October 1, 2012

Patrick A. De Ridder, Esq.
Partner, Co-Chair Corporate Department
McGuireWoods LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 775-4369
pderidder@mcguirewoods.com

SAMPLE PROVISIONS

1. Choice of Law.

The choice of law provision states which country's laws will govern the interpretation of the agreement for the taxable year in which the violation occurred in the event of a dispute between the parties or a breach of the agreement by one of the parties.

It is important that both parties from the outset know which body of law will govern their relationship. Decisions as to which law will govern the agreement should not be taken lightly. Discussion with and advice from foreign local counsel may need to be obtained in order to make an informed decision.

The following choice of law clause can be used as a starting point:

> "This Agreement shall be governed by and construed under the laws of *[Governing Law Jurisdiction]* without giving effect to any choice of law or conflict of law provisions or rule (whether of the *[Governing Law Jurisdiction]* or any other jurisdiction) that would require the application of any other law."

2. Exclusion of the United Nations Convention for the International Sale of Goods (the "CISG").

The CISG has been adopted by 78 countries, including the United States. Consequently, in addition to determining which country's law will govern the contract, the parties also need to decide whether they want the provisions of the CISG to apply to their transaction. If the parties wish to exclude the application of the CISG, the following provision may be used:

> "This Agreement and the rights and obligations of the parties hereto, shall not be governed by the provisions of the United Nations Convention for the International Sale of Goods. This Agreement shall be governed by and construed under the laws of *[Governing Law Jurisdiction]* without giving effect to any choice of law or conflict of law provisions or rule (whether of the *[Governing Law Jurisdiction]* or any other jurisdiction) that would require the application of any other law."

3. Choice of Forum – Courts.

In addition to determining the law that will govern the agreement, the parties will need to decide whether disputes will be resolved by the courts of a certain jurisdiction or if instead arbitration will be the preferred method of dispute resolution.

If the parties agree that all disputes will be resolved through litigation in the courts, it is advisable that the agreement spells out which courts will have jurisdiction and whether such jurisdiction will be exclusive. If jurisdiction is not exclusive, a contract party is free to bring its claim before any other court that has jurisdiction over the matter. As such, the parties could initiate litigation in different courts, resulting in significant costs and expenses to the parties.

If the parties wish to include an exclusive jurisdiction clause in their agreement, the below provision may be used. If the parties want to exclude a jury trial, specific waiver language should be included too.

> "Any proceeding arising out of or relating to this Agreement may be brought in the courts of the [*State or Country Name*], or, if it has or can acquire jurisdiction, in the United States District Court for the [*District and State Name*], and each of the parties irrevocably submits to the exclusive jurisdiction of each such court in any such proceeding, waives any objection it may now or hereafter have to venue or to convenience of forum, agrees that all claims in respect of the proceeding shall be heard and determined only in any such court and agrees not to bring any proceeding arising out of or relating to this Agreement in any other court. The parties agree that either or both of them may file a copy of this paragraph with any court as written evidence of the knowing, voluntary and bargained agreement between the parties irrevocably to waive any objections to venue or to convenience of forum. Process in any proceeding referred to in the first sentence of this section may be served on any party anywhere in the world."
>
> "WAIVER OF JURY TRIAL. EACH PARTY HERETO HEREBY IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT SUCH PARTY MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL PROCEEDING DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OTHER

> DOCUMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY (WHETHER BASED ON CONTRACT, TORT OR ANY OTHER THEORY). EACH PARTY HERETO (A) CERTIFIES THAT NO REPRESENTATIVE OR ATTORNEY OF ANY OTHER PERSON HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PERSON WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER, AND (B) ACKNOWLEDGES THAT IT AND THE OTHER PARTIES HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT AND THE OTHER DOCUMENTS BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION."

4. Choice of Forum – Arbitration.

Once the parties agree to settle their disputes by means of arbitration, it is advisable to also select the arbitration agency that will administer the arbitration proceedings.

The following arbitration clause can be used if the parties will settle their disputes under the auspices of the American Arbitration Association:

> "Either party may petition the American Arbitration Association's International Centre for Dispute Resolution to resolve the controversy, claim or dispute by binding arbitration and request the American Arbitration Association to propose a list of at least fifteen arbitrators. Each party will strike one name from the list in rotation, beginning with the party against whom arbitration is sought, until three names remain. The controversy, claim or dispute will be submitted to this panel of three arbitrators for final and binding resolution in accordance with the International Arbitration Rules of the American Arbitration Association then in effect to the extent those Rules are not in conflict with the provisions of this Agreement. The arbitration will be held in _____. The language of the arbitration shall be English. As part of their award, the arbitrators will assess all costs of the arbitration, including without limitation, legal fees and other expenses of the prevailing party, against the losing party. Judgment on any decision or award may be entered in any court having jurisdiction."

The following arbitration clause can be used if the parties will settle their disputes under the auspices of the International Chamber of Commerce:

> "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said Rules. The place of the arbitration shall be _____. The language to be used in the arbitral proceedings shall be English. As part of their award, the arbitrators will assess all costs of the arbitration, including without limitation, legal fees and other expenses of the prevailing party, against the losing party. Judgment on any decision or award may be entered in any court having jurisdiction."

The following arbitration clause can be used if the parties desire to use the UNCITRAL Arbitration Rules:

> "Any dispute, controversy or claim arising out of or in connection with this Agreement shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules. The arbitral tribunal shall be composed of either (i) one arbitrator if the parties can reach agreement on the appointment of such arbitrator or (ii) three arbitrators if no agreement can be reached on the appointment of a single arbitrator. In the latter case, each party shall appoint one arbitrator and the arbitrators so appointed shall appoint the third, subject to recourse to the UNCITRAL rules for such appointments if they are not made within the time limits specified therein. The place of the arbitration shall be _____. The language to be used in the arbitral proceedings shall be English. As part of their award, the arbitrators will assess all costs of the arbitration, including without limitation, legal fees and other expenses of the prevailing party, against the losing party. Judgment on any decision or award may be entered in any court having jurisdiction."

* * * * * * * * * * * *

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United States District Court,
N.D. California,
San Jose Division.
ASANTE TECHNOLOGIES, INC., Plaintiff,
v.
PMC–SIERRA, INC., Defendant.

No. C 01–20230 JW.
July 30, 2001.

Manufacturer of computer-network switchers sued supplier of application-specific integrated circuits in state court, alleging supplier breached contract and breached express warranty by supplying circuits which did not meet specifications. Supplier removed action to federal court. On manufacturer's motion to remand to state court, the District Court, Ware, J., held that: (1) United Nations Convention on Contracts for International Sale of Goods (CISG) applied to contract between manufacturer and supplier, raising federal question, and (2) as matter of first impression, CISG preempted state-law claims.

Motion denied.

West Headnotes

[1] Removal of Cases 334 25(1)

334 Removal of Cases
334II Origin, Nature, and Subject of Controversy
334k25 Allegations in Pleadings
334k25(1) k. In General. Most Cited Cases

Determination of whether action arises under federal law is guided by "well-pleaded complaint" rule, which provides that removal is proper when federal question is presented on face of complaint.

[2] Removal of Cases 334 25(1)

334 Removal of Cases
334II Origin, Nature, and Subject of Controversy
334k25 Allegations in Pleadings
334k25(1) k. In General. Most Cited Cases

Where federal law completely preempts state law, even if plaintiff's claims are purportedly based on state law, claims are considered to have arisen under federal law, permitting defendant to remove action.

[3] Removal of Cases 334 107(7)

334 Removal of Cases
334VII Remand or Dismissal of Case
334k107 Proceedings for Remand and Review Thereof
334k107(7) k. Evidence. Most Cited Cases

Defendant has burden of establishing that removal is proper.

[4] Removal of Cases 334 19(5)

334 Removal of Cases
334II Origin, Nature, and Subject of Controversy

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334k19 Cases Arising Under Laws of United States
334k19(5) k. Cases Under Laws Relating to Navigation and Commerce. Most Cited Cases

United Nations Convention on Contracts for International Sale of Goods (CISG) applied to action by manufacturer of computer-network switchers against supplier of application-specific integrated circuits, alleging supplier breached contract and breached express warranty by supplying circuits which did not meet specifications, and thus action presented federal question permitting supplier to remove action to federal court; manufacturer's place of business was United States, and supplier's place of business was Canada, even though supplier was incorporated and maintained offices in United States, since written materials and statements regarding technical specifications of circuits were all issued from supplier's offices in Canada. United Nations Convention on Contracts for the International Sale of Goods, Arts. 1(1)(a), 10, 15 U.S.C.A.App.

[5] Treaties 385 12

385 Treaties
385k12 k. Self-Executing Provisions. Most Cited Cases

Individual may only enforce treaty's provisions when treaty is self-executing, that is, when it expressly or impliedly creates private right of action.

[6] Contracts 95 206

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k206 k. Legal Remedies and Proceedings. Most Cited Cases

Sales 343 2

343 Sales
343I Requisites and Validity of Contract
343k2 k. What Law Governs. Most Cited Cases

Treaties 385 11

385 Treaties
385k11 k. Operation as to Laws Inconsistent with or Repugnant to Treaty Provisions. Most Cited Cases

Choice of law provisions in purchase orders submitted by manufacturer of computer-network switchers to supplier of application-specific integrated circuits, adopting "laws of" California, and supplier's conditions of sale adopting "laws of the Province of British Columbia and the laws of Canada" did not evince clear intention of parties to exclude sales between supplier and manufacturer from United Nations Convention on Contracts for International Sale of Goods (CISG); California was bound by supremacy clause to CISG as treaty of United States, and CISG was law of British Columbia. U.S.C.A. Const. Art. 6, § 2; United Nations Convention on Contracts for the International Sale of Goods, Art. 6, 15 U.S.C.A.App.

[7] Removal of Cases 334 25(1)

334 Removal of Cases
334II Origin, Nature, and Subject of Controversy
334k25 Allegations in Pleadings
334k25(1) k. In General. Most

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Cited Cases

Anticipation of federal preemption defense, such as defense that federal law prohibits state claims, is insufficient to establish federal jurisdiction permitting removal.

[8] Removal of Cases 334 25(1)

334 Removal of Cases
334II Origin, Nature, and Subject of Controversy
334k25 Allegations in Pleadings
334k25(1) k. In General. Most Cited Cases

Even where both parties concede that determination of federal question is only issue in case, removal is improper unless plaintiff's complaint establishes that case "arises under" federal law.

[9] States 360 18.11

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.11 k. Congressional Intent. Most Cited Cases

Question of whether certain action is preempted by federal law is one of congressional intent; purpose of Congress is ultimate touchstone.

[10] Treaties 385 11

385 Treaties
385k11 k. Operation as to Laws Inconsistent with or Repugnant to Treaty Provisions. Most Cited Cases

Question of whether certain action is preempted by treaty is one of intent of treaty's contracting parties.

[11] Sales 343 405

343 Sales
343VIII Remedies of Buyer
343VIII(C) Actions for Breach of Contract
343k405 k. Right of Action. Most Cited Cases

Sales 343 427

343 Sales
343VIII Remedies of Buyer
343VIII(D) Actions and Counterclaims for Breach of Warranty
343k427 k. Right of Action. Most Cited Cases

Treaties 385 11

385 Treaties
385k11 k. Operation as to Laws Inconsistent with or Repugnant to Treaty Provisions. Most Cited Cases

United Nations Convention on Contracts for International Sale of Goods (CISG) preempted state-law claims for breach of contract and breach of express warranty by American manufacturer of computer-network switchers against Canadian supplier of application-specific integrated circuits related to sale of circuits; CISG's expressly stated goal of developing uniform international contract law to promote international trade indicated intent of parties to treaty to preempt state law causes of action, and availability of state-law causes of action would frustrate goals of uniformity and cer-

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tainty. United Nations Convention on Contracts for the International Sale of Goods, Art. 1 et seq., 15 U.S.C.A.App.

[12] Courts 106 489(1)

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(B) State Courts and United States Courts
106k489 Exclusive or Concurrent Jurisdiction
106k489(1) k. In General. Most Cited Cases

Even where federal law completely preempts state law, state courts may have concurrent jurisdiction over federal claim if defendant does not remove case to federal court.

[13] Sales 343 405

343 Sales
343VIII Remedies of Buyer
343VIII(C) Actions for Breach of Contract
343k405 k. Right of Action. Most Cited Cases

Treaties 385 11

385 Treaties
385k11 k. Operation as to Laws Inconsistent with or Repugnant to Treaty Provisions. Most Cited Cases

Determination of preemption of particular state-law claims by United Nations Convention on Contracts for International Sale of Goods (CISG) is wholly independent of question of whether choice-of-law clause in particular contract is ambiguous or not. United Nations Convention on Contracts for the International Sale of Goods, Art. 1 et seq., 15 U.S.C.A.App.

***1144** Jeffrey J. Lederman,Gray Cary Ware & Freidenrich, Palo Alto, CA, for plaintiff.

Michael A. Jacobs, Morrison & FOerster, San Francisco, CA, for defendant.

ORDER DENYING MOTION TO REMAND AND REQUEST FOR ATTORNEYS' FEES

WARE, District Judge.

I. INTRODUCTION

This lawsuit arises out of a dispute involving the sale of electronic components. Plaintiff, Asante Technologies Inc., filed the action in the Superior Court for the State of California, Santa Clara County, on February 13, 2001. Defendant, PMC–Sierra, Inc., removed the action to this Court, asserting federal question jurisdiction pursuant to 28 U.S.C. section 1331. Specifically, Defendant asserts that Plaintiff's claims for breach of contract and breach of express warranty are governed by the United Nations Convention on Contracts for the International Sale of Goods ("CISG"). Plaintiff disputes jurisdiction and filed this Motion To Remand And For Attorneys' Fees. The Court conducted a hearing on June 18, 2001. Based upon the submitted papers and oral arguments of the parties, the Court DENIES the motion to remand and the associated request for attorneys' fees.

II. BACKGROUND

The Complaint in this action alleges claims based in tort and contract. Plaintiff contends that Defendant failed to provide it with electronic components meeting certain

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designated technical specifications. Defendant timely removed the action to this Court on March 16, 2001.

Plaintiff is a Delaware corporation having its primary place of business in Santa Clara County, California. Plaintiff produces network switchers, a type of electronic component used to connect multiple ***1145** computers to one another and to the Internet. Plaintiff purchases component parts from a number of manufacturers. In particular, Plaintiff purchases application-specific integrated circuits ("ASICs"), which are considered the control center of its network switchers, from Defendant.

Defendant is also a Delaware corporation. Defendant asserts that, at all relevant times, its corporate headquarters, inside sales and marketing office, public relations department, principal warehouse, and most design and engineering functions were located in Burnaby, British Columbia, Canada. Defendant also maintains an office in Portland, Oregon, where many of its engineers are based. Defendant's products are sold in California through Unique Technologies, which is an authorized distributor of Defendant's products in North America. It is undisputed that Defendant directed Plaintiff to purchase Defendant's products through Unique, and that Defendant honored purchase orders solicited by Unique. Unique is located in California. Determining Defendant's "place of business" with respect to its contract with Plaintiff is critical to the question of whether the Court has jurisdiction in this case.

Plaintiff's Complaint focuses on five purchase orders.[FN1] Four of the five purchase orders were submitted to Defendant through Unique as directed by Defendant. However, Plaintiff does not dispute that one of the purchase orders, dated January 28, 2000, was sent by fax directly to Defendant in British Columbia, and that Defendant processed the order in British Columbia. Defendant shipped all orders to Plaintiff's headquarters in California. [FN2] Upon delivery of the goods, Unique sent invoices to Plaintiff, at which time Plaintiff tendered payment to Unique either in California or in Nevada.

FN1. The relevant Purchase Orders are: Purchase Order No. 62799, dated November 1998 (Contos Decl., ¶ 6, Exh. A), Purchase Order No. 53527, dated June 1999 (Contos Decl., ¶ 7, Exh. B); Purchase Order No. 53724, dated January 2000 (Contos Decl., ¶ 8, Exh. C); Purchase Order No. 53729, dated February 2000 (Contos Decl., ¶ 9, Exh. D); and Purchase Order No. 63095, dated April 2000 (Contos Decl ., ¶ 10, Exh. E).

FN2. Plaintiff contends in this suit that the delivered ASICs did not comply with required technical specifications.

The Parties do not identify any single contract embodying the agreement pertaining to the sale. Instead, Plaintiff asserts that acceptance of each of its purchase orders was expressly conditioned upon acceptance by Defendant of Plaintiff's "Terms and Conditions," which were included with each Purchase Order. Paragraph 20 of Plaintiff's Terms and Conditions provides "APPLICABLE LAW. The validity [and] performance of this [purchase] order shall be gov-

erned by the laws of the state shown on Buyer's address on this order." (Contos Decl., Exh. H, ¶ 16.) The buyer's address as shown on each of the Purchase Orders is in San Jose, California. Alternatively, Defendant suggests that the terms of shipment are governed by a document entitled "PMC–Sierra TERMS AND CONDITIONS OF SALE." Paragraph 19 of Defendant's Terms and conditions provides "APPLICABLE LAW: The contract between the parties is made, governed by, and shall be construed in accordance with the laws of the Province of British Columbia and the laws of Canada applicable therein, which shall be deemed to be the proper law hereof ...." (Wechsler Decl., Exh. D, ¶ 6.)

Plaintiff's Complaint alleges that Defendant promised in writing that the chips would meet certain technical specifications. (Compl. ¶¶ 13, 14, 15, 17, 18, 22, 23, & 25.) Defendant asserts that the following documents upon which Plaintiff relies emanated ***1146** from Defendant's office in British Columbia: (1) Defendant's August 24, 1998 press release that it would be making chips available for general sampling (Doucette Decl. ¶ 13); (2) Defendant's periodic updates of technical specifications (Doucette Decl., Exh. H); and (3) correspondence from Defendant to Plaintiff, including a letter dated October 25, 1999. It is furthermore undisputed that the Prototype Product Limited Warranty Agreements relating to some or all of Plaintiff's purchases were executed with Defendant's British Columbia facility. (Doucette Decl., Exhs. B & C.)

Defendant does not deny that Plaintiff maintained extensive contacts with Defendant's facilities in Portland Oregon during the "development and engineering" of the ASICs. (Amended Supplemental Decl. of Anthony Contos, ¶ 3.) These contacts included daily email and telephone correspondence and frequent in-person collaborations between Plaintiff's engineers and Defendant's engineers in Portland. (*Id.*) Plaintiff contends that this litigation concerns the inability of Defendant's engineers in Portland to develop an ASIC meeting the agreed-upon specifications. (*Id.*)

Plaintiff now requests this Court to remand this action back to the Superior Court of the County of Santa Clara pursuant to 28 U.S.C. section 1447(c), asserting lack of subject matter jurisdiction. In addition, Plaintiff requests award of attorneys fees and costs for the expense of bringing this motion.

III. STANDARDS

A defendant may remove to federal court any civil action brought in a state court that originally could have been filed in federal court. 28 U.S.C. § 1441(a); *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). When a case originally filed in state court contains separate and independent federal and state law claims, the entire case may be removed to federal court. 28 U.S.C. 1441(c).

[1][2][3] The determination of whether an action arises under federal law is guided by the "well-pleaded complaint" rule. *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 10, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). The rule provides that removal is proper when a federal question is presented on the face of the Complaint. *Id.* at 9, 103 S.Ct. 2841. However, in areas where federal law completely preempts state law, even if the claims are

purportedly based on state law, the claims are considered to have arisen under federal law. *Ramirez v. Fox Television Station, Inc.*, 998 F.2d 743 (9th Cir.1993). Defendant has the burden of establishing that removal is proper. *Gaus v. Miles, Inc.*, 980 F.2d 564 (9th Cir.1992). If, at any time before judgment, the district court determines that the case was removed from state court improvidently and without jurisdiction, the district court must remand the case. 28 U.S.C. § 1447(c).

The Convention on Contracts for the International Sale of Goods ("CISG") is an international treaty which has been signed and ratified by the United States and Canada, among other countries. The CISG was adopted for the purpose of establishing "substantive provisions of law to govern the formation of international sales contracts and the rights and obligations of the buyer and the seller ." U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods: Official English Text, 15 U.S.C.App. at 52 (1997). The CISG applies "to contracts of sale of goods between parties whose places of business are in different States ... when the States are Contracting States." 15 U.S.C.App., Art. ***1147** 1(1)(a). Article 10 of the CISG provides that "if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance." 15 U.S.C.App. Art. 10.

IV. DISCUSSION

[4] Defendant asserts that this Court has jurisdiction to hear this case pursuant to 28 U.S.C. section 1331, which dictates that the "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Specifically, Defendant contends that the contract claims at issue necessarily implicate the CISG, because the contract is between parties having their places of business in two nations which have adopted the CISG treaty. The Court concludes that Defendant's place of business for the purposes of the contract at issue and its performance is Burnaby, British Columbia, Canada. Accordingly, the CISG applies. Moreover, the parties did not effectuate an "opt out" of application of the CISG. Finally, because the Court concludes that the CISG preempts state laws that address the formation of a contract of sale and the rights and obligations of the seller and buyer arising from such a contract, the well-pleaded complaint rule does not preclude removal in this case.

A. Federal Jurisdiction Attaches to Claims Governed By the CISG

[5] Although the general federal question statute, 28 U.S.C. § 1331(a), gives district courts original jurisdiction over every civil action that "arises under the ... treaties of the United States," an individual may only enforce a treaty's provisions when the treaty is self-executing, that is, when it expressly or impliedly creates a private right of action. *See Tel–Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C.Cir.1984) (Bork, J., concurring); *Handel v. Artukovic*, 601 F.Supp. 1421, 1425 (C.D.Cal.1985). The parties do not dispute that the CISG properly creates a private right of action. *See Delchi Carrier v. Rotorex Corp.*, 71 F.3d 1024, 1027–28 (2d Cir.1995); *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F.Supp. 1229, 1237 (S.D.N.Y.1992); U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods: Official English Text, 15 U.S.C.App. at 52

(1997) ("The Convention sets out substantive provisions of law to govern the formation of international sales contracts and the rights and obligations of the buyer and seller. It will apply to sales contracts between parties with their places of business in different countries bound by Convention, provided the parties have left their contracts silent as to applicable law."). Therefore, if the CISG properly applies to this action, federal jurisdiction exists.[FN3]

FN3. Diversity cannot serve as a basis for jurisdiction in this case, because both parties are incorporated in the state of Delaware. *See Bank of California Nat'l Ass'n v. Twin Harbors Lumber Co.,* 465 F.2d 489, 491–92 (9th Cir.1972).

B. The Contract In Question Is Between Parties From Two Different Contracting States

The CISG only applies when a contract is "between parties whose places of business are in different States." [FN4] 15 U.S.C.App., Art. 1(1)(a). If this requirement is not satisfied, Defendant cannot claim jurisdiction under the CISG. It is undisputed that Plaintiff's place of business is Santa Clara County, California, ***1148** U.S.A. It is further undisputed that during the relevant time period, Defendant's corporate headquarters, inside sales and marketing office, public relations department, principal warehouse, and most of its design and engineering functions were located in Burnaby, British Columbia, Canada. However, Plaintiff contends that, pursuant to Article 10 of the CISG, Defendant's "place of business" having the closest relationship to the contract at issue is the United States.[FN5]

FN4. In the context of the CISG, "different States" refers to different countries. U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods: Official English Text, 15 U.S.C.App. at 52 (1997).

FN5. Article 10 of the CISG states *inter alia:*

> For the purposes of this Convention:
>
> (a) If a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

The Complaint asserts *inter alia* two claims for breach of contract and a claim for breach of express warranty based on the failure of the delivered ASICS to conform to the agreed upon technical specifications. (Compl.¶¶ 40–53.) In support of these claims, Plaintiff relies on multiple representations allegedly made by Defendant regarding the technical specifications of the ASICS products at issue. Among the representations are: (1) an August 24, 1998 press release (*Id.,* ¶ 13); (2) "materials" released by Defendant in September, 1998 (*Id.,* ¶ 14); (3) "revised materials" released by Defendant in November 1998 (*Id.,* ¶ 15); (4) "revised materials" released by Defendant in January, 1999 (*Id.,* ¶ 17); (5) "revised materials" released by Defendant in April, 1999 (*Id.,* ¶ 18); (6) a September, 1999 statement

by Defendant which included revised specifications indicating that its ASICS would comply with 802.1q VLAN specifications (*Id.,* ¶ 22); (7) a statement made by Defendant's President and Chief Executive Officer on October 25, 1999 (*Id.,* ¶ 23); (8) a communication of December, 1999 (*Id.,* ¶ 24); and (9) "revised materials" released by Defendant in January, 2000 (*Id.,* ¶ 25). It appears undisputed that each of these alleged representations regarding the technical specifications of the product was issued from Defendant's headquarters in British Columbia, Canada. (*See* Opposition Brief at 3.)

Rather than challenge the Canadian source of these documents, Plaintiff shifts its emphasis to the purchase orders submitted by Plaintiff to Unique Technologies, a non-exclusive distributor of Defendant's products. Plaintiff asserts that Unique acted in the United States as an agent of Defendant, and that Plaintiff's contacts with Unique establish Defendant's place of business in the U.S. for the purposes of this contract.

Plaintiff has failed to persuade the Court that Unique acted as the agent of Defendant. Plaintiff provides no legal support for this proposition. To the contrary, a distributor of goods for resale is normally not treated as an agent of the manufacturer. Restatement of the Law of Agency, 2d § 14J (1957) ("One who receives goods from another for resale to a third person is not thereby the other's agent in the transaction."); *Stansifer v. Chrysler Motors Corp.,* 487 F.2d 59, 64–65 (9th Cir.1973) (holding that nonexclusive distributor was not agent of manufacturer where distributorship agreement expressly stated "distributor is not an agent"). Agency results "from the manisfestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement of the Law of Agency, 2d, § 1 (1957). Plaintiff has produced no evidence of consent by Defendant to be bound by the acts of Unique. To the contrary, Defendant cites the distributorship agreement with Unique, which expressly***1149** states that the contract does not "allow Distributor to create or assume any obligation on behalf of [Defendant] for any purpose whatsoever." (Doucette Decl. Exh. M, ¶ 1.6(b).) Furthermore, while Unique may distribute Defendant's products, Plaintiff does not allege that Unique made any representations regarding technical specifications on behalf of Defendant. Indeed, Unique is not even mentioned in the Complaint. To the extent that representations were made regarding the technical specifications of the ASICs, and those specifications were not satisfied by the delivered goods, the relevant agreement is that between Plaintiff and Defendant. Accordingly, the Court finds that Unique is not an agent of Defendant in this dispute. Plaintiff's dealings with Unique do not establish Defendant's place of business in the United States.

Plaintiff's claims concern breaches of representations made by Defendant from Canada. Moreover, the products in question are manufactured in Canada, and Plaintiff knew that Defendant was Canadian, having sent one purchase order directly to Defendant in Canada by fax. Plaintiff supports its position with the declaration of Anthony Contos, Plaintiff's Vice President of Finance and Administration, who states that Plaintiff's primary contact with Defendant "during the development and engineering of the ASICs at issue ... was with [Defendant's]

facilities in Portland, Oregon." (Contos Amended Supplemental Decl. ¶ 3.) The Court concludes that these contacts are not sufficient to override the fact that most if not all of Defendant's alleged representations regarding the technical specifications of the products emanated from Canada. (*See supra* at 7:1–12.) Moreover, Plaintiff directly corresponded with Defendant at Defendant's Canadian address. (*See* Doucette Decl. ¶ 15.) Plaintiff relies on all of these alleged representations at length in its Complaint. (*See supra* at 7:1–12.) In contrast, Plaintiff has not identified any specific representation or correspondence emanating from Defendant's Oregon branch. For these reasons, the Court finds that Defendant's place of business that has the closest relationship to the contract and its performance is British Columbia, Canada. Consequently, the contract at issue in this litigation is between parties from two different Contracting States, Canada and the United States. This contract therefore implicates the CISG.

C. The Effect of the Choice of Law Clauses

[6] Plaintiff next argues that, even if the Parties are from two nations that have adopted the CISG, the choice of law provisions in the "Terms and Conditions" set forth by both Parties reflect the Parties' intent to "opt out" of application of the treaty.[FN6] Article 6 of the CISG provides that "[t]he parties may exclude the application of the Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions." 15 U.S.C.App., Art. 6. Defendant asserts that merely choosing the law of a jurisdiction is insufficient to opt out of the CISG, absent express***1150** exclusion of the CISG. The Court finds that the particular choice of law provisions in the "Terms and Conditions" of both parties are inadequate to effectuate an opt out of the CISG.

> FN6. Plaintiff's Terms and Conditions provides "APPLICABLE LAW. The validity [and] performance of this [purchase] order shall be governed by the laws of the state shown on Buyer's address on this order." (Contos Decl. ¶ 16, Exh. H.) The buyer's address as shown on each of the Purchase Orders is San Jose, California. (Contos Decl. ¶¶ 6, 7, 8, 9, 10; Exhs. A, B, C, D, E.)
>
> Defendant's Terms and Conditions provides "APPLICABLE LAW: The contract between the parties is made, governed by, and shall be construed in accordance with the laws of the Province of British Columbia and the laws of Canada applicable therein, which shall be deemed to be the proper law hereof ...." (Wechsler Decl. ¶ 6, Exh. D.) It is undisputed that British Columbia has adopted the CISG.

Although selection of a particular choice of law, such as "the California Commercial Code" or the "Uniform Commercial Code" *could* amount to implied exclusion of the CISG, the choice of law clauses at issue here do not evince a clear intent to opt out of the CISG. For example, Defendant's choice of applicable law adopts the law of British Columbia, and it is undisputed that the CISG *is* the law of British Columbia. (International Sale of Goods Act ch. 236, 1996 S.B.C. 1 *et seq.* (B.C.).) Furthermore, even Plaintiff's choice of applicable law generally adopts the "laws of" the State of California, and California is bound by the Supremacy Clause to the treaties of the United States.

U.S. Const. art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.") Thus, under general California law, the CISG is applicable to contracts where the contracting parties are from different countries that have adopted the CISG. In the absence of clear language indicating that both contracting parties intended to opt out of the CISG, and in view of Defendant's Terms and Conditions which would apply the CISG, the Court rejects Plaintiff's contention that the choice of law provisions preclude the applicability of the CISG.

D. Federal Jurisdiction Based Upon the CISG Does Not Violate the Well–Pleaded Complaint Rule

[7][8] The Court rejects Plaintiff's argument that removal is improper because of the well-pleaded complaint rule. The rule states that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law. *Gully v. First National Bank,* 299 U.S. 109, 112, 57 S.Ct. 96, 81 L.Ed. 70 (1936); *Louisville & Nashville R. Co. v. Mottley,* 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). Anticipation of a federal preemption defense, such as the defense that federal law prohibits the state claims, is insufficient to establish federal jurisdiction. *Gully,* 299 U.S. at 116, 57 S.Ct. 96. Even where both parties concede that determination of a federal question is the only issue in the case, removal is improper unless the plaintiff's complaint establishes that the case "arises under" federal law. *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 393, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987).

It is undisputed that the Complaint on its face does not refer to the CISG. However, Defendants argue that the preemptive force of the CISG converts the state breach of contract claim into a federal claim. Indeed, Congress may establish a federal law that so completely preempts a particular area of law that any civil complaint raising that select group of claims is necessarily federal in character. *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 62, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987) (holding that Employee Retirement Income Security Act (ERISA) preempts an employee's common-law contract and tort claims arising from employer's insurer's termination of disability benefits, establishing federal jurisdiction); *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n. of Machinists,* 390 U.S. 557, 560, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968) (holding that section 301 of Labor Management Relations Act (LMRA) preempts any state cause of action for violation of contracts between an employer and a labor organization).

[9][10] It appears that the issue of whether or not the CISG preempts state law is a matter of first impression. In the case of federal statutes, "[t]he question of ***1151** whether a certain action is preempted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone." *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 45, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) (internal quotations and citations omitted). Transferring this analysis to the question of preemption by a treaty, the Court focuses on the intent of the treaty's contracting parties. *See Husmann v. Trans World Airlines, Inc.,* 169 F.3d 1151, 1153 (8th Cir.1999) (finding Warsaw Convention preempts state law personal injury claim);

Jack v. Trans World Airlines, Inc., 820 F.Supp. 1218, 1220 (N.D.Cal.1993) (finding removal proper because Warsaw Convention preempts state law causes of action).

[11] In the case of the CISG treaty, this intent can be discerned from the introductory text, which states that "the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade." 15 U.S.C.App. at 53. The CISG further recognizes the importance of "the development of international trade on the basis of equality and mutual benefit." *Id.* These objectives are reiterated in the President's Letter of Transmittal of the CISG to the Senate as well as the Secretary of State's Letter of Submittal of the CISG to the President. *Id.* at 70–72. The Secretary of State, George P. Shultz, noted:

> Sales transactions that cross international boundaries are subject to legal uncertainty-doubt as to which legal system will apply and the difficulty of coping with unfamiliar foreign law. The sales contract may specify which law will apply, but our sellers and buyers cannot expect that foreign trading partners will always agree on the applicability of United States law.... The Convention's approach provides an effective solution for this difficult problem. When a contract for an international sale of goods does not make clear what rule of law applies, the Convention provides uniform rules to govern the questions that arise in making and performance of the contract.

Id. at 71. The Court concludes that the expressly stated goal of developing uniform international contract law to promote international trade indicates the intent of the parties to the treaty to have the treaty preempt state law causes of action.

The availability of independent state contract law causes of action would frustrate the goals of uniformity and certainty embraced by the CISG. Allowing such avenues for potential liability would subject contracting parties to different states' laws and the very same ambiguities regarding international contracts that the CISG was designed to avoid. As a consequence, parties to international contracts would be unable to predict the applicable law, and the fundamental purpose of the CISG would be undermined. Based on very similar rationale, courts have concluded that the Warsaw Convention preempts state law causes of action. *Husmann*, 169 F.3d at 1153; *Shah v. Pan American World Services, Inc.*, 148 F.3d 84, 97–98 (2d Cir.1998); *Potter v. Delta Air Lines*, 98 F.3d 881, 885 (5th Cir.1996); *Boehringer–Mannheim Diagnostics v. Pan Am. World*, 737 F.2d 456, 459 (5th Cir.1984). The conclusion that the CISG preempts state law also comports with the view of academic commentators on the subject. *See* William S. Dodge, *Teaching the CISG in Contracts*, 50 J. Legal Educ. 72, 72 (March 2000) ("As a treaty the CISG is federal law, which preempts state common law and the UCC."); David Frisch, ***1152***Commercial Common Law, The United Nations Convention on the International Sale of Goods, and the Inertia of Habit*, 74 Tul. L.Rev. 495, 503–04 (1999) ("Since the CISG has the preemptive force of federal law, it will preempt article 2 when applicable.").

Furthermore, the Court has considered Plaintiff's arguments and finds them unpersuasive. Plaintiff argues that the CISG is incomparable to preemption under the Warsaw Convention, because "the CISG leaves open the possibility of other, concurrent causes of action." (Reply Brief at 9.) This argument merely begs the question by assuming that the state law causes of action asserted by Plaintiff are properly brought. Based on the proper applicable legal analysis discussed above, the Court concludes that the pleaded state law claims are preempted.

Plaintiff next claims that the CISG does not completely supplant state law, because the CISG is limited in scope to the formation of the contract and the rights and obligations of the seller and buyer arising from the contract. (*Id.*) Plaintiff's correct observation that the CISG does not concern the validity of the contract or the effect which the contract may have on the property in the goods sold fails to support Plaintiff's conclusion that the CISG does not supplant *any area* of state contract law. Although the CISG is plainly limited in its scope (15 U.S.C.App., Art. 4.), the CISG nevertheless can and does preempt state contract law to the extent that the state causes of action fall within the scope of the CISG. *Compare* *Franchise Tax Bd.*, 463 U.S. at 22–23, 103 S.Ct. 2841 (holding that ERISA did not preempt the state tax collection suit at issue, because the state causes of action did not fall within the scope of § 502(a) of ERISA) and *Metropolitan Life Ins. Co.*, 481 U.S. at 66, 107 S.Ct. 1542 (relying on *Franchise Tax Bd.* and holding that ERISA preempts all state causes of action within the scope of § 502(a)).

[12][13] Finally, Plaintiff appears to confuse the matter of exclusive federal jurisdiction with preemption. Plaintiff first asserts that "[i]f ... the CISG is 'state law' ... then the California courts have jurisdiction to adjudicate a case arising under these laws." (Reply Brief at 9.) The matter of whether California courts may have jurisdiction to interpret the CISG is irrelevant to the determination of whether the CISG preempts state law and establishes federal jurisdiction over the case. Even where federal law completely preempts state law, state courts may have concurrent jurisdiction over the federal claim if the defendant does not remove the case to federal court. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103–04, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962). This Court does not hold that it has exclusive jurisdiction over CISG claims. Hence, the Court's conclusion that the CISG preempts state claims is not inconsistent with Plaintiff's examples of the adjudication of CISG-based claims in state court. Plaintiff further asserts that "if the CISG so completely supplants state law as to deny the California courts the opportunity to rule on a CISG cause of action, then the reference to 'state law' in Asante's choice-of-law provision is unambiguous, and the CISG also does not apply." (Reply Brief at 9.) The Court also rejects this claim, as the determination of CISG preemption is wholly independent of the question of whether a choice-of-law clause in a particular contract is ambiguous or not.

The Court concludes that the well-pleaded complaint rule does not preclude federal jurisdiction in this case, because the CISG preempts state law causes of action falling within the scope of the CISG.

V. CONCLUSION

164 F.Supp.2d 1142
(Cite as: 164 F.Supp.2d 1142)

For the foregoing reasons, Plaintiff's Motion to Remand is DENIED. Accordingly,***1153** the Request for Attorney's Fees is also DENIED.

N.D.Cal.,2001.
Asante Technologies, Inc. v. PMC-Sierra, Inc.
164 F.Supp.2d 1142

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Not Reported in F.Supp.2d, 2007 WL 2875256 (E.D.Mich.), 64 UCC Rep.Serv.2d 106
(Cite as: 2007 WL 2875256 (E.D.Mich.))

United States District Court,
E.D. Michigan,
Southern Division.
EASOM AUTOMATION SYSTEMS, INC., Plaintiff,
v.
THYSSENKRUPP FABCO, CORP., Defendant.

No. 06-14553.
Sept. 28, 2007.

Dennis W. Loughlin, George S. Fish, Strobl and Sharp, Bloomfield Hills, MI, Leslie M. Carr, Nearpass & Hudson, Monroe, MI, for Plaintiff.

Daniel J. Dulworth, Daniel N. Sharkey, Butzel Long, Detroit, MI, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR IMMEDIATE POSSESSION

DENISE PAGE HOOD, United States District Judge.

I. INTRODUCTION

***1** This matter is before the Court on Plaintiff Easom Automation Systems, Inc.'s Motion for Immediate Possession, filed on January 30, 2007. Defendant ThyssenKrupp Fabco, Corp. filed its Response to Plaintiff's Motion for Immediate Possession on March 2, 2007.

On October 17, 2006, Plaintiff filed the instant action pursuant to 28 U.S.C. § 1332 alleging the following against Defendant: Count I, Breach of Contract; Count II, Breach of Implied Contract; Count III, Unjust Enrichment; and Count IV, Enforcement of Michigan Special Tool Lien.

II. STATEMENT OF FACTS

Plaintiff is a Michigan Corporation with its principal place of business in Madison Heights, Michigan. (Pl.'s Compl., ¶ 1) Plaintiff designs, builds, integrates and installs automation equipment and systems for the auto industry. (Pl.'s Compl., ¶ 5) Defendant is a Nova Scotia Corporation headquartered in Ontario, and it is in the business of supplying medium and heavy metal stampings and systems to automotive customers. (Def.'s Mot. to Dismiss, p. 1, 2) The present matter arises out of an "agreement" between the parties where Plaintiff was to design, fabricate and install the Sport Bar Assembly System (SBA) [FN1] for Defendant.

> FN1. The Sport Bar Assembly System is a special machine used by Defendant to fabricate roll bars for DaimlerChrysler Corporation's JK Platform, the 2007 Jeep Wrangler. (Pl.'s Compl., ¶ 8, Def.'s Mot. to Dismiss)

Plaintiff asserts that on July 19, 2005, it issued a Quote to Defendant for the SBA, which specified a price of $5,400,000.00 and a delivery date of March 30, 2006.[FN2] (Pl.'s Compl., ¶ 10-12) According to Plaintiff, that same day, Defendant orally instructed Plaintiff to commence work on the SBA. (Pl.'s Compl., ¶ 13,14) Plaintiff commenced work on the SBA. Plaintiff asserts that Defendant issued a written purchase order on August 30, 2005, which included the following choice of law/forum selection

clause:

> FN2. This quote also contained the following provision:
>
> **AGREEMENT OF SALE**
>
> Any terms and provisions of buyer's orders which are inconsistent with, additional or different from the terms and provisions of this order acknowledgment are rejected, will not be binding on the seller nor considered applicable to the sale or shipment referred to herein. Unless buyer shall notify seller in writing within fifteen (15) days after receipt of this order acknowledgment by buyer, acceptance of the terms and conditions hereof by buyer shall be indicated, and in the absence of such notification, the sale and shipment by the seller of the products covered hereby shall be conclusively deemed to be subject to the terms and conditions hereof. No waiver, alteration, or modification of the provisions hereof shall be binding on the seller unless agreed to in writing by a duly authorized official of seller at its headquarters office(s) ....
>
> (*See* Pl.'s Resp. to Defendant's Mot. to Dismiss, Pl.'s Ex. 2)

> 25. *Jurisdiction/Governing law.* The contract created by Seller's acceptance of Buyer's offer as set out in Paragraph 3 hereof shall be deemed in all respects to be a contract made under, and shall for all purposes be governed by and construed in accordance, with, the laws of the Province where the registered head office of Buyer is located and the laws of Canada applicable therein. Any legal action or proceeding with respect to such contract may be brought in the courts of the Province where the registered head office of buyer is located and the parties hereto attorn to the non-exclusive jurisdiction of the aforesaid courts.
> (Def.'s Mot. to Dismiss, Ex. B, ¶ 25) Between August and October 2005, during the design and engineering phase of the SBA, Plaintiff asserts that Defendant's representatives regularly met for weekly meetings at Plaintiff's Madison Heights facility. (Pl.'s Resp. to Mot. to Dismiss)

Plaintiff alleges that on October 21, 2005, Defendant's Vice-President, Gary Herman, instructed Plaintiff to begin delivery of the SBA in an "as is" condition by December 31, 2005, with the remainder of the installation to occur on Defendant's facility floor in Dresden, Ontario. (Pl.'s Compl., ¶ 18) Plaintiff permanently affixed its name and address to the SBA's component parts before shipment. (Pl.'s Resp. to Def.'s Mot. to Dismiss, p. 5) Plaintiff began to ship the SBA in an "as is" condition on December 31, 2005. (Pl.'s Compl., ¶ 21) Plaintiff further alleges that it agreed to deliver the SBA on this expedited basis because of Defendant's agreements to do certain things to assist in the expedited installation of the SBA. (Pl.'s Compl., ¶ 23) Plaintiff asserts that Defendant failed to follow through on these agreements. Plaintiff's employees worked on the installation, and testing of the SBA at Defendant's facility. (Pl.'s Compl, 22)

***2** On March 9, 2006, Plaintiff filed a Financing Statement with the Ontario Min-

istry of Consumer and Industry Services. (Pl.'s Resp. to Def.'s Mot. to Dismiss, Ex. 1) On November 4, 2006, after this suit was already filed, Defendant filed an Application in the Ontario Superior Court of Justice seeking discharge of Plaintiff's financing statement. Plaintiff also alleges that Defendant has failed to pay Plaintiff $1,484,498.05, plus interest, while Defendant continues to operate the SBA. (Pl.'s Compl., ¶ 26) [FN3]

FN3. Defendant asserts that neither Plaintiff nor Defendant have been able to get the SBA to perform at the specifications agreed upon by the parties, nor does it meet the requirements of DaimlerChrysler Corporation's final Production Part Approval Process (PPAP). (Def.'s Mot. to Dismiss, Ex. C)

III. PROCEDURAL POSTURE

On December 29, 2006, Defendant filed a Motion to Dismiss on Grounds of *Forum Non Conveniens,* asserting, among other things, that the Choice of Law/Forum Selection Clause governs the agreement between the parties. On August 1, 2007, this Court denied Defendant's Motions to Dismiss on Grounds of *Forum Non Conveniens,* holding, without definitively answering the question of what law governs this action, that Defendant's failure to demonstrate that the "balance of hardships" or trial of this matter in this Court would be "oppressive and vexatious" to Defendant.

IV. APPLICABLE LAW & ANALYSIS

Plaintiff argues that pursuant to Michigan's Special Tools Lien Act, MICH. COMP. LAWS § 570.563 *et seq.,* it is entitled to immediate possession of the SBA, currently in Defendant's possession in Canada. Plaintiff asserts that because it complied with the requirements of the Act to perfect the lien on the SBA, specifically affixed its name and address to the SBA, filed a financing statement with the Province of Ontario, sent notification and a demand for payment letter to Defendant, and waited ninety days without receiving payment, Plaintiff is entitled to immediate possession of the SBA.

Defendant's argument mainly rests upon the assumption that the purchase orders it issued to Plaintiff constituted Defendant's offer, not the quote issued by Plaintiff. By accepting Defendant's offer to build the SBA pursuant to the terms and conditions set forth in the purchase orders, specifically the Choice of Law/Forum Selection Clause, Defendant claims Plaintiff agreed the contract was governed by Ontario law. Defendant argues that since the parties expressly agreed that Ontario law would govern their agreement, the Michigan Special Tools Lien Act is inapplicable, and Plaintiff has no right to immediate possession. Alternatively, Defendant argues that if the Act does apply to this action, Plaintiff expressly waived its right to enforce the lien, and, in any event, Plaintiff did not comply with the financing statement filing requirements, as such, the lien is invalid.

It is Plaintiff's contention that the United Nations Convention on Contracts for the International Sale of Goods, or the CISG, May 1980, S. Treaty. No. 9, 98th Cong., 1st Sess. 22 (1983), 19 I.L.M. 671 (reprinted at U.S.C.S. Int.'l Sale Goods) controls this matter based upon the fact that on July 19, 2005, Plaintiff sent Defendant a series of quotes, which constitutes Plaintiff's offer to

manufacture and assemble the SBA. (*See* Pl.'s Resp. to Defendant's Mot. to Dismiss, Pl.'s Ex. 2) According to Plaintiff, Defendant verbally accepted this offer on July 19, 2005 (the very same day), and Plaintiff began work on the SBA shortly thereafter.

***3** The CISG governs only the formation of the contract of sale, and the rights and obligations of the seller and the buyer arising from such a contract. *See* CISG, Art. 4. The CISG governs contracts for the sale of goods between parties whose places of business are in different nations, if the nations are Contracting States, unless the subject contract contains a choice-of-law provision. See CISG, Art. 1, 6; *See also* *American Biophysics Corp. v. DuBois Marine Specialities,* 411 F.Supp.2d 61, 63-64 (D.R.I.2006); *See also* *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador,* 332 F.3d 333, 337 (5th Cir.2003). Both the United States and Canada are signatory nations.

Under the CISG, the July 19, 2005 quote issued by Plaintiff could constitute Plaintiff's offer because the quote was "sufficiently definite and indicate[d] the intention of the offeror to be bound in case of acceptance." *See* CISG, Art. 14. Article 14 indicates that "[a] proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provisions for determining the quantity and the price." *Id.* Plaintiff's quote specifically indicates that Plaintiff would design and build the SBA in the amount of $5,400,000.00.

Defendant's oral acceptance of the quote is recognized as a valid form of acceptance under the CISG. *See* CISG, Art. 18. The CISG specifically states that "[a] statement made by or other conduct of the offeree indicating assent to an offer is acceptance." *See* CISG, Art. 18(1). Additionally, "[a]n acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror...." *See* CISG, Art. 18(2).

The CISG makes provision for the parties to a contract to opt out of the CISG as the governing law and agree that their contract be governed by another law. *See* CISG, Art. 6. "The parties may exclude the application of this Convention, or ... derogate from or vary the effect of any of its provisions." CISG, Art. 6. Courts that have reviewed this provision have held that the parties must expressly opt out of applying the CISG to their agreement. *See* *BP Oil Int'l,* 332 F.3d at 337; *Asante Techs., Inc. v. PMC-Sierra, Inc.,* 164 F.Supp.2d 1142, 1150 (N.D.Cal.2001) ("A signatory's assent to the CISG necessarily incorporates the treaty as part of that nation's domestic law."); *See also Ajax Tools Works, Inc. v. Can-Eng Manu. Ltd.,* 2003 U.S. Dist. LEXIS 1306, at *8 (holding that since Germany is a contracting state, "the CISG is an integral part of German law. Where parties designate a choice of law clause in their contract, selecting the law of a contracting state without expressly excluding application of the CISG-German courts uphold application of the Convention as the law of the designated Contracting state. To hold otherwise would undermine the objectives of the Convention which Germany has agreed to uphold").

Under either the Plaintiff's quote or Defendant's purchase orders, the CISG applies as neither the quote nor the purchase orders expressly indicated that the CISG did not apply. Further, stating that the law of Canada applied to the agreement indicates that the CISG applied as well, as the Convention

is the law of Canada.

***4** The CISG governs only the formation of the contract of sale, and the rights and obligations of the seller and the buyer arising from such a contract. As such, if the Plaintiff's quote constitutes the contract in this case, as opposed to Defendant's purchase orders, the Michigan Special Tools Lien Act may apply to the parties' agreement.

If Defendant's purchase orders govern, Plaintiff has no right to immediate possession because the purchase orders contain a waiver of liens provision. Specifically, the purchase orders contain the following language: "Seller hereby waives all mechanic liens and claims and agrees that none shall be filed or maintained against Buyer or the Product on account of any Product stored by or on behalf of Seller ...." (*See* Def.'s Resp. to Pl.'s Mot. for Immediate Possession, Ex. 8, ¶ 18)

Even if the Special Tools Lien Act applies, Defendant argues that Plaintiff failed to file its financing statement with Michigan's Secretary of State as the Act requires. *See* Mich. Comp. Laws §§ 440.9501 and 9502. Plaintiff instead filed its financing statement with the Ontario Ministry of Consumer and Business Services. As such, the lien is invalid. In support of this argument, Defendant cites MICH. COMP. LAWS §§ 440.9501 and 9502. MICH. COMP. LAWS § 440.9501(1) states that:

> Except as otherwise provided in subsection (2), the office in which to file a financing statement to perfect the security interest or agricultural lien is 1 of the following:
>
> (a) The office designated for the filing or recording of a record of a mortgage on the related real property, if the collateral is as-extracted collateral or timber to be cut, or the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures.
>
> (b) The *office of secretary of state* in all other cases, including a case in which the collateral is goods that are or are to become fixtures and the financing statement is not filed as a fixture filing.
>
> (2) The office in which to file a financing statement to perfect a security interest in collateral, including fixtures, of a transmitting utility *is the office of the secretary of state.* The financing statement also constitutes a fixture filing as to the collateral indicated in the financing statement which is or is to become fixtures.

MICH. COMP. LAWS § 440.9501(1) (italics added).

At this juncture, there remain issues of fact as to which document constitutes the contract in this case-the quotes prepared by Plaintiff or the purchase orders prepared by Defendant. Until this issue is resolved, the Court is unable to determine whether Michigan law applies and whether the Michigan's Special Tools Lien Act applies. Plaintiff is correct that under M.C.L.A. § 570.567(a), a special tool builder may take possession without judicial process if it can be done without breach of the peace. However, Plaintiff has not chosen this alternative since Plaintiff involved the judiciary by filing the instant action in this Court.[FN4]

FN4. Plaintiff submits the opinion written by the Oakland County Circuit Court but the Court is not bound by the opinion. In any event, since questions of fact remain regarding what document governs the parties in this case, the Court need not address whether Plaintiff is entitled to "immediate" possession of the SBA.

V. CONCLUSION

***5** For the reasons set forth above,

IT IS ORDERED that Plaintiff Easom Automation System, Inc.'s Motion for Immediate Possession [**Docket No. 11, filed on January 30, 2007**] is DENIED without prejudice.

E.D.Mich.,2007.
Easom Automation Systems, Inc. v. Thyssenkrupp Fabco, Corp.
Not Reported in F.Supp.2d, 2007 WL 2875256 (E.D.Mich.), 64 UCC Rep.Serv.2d 106

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Slip Copy, 2012 WL 1608709 (S.D.N.Y.)
(Cite as: 2012 WL 1608709 (S.D.N.Y.))

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
MICROGEM CORP., INC., Plaintiff,
v.
HOMECAST CO., LTD., Defendant.
Homecast Co., Ltd., Counterclaim–Plaintiff,
v.
Microgem Corp., Inc., Counterclaim–Defendant.

No. 10 Civ. 3330(RJS).
April 27, 2012.

MEMORANDUM

RICHARD J. SULLIVAN, District Judge.

***1** The Court held a jury trial in this matter from April 2 to 16, 2012. Prior to beginning trial, the Court issued a short Order that announced the Court's rulings on the parties' cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and deferred explanation of these rulings to a subsequent written opinion. This Memorandum sets forth the reasons for those rulings that remain relevant following trial.

I. BACKGROUND

A. *Facts*[FN1]

FN1. The following facts are taken from the pleadings, the parties' Local Rule 56.1 Statements, the affidavits submitted in connection with the instant motion, and the exhibits attached thereto. The facts are undisputed unless otherwise noted. Where only one party's 56.1 Statement is cited, the facts are taken from that party's statement, and the other party does not dispute the fact asserted or has offered no admissible evidence to refute that fact, The abbreviation "HC 56.1" refers to Homecast's Local Rule 56.1 statement in support of its motion for summary judgment, while "HC Opp'n 56.1" refers to Homecast's Local Rule 56.1 statement in opposition to Microgem's cross-motion for summary judgment. Similarly, "MG 56.1" and "MG Opp'n 56.1" refer, respectively, to Microgem's Local Rule 56.1 statements in support of its motion for summary judgment and in opposition to Microgem's cross-motion.

This dispute arises out of Homecast Co., Ltd.'s ("Homecast") sale of MG2000 digital converter boxes to Microgem Corp., Inc. ("Microgem"). (MG 56.1 ¶¶ 22, 24, 26; HC 56.1 ¶ 1.) Homecast is an electronics manufacturer and Microgem is a distributor of consumer electronics products. (HC 56.1 ¶¶ 2–3.) The parties attempted to capitalize on an opportunity created by the phasing out of analog television broadcasts in the United States by selling digital converter boxes, which were necessary to enable individuals with older, analog only televisions to receive and decode digital broadcasts. (MG 56.1 ¶¶ 11, 13, 14.)

The parties initially entered into a Sales Agent Agreement on July 27, 2007 (the "July 2007 Agreement") pursuant to which Microgem would act as a sales agent and

market digital converter boxes produced under Homecast's brand name to distributors in the United States. (*Id.* ¶ 24; HC 56.1 ¶¶ 4–5.) Microgem alleges that the parties subsequently modified the July 2007 Agreement through a series of meetings and email correspondence to reflect that, instead of acting as a sales agent, Microgem would purchase digital converter boxes manufactured by Homecast and resell them under the Microgem brand name. (MG 56.1 ¶¶ 22–33; HC Opp'n 56.1 ¶¶ 22–33; HC 56.1 ¶¶ 7–8.)

Microgem ultimately submitted three purchase orders to Homecast, for a total of 34,000 MG2000s, which were filled. (HC 56.1 ¶¶ 21, 23, 27, 29, 30, 35, 37.) Microgem did not, however, pay the total outstanding balance due on the three purchase orders. (*Id.* ¶¶ 33, 34.) Instead, Microgem asserts that its obligation to pay was excused because the MG2000s that Homecast delivered were defective. (MG Opp'n 56.1 ¶ 34.)

On September 29, 2009, after Microgem filed this lawsuit, but before it served Homecast, the parties met to discuss the problems Microgem was having with the MG2000s, including the costs and expenses it had incurred in connection with processing returns. (HC 56.1 ¶¶ 143–45.) At this meeting Homecast agreed to pay Microgem $456,912. (HC 56.1 ¶¶ 150, 152.) Homecast asserts that this payment was in exchange for a full settlement of the claims alleged in this lawsuit; Microgem disputes this, (HC 56.1 ¶¶ 151–53; MG Opp'n 56.1 ¶¶ 151–53; MG 56.1 ¶¶ 71–73; HC Opp'n 56.1 ¶¶ 71–73.) Homecast sent $456,912 by wire to Microgem on October 23, 2009, but the parties did not reduce to writing any of the terms regarding this payment, or whether it was intended to settle all claims in this matter. (HC 56.1 ¶ 154; MG 56.1 ¶ 73; HC Opp'n 56.1 ¶ 73.)

B. *Procedural History*

***2** Microgem commenced this action by fifing a Complaint on September 4, 2009, in New York State Supreme Court, New York County. Homecast removed the case to this Court on April 20, 2010 on the basis of diversity jurisdiction. (Doc. No. 1.) The parties submitted cross-motions for partial summary judgment on August 15, 2011, which were fully submitted as of September 26, 2011. On February 28, 2012, the Court issued a "bottom-line" Order that announced the Court's rulings on these motions. (Doc. No. 71.) Trial commenced in this matter on April 2, 2012 and, on April 16, 2012, the jury returned a verdict in favor of Homecast on Microgem's remaining claims. The jury also found in favor of Homecast on all of its remaining counterclaims.

II. LEGAL STANDARDS

A. *Summary Judgment*

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, a court shall grant a motion for summary judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The moving party bears the burden of showing that it is entitled to summary judgment. *See Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 256 (1986). The court "is not to weigh evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Amnesty Am. v. Town of W. Hartford,* 361 F.3d 113, 122 (2d Cir.2004) (internal quotation marks

omitted); *accord Anderson,* 477 U.S. at 248. Once the moving party has met its burden, the nonmoving party "must come forward with specific facts showing that there is a *genuine issue for trial."* *Caldarola v. Calabrese,* 298 F.3d 156, 160 (2d Cir.2002) (emphasis in original) (internal citations and quotation marks omitted).

B. *Governing Law*

The parties dispute what law governs the contract claims in this matter. [FN2] Homecast argues that the July 2007 Agreement is the operative contract and that the Court should enforce the New York choice of law clause in that agreement. Microgem, however, asserts that the Convention on the International Sale of Goods ("CISG") supplies the governing law for the contract claims. "The CISG is a self-executing treaty, binding on all signatory nations, that creates a private right of action in federal court under federal law ." *Hanwha Corp. v. Cedar Petrochemicals, Inc.,* 760 F.Supp.2d 426, 430–31 (S.D.N.Y.2011) (citing *Delchi Carrier SpA v. Rotorex Corp.,* 71 F.3d 1024, 1027–28 (2d Cir.1995)). In the absence of an agreement to the contrary, the CISG governs contracts for the sale of goods between parties in different countries that are signatories to the convention. CISG, art. I(1)(a), 15 U.S.C.App., 52 Fed.Reg. 6262 (March 2, 1987); *see Delchi Carrier,* 71 F.3d at 1027 n. 1; *Hanwha,* 760 F.Supp.2d at 430–31. The parties do not dispute that the United States and South Korea are both signatories to the CISG. *Cf., e.g., Hanwha,* 760 F.Supp.2d at 428, 431 (holding that the CISG applies to a contract for the sale of goods between a New York corporation and a Korean corporation).

FN2. The parties agree that the tort claims are governed by New York law.

***3** Even assuming that the July 2007 Agreement controls, a fact that Microgem disputes,[FN3] the choice of law clause is, standing alone, insufficient to establish that the parties intended to opt-out of the CISG. As a treaty, the CISG is incorporated into federal law and, thus, is a part of New York law. *Delchi Carrier,* 71 F.3d at 1027–28; *Hanwha,* 760 F.Supp.2d at 430. Stating only that a contract will be governed by a particular jurisdiction's laws is generally insufficient to opt-out of the CISG when the CISG has been incorporated into that jurisdiction's laws. *See St. Paul Guardian Ins. Co. v. Neuromed Medical Sys. & Support, GmbH,* No. 00 Civ. 9344(SHS), 2002 WL 465312, at *3 (S.D.N.Y. Mar. 26, 2002) (applying the CISG when the contract's forum selection clause designated German law because German law would apply the CISG); *see also Travelers Prop. Cas. Co. of Am. v. Saint–Gobain Technical Fabrics Canada Ltd.,* 474 F.Supp.2d 1075, 1081–82 (D.Minn.2007) (noting that "a reference to a particular state's law does not constitute an opt out of the CISG" and applying the CISG where the contract specified that it would be governed by Minnesota law); *Asante Techs., Inc. v. PMC–Sierra, Inc.,* 164 F.Supp.2d 1142, 1150 (N.D.Cal.2001) (applying the CS1G despite clause stating that the agreement would be governed by California law). In order to opt-out of the CISG, the parties must do so clearly and unequivocally. *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co., Ltd.,* No. 06 Civ. 3972(LTS), 2011 WL 4494602, at *3 (S.D.N.Y. Sept. 28, 2011); *Hanwha,* 760 F.Supp.2d at 430. Therefore, in this situation, New York law would apply the CISG. *See Valero Mktg. &*

Supply Co. v. Greeni Oy, 373 F.Supp.2d 475, 480 (D.N.J.2005), *rev'd on other grounds* 242 F. App'x 840 (3d Cir.2007). Accordingly, the Court cannot conclude that the parties intended to opt-out of the CISG solely on the basis of the New York choice of law provision in the July 2007 Agreement and will apply the CISG to the contract claims in this action.

FN3. Microgem asserts that the operative agreement is a subsequent, oral agreement that the parties reached, Because neither party has argued that this oral agreement contains a choice of law clause, the CISG would also govern in the event that a subsequent oral agreement is found to be the operative contract.

III. DISCUSSION

A. *Microgem's Claims*

1. Fraud Claims

The Court granted in part and denied in part Homecast's motion for summary judgment regarding Microgem's fraud allegations set forth in Claims 5, 6, and 7 of the Amended Complaint. After the close of Microgem's case, Homecast moved for judgment as a matter of law pursuant to Rule 50 regarding all claims. At that time, Microgem conceded that it had not established its fraud claims and was no longer pursuing those claims. (Trial Tr. at 744, 970.) Accordingly, as Microgem dropped its claims for fraud, the Court's summary judgment ruling on these claims is moot. Similarly, the Court's decision granting summary judgment in favor of Homecast regarding Microgem's claim for punitive damages based on these claims is also mooted.

2. Contract Damages

Additionally, in light of the jury's verdict in favor of Homecast on Microgem's contract claims, the Court's rulings on Homecast's motion for summary judgment regarding the damages that Microgem could seek at trial arising out of these claims is no longer relevant, Homecast sought summary judgment on Microgem's claims to recover current lost profits, future lost profits, lost market share, and loss of goodwill. After trial, however, the jury found that Microgem had not established that Homecast was liable for breaching an agreement between the parties. Accordingly, because Microgem failed to establish a breach of an agreement between the parties, Microgen is not entitled to damages for breach of contract and the rationale underlying the Court's decision to grant in part and deny in part Homecast's motion for summary judgment regarding certain damages issues is no longer relevant.

B. *Homecast's Counterclaims*

1. Breach of the Settlement Agreement

***4** Microgem argues that it is entitled to summary judgment on Homecast's counterclaim for breach of a settlement agreement because any agreement that the parties may have reached was not a valid settlement agreement under New York law. The Second Circuit has not definitively addressed whether the validity of settlement agreements is determined by reference to state or federal law. *E.g., Monaghan v. SZS 33 Assocs., L.P.,* 73 F.3d 1276, 1283 (2d Cir, 1996); *see also Powell v. Omnicom,* 497 F.3d 124, 129 (2d Cir.2007). In this case, although the parties dispute what is required for a valid settlement agreement, Homecast does not argue that this question is answered by federal, rather than New York, law.

Generally, New York permits parties to

enter binding agreements without memorializing the terms of the agreement in a writing. *See, e.g., Winston v. Mediafare Entm't Corp.,* 777 F.2d 78, 80 (2d Cir.1985). In the absence of a written agreement, courts consider the following four factors to determine if parties intended to be bound by an oral agreement: "(1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing." *Id.* Despite this general principle, in New York, a settlement agreement is enforceable only if it is reduced to writing, or made between the parties in open court. N.Y. C.P.L.R. § 2104; *Bonnette v. Long Island College Hosp.,* 3 N.Y.3d 281, 286 (2004). In this case, the parties did not comply with the requirements of § 2104 because they did not reach the settlement agreement in open court or reduce the agreement to writing.

Homecast argues that federal courts applying New York law use the *Winston* factors to determine if an oral settlement agreement should be enforced. However, Homecast has not identified any case where these factors were at all relevant to a New York court sitting in diversity determining whether to enforce an oral settlement of state law claims reached *outside* of court. Instead, courts consider these factors only when determining whether parties should be bound by oral settlement agreements reached *in* open court. *See, e.g., Langreich v. Gruenbaum,* 775 F.Supp.2d 630, 635 (S.D.N.Y.2011). Therefore, because any agreement that the parties reached was not a valid settlement agreement under New York law, Microgem is entitled to summary judgment on this claim.

2. Abuse of Process

Microgem is also entitled to summary judgment on Homecast's counterclaim based on abuse of process. "An abuse of process claim has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective." *O'Bradovich v. Village of Tuckahoe,* 325 F.Supp.2d 413, 434 (S.D.N.Y.2004). Homecast, however, concedes that this claim fails if the parties did not settle the matter prior to Microgem serving it. (Homecast Br. in Opp'n at 9 & n. 7.) As set forth above, the parties did not reach a valid settlement agreement under New York law and, therefore, Microgem is entitled to summary judgment on this claim.

3. Failure to Pay for Products Delivered

***5** The Court denied MicrogenVs motion for summary judgment on Homecast's counterclaim for breach of contract by failing to pay for the products that were delivered. The Court concluded that material questions of fact precluded a grant of summary judgment on these claims and, after trial, the jury found in favor of Homecast on these claims. Accordingly, in light of the jury's verdict, further explanation is unnecessary.

4. Fraud

Homecast's fifth counterclaim asserts that Microgem is liable for fraud based on misrepresentations regarding (1) its willingness to settle the matter for $456,912, and (2) the number of defective boxes. Mi-

crogem is entitled to summary judgment with respect to the portion of this counterclaim that asserts Microgem fraudulently represented that it would be willing to settle the matter for $456,912. "A cause of action for fraud does not generally lie where the plaintiff alleges only that the defendant entered into a contract with no intention of performing." *Grappo v. Alitalia Linee Aeree Italiane, S.p.A.*, 56 F.3d 427, 434 (2d Cir.1995); *accord TVT Records v. Island Def Jam Music Grp.*, 412 F.3d 82, 91 (2d Cir.2005). As noted above, the parties did not reach a valid settlement agreement under New York law. However, in so far as the parties entered into an agreement relating to this payment, any claim that Microgem entered the agreement with no intention of performing would be improperly duplicative of an action for breach of contract. Accordingly, summary judgment in favor of Microgem on this aspect of Homecast's fraud counterclaim is appropriate.

With respect to the portion of this counterclaim that alleges Microgem fraudulently misrepresented the number of defective boxes, the Court found that disputed issues of fact made summary judgment inappropriate. After trial, the jury found in favor of Homecast on this counterclaim and awarded damages of $232,511.

IV. CONCLUSION

In sum, for the foregoing reasons, the Court reaffirms the summary judgment rulings contained in its bottom-line order dated February 28, 2012.

SO ORDERED.

S.D.N.Y.,2012.
Microgem Corp., Inc. v. Homecast Co., Ltd.

Slip Copy, 2012 WL 1608709 (S.D.N.Y.)

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REMARKS ON THE UNCITRAL DIGEST'S COMMENTS ON ARTICLE 6 CISG

Franco Ferrari[*]

I. INTRODUCTION

The text of the UNCITRAL Digest of Case Law on the United Nations Convention on the International Sales of Goods (Digest) relating to Article 6 CISG, not unlike the text relating to other provisions, evidences both the Digest's usefulness as well as its weaknesses.[1] As far as the former is concerned, it can easily be evinced from the number of court decisions cited in the Digest, the retrieval of which would otherwise be difficult.[2] Furthermore, the Digest is helpful as it organizes all decisions under different headings, thus making the research even easier. Also, the fact that the Digest is published in each of the six official languages of the United Nations allows it to reach more scholars and practitioners than any other instrument of interpretation. However, the use of all six official languages, albeit necessary for achieving a more global outreach, does bear some risk, namely that of certain statements drafted in one language being wrongly translated into another.

Although this appears to be a point too general to be made here, in the beginning of a number of comments on that part of the Digest that deals with Article 6 CISG, this is exactly the time and place where to make this comment, as an error in the translation from (at least) English to French did occur. Having drafted the Digest part to be discussed, I can vouch at least for what the drafter wanted to state in the English version of the relevant part of the Digest.

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* Full Professor of International Law, Verona University School of Law; former Legal Officer, United Nations Office of Legal Affairs, International Trade Law Branch; the author is the drafter of the UNCITRAL draft Digest on Articles 1-13 and 78 on which the final version of the Digest is based.

1. For an overview of the advantages and disadvantages of the UNCITRAL Digest, see Heinz A. Friehe, *Review of The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention*, INTERNATIONALES HANDELSRECHT 175-76 (2004).

2. *See also* Joseph Lookofsky, *Digesting CISG Case Law: How Much Regard Should We Have?*, 8 VINDOBONA J. INT'L COM. L. & ARB. 181-82 (2004).

The error occurred in relation to that part of the Article 6 Digest (para. 5) that deals with those cases where the CISG's application is excluded with an indication of the applicable law. According to the English version of the Digest, the applicable law is determined by virtue of the rules of private international law of the forum, which in most countries makes applicable the law chosen by the parties, at least in those countries where the 1980 Convention on the law applicable to contractual obligations is to be applied. Unfortunately, the French version of the Digest refers to this solution when dealing with the cases where *l'application de la Convention est exclue sans indication du droit applicable*, a line of cases specifically dealt with at a later stage.

Apart from this weakness, there are other reasons why one should go beyond the Digest. These reasons can be summarized as follows: since the Digest cites many (albeit not all) decisions that deal with a specific provision, there will be cases where a contrast in case law will emerge. Pursuant to a decision taken by the United Nations Commission on International Trade Law when authorizing the drafting of the Digest,[3] the Digest itself does not criticize any decision,[4] neither does it point out those cases that are worth being followed. This means, however, that ultimately the Digest is not too helpful in guiding the interpreter through the labyrinth of case law which it makes readily available. If one were to look for a guide, one would have to look elsewhere, for instance to comments by legal writers such as those made on the occasion of this Conference.

Furthermore, the Digest does not deal with all the cases that have been decided by courts in relation to a given provision. This is of course a natural consequence of there having to be a deadline for comments to be drafted in order for the Digest to be published, but it poses a problem nonetheless, as important issues may have been dealt with after the deadline for the Digest's finalization.

In respect of the Digest comments on Article 6 CISG, this is an important issue, given a very recent Italian court decision[5] which dealt with a particular problem—namely the effect of the parties' choice to apply the CISG to

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3. *See* Report of the United Nations Commission on International Trade Law on its Thirty-Fourth Session, U.N. GAOR, 56th Sess., Supp. No. 17, U.N. DOC. A/56/17 (2001).

4. *See* Jernej Sekolec, *Digest of case law on the UN Sales Convention: The combined wisdom of judges and arbitrators promoting uniform interpretation of the Convention, in* THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 1, 14 (Franco Ferrari et al. eds., 2004).

5. *See* Tribunale di Padova, Italy, 11 Jan. 2005, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=FullText.

contracts to which it would otherwise not apply. Although this issue is referred to in the Article 6 Digest (para. 12), the Digest does not refer to any court decisions dealing with that issue, even though today there is case law on this issue.[6]

In the following pages, I will comment on the decisions referred to in (and missing from) the Article 6 Digest. In doing so, I will be a little more critical then when drafting those Digest comments.

II. EFFECTS OF ARTICLE 6 IN GENERAL

It is common knowledge, that even where all the CISG's requirements of applicability (international, substantive, temporal, and personal/territorial)[7] are met, the CISG does not necessarily apply,[8] since pursuant to Article 6,[9] the parties may exclude the CISG's application. Consequently, in order to decide whether the CISG is applicable, one must also look into whether it has been excluded by the parties,[10] as pointed out by several court decisions,[11] some of

6. For a more detailed analysis of this issue, see *infra* text accompanying note 118 ff.

7. For comments on these requirements, see, most recently, Franco Ferrari, *The CISG's Sphere of Application: Articles 1-3 and 10, in* THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 21 ff. (Franco Ferrari et al. eds., 2004).

8. *See* FRANCO FERRARI, THE SPHERE OF APPLICATION OF THE VIENNA SALES CONVENTION 20 (1995).

9. For a detailed overview of the history of Article 6 CISG, see Maureen T. Murphy, *United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity on International Sales Law*, 12 FORDHAM INT'L L.J. 727-29 (1989).

10. *See also* Kenneth C. Randall & John E. Norris, *A New Paradigm for International Business Transactions*, 71 WASH. U. L.Q. 616 f. (1993).

11. For decisions not referred to in the Digest that also refer to the lack of exclusion as an applicability requirement, see Tribunale di Padova, *supra* note 5; Tribunale di Padova, Italy, 31 Mar. 2004, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=966&step=FullText; Tribunale di Padova, Italy, 25 Feb. 2004, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=972&step=FullText.

which (albeit not all) are quoted in the Digest.[12] Thus, the lack of an exclusion can be regarded as a (negative) applicability requirement.[13]

By providing for this possibility, the draftsmen of the CISG reaffirmed one of the general principles already embodied in the 1964 Hague Conventions,[14] that is, the principle according to which the primary source of the rules governing international sales contracts is party autonomy,[15] which is why it is no surprise that some court decisions state that the CISG is based upon the general principle of "prevalence of party autonomy."[16] By stating

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12. *See, e.g.*, Tribunale di Vigevano, Italy, 12 July 2000, *published in* GIURISPRUDENZA ITALIANA 281 ff. (2001), also *available at* http://cisgw3.law.pace.edu/cases/000712i3.html; Oberlandesgericht Hamm, Germany, 23 June 1998, *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/434.htm; Cour d'appel Paris, France, 15 Oct. 1997, *available at* http://witz.jura.uni-sb.de/CISG/decisions/151097v.htm; Oberlandesgericht München, Germany, 9 July 1997, *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/281.htm; Oberlandesgericht Karlsruhe, Germany, 25 June 1997, *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/263.htm; Oberster Gerichtshof, Austria, 11 Feb. 1997, *available at* http://www.cisg.at/10_150694.htm; Landgericht Landshut, Germany, 5 Apr. 1995, *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/193.htm; Landgericht Oldenburg, Germany, 15 Feb. 1995, *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/197.htm; Oberster Gerichtshof, Austria, 10 Nov. 1994, *published in* ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG 79 f. (1995); Tribunal Cantonal Valais, Switzerland, 29 June 1994, *published in* ZEITSCHRIFT FÜR WALLISER RECHTSPRECHUNG 125 (1994); Amtsgericht Nordhorn, Germany, 14 June 1994, *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/259.htm; Oberlandesgericht Karlsruhe, Germany, 20 Nov. 1992, *published in* NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNGS-REPORT 1316 (1993); Landgericht Düsseldorf, Germany, 9 July 1992, *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/42.htm.

13. In this respect, see Landgericht Trier, Germany, 12 Oct. 1995, *published in* NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNGS-REPORT 564 ff. (1996) (expressly mentioning the parties' not excluding the CISG as a requirement for the CISG's applicability).

14. Despite some textual differences, Article 6 CISG is based upon Article 3 ULIS, as has often been pointed out; *see, e.g.*, M.J. Bonell, *Art. 6, in* COMMENTARY ON THE INTERNATIONAL SALES LAW 51 (C.M. Bianca & M.J. Bonell eds., 1987); FRANCO FERRARI, LA VENDITA INTERNAZIONALE. APPLICABILITÀ ED APPLICAZIONI DELLA CONVENZIONE DI VIENNA 157 (1997); Rolf Herber, *Art. 6, in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT 83 (Peter Schlechtriem ed., 2d ed. 1995).

15. For a similar statement, see BERNARD AUDIT, LA VENTE INTERNATIONALE DE MARCHANDISES 37 (1990) (stating that "the Convention makes of the parties' will the primary source of the sales contract"); Fritz Enderlein, *Die Verpflichtung des Verkäufers zur Einhaltung des Lieferzeitraums und die Rechte des Käufers bei dessen Nichteinhaltung nach dem UN-Übereinkommen über Verträge über den Internationalen Warenkauf, in* PRAXIS DES INTERNATIONALEN PRIVAT-UND VERFAHRENSRECHTS 314 (1991); Hans Hoyer, *Der Anwendungsbereich des Einheitlichen Wiener Kaufrechts, in* DAS EINHEITLICHE WIENER KAUFRECHT 41 (Hans Hoyer & Willibald Posch eds., 1992) (stating the same); ULRICH MAGNUS, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN, WIENER UN-KAUFRECHT (CISG) 133 (13th revised ed., 1999) (making a similar statement).

16. *See* Tribunale di Rimini, Italy, 26 Nov. 2002, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=823&step=FullText; Hof Beroep Gent, Belgium, 17 May 2002, *available at* http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-05-17.htm; Rechtbank Koophandel Ieper, Belgium, 29 Jan. 2001, *available at* http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-01-29.htm; Landgericht Stendal, 12 Oct. 2000, *published in* INTERNATIONALES HANDELSRECHT 32 (2001).

that the CISG can be excluded, the drafters clearly acknowledged the dispositive nature[17]—emphasized also in case law[18]—and the "central role which party autonomy plays in international commerce and, particularly, in international sales."[19]

As far as party autonomy is concerned,[20] it must be pointed out (as the Digest does in para. 3) that Article 6 CISG refers to two different lines of

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17. For this statement, see Sergio M. Carbone, *L'ambito di applicazione ed i criteri interpretativi della convenzione di Vienna, in* LA VENDITA INTERNAZIONALE. LA CONVENZIONE DELL'11 APRILE 1980 78 (1981); Sergio M. Carbone & Riccardo Luzzatto, *I contratti del commercio internazionale, in* 11 TRATTATO DI DIRITTO PRIVATO 131 (Pietro Rescigno ed., 1984); Johan Erauw, *Waneer is het Weens koopverdrag van toepassing?, in* HET WEENS KOOPVERDRAG 47 (Hans van Houtte et al. eds., 1997); FRANCO FERRARI, VENDITA INTERNAZIONALE DI BENI MOBILI. ART. 1-13. AMBITO DI APPLICAZIONE. DISPOSIZIONI GENERALI 110 (1994); Herber, *supra* note 14, at 84; ALESSANDRA LANCIOTTI, NORME UNIFORMI DI CONFLITTO E MATERIALI NELLA DISCIPLINA CONVENZIONALE DELLA COMPRAVENDITA 146 (1992); BURGHARD PILTZ, INTERNATIONALES KAUFRECHT 64 (1993); GERT REINHART, UN-KAUFRECHT 26 (1991); Giorgio Sacerdoti, *I criteri di applicazione della convenzione di Vienna sulla vendita internazionale: diritto uniforme, diritto internazionale privato e autonomia dei contratti*, 44 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 744 (1990); Ingo Saenger, *Art. 6, in* 3 KOMMENTAR ZUM BURGERLICHEN GESETZBUCH §§ 1297-2385. EGBGB. CISG 2779 (Heinz G. Bamberger & Herbert Roth eds., 2003); Claude Witz, *L'exclusion de la Convention des Nations Unies sur les contrats de vente internationale de marchandises par la volonté des parties (Convention de Vienne du 11 avril 1980)*, RECEUIL DALLOZ CHRONIQUE 107 (1990).

Note, however, that even though the principle of party autonomy is widely accepted, there were some States which expressed reservations to it; "[t]heir concern was that, in practice, the principle could be abused by the economically stronger party imposing his own national law or contractual terms far less balanced than those contained in the Convention," Bonell, *supra* note 14, at 51; *see also* 1 UNCITRAL YEARBOOK 168 (1968-1970); 2 UNCITRAL YEARBOOK 43-44 (1971); 3 UNCITRAL YEARBOOK 73 (1973).

18. For an express reference to the Convention's non-mandatory nature, see Cassazione Civile, Italy, 19 June 2000, *published in* GIURISPRUDENZA ITALIANA 236 (2001); Oberster Gerichtshof, Austria, 21 Mar. 2000, *published in* INTERNATIONALES HANDELSRECHT 41 (2001); Oberster Gerichtshof, Austria, 15 Oct. 1998, *published in* ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG 63 (1999); Handelsgericht Wien, Austria, 4 Mar. 1997, *available at* http://www.cisg.at/1R4097x.htm; Kreisgericht Wallis, Austria, 29 June 1994, *published in* ZEITSCHRIFT FÜR WALLISER RECHTSPRECHUNG 126 (1994).

19. M.J. Bonell, *Commento all'art. 6*, NUOVE LEGGI CIVILI COMMENTATE 16 (1989); for similar affirmations in scholarly writing, see Samuel Date-Bah, *The United Nations Convention on Contracts for the International Sale of Goods: Overview and Selective Commentary, in* REVIEW OF GHANA LAW 54 (1979); Enderlein, *supra* note 15, at 316; Hoyer, *supra* note 15, at 41; PETER SCHLECHTRIEM, EINHEITLICHES UN-KAUFRECHT 21 (1981). For a reference in case law to the party autonomy's central role, see Landgericht Stendal, Germany, 12 Oct. 2000, *published in* INTERNATIONALES HANDELSRECHT 32 (2001).

20. Note, that Carbone, *supra* note 17, at 78, has compared the reaffirmation of party autonomy as a basic principle of the CISG to "the recognition of a necessity for the development of international commerce." *See also* Luigi Rovelli, *Conflitti tra norme della Convenzione e norme di diritto internazionale privato, in* LA VENDITA INTERNAZIONALE. LA CONVENZIONE DELL'11 APRILE 1980 102 (1981), stating that the introduction of Article 6 CISG and, therefore, the recognition of party autonomy was, a "political need."

cases.[21] One where the Convention's application is excluded, the other where the parties derogate from—or modify the effects of—the provisions of the CISG on a substantive level.[22] These two situations differ from each other in that the former does, according to the CISG, *per se* not encounter any restrictions,[23] as also pointed out in the Digest (para. 3), whereas the latter is limited, as there are provisions the parties are not allowed to derogate from. Where, for instance, at least one of the parties to the contract governed by the CISG has its place of business in a State that has made a reservation under Article 96, the parties may not derogate from or vary the effect of Article 12. In those cases, according to Article 12, any provision "that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply."

Although this matter has been referred to in the Digest as well (para. 3), the Digest does not conclusively deal with the effects of such a reservation, not even in its comments on Article 12. It states—correctly—that the effects of Article 12 lead to the principle of freedom from form requirements not being *per se* applicable where one party has its relevant place of business in a State that made an Article 96 declaration.[24] It then cites the contradictory views held in case law in respect of the effects of an Article 96 declaration, unfortunately without stating which view is the correct one: that according to which the sole fact that one party has its place of business in a State that made an Article 96 reservation does not necessarily mean that the form requirements of that State apply,[25] thus letting it (correctly) depend on the law to which the rules of private international of the forum lead whether any form requirements have to be met;[26] or that pursuant to which where one party has its relevant

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21. For this statement, see also Bonell, *supra* note 14, at 53; ESPERANZA CASTELLANOS RUIZ, AUTONOMIA DE LA VOLUNTAD Y DERECHO UNIFORME EN LA COMPRAVENTA INTERNACIONAL 37 (1998); FRANCO FERRARI, LA COMPRAVENTA INTERNACIONAL 119 ff. (1999); TOMÁS VAZQUEZ LEPINETTE, COMPRAVENTA INTERNACIONAL DE MERCADERIAS. UNA VISION JURISPRUDENCIAL 86 (2000).

22. For this distinction, see also LANCIOTTI, *supra* note 17, at 148 f.; MAGNUS, *supra* note 15, at 105 ff.; Dieter Martiny, *Kommentar zum UN-Kaufrecht, in* 7 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH 1655 f. (Hans-Jürgen Sonnenberger ed., 1989); Sacerdoti, *supra* note 17, at 745-46.

23. For this statement, see Hoyer, *supra* note 15, at 41.

24. *See* Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, *available at* http://www.law.kuleuven.ac.be/int/tradelaw/WK/1995-05-02.htm.

25. Rechtbank Rotterdam, Netherlands, 12 July 2001, *published in* 278 NEDERLANDS INTERNATIONAAL PRIVAATRECHT (2001).

26. *Id.*; Hooge Raad, Netherlands, 7 Nov. 1997, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=333&step=FullText.

place of business in a State that made an Article 96 reservation, the contract must necessarily be concluded or evidenced or modified in writing.[27]

It should be noted that although the Convention does not expressly mention it, there are other provisions that the parties cannot derogate from, as also pointed out by the Digest (para. 4), namely the public international law provisions (i.e. Articles 89-101).[28] As the Digest correctly states, this is due to the fact that those provisions relate to issues relevant to Contracting States rather than private parties. Even though the Digest holds that there is no case law on this point yet, it should be noted that the Tribunale di Vigevano in its rather famous decision of 12 July 2000, expressly took the view referred to in the Digest and stated that Articles 89-101 cannot be derogated from.[29] In a 2005 decision, the Tribunale di Padova not only confirmed that the parties cannot exclude the CISG's final provisions, but it also stated that the parties cannot derogate from Article 28 either.[30] In my opinion, that view is correct, as Article 28 is not directed to the parties, but rather to the courts of

27. The High Arbitration Court of the Russian Federation, 16 Feb. 1998, *available at* http://cisgw3.law.pace.edu/cases/980216r2.html; Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, *available at* http://www.law.kuleuven.ac.be/int/tradelaw/WK/1995-05-02.htm.

28. For this conclusion, *see also* BEATE CZERWENKA, RECHTSANWENDUNGSPROBLEME IM INTERNATIONALEN KAUFRECHT 172 (1988); FERRARI, *supra* note 17, at 111.

29. *See* Tribunale di Vigevano, Italy, 12 July 2000, *available at* http://cisgw3.law.pace.edu/cases/000712i3.html.

30. Tribunale di Padova, Italy, 11 Jan. 2005, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=FullText.

Contracting States.[31] However, the aforementioned exceptions are the only ones. All other provisions can be derogated from.[32]

III. Implied Exclusion of the CISG and Choice of the Applicable Law

Party autonomy also played a very important role under the ULIS.[33] A comparison of Article 6 CISG and its "direct predecessor,"[34] Article 3 ULIS, could even lead to the conclusion that under ULIS party autonomy was more widely recognized,[35] since the ULIS expressly stated that its exclusion could also be made implicitly.[36] However, this provision was later criticized,[37] which is why the express reference to the possibility of an implicit exclusion

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31. For this conclusion, see also Audit, *supra* note 15, at 123 f.; Franco Ferrari, *Art. 6, in* Kommentar zum Einheitlichen UN-Kaufrecht (CISG) 125-26 (Peter Schlechtriem & Ingeborg Schwenzer eds., 4th ed. 2004); Martin Karollus, *Art. 28, in* Kommentar zum UN-Kaufrecht 298, 309 (Heinrich Honsell ed., 1997); *contra* Amy H. Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 63 Wash. L. Rev. 607, 641-42 (1988), stating that:

> Arguably, however, article 28 differs from most of the Convention's provisions because it deals directly with a court's power and discretion to grant injunctive relief. In this way, article 28 is more like article 12, regarding domestic statutes of frauds. Article 12 is expressly exempted from the contractual waiver power in article 6. The parties cannot agree to be bound by an oral modification if any party has its principal place of business in a Contracting State that has preserved its own statute of frauds under article 96. Similarly, one may argue, the parties cannot require specific performance when the court would not otherwise grant it under article 28. On balance, however, article 6 should be interpreted to permit waiver of article 28. First, only article 12, not article 28, is expressly exempted from article 6. Furthermore, the Convention's drafters reasonably might have concluded that the domestic policies supporting a statute of frauds are more significant than those protecting a court's discretion to deny specific performance.

Id. (citations omitted).

32. Thus, it cannot surprise that a court has recently stated that Article 55, relating to open-price contracts, is only applicable where the parties have not agreed to the contrary. *See* Cour d'appel Grenoble, France, 26 Apr. 1995, *available at* http://witz.jura.uni-sb.de/CISG/decisions/2604952v.htm. Neither is a court decision surprising which expressly states that Article 39, relating to the notice requirement, is not mandatory and can be derogated from. *See* Landgericht Giessen, Germany, 5 July 1994, *published in* Neue Juristische Wochenschrift Rechtsprechungs-Report 438 (1995). To make another example, according to the Austrian Supreme Court, Article 57 also can be derogated from. *See* Oberster Gerichtshof, Austria, 10 Nov. 1994, *published in* Zeitschrift für Rechtsvergleichung 79 ff. (1995).

33. For a similar statement, see Rolf Herber, *Art. 3, in* Kommentar zum Einheitlichen Kaufrecht 19 (Hans Dölle ed., 1976); Hoyer, *supra* note 15, at 41; Lanciotti, *supra* note 17, at 145-46.

34. Bonell, *supra* note 19, at 17.

35. This has already been pointed out by Carbone & Luzzatto, *supra* note 17, at 132.

36. Article 3 ULIS reads as follows: "The parties to a contract of sale shall be free to exclude the application thereto of the present Law either entirely or partially. Such exclusion may be express or implied." Uniform Law on the International Sale of Goods (ULIS) ch. 1, art. 3 (1964).

37. *See* 1 UNCITRAL Yearbook 168 (1968-1970).

was not retained by the drafters of the CISG,[38] even though at the Vienna Diplomatic Conference proposals to reintroduce that express reference were made.[39] In my opinion, this does not mean that under the CISG the exclusion always has to be made expressly,[40] as, however, stated in several court decisions cited—once again, without any comment—in the Digest,[41] as well

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38. *See* Claude Samson, *La Convention des Nations Unies sur les contrats de vente internationale de marchandises: Etude comparative des dispositions de la Convention et des règles de droit québécois en la matière*, CAHIERS DE DROIT 931 (1982).

39. Both the representatives of England and Belgium made proposals to reintroduce a reference to the possibility of implicitly excluding the CISG's application; for a reference to these attempts, see FERRARI, *supra* note 14, at 162; Herber, *supra* note 14, at 83-84; MAGNUS, *supra* note 15, at 134; United Nations Conference on Contracts for the International Sale of Goods, Vienna, Mar. 10, 1980-Apr. 11, 1980, *Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees* 85-86, 249-50, U.N. DOC. A/CONF.97/19 (1981) [hereinafter *Records*]; SCHLECHTRIEM, *supra* note 19, at 22 n.98.

40. This conclusion, possibility of an implicit exclusion, is favored by most legal scholars; *see, e.g.*, WILHELM-ALBRECHT ACHILLES, KOMMENTAR ZUM UN-KAUFRECHTSÜBEREINKOMMEN (CISG) 25 (2000); AUDIT, *supra* note 15, at 38; Kevin Bell, *The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods*, 8 PACE INT'L L. REV. 237, 255 (1996); CHRISTOPH BRUNNER, UN-KAUFRECHT—CISG: KOMMENTAR ZUM ÜBEREINKOMMEN DER VEREINTEN NATIONEN ÜBER DEN INTERNATIONALEN WARENKAUF VON 1980, at 68 (2004); Jacopo Cappuccio, *La deroga implicita nella Convenzione di Vienna del 1980*, 8 DIRITTO DEL COMMERCIO INTERNAZIONALE 867, 868 (1994); Carbone & Luzzatto, *supra* note 17, at 132; CZERWENKA, *supra* note 28, at 170; Date-Bah, *supra* note 19, at 54; FERRARI, *supra* note 17, at 113; Ferrari, *supra* note 31, at 128; ALEJANDRO M. GARRO & ALBERTO LUIS ZUPPI, COMPRAVENTA INTERNACIONAL DE MERCADERÍAS 98 (1990); ROLF HERBER & BEATE CZERWENKA, INTERNATIONALES KAUFRECHT 42 (1992); Rudiger Holthausen, *Vertraglicher Ausschluß des UN-Übereinkommens über internationale Warenkaufverträge*, RECHT DER INTERNATIONALEN WIRTSCHAFT 515 (1989); Hoyer, *supra* note 15, at 41; MARTIN KAROLLUS, UN-KAUFRECHT 38 (1991); Nicole Lacasse, *Le champ d'application de la Convention des Nations Unies sur les contrats de vente internationale de marchandises*, *in* ACTES DU COLLOQUE SUR LA VENTE INTERNATIONALE 23, 37 (Nicole Lacasse & Louis Perret eds., 1989); Fabio Liguori, *La Convenzione di Vienna sulla vendita internazionale di beni mobili nella pratica: un'analisi critica delle prime cento decisioni*, FORO ITALIANO 145, 158 (1996); JOCHEN LINDBACH, RECHTSWAHL IM EINHEITSRECHT AM BEISPIEL DES WIENER UN-KAUFRECHTS 253 (1996); Ulrich Magnus, *Das UN-Kaufrecht tritt in Kraft*, 51 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 123, 126 (1987); Martiny, *supra* note 22, at 1655 f.; Barry Nicholas, *The Vienna Convention on International Sales Law*, 105 L.Q. REV. 201, 208 (1989); REINHART, *supra* note 17, at 27; Bradley J. Richards, *Contracts for the International Sale of Goods: Applicability of the United Nations Convention*, 69 IOWA L. REV. 209, 237 (1983); Saegner, *supra* note 17, at 2779; SCHLECHTRIEM, *supra* note 19, at 21; Peter Winship, *The Scope of the Vienna Convention on International Sale Contracts*, *in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1.35 (Nina M. Galston & Hans Smit eds., 1984); Witz, *supra* note 17, at 108.

See also Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 281 (1984), where the author criticizes the draftsmen who, although they could have foreseen the problems which the lack of an express reference to the possibility of implicitly excluding the Convention would cause, "chose to provide little guidance."

41. *See* Helen Kaminski Pty. Ltd. v. Mktg. Australian Products, Inc., No. 96B46519, 1997 U.S. Dist. LEXIS 10630 (S.D.N.Y. July 27, 1997); Landgericht Landshut, Germany, 5 Apr. 1995; Orbisphere Corp. v. United States, 13 Ct. Int'l Trade 866, 726 F. Supp. 1344 (Ct. Int'l Trade 1990).

as in some other court decisions not cited at all.[42] This is evidenced, *inter alia*, by the fact that "the majority of delegations was . . . opposed to the proposal according to which a total or partial exclusion of the Convention could only be made 'expressly.'"[43] Consequently, the lack of express reference to the possibility of an implicit exclusion must not be regarded as precluding such possibility.[44] Rather it has a different meaning, to discourage courts from too easily inferring an 'implied' exclusion or derogation.[45] Therefore, an implicit exclusion must be regarded as possible, a view which has already been confirmed by many court decisions.[46] Some of these

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42. *See* BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador, 323 F. 3d 333 (5th Cir. 2003), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/030611u1.html; Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd., No. 01 C 5938, 2003 U.S. Dist. LEXIS 1306 (N.D. Ill. Jan. 29, 2003), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/030129u1.html; St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, No. 00 Civ. 9344(SHS), 2002 WL 465312, at *2 (S.D.N.Y. Mar. 26, 2002).

43. Bonell, *supra* note 14, at 52; *see also* AUDIT, *supra* note 15, at 38; PILTZ, *supra* note 17, at 48. For the proposal mentioned in the text, see *Records*, *supra* note 39, at 86, 249-50.

44. However, several authors have argued that in order to be effective, the exclusion of the Convention's application must be explicit; *see, e.g.*, Isaak I. Dore & James E. DeFranco, *A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code*, 23 HARV. INT'L L.J. 49, 53-54 (1982), stating that "[u]nlike the U.C.C. . . . the Convention does not seem to recognize implied agreements which exclude the application of the Convention. The Convention may therefore govern contracts which the parties by their implied agreement might have assumed to be governed by domestic law."

For a similar conclusion, see also Isaak I. Dore, *Choice of Law under the International Sales Convention: A U.S. Perspective*, 77 AM. J. INT'L L. 521, 532 (1981); Caroline D. Klepper, *The Convention for the International Sale of Goods: A Practical Guide for the State of Maryland and Its Trade Community*, 15 MD. J. INT'L L. & TRADE 235, 238 (1991); Murphy, *supra* note 9, at 728; Robert S. Rendell, *The New U.N. Convention on International Sales Contracts: An Overview*, 15 BROOK. J. INT'L L. 23, 25 (1989).

45. For a similar justification of the lack of reference to the possibility of implicitly excluding the CISG's application, *see also Records*, *supra* note 39, at 17 (stating that "[t]he second sentence of ULIS, article 3, providing that 'such exclusion may be express or implied' has been eliminated lest the special reference to 'implied' exclusion might encourage courts to conclude, on insufficient grounds, that the Convention had been wholly excluded"); PETER SCHLECHTRIEM, UNIFORM SALES LAW. THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 35 (1986) (stating that "[i]n contrast to Article 3 sentence 2 of ULIS, the Convention does not mention the possibility of an 'implied' exclusion, but this does not mean that a tacit exclusion is impossible. The intent of deleting the word 'implied' was to prevent the courts from being too quick to impute exclusion or the Convention"); *see also* Bell, *supra* note 40, at 255; Cappuccio, *supra* note 40, at 868; Thomas C. Ebenroth, *Internationale Vertragsgestaltung im Spannungsverhältnis zwischen ABGB, IPR-Gesetz und UN-Kaufrecht*, *in* JURISTISCHE BLÄTTER 681, 684 (1986); Ferrari, *supra* note 31, at 128; MAGNUS, *supra* note 15, at 104; PILTZ, *supra* note 17, at 48; Reifner, *infra* note 49, at 55.

46. *See* Tribunale di Padova, Italy, 11 Jan. 2005, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=FullText; Tribunale di Padova, Italy, 31 Mar. 2004, *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040331i3.html; Tribunale di Padova, Italy, 25 Feb. 2004, *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040225i3.html; Tribunale di Rimini, Italy,

decisions the Digest cites (para. 6 ff.) without commenting on, not unlike the cases holding the opposite view. Of course, there must be clear indications that the parties really wanted such an exclusion,[47] that is, there must be a real—as opposed to theoretical, fictitious or hypothetical[48]—agreement of exclusion.[49]

This is not a merely theoretical problem, as evidenced by the variety of ways to implicitly exclude the CISG. A typical[50] way of implicitly excluding the CISG is through the parties' choice of the applicable law.[51] There is no doubt that such a choice must be considered as being an effective exclusion

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26 Nov. 2002, *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021126i3.html; Oberster Gerichtshof, Austria, 22 Oct. 2001, *available at* http://www.cisg.at/1_7701g.htm; Cour de Cassation, France, 26 June 2001, *available at* http://witz.jura.uni-sb.de/CISG/decisions/260601 2v.htm; Tribunale di Vigevano, Italy, 12 July 2000, *published in* GIURISPRUDENZA ITALIANA 281 (2001); Oberlandesgericht Dresden, Germany, 27 Dec. 1999, *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/511.htm; Oberlandesgericht München, Germany, 9 July 1997, *available at* http://www.cisg-online.ch/cisg/urteile/282.htm; Landgericht München, Germany, 29 May 1995, *published in* NEUE JURISTISCHE WOCHENSCHRIFT 401 (1996); Oberlandesgericht Celle, Germany, 24 May 1995, *available at* http://www.cisg-online.ch/cisg/urteile/152.htm.

47. For a similar affirmation, see Michael J. Bonell, *La nouvelle Convention des Nations-Unies sur les contracts de vente internationale de marchandises*, DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL 7, 13 (1981) (stating that a "tacit exception may only be admitted if there are valid elements of indications showing the parties' 'true' intention"); FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW 48 (1992) (suggesting that there must be clear indications that an implicit exclusion is wanted); Erauw, *supra* note 17, at 47 (stating the same); Rovelli, *supra* note 20, at 105 (stating that "of course, the determination of the applicable law can result from an implicit choice of the parties, but is must be 'certain': this means that the intention of implicitly excluding the Convention must be real, not hypothetical").

48. *See also* Kammergericht Berlin, Germany, 24 Jan. 1994, *published in* RECHT DER INTERNATIONALEN WIRTSCHAFT 683 (1994) (expressly stating that the CISG's applicability cannot be excluded by a hypothetical choice of law).

49. For a similar statement, see JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 80 (3d ed. 1999) (stating that "although an agreement to exclude the Convention need not be 'express' the agreement may only be implied from facts pointing to *real*—as opposed to theoretical or fictitious—agreement"); for similar statements, see Christina Reifner, *Stillschweigender Ausschluss des UN-Kaufrechts im Prozess?*, *in* INTERNATIONALES HANDELSRECHT 55 (2002).

Note, however, that according to Murphy, *supra* note 9, at 749, the possibility of implicitly excluding the CISG contrasts with the need for certainty of law.

50. For this evaluation, see also Ferrari, *supra* note 31, at 129; Herber, *supra* note 14, at 81; MAGNUS, *supra* note 15, at 138.

51. As far as the validity of the choice of law is concerned, it must be evaluated on the grounds of the law applicable to this issue. According to Article 2 of the 1955 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, the *electio iuris* is governed by the law chosen by the parties; the same is true according to Article 3(4) and 8 of the 1980 EEC Convention on the Law Applicable to Contractual Obligations. For further reference to this problem, see Bonell, *supra* note 19, at 19; FERRARI, *supra* note 17, at 115-16; HERBER & CZERWENKA, *supra* note 40, at 43.

of the CISG, at least where the applicable law chosen by the parties is the law of a non-Contracting State.[52] This was true under the ULIS as well[53] and has been confirmed by a German court decision[54] cited in the Digest.

The choice of the law of a Contracting State as the law governing the contract poses more difficult problems.[55] One of these problems relates to the question of whether the CISG is applicable when the parties agree upon a national law, such as French, U.S. or Italian law, as the law applicable to their contract. As the Digest clearly shows (para. 8), the case law is contradictory on this issue as well. Since the Digest, however, simply lists the contradictory cases, once again without commenting on them, the interpreter has to look elsewhere to determine which cases should be followed.

In respect to the issue at hand, several courts,[56] as well as several legal writers,[57] suggest that the indication of the law of a Contracting State ought

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52. For a similar statement, *see, e.g.*, Bonell, *supra* note 14, at 56 (stating that there is an "[implicit] indication of the parties' intention to exclude the application of the Convention, either entirely or partially, whenever they have chosen as the proper law of their contract the law of a non-Contracting State . . ."); *see also* AUDIT, *supra* note 15, at 39; Carbone & Luzzatto, *supra* note 17, at 132; FRITZ ENDERLEIN ET AL., INTERNATIONALES KAUFRECHT: KAUFRECHTSKONVENTION. VERJÄHRUNGSKONVENTION. VERTRETUNGSKONVENTION. RECHTSANWENDUNGSKONVENTION 58 (1991); FERRARI, *supra* note 14, at 166; Ferrari, *supra* note 31, at 129; GARRO & ZUPPI, *supra* note 40, at 95; Holthausen, *supra* note 40, at 515; Ole Lando, *The 1985 Hague Convention on the Law Applicable to Sales*, *in* RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 84 (1987); Liguori, *supra* note 40, at 158; LINDBACH, *supra* note 40, at 308; MAGNUS, *supra* note 15, at 138; Martiny, *supra* note 22, at 1656; PILTZ, *supra* note 17, at 48; Reifner, *supra* note 49, at 55; Sacerdoti, *supra* note 17, at 746; Christian Thiele, *Das UN-Kaufrecht vor US-amerikanischen Gerichten—zugleich Anmerkung zu Viva Vino Import Corp. v. Franese Vini S.r.l. (E.D.Pa. 2000)*, *in* INTERNATIONALES HANDELSRECHT 9 (2002); Winship, *supra* note 40, at 1.35.

53. *See* Herber, *supra* note 33, at 20.

See, however, Rechtbank Koophandel Tongeren, Belgium, 18 Mar. 1976, *in* INTERNATIONALE RECHTSPRECHUNG ZU EKG UND EAG 136 f. (Peter Schlechtriem & Ulrich Magnus eds., 1987); Rechtbank Koophandel Tongeren, Belgium, 9 June 1977, *in* INTERNATIONALE RECHTSPRECHUNG ZU EKG UND EAG 138.

54. *See, e.g.*, Oberlandesgericht Düsseldorf, Germany, 2 July 1993, *published in* RECHT DER INTERNATIONALEN WIRTSCHAFT 845 (1993).

55. For an overview of this issue, see Franco Ferrari, *Zum vertraglichen Ausschluss des UN-Kaufrecht*, *in* ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 743 (2002); MAGNUS, *supra* note 15, at 138-39.

56. *See* Cour d'Appel Colmar, France, 26 Sept. 1995, *available at* http://witz.jura.uni-sb.de/cisg/decisions/260995.htm; Kammergericht Zug, Germany, 16 Mar. 1995, *published in* INTERNATIONALES HANDELSRECHT 44 (2000); Ad Hoc Arbitral Tribunal Florence, 19 Apr. 1994, *published in* DIRITTO DEL COMMERCIO INTERNAZIONALE 861 (1994); Tribunale di Monza, Italy, 14 Jan. 1993, *published in* FORO ITALIANO 916 (1994).

57. *See, e.g.*, Franz Bydlinski, *Diskussionsbeitrag*, *in* DAS UNCITRAL-KAUFRECHT IM VERGLEICH ZUM ÖSTERREICHISCHEN RECHT 48 (Peter Doralt ed., 1985); Martin Karollus, *Der Anwendungsbereich des UN-Kaufrechts im Überblick*, JURISTISCHE SCHULUNG 381 (1993).

to amount to an (implicit) exclusion of the CISG, because otherwise the indication of the parties would have no practical meaning.[58] In my opinion,[59] however, this solution is not tenable under the CISG,[60] not unlike under the ULIS.[61] The indication of the law of a Contracting State, if made without particular reference to the domestic law of that State,[62] as in two of the cases cited by the Digest,[63] does not *per se* exclude the Convention's application,[64]

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58. *See*, apart from the authors cited in the preceding note, KAROLLUS, *supra* note 40, at 38-39; Francis A. Mann, *Anmerkung zu BGH, Urteil vom 4.12.1985*, JURISTENZEITUNG 647 (1986); Walter A. Stoffel, *Ein neues Recht des internationalen Warenkaufs in der Schweiz*, SCHWEIZERISCHE JURISTENZEITUNG 173 (1990); Lajos Vekas, *Zum persönlichen und räumlichen Anwendungsbereich des UN-Einheitskaufrechts*, RECHT DER INTERNATIONALEN WIRTSCHAFT 346 (1987).

59. *See* Franco Ferrari, *Exclusion et inclusion de la CVIM*, REVUE DE DROIT DES AFFAIRES INTERNATIONALES 401, 403 (2001).

60. This view was also expressed on the occasion of the Vienna Diplomatic Conference, when a large number of delegations rejected proposals by Canada and Belgium (for these proposals, see *Records*, *supra* note 39, at 250) according to which the domestic sales law, and not the CISG, would have to be applied whenever the parties indicated the law of a Contracting State as the proper law for their contract.

For a reference to the rejection of the foregoing proposals as argument in favor of the view expressed in the text, see also Bonell, *supra* note 14, at 56; MAGNUS, *supra* note 15, at 106.

61. This view was predominant under the 1964 Hague Conventions; for a reference to this view in legal writing, see, e.g., ENDERLEIN & MASKOW, *supra* note 47, at 49; Herber, *supra* note 33, at 21; Gert Reinhart, *Dix ans de jurisprudence de la République Fédérale d'Allemagne à propos de la loi uniforme sur la vente internationale d'objets mobiliers corporels*, UNIFORM LAW REVIEW 424 (1984); Witz, *supra* note 17, at 110; Konrad Zweigert & Ulrich Drobnig, *Einheitliches Kaufrecht und internationales Privatrecht*, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 162-63 (1965).

62. There is no doubt that the CISG's application is excluded where the parties merely refer to the domestic law of a Contracting State; for a similar conclusion, see Bonell, *supra* note 19, at 18; BRUNNER, *supra* note 40, at 70; Cappuccio, *supra* note 40, at 873; Erauw, *supra* note 17, at 49; FERRARI, *supra* note 17, at 117; SCHLECHTRIEM, *supra* note 45, at 35. Consequently, where the parties state, for instance, that "the contract be governed by American law as laid down in the U.C.C.," the CISG's application should be considered as being excluded.

For further examples of clauses that successfully exclude the Convention's application, see B. Blair Crawford, *Drafting Considerations under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 193 (1988); E. Allen Farnsworth, *Review of Standard Forms or Terms under the Vienna Convention*, 21 CORNELL INT'L L.J. 442 (1988); Herber, *supra* note 14, at 87; Holthausen, *supra* note 40, at 515; David L. Perrott, *The Vienna Convention 1980 on Contracts for the International Sale of Goods*, INTERNATIONAL CONTRACT LAW AND FINANCE REVIEW 580 (1980); PILTZ, *supra* note 17, at 48; Winship, *supra* note 40, at 1.35.

63. Oberlandesgericht Frankfurt, Germany, 30 Aug. 2000, *available at* http://cisgw3.law.pace.edu/cases/000830g1.html; Oberlandesgericht Frankfurt, Germany, 15 Mar. 1996, *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/284.htm.

64. This view is shared by the majority of commentators; *see, e.g.*, AUDIT, *supra* note 15, at 39; Bonell, *supra* note 14, at 56; Erauw, *supra* note 17, at 21, 25, 48; Farnsworth, *supra* note 62, at 442; FERRARI, *supra* note 17, at 117; Rolf Herber, *Anwendungsvoraussetzungen und Anwendungsbereich des Einheitlichen Kaufrechts*, *in* EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT 104 (Peter Schlechtriem ed., 1987); HERBER & CZERWENKA, *supra* note 40, at 44; ALBERT H. KRITZER, GUIDE TO

as confirmed by many court decisions[65] and arbitral awards[66] cited in the

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PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 100-01 (1989); Jean-Pierre Plantard, *Un nouveau droit uniforme de la vente internationale: La Convention des Nations Unies du 11-4-1980*, JOURNAL DU DROIT INTERNATIONAL 321 (1988); SCHLECHTRIEM, *supra* note 19, at 22; Pierre Thieffry, *Les Nouvelles Règles de la Vente Internationale*, 15 DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL 373 (1989); Peter Winship, *International Sales Contracts under the 1980 Vienna Convention*, 17 UCC L.J. 55, 65 (1984).

65. Hof van Beroep Gent, Belgium, 17 May 2002, *available at* http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-05-17.htm; Oberlandesgericht Frankfurt, Germany, 30 Aug. 2000, *available at* http://cisgw3.law.pace.edu/cases/000830g1.html; Bundesgerichtshof, Germany, 25 Nov. 1998, *published in* TRANSPORTRECHT-INTERNATIONALES HANDELSRECHT 18 (1999); Oberlandesgericht Hamburg, Germany, 5 Oct. 1998, *available at* http://www.cisg-online.ch/cisg/urteile/473.htm; Kantongericht Nidwalden, Switzerland, 3 Dec. 1997, *published in* TRANSPORTRECHT-INTERNATIONALES HANDELSRECHT 10 (1999); Bundesgerichtshof, Germany, 25 June 1997, *available at* http://www.cisg-online.ch/cisg/urteile/277.htm; Oberlandesgericht München, Germany, 9 July 1997, *available at* http://www.cisg-online.ch/cisg/urteile/281.htm; Oberlandesgericht Karlsruhe, Germany, 25 June 1997, *available at* http://www.cisg-online.ch/cisg/urteile/263.htm; Handelsgericht Kanton Zürich, Switzerland, 5 Feb. 1997, *available at* http://www.cisg-online.ch/cisg/urteile/327.htm; Cour de Cassation, France, 17 Dec. 1996, *available at* http://www.cisg-online.ch/cisg/urteile/220.htm; Landgericht Kassel, Germany, 15 Feb. 1996, *published in* NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNGS-REPORT 1146 (1996); Oberlandesgericht Hamm, Germany, 9 June 1995, *published in* RECHT DER INTERNATIONALEN WIRTSCHAFT 689 (1996); Arrondissementsrechtbank Gravenhage, Netherlands, 7 June 1995, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=154&step=FullText; Oberlandesgericht München, Germany, 8 Feb. 1995, *available at* http://www.cisg-online.ch/cisg/urteile/142.htm; Oberlandesgericht Köln, Germany, 22 Feb. 1995, *published in* PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 393 ff. (1995); Oberlandesgericht Koblenz, Germany, 17 Sept. 1993, *published in* RECHT DER INTERNATIONALEN WIRTSCHAFT 934 (1993); Oberlandesgericht Düsseldorf, Germany, 8 Jan. 1993, *published in* RECHT DER INTERNATIONALEN WIRTSCHAFT 325 (1993).

66. *See* Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 9187, June 1999, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=466&step=FullText (CISG applicable pursuant to the choice of French law, i.e., the law of a Contracting State); Schiedsgericht der Handelskammer Hamburg, Germany, 21 Mar. 1996, *published in* MONATSSCHRIFT FÜR DEUTSCHES RECHT 781 (1996) (applying the CISG on the grounds that the choice of the Hamburg arbitral tribunal was to be analogized to the choice of German law, *i.e.*, that of a Contracting State); Court of Arbitration of the Hungarian Chamber of Commerce and Industry, 17 Nov. 1995, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=217&step=FullText (stating that the CISG was applicable, among others, because the parties had chosen the law of two (!) Contracting States as the law governing the contract); Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 8324, 1995, *published in* JOURNAL DU DROIT INTERNATIONAL 1019 (1996) (applying the CISG to a contract which the parties had subjected to French law, *i.e.*, the law of a Contracting State); Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 7844, 1994, *published in* ICC COURT OF ARBITRATION BULLETIN 72 (1995) (stating that the CISG is applicable where the parties have chosen the law of a Contracting State to govern their international sales contract); Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 7660, 23 Aug. 1994, *published in* ICC COURT OF ARBITRATION BULLETIN 68 (1995) (holding that the CISG was applicable on the grounds that the parties had agreed upon the law of a Contracting State (Austria) as the law governing their contract and that the choice of the law of a Contracting State included the CISG); Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 7565, *published in* ICC COURT OF ARBITRATION BULLETIN 64 (1995) (applying the CISG to a contract to which the parties had made applicable "the Laws of Switzerland" based upon the

Digest. This is true even where the law chosen is that of a Contracting State that made an Article 95 reservation.[67]

The application of the Convention does not make the national law irrelevant, as suggested.[68] The indication of the law of a Contracting State must be interpreted as both making the CISG applicable (as part of the chosen law)[69] and as determining the law applicable to the issues not governed by the CISG (to the extent to which the parties are allowed to make a choice in respect of those issues),[70] such as the issues relating to the validity, thus avoiding to have to resort to the complex rules of private international law in order to determine the law applicable to the issues not governed by the CISG.[71]

Quid iuris if under the 1964 Hague Conventions the parties have established practices between themselves according to which the reference to the law of a Contracting State had to be interpreted as an exclusion of the uniform sales law and the parties continue to refer to the law of that State even

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argument that "Swiss law, when applicable, consists of the Convention itself as of the date of its incorporation into Swiss law"); Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 6653, *published in* JOURNAL DU DROIT INTERNATIONAL 1040 (1993) (applying the CISG to a contract which the parties had agreed upon to subject to French law, the law of a Contracting State to the CISG); Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, Arbitral Award No. SCH-4366, 15 June 1994, *published in* RECHT DER INTERNATIONALEN WIRTSCHAFT 590 (1995) (expressly stating that "the parties' choice of the law of a Contracting State is understood as a reference to the corresponding national law, including the CISG as the international sales law of that State and not merely to the—non-unified—domestic sales law").

67. For this solution, *see also* Gerold Herrmann, *Anwendungsbereich des Wiener Kaufrechts—Kollisionsrechtliche Probleme*, *in* WIENER KAUFRECHT. DER SCHWEIZERISCHE AUSSENHANDEL UNTER DEM ÜBEREINKOMMEN ÜBER DEN INTERNATIONALEN WARENKAUF 95 (Eugen Bucher ed., 1991); MAGNUS, *supra* note 15, at 139.

Contra, in the sense that in this line of cases the CISG should not apply, AUDIT, *supra* note 15, at 39 n.3.

68. For this affirmation, *see also* FERRARI, *supra* note 14, at 170.

69. *See* SCHLECHTRIEM, *supra* note 19, at 13.

70. *Compare* Franco Ferrari, *Diritto Uniforme della Vendita Internazionale: Questioni di Applicabilità e di Diritto Internazionale Privato*, RIVISTA DI DIRITTO CIVILE 669, 685 (1995); Liguori, *supra* note 40, at 158.

71. For a similar conclusion in respect of the consequences of the parties' choice of the law of a Contracting State as the proper law for their contract, see ENDERLEIN & MASKOW, *supra* note 47, at 49, stating that:

> When a state participates in the Convention the latter can be assumed to be part of his domestic law so that additional reference to it could be considered as superfluous at first, and/or for the reference to make sense, as an exclusion of the CISG. But the application of the Convention does in no way make the application of the other parts of the national law irrelevant . . . . Therefore, it must be recommended to the parties to determine the national law that is applicable in addition to the Convention . . . so that they can avoid the uncertainties involved in determining that law, using the conflict-of-law norms.

after that State becomes a Contracting one to the CISG? Does the continuing reference to the law of that State have to be considered as an exclusion of the CISG? Even though several authors have argued in favor of an affirmative answer to this question,[72] most recently the opposite view was adopted by a German court.[73]

IV. EXCLUSION OF THE CISG BY VIRTUE OF STANDARD CONTRACT FORMS AND CHOICE OF FORUM

The choice of the law of a State—whether Contracting or not—does not constitute the sole kind of implicit exclusion which can be used to bar the Convention's application.[74] Indeed, in certain situations, and this was also true under the 1964 Hague Conventions,[75] the use of standard contract forms can lead to the exclusion of the CISG's application.[76] This is true provided that these forms become part of the contract[77] and that (a) their contents are so profoundly influenced by the rules and the concepts of a specific legal system that their use is incompatible with the CISG and implicitly manifests the parties' intention to have the contract governed by that legal system[78] and

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72. *See, e.g.*, FERRARI, *supra* note 17, at 118; Holthausen, *supra* note 40, at 516.

73. *Compare* Landgericht Düsseldorf, Germany, 11 Oct. 1995, *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/180.htm (stating that the express exclusion of the 1964 Uniform Sales Law did not amount per se to an implied exclusion of the CISG and therefore applied the CISG to an international sales contract which the parties had agreed upon subjecting to the sole law of Germany, i.e., the law of a Contracting State to the CISG).

74. *See also* ACHILLES, *supra* note 40, at 26; FERRARI, *supra* note 14, at 172 ff.; MAGNUS, *supra* note 15, at 140 ff.

75. For a very detailed discussion of the possibility of implicitly excluding the application of both the ULIS and ULF, among others by adopting standard contract forms, see, e.g., Friedrich Graf von Westphalen, *Allgemeine Geschäftsbedingungen und Einheitliches Kaufgesetz (EKG)*, *in* EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT, *supra* note 64, at 49 ff.; Rainer Hausmann, *Stillschweigender Ausschluß der Einheitlichen Kaufgesetze durch allgemeine Geschäftsbedingungen*, RECHT DER INTERNATIONALEN WIRTSCHAFT 186 (1977); Gert Reinhart, *Erschwerter Ausschluß der Anwendung des Einheitlichen Kaufgesetzes*, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 288 (1986).

76. For a similar statement, see Erauw, *supra* note 17, at 49; Herrmann, *supra* note 67, at 95-96; Martiny, *supra* note 22, at 1656.

77. *See* SCHLECHTRIEM, *supra* note 19, at 14.

78. The possibility of an implicit exclusion of the CISG by means of standard contract forms has also been favored by Bonell, *supra* note 14, at 56-57, stating that:

> [T]he use of general conditions or of standard form contracts whose content is influenced by principles and rules typical of the domestic law of a particular State, is certainly an element from which one could infer the intention of the parties to have that domestic law rather than the Convention govern their contract. Before reaching such a conclusion, however, due consideration should be given to other circumstances of the case.

(b) their use tends at the same time to exclude the application of the CISG as a whole.[79] Where, on the contrary, standard contract forms are intended to merely regulate specific issues in contrast with the CISG, one must presume that only a derogation of some of the CISG provisions is desired.[80]

Furthermore, as pointed out also by the Digest (para. 9), the choice of forum can lead to the exclusion of the CISG's application,[81] and the same is true with reference to the choice of an arbitral tribunal,[82] provided that two requirements are met: (a) one must be able to infer from the parties' choice their clear intention to have the domestic law of the State where the forum or arbitral tribunal is located govern their contract,[83] and (b) the forum must not be located in a Contracting State,[84] otherwise the CISG would be applicable,[85] as confirmed by two arbitral rewards referred to in the Digest.[86]

This view is shared by other authors as well; *see, e.g.*, AUDIT, *supra* note 15, at 39; Ulrich Huber, *Der UNCITRAL-Entwurf eines Übereinkommens über internationale Warenkaufverträge*, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 426 (1979); SCHLECHTRIEM, *supra* note 19, at 21.

79. *See also* MAGNUS, *supra* note 15, at 141 (stating that standard contract forms which contrast with specific provisions of the CISG should not *per se* be looked upon as excluding the CISG as a whole). This was true under the Hague Conventions as well; see, for instance, Oberlandesgericht Hamm, Germany, 7 May 1979, *in* INTERNATIONALE RECHTSPRECHUNG ZU EAG UND EKG, *supra* note 53, at 141 f.

80. For a similar solution, see ENDERLEIN & MASKOW, *supra* note 47, at 49 (stating that "[o]n no account can the exclusion of the Convention be deduced merely from agreement of such terms of contract which contradict specific provisions because deviating individual exclusions are indeed compatible with the CISG"). This view is also held by FERRARI, *supra* note 17, at 119; Witz, *supra* note 17, at 111.

81. Note to this regard, that it has been asserted that "[i]f the parties have not provided otherwise, but have included a choice of forum clause, courts are inclined to rule that the choice of forum indicates a choice of that jurisdiction's substantive law," Ronald A. Brand, *Nonconvention Issues in the Preparation of Transnational Sales Contracts*, 8 J.L. & COM. 145, 167 (1988).

For practical applications of the aforementioned tendency, see *Tzotrzis v. Monard Line A/B*, [1968] W.L.R. 406, 411-12 (C.A.); *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 14 n.15 (1972).

82. For this conclusion, see Holthausen, *supra* note 40, at 517-18; MAGNUS, *supra* note 15, at 140-41.

83. Several authors have pointed out that, even though the choice of a forum or of an arbitral tribunal may indicate the parties' intention to exclude the CISG, that choice by itself is not sufficient to bar the Convention's application; for similar affirmations, see HERBER & CZERWENKA, *supra* note 40, at 43 (stating that an arbitration clause or the choice of a forum might indicate the parties' intention to exclude the Convention); Huber, *supra* note 78, at 426 (stating that the choice of an arbitral tribunal by itself does not lead to the exclusion of the Convention); SCHLECHTRIEM, *supra* note 45, at 35 (stating that the choice of an arbitral tribunal does not by itself imply that the parties wish to exclude the Convention's application).

84. For similar, albeit not identical conclusions, see Erauw, *supra* note 17, at 49; Herber, *supra* note 14, at 87; Holthausen, *supra* note 40, at 519; Reifner, *supra* note 49, at 55.

85. For this solution, see Gerhard Walter, *Kaufrecht*, HANDBUCH DES SCHULDRECHTS 632 (1987) (stating that whenever the arbitral tribunal chosen by the parties is located in a Contracting State, the CISG is applied).

86. *See* Schiedsgericht der Hamburger freundlichen Arbitrage, Germany, 29 Dec. 1998, *published in* INTERNATIONALES HANDELSRECHT 36-37 (2001) (applying the CISG on the grounds that the choice of

Finally, although this possibility is nowhere referred to in the Digest, parties can exclude the CISG by agreeing that specific issues of their contract be subject to specific provisions of a law different than the CISG, provided, however, that those issues are fundamental ones[87] and that from the subjection of those issues to a domestic sales law one can infer the parties' clear intention to have the contract governed by a law different from the uniform one, as pointed out by various court decisions rendered in respect of the 1964 Hague Conventions.[88] As correctly stated in a decision referred to in the Digest (para. 11), the inclusion of Incoterms by the parties does not amount to an implicit exclusion of the CISG.[89]

V. Implicit Exclusion and Pleadings on the Sole Basis of Domestic Law

Quid iuris where the parties argue a case on the sole basis of a domestic law despite the fact that all of the CISG's criteria of applicability are met? Although this issue is referred to in the Digest (para. 10), as there is case law on it, the Digest itself does not help to answer the question. The cases it cites are contradictory and the Digest once again does not help to solve the contradiction.

In my opinion,[90] the mere fact that the parties argue on the sole basis of a domestic law does *not per se* lead to the exclusion of the CISG,[91] a view recently confirmed by several courts,[92] unless the parties are aware of the CISG's applicability or the intent to exclude the CISG can otherwise be

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the Hamburg arbitral tribunal was to be analogized to the choice of German law, *i.e.*, that of the Contracting State in which the arbitral tribunal was located); Schiedsgericht der Handelskammer Hamburg, Germany, 21 Mar. 1996, *published in* Monatsschrift für deutsches Recht 781 (1996) (applying the CISG on the same grounds).

87. For this prerequisite, see Herber, *supra* note 14, at 87.

88. *See, e.g.*, Landgericht Bamberg, Germany, 12 Oct. 1983, *published in* Praxis des internationalen Privat- und Verfahrensrechts 266 (1984); Bundesgerichtshof, 26 Nov. 1980, *published in* Neue Juristische Wochenschrift 1156 f. (1981).

89. Oberster Gerichtshof, Austria, 22 Oct. 2001, *available at* http://www.cisg.at/1_7701g.htm.

90. *See* Ferrari, *supra* note 55, at 744 ff.

91. For this conclusion, see Schlechtriem, *supra* note 19, at 14.

92. *See* Tribunale di Padova, Italy, 25 Feb. 2004, *available at* http://cisgw3.law.pace.edu/cases/040225i3.html; Landgericht Saarbrücken, Germany, 2 July 2002, *available at* http://cisgw3.law.pace.edu/cases/020702g1.html; Oberlandesgericht Rostock, Germany, 10 Oct. 2001, *available at* http://cisgw3.law.pace.edu/cisg/cases/011010g1.html; Tribunale di Vigevano, Italy, 12 July 2000, *published in* Giurisprudenza italiana 281 (2001); Oberlandesgericht Hamm, Germany, 9 June 1995, *published in* Praxis des internationalen Privat- und Verfahrensrechts 269 (1996); Landgericht Landshut, Germany, 5 Apr. 1995, *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/193.htm.

inferred with certainty. If the parties are not aware of the CISG's applicability and argue on the basis of a domestic law merely because they believe that this law is applicable, the judges will nevertheless have to apply the CISG on the grounds of the principle *iura novit curia*, provided that this principle is part of the *lex fori*.

One of the courts stated this very clearly:

> The fact that during the preliminary legal proceedings in this case the parties based their arguments exclusively on Italian domestic law without any references to the [CISG] cannot be considered an implicit manifestation of an intent to exclude application of the Convention . . . . [R]eference in a party's brief to the non-uniform national law of a Contracting State—even though it is theoretically some evidence of an intent to choose the national law of that State—does not imply the automatic exclusion of the [CISG]. We will assume that the parties wanted to exclude the application of the Convention only if it appears in an unequivocal way that they recognized its applicability and they nevertheless insisted on referring only to national, non-uniform law. In the present case, it does not appear from the parties' arguments that they realized that the [CISG] was the applicable law . . .; we cannot, therefore, conclude that they implicitly wanted to exclude the application of the Convention by choosing to refer exclusively to national Italian law. Thus according to the principle *iura novit curia*, it is up to the judge to determine which Italian rules should be applied; for the reasons mentioned above, the applicable rules are those in the Vienna Convention.[93]

In light of what has been said thus far, one has to reject the opposite view held by two tribunals (a state court[94] and an arbitral tribunal[95]) according to which pleadings on the sole grounds of domestic law automatically leads to the exclusion of the CISG.

VI. EXPRESS EXCLUSION OF THE CISG

In addition to problems concerning the CISG's implicit exclusion, problems can also arise with respect to its explicit exclusion.[96] In this respect, two lines of cases have to be distinguished: the exclusion with and the

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93. Tribunale di Vigevano, Italy, 12 July 2000, English translation quoted from 20 J.L. & COM. 213-14 (2001).

94. Cour de Cassation, France, 26 June 2001, *available at* http://witz.jura.uni-sb.de/CISG/decisions/2606012v.htm.

95. Court of Arbitration of the International Chamber of Commerce, Arbitral Award No. 8453, Oct. 1995, *published in* ICC COURT OF ARBITRATION BULLETIN 56 (2000).

96. For a suggestion of various clauses by means of which the CISG can be expressly excluded, see Peter Winship, *Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners*, 29 INT'L LAWYER 538 (1995).

exclusion without indication of the law applicable to the contract between the parties.[97]

Nulla quaestio in the case in which the CISG is excluded with the indication of the applicable law, indication which under the CISG can, not unlike under the Hague Conventions,[98] also be made in the course of a legal proceeding,[99] at least where this is admissible according to the *lex fori*,[100] as in Germany[101] and Switzerland for instance,[102] even though the parties will normally make their choice before the conclusion of the contract.[103] In this case, the judge has to apply the law chosen by the parties,[104] and it is this law on the basis of which he has to decide upon the validity of the choice of law, at least where the applicable rules of private international law correspond to those laid down in the 1980 Convention on the law applicable to contractual obligations.[105] Where the parties' choice of law is invalid, the contract should

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97. For this distinction, see FERRARI, *supra* note 17, at 121.

98. Under the 1964 Hague Conventions, the indication of the applicable law could be made during the legal proceeding. For a reference to this rule in respect of ULIS and ULF, see Volker Stötter, *Stillschweigender Ausschluß der Anwendbarkeit des internationalen Kaufabschlußübereinkommens und des Einheitlichen Kaufgesetzes*, RECHT DER INTERNATIONALEN WIRTSCHAFT 38 (1980); Christoph von der Seipen, *Zum Ausschluß des Einheitlichen Kaufrechts im deutsch-englischen Rechtsverkehr*, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 246 (1984).

For judicial applications of this principle, see Bundesgerichtshof, Germany, 26 Nov. 1980, *published in* NEUE JURISTISCHE WOCHENSCHRIFT 1156 (1981); Bundesgerichtshof, Germany, 26 Oct. 1983, *published in* RECHT DER INTERNATIONALEN WIRTSCHAFT 151 (1984).

99. *See* Erauw, *supra* note 17, at 47; KAROLLUS, *supra* note 40, at 38; SCHLECHTRIEM, *supra* note 19, at 14.

100. *See* ACHILLES, *supra* note 40, at 27; CZERWENKA, *supra* note 28, at 169-70; Holthausen, *supra* note 40, at 515; Ulrich Magnus, *Zum räumlich-internationalen Anwendungsbereich des UN-Kaufrechts und zur Mängelrüge*, PRAXIS DES INTERNATIONALEN PRVAT- UND VERFAHRENSRECHTS 391 (1993).

101. Oberlandesgericht Köln, Germany, 26 Aug. 1994, *available at* http://www.cisg-online.ch/cisg/urteile/132.htm; Oberlandesgericht Saarbrücken, Germany, 13 Jan. 1993, *available at* http://www.cisg-online.ch/cisg/urteile/83.htm.

102. Handelsgericht Kanton Zürich, Switzerland, 10 Feb. 1999, *published in* SCHWEIZERISCHE ZEITSCHRIFT FÜR INTERNATIONALES UND EUROPÄISCHES RECHT 111 (2000).

103. In this respect, it has been stated that:

> One might expect that, in practice, the parties would normally indicate their intention at the beginning of their negotiations, or at least before the contract is concluded. Nonetheless, there is nothing to prevent them from deciding at a later stage, even after the initiation of a legal proceeding relating to their contract. . . . It should, however, be borne in mind that any exclusion of or derogation from the Convention agreed upon after the conclusion of the contract amounts to a modification of the contract, which in some cases may require a particular form.

Bonell, *supra* note 14, at 58.

104. For this solution see also Sacerdoti, *supra* note 17, at 746.

105. Although it is common knowledge that the question of whether the parties' choice of law is valid falls outside the sphere of application of the Convention, there is uncertainty about the law on the basis of which to decide whether the parties have validly excluded the Convention, as has been pointed out, for

be governed by the law to be determined on the basis of the rules of private international law of the forum.[106] If this law turns out to be that of a Contracting State to the CISG, its domestic law rather than the CISG will have to be applied.[107]

Quid iuris, however, in the case of an express exclusion without indication of the applicable law, an issue also referred to in the Digest, although there is no case law on it yet?[108] In this case, the preferable view, held by most legal scholars,[109] is the one according to which "if the parties merely agree that the Convention does not apply, rules of private international law would determine the applicable domestic law."[110] And whenever these rules refer to the law of a Contracting State, its domestic sales law, not the uniform one, should apply.[111]

Undoubtedly, this rule applies in cases in which the CISG is excluded *in toto*.[112] However, its application to cases in which it is excluded only partially created disagreement among legal scholars.[113] Some authors favor the view according to which the issues dealt with in the excluded provisions must be

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instance, by Bonell, *supra* note 14, at 60-61 (stating that "given the special nature of a choice-of-laws clause, it is uncertain whether the validity of the parties' consent is to be decided according to the proper law as objectively determined, the law chosen by the parties, or the substantive rules of the forum." In this respect, "see Article 10 of the 1985 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, according to which whenever the parties' agreement as to the applicable law is either express or clearly demonstrated by the terms of the contract and the conduct of the parties, the existence and validity of that agreement shall be determined by the law chosen.").

106. This solution is shared by Bonell, *supra* note 14, at 61; FERRARI, *supra* note 17, at 121; HONNOLD, *supra* note 49, at 126.

107. However, see HERBER & CZERWENKA, *supra* note 40, at 44 (favoring the view according to which the invalidity of the parties' choice of law leads to the application of the CISG).

108. Note, that while at one point an exclusion without indication of the applicable law was considered inadmissible, this view is no longer tenable. *See* Michael J. Bonell, *UN-Kaufrecht und das Kaufrecht des Uniform Commercial Code im Vergleich*, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALS PRIVATRECHT 28 (1994); HONNOLD, *supra* note 49, at 78.

109. This solution has been favored, for instance, by FERRARI, *supra* note 14, at 179; HERBER & CZERWENKA, *supra* note 40, at 41-42; KAROLLUS, *supra* note 40, at 38; Martiny, *supra* note 22, at 1655; Sacerdoti, *supra* note 17, at 746; SCHLECHTRIEM, *supra* note 19, at 21.

110. HONNOLD, *supra* note 49, at 78; *see* Bonell, *supra* note 19, at 19; FERRARI, *supra* note 17, at 122; Jolanta K. Kostkiewicz & Ivo Schwander, *Zum Anwendungsbereich des UN-Kaufrechtsübereinkommens, in* FESTSCHRIFT NEUMAYER 48 (Ferenc Majoros ed., 1997); MAGNUS, *supra* note 15, at 137.

111. For this solution, see also Herber, *supra* note 14, at 85; KAROLLUS, *supra* note 40, at 38; MAGNUS, *supra* note 15, at 104; Martiny, *supra* note 22, at 1656; Kurt Siehr, *Der internationale Anwendungsbereich des UN-Kaufrecht*, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATECHT 600 (1988).

112. For this affirmation, see Bonell, *supra* note 14, at 59.

113. For a recent overview of the discussion on this issue, see MAGNUS, *supra* note 15, at 142-43.

settled, according to Article 7(2) CISG, in conformity with the CISG's general principles.[114] In my opinion,[115] the better view seems to be the opposite one: the rules to substitute the excluded CISG provisions are to be determined, not unlike in the case of an exclusion *in toto* of the Convention, by applying the rules of private international law (of the forum State)[116]—without resorting to the general principles of the CISG—otherwise the exclusion would have no practical meaning. Indeed, it would make little sense to substitute specific solutions provided for by the Convention and which, therefore, are necessarily in conformity with its general principles, with solutions that are "in conformity with the general principles on which [the Convention] is based."[117]

VII. APPLICABILITY OF THE CISG AND OPTING-IN

As stated, the CISG provides for the parties' possibility of excluding (totally or partially) its application. To contrast, the Convention does not address the issue of whether the party may make the Convention applicable when it would otherwise not apply,[118] that is, where the prerequisites for application are not met.[119]

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114. For this view, see Bonell, *supra* note 14, at 59; Herber, *supra* note 14, at 88-89; HERBER & CZERWENKA, *supra* note 40, at 42.

115. *See* FERRARI, *supra* note 17, at 122.

116. *Compare also* FERRARI, *supra* note 14, at 180.

117. CISG art. 7(2).

118. For a discussion of this problem, see AUDIT, *supra* note 15, at 40; FERRARI, *supra* note 17, at 124-26.

119. Note, that according to Bonell, *supra* note 14, at 63-64, the issue of the possibility of "opting-in" arises only where State courts are involved, since generally the parties are not allowed to select by virtue of a choice of law an international convention, instead of a particular domestic law.

> The situations may be different if the parties agree to submit the disputes arising from their contract to arbitration. Arbitrators are not necessarily bound by a particular domestic law. This is self-evident, if they are authorized by the parties to decide *ex aequo et bono*. . . . But even in the absence of such an authorization there is a growing tendency to permit arbitrators to base their decisions on principles and rules different from those adopted by State courts. This tendency has recently received a significant confirmation by the Uncitral Model Law on International Commercial Arbitration, where it is expressly stated that '[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute' (Article 28(1)). . . . Following this approach the parties to an international contract would be free to indicate in the Convention the 'rules of law' according to which the arbitrators shall decide any dispute, with the result that the Convention would directly apply regardless of whether or not the positive and negative conditions for this application are fulfilled in the single case.

Id.

As also pointed out in the Digest (para. 12), this issue did not arise at all under the ULIS which embodied a provision, Article 4,[120] that expressly provided for the parties' possibility of "opting-in."[121] The fact that the drafters did not retain that express reference to the parties' possibility of opting-in should, however, not be interpreted as preventing the parties from being entitled to do so.[122] This view can be justified on the grounds that the proposal (made by the former German Democratic Republic),[123] according to which the CISG should apply even where the preconditions for its application are not met, as long as the parties wanted it to be applicable, was rejected on the sole ground that an express provision to allow such possibility was not necessary,[124] because of the already existing principle of party autonomy.[125] Most recently, this view was confirmed by a Chinese court decision which applied the CISG by virtue of the parties' opting-in to a contract for the sale

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120. *See* Article 4 ULIS.

> The present law shall also apply where it has been chosen as the law of the contract by the parties, whether or not their places of business or their habitual residences are in different States and whether or not such States are Parties to the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods, to the extent that it does not affect the application of any mandatory provisions of the law which would have been applicable if the parties had not chosen the Uniform Law.

Id.

121. For a reference to Article 4 ULIS in scholarly writing relating to Article 6 CISG, see FERRARI, *supra* note 14, at 182-83; HERBER & CZERWENKA, *supra* note 40, at 45.

122. For the possibility of "opting-in," see ENDERLEIN & MASKOW, *supra* note 47, at 51 (stating that "[t]he Convention can be interpreted in such a way that its application . . . can be agreed. In this case the substantive and territorial, and hence personnel and time *scope of application*, can be *extended*"); SCHLECHTRIEM, *supra* note 45, at 36 (stating that "[n]ot only can the parties agree to reject the application of the Convention, but they can also agree to apply the Convention when the preconditions for application have not been met"); Winship, *supra* note 40, at 1.34, stating that:

> Although the conference rejected an amendment which would have expressly permitted parties to derogate from Articles 2 and 3 the debate suggests that delegations could not agree on how to express the limitations on party autonomy required by 'mandatory' national laws. Parties should not be foreclosed, therefore, from agreeing to have the convention apply to a transaction otherwise excluded as long as the policy behind the specific exclusion is not contravened.

Id.

123. For this proposal, see *Records*, *supra* note 39, at 86 (reporting the proposal according to which Article 6 should be amended as follows: "Even if this Convention is not applicable in accordance with articles 2 . . . or . . . 3, it shall apply if it has been validly chosen by the parties. . . .").

124. For a similar reasoning, see FERRARI, *supra* note 17, at 125; HONNOLD, *supra* note 49, at 83; MAGNUS, *supra* note 15, at 145.

125. For this argument, see the considerations of the delegate of the Republic of Korea at the Vienna Conference, *reported in Records*, *supra* note 39, at 252 (stating that "the provision proposed by the [former] German Democratic Republic was not necessary because of the principle of the autonomy of the will of the parties. It [is] thus always permissible for the parties to decide to apply the Convention, even in the cases covered by articles 2 and 3").

of fish powder which otherwise would have fallen outside the CISG's scope of application or its substantive scope,[126] a decision not referred to in the Digest.

As far as the significance of the parties' "opting-in" is concerned, it must be emphasized that by virtue of the "opting-in," the CISG becomes part of the contract not unlike any other contractual clause.[127] In other words, the choice of the CISG in contracts to which it would otherwise not apply does not constitute a "choice of law," as there are no private international law rules that allow such a "choice" to have a different value. Consequently, it can be presumed, that "[t]he mandatory rules of the applicable law are . . . not affected by this [opting-in]."[128] Very recently, this view has been confirmed by the Tribunale di Padova in a decision of 11 January 2005,[129] a decision which the Digest does (obviously) not refer to. Referring to both the 1980 Convention on the law applicable to contractual obligations as well as the 1955 Hague Convention on the law applicable to contracts for the international sale of goods, the Italian court correctly decided that the choice of the CISG as the "law" applicable to a contract in cases where the CISG would otherwise not apply cannot amount to a "choice of law," since the aforementioned conventions do not allow for a choice of law different from State law.

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126. *See* Xiamen Intermediate People's Court, People's Republic of China, 5 Sept. 1994, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=211&step=Abstract.

127. For a similar statement, see AUDIT, *supra* note 15, at 40.

128. ENDERLEIN & MASKOW, *supra* note 47, at 51.

For a similar conclusion, see Bonell, *supra* note 19, at 19 (stating that the result of the parties' "opting-in" "will be that the individual provisions of the Convention like any other contractual term may bind the parties only to the extent that they are not contrary to mandatory rules of the proper law of contract, i.e., the domestic law which by virtue of the rules of private international law of the forum governs the transaction in question"); Horacio Grigera Naon, *The UN Convention on Contracts for the International Sale of Goods*, *in* 2 THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 101 (Norbert Horn & Clive M. Schmitthoff eds., 1982) (stating the same); HERBER & CZERWENKA, *supra* note 40, at 45 (stating the same); HONNOLD, *supra* note 49, at 87 (stating that "[r]ules of domestic law that are 'mandatory' are not disturbed when the Convention becomes applicable by virtue of an agreement by the parties"); MAGNUS, *supra* note 15, at 111; Sacerdoti, *supra* note 17, at 746 (stating the same).

Note, however, that a similar statement had already been made at the Vienna Conference; see *Records*, *supra* note 39, at 252, reporting the Egyptian delegate's statement:

> [T]he draft amendment was an attractive one but was unnecessary because of the principle of the autonomy of the will of the parties. If the latter agreed to apply the Convention, even in cases where it would normally not apply, their wish should be respected. Naturally, if the applicable law did not admit certain provisions of the Convention, that law would prevail. But it was not for the Convention to settle that question.

129. *See* Tribunale di Padova, Italy, 11 Jan. 2005, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=FullText.

Although it is not surprising that the aforementioned Italian decision is not included in the Digest, it poses the problem of how to deal with new case law, of which there is a lot. This is for sure one of the challenges UNCITRAL will face in the future.