INTERNATIONAL SOFTWARE LICENSES AND THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

Mehdi Sheikerz[1]

I. INTRODUCTION

With the signing of the General Agreement on Tariffs and Trade (GATT) by the United States in 1994[2] and the GATT's requirement for signatory countries to establish intellectual property laws,[3] United States software vendors are increasingly finding that licensing their software to foreign customers can be done with fewer legal and business risks.[4] The GATT does not, however, remove all risks from licensing intellectual property internationally, as licenses are affected by a number of laws, such as the United Nations Convention on Contracts for the International Sale of Goods ("CISG").[5] As the number of foreign countries adopting the CISG increases,[6] so will the likelihood that a given transaction will be governed by the CISG. A key provision of the Convention, however, allows the parties by agreement to exclude the application of the CISG or derogate from or vary the effect of its provisions.[7] Consequently, software licensors are faced with the issue of whether or not they should opt for coverage under the CISG and if they do opt in, what effect will the CISG have on them?

This Article addresses the applicability of the CISG to international software license agreements. Specifically, this Article focuses on the circumstances under which a software licensor or vendor should opt in or out of the CISG in view of United States law, especially Article 2 of the Uniform Commercial Code ("UCC").

II. THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

A. *Background*

The CISG is a uniform law drafted and approved by the United Nations,[8] which governs contracts for the international sale of goods. It serves the equivalent purpose in international sale of goods transactions as does the UCC in domestic sale of goods transactions.[9] It is the result of the international community's desire to establish a uniform law on the international sale of goods for facilitating more efficient and stable contractual relationships between parties.[10] The Official Commentary to the 1978 draft of the CISG states three major purposes of the CISG: (1) to reduce the search for a forum with the most favorable law; (2) to reduce the necessity of resorting to rules of private international law; and (3) to provide a modern law of sales appropriate for transactions of an international character.[11] Thus, the CISG addresses questions that commonly arise in typical international sales transactions, such as the creation or existence of an international sales contract and the rights and obligations of the parties under such a contract.[12] It should be noted, however, that the CISG does not resolve the threshold questions of *validity of the contract*, *choice of forum* or *intellectual property* and *liability for death or personal injury* issues.[13] Otherwise, the Convention provides a robust body of law governing the rights of the parties once it is determined that the CISG governs the contract. Some of the general principles and policies as well as structure of the UCC are also embodied in the CISG, because the United States supported the CISG and played a role in drafting of the CISG.[14]

B. *Member States*

The United States formally adopted the Convention in December 11, 1986 and the Convention became effective in U.S. on January 1, 1988.[15] The following forty-seven countries, including the United States, had adopted the CISG as of March 1995:[16] Argentina, Australia, Austria, Belarus, Bosnia and Herzegovina, Bulgaria, Canada, Chile, China, Cuba, Czech and Slovak Republics, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Ghana, Guinea, Hungary, Iraq, Italy, Lesotho, Mexico, Netherlands, New Zealand, Norway, Poland, Republic of Moldova, Romania, Russian Federation, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Uganda, Ukraine, Venezuela, Yugoslavia, and Zambia.

C. *Application of the CISG*

The convention contains 101 Articles. The text of the Convention is broken down into four parts: Articles in Part I (Articles 1-13) deal with the sphere of application of the CISG, Articles in Part II (Articles 14-24) deal with formation of contracts, Articles in Part III (Articles 25-88) deal with the rights and obligations of buyers and sellers, and Articles in Part IV (Articles 89-101) are the final provisions.

Accordingly, Article 1 governs the scope of application of the CISG.[17] Essentially there are three requirements for the CISG to apply: the CISG *automatically* applies to (1) sale of "goods" transactions between buyers and sellers, (2) whose "places of business" are in different countries, and (3) the relevant countries are "Contracting States," unless (4) the parties have effectively opted out. The CISG *automatically* applies because unlike other international agreements, such as the GATT, the CISG was not designed to be a treaty requiring implementing legislation to mandate its application but as a self-executing treaty.[18]

1. Sale of "Goods" Requirement

The Convention governs only sales transactions that involve *goods.*[19] Because software licenses involve licensing of the underlying copyright rights to the software - e.g., right to reproduce, right to modify or right to use - which are intangible in nature, the threshold issue becomes whether or not software is a *good* as defined under the Convention. This issue will be addressed in more detail in Part III below. Unlike the UCC, the CISG does not expressly define the term "goods."[20] Instead, Article 1 states that this convention applies to contracts of sale of goods and Articles 2 and 3 define *goods* indirectly by enumerating certain sales or types of transactions that are excluded from the application of the CISG.

For example, Article 2(a) excludes consumer sales from the scope of the CISG by excluding sale of goods that are bought for personal, family or household use - i.e., consumer sales.[21] Therefore the CISG will apply only to commercial sales between persons in business.[22] Article 2(d), (e) and (f) exclude certain types of goods such as stocks, shares, investment securities, negotiable instruments, money, ships, vessels, aircraft and sales of electricity. Article

2(b) and (c) exclude sales by auction and sales by judicial execution or by authority of law. The CISG's reasoning behind the exclusions in Articles 2 is that there are usually special domestic rules with regard to such issues and the CISG does not attempt to unify the law in those areas.[23] Article 3(2) also excludes contracts in which "the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services" - i.e., "service" contracts.[24]

2. "Place of Business" Requirement

Both Articles 1 and 10 emphasize that the relevant *place of business* of a party must be determined without reference to a party's nationality, place of incorporation, or place of head office.[25] Article 10 specifically addresses the determination of the relevant *place of business* of a party. Article 10(a) provides that in the case of multiple places 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." Thus, the test includes factors relating to the offer and the acceptance as well as the performance of the contract.[26] Furthermore, the determination must be made in light of the circumstances *at the time period* before or at the conclusion of the contract and not during the performance of the contract.[27]

Of course, Article 10's scope of application can greatly complicate matters. For example, if a United States software licensor[28] plans to develop its software overseas - e.g., at the buyer's site - the licensor may run the risk that the United States will not be considered a *place of business* under the CISG. Under these facts the Convention would not govern the contract because the parties would not have places of business in different nations that are contracting states.[29] Matters become even more complicated if the United States licensor consummated the contract overseas. Such licensors or sellers cannot rely on the Convention to apply automatically, because the crucial *place of business* may or may not be easily determinable by the parties. The language of Article 10, "at any time before or at the conclusion of the contract," suggests that contractual service duties, such as integration, that become local during the performance of the contract will not shift the place of business to the licensee's country.[30] Therefore, should the parties desire for the Convention or another jurisdiction's law to apply, they should explicitly provide for it in their contract.[31] Otherwise, in subsequent litigation there would be a need to apply the complex rules of conflict of laws principles.[32]

3. "Contracting State" Requirement

A *Contracting State* is a country that has formally adopted the Convention.[33] A prospective United States buyer or seller may easily contact the United Nations to obtain the most current information about countries that have ratified or acceded to the Convention.[34] Under various articles of the CISG, each country may adopt the CISG either completely or in part or even denounce the CISG or parts of it after ratification.[35] Therefore, before deciding whether or not to be governed by the Convention, a buyer or seller should ascertain if the relevant countries of the parties are "Contracting States" and whether those countries made any reservations or declarations when they adopted the Convention.

For example, the United State ratified the CISG with the declaration that the United States would not be bound by Article 1(1)(b), which addresses the scope of application of the CISG.[36] The declaration has a narrowing effect on the application of the CISG because the CISG will apply to a United States seller or buyer only if the other relevant party also has its place of business in a Contracting State.[37] Without the declaration, under Article 1(1)(b), the rules of private international law could lead to the application of the Convention to a U.S. buyer or seller even though the other party did not have a place of business in a Contracting State.[38]

Article 1(2) further limits the application of the Convention. The CISG only applies to cases where it is *apparent* that the parties have their places of business in different Contracting States. Thus, the CISG does not apply if it appears from the contract or from the dealings between the parties that their places of business are in the same country. The actual place of business is disregarded except as disclosed at or before the conclusion of the contract. For example, when it appears that the parties had their places of business in the same Contracting State but one of the parties acted as the agent for an undisclosed foreign principal the Convention will not apply.[39]

4. Exclusion of Application by the Parties

Under Article 6, "[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." The important option of contractually opting out of the CISG needs further elaboration, because the parties must do so using express language. To the extent that if all the requirements are met the Convention applies *automatically*, it will not be enough for a contract clause to simply provide, for example, "this agreement shall be governed by and construed under the laws of the state of New Hampshire excluding its conflicts of laws rules." Under these facts, the Convention would be considered New Hampshire law. Therefore, the parties must affirmatively exclude the application of the CISG by additionally providing, for example, "this agreement shall not be governed by the United Nations Convention on the International Sale of Goods."[40]

In summary, for the CISG to apply to a particular transaction there are three general criteria which all must be met: (1) the relevant countries must be *Contracting States*; (2) the parties must have a their *places of business* in different Contracting States; and (3) the transaction must be a contract of sale of *goods*. Under these conditions, the Convention applies *automatically* unless (4) the parties have effectively opted out.

D. *The Importance of the CISG*

One of the major purposes of the CISG is to provide a modern law of sales appropriate for transactions of an international character.[41] As a result many of the CISG's underlying concepts and principles are derived from the commercial laws of the countries that participated in the drafting of the convention, which includes the United States.[42] Three important characteristics of the Convention should be noted. First, the CISG is a complete body of law of contracts,

containing 101 articles, which cover formation, duties, risk, breach, excuse and remedies. Second, there are some differences between the CISG and the United States' UCC, especially in the area of statutory interpretation. Third and finally, the parties may choose to exclude the application of the CISG or vary the effects of its provisions but if they do not do so the CISG applies *automatically* assuming all the requirements are met.

A major similarity between the CISG and the UCC is the preservation of the principle of freedom of contract, which is based on Article 6.[43] Accordingly, the Convention has a gap-filling role based on Article 6. The CISG contains gap-filling provisions that are similar in effect to the gap-filling provisions of the UCC.[44] If the contracting parties have not contractually excluded the CISG and have failed to provide for certain terms, the CISG may fill in such terms. For example, Article 9(2) provides a definition for trade usage between the parties unless the parties have specifically agreed to a trade usage. With only one exception,[45] under Article 6 the parties may also derogate or vary the effects of any of the provisions of the CISG. The structure of the CISG should therefore allow the parties in an international sales transaction to choose to be bound by nearly any terms which they agree. Only upon future litigation a contract would be governed by the Convention, and it would not be used to displace the terms of the agreement but be used only to determine the rights and obligations of the parties under their contract.[46] Freedom of contract should facilitate the development of commercial practices that reflect changing practices in the international business.

It should be noted that the Convention does not cover all issues, but only certain issues, arising from a *sale of goods* contract. Article 4 states that the Convention "governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such a contract." Article 4 expressly excludes from the CISG issues concerning the validity of the contract or any of its provisions or any usage, and the effect which the contract may have on the property in the goods sold. For example, validity issues such as capacity, fraud, duress or illegality are outside the scope of the Convention.[47] The CISG also provides in Article 5 that it does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

More importantly, however, Article 7, which concerns the interpretation of the Convention, states that where issues arise that are governed by the CISG but "which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law"- i.e., conflict of laws principles.[48] The language "to be settled in conformity with the general principles [of the convention]" is a civil law concept under which a civil law judge in interpreting a statute is compelled to abstract basic ideas or general language and concepts from the code in making a decision.[49] It should be noted that in civil law countries there is no system of precedent or *stare decisis*. In resolving issues not expressly addressed by the Convention, a judge under Article 7(2) will therefore first need to attempt to derive a rule from principles implicit in the Convention before resorting to the applicable domestic law.[50] This is similar to UCC's section 1-103, which states that unless the code provisions displace the common law on a particular issue, the common law still applies.[51] Article 7 provides little guidance to a lawyer designing a transaction to the extent that issues may arise that are not

expressly addressed by the CISG. There is also uncertainty as to how a judge, especially a common law judge, will apply the mandate of Article 7.[52]

While the underlying concepts behind the CISG and the UCC may be similar, externalities such as conflict of laws principles, the maturity of contract and intellectual property laws in foreign countries, and interpretation of the CISG by foreign courts may affect the application of the CISG. Indeed where there is uncertainty as to the application and interpretation of the Convention's provisions, the forum applying the CISG could very well interpret the CISG based on its own understanding of the law concerning the issue.[53]

Therefore, while in domestic transactions the parties may desire to rely on the default principles of the UCC,[54] in international transactions the legal risks of relying on the default principles of the Convention are much higher because of the uncertainties as to how the CISG will be interpreted. This is especially true of software licenses because the law in this area is still developing in the United States and may be even less settled in foreign countries which may have new contract as well as intellectual property laws. Indeed, unlike domestic contracts where choice of law clauses may be loosely negotiated,[55] the choice of law provisions in international contracts are extremely important because of the uncertainties of international law and the marked variations between the legal systems, which led to the CISG.

To avoid uncertainties, careful contract drafting is a must. United States licensors or licensees should consider two items. First, they should be advised as to whether or not they should opt in or out of the CISG under the given circumstances and accordingly negotiate appropriate choice of law and forum[56] provisions in their license agreements. Theoretically, based on the highly developed nature of United States laws on software licensing and the certainty of United States laws as compared to the laws of foreign countries, United States software licensors should choose United States law as the governing law in their contracts. In practice, however, other factors involved in negotiating contracts, - i.e., competing business and legal risks - may very well drive the content of the choice of law provision. Specifically for software licensors, the size of the customer, the place of business of the licensee and the technology being licensed all play a major role in negotiating the terms of the license agreement. Thus, knowing that the business risks, as determined by management, may influence the choice of law provision in the contract, an effective attorney should be prepared to put its client in the most favorable position based on the competing legal risks.

Second, because the Convention has a gap filling role, the parties should avoid relying on the default principles of the CISG to avoid the uncertainties in interpretation of the CISG. In case of a dispute, an agreement that addresses all the relevant issues should obviate or minimize the CISG's application because of its gap filling role. The choice of CISG coupled with a carefully drafted contract should be more advantageous to the U.S. software licensors and licensees than the application of the laws of a foreign jurisdiction, especially considering the requirement of Article 7(1) for promoting uniformity in application of the CISG, which has been recognized by some courts.[57]

III. APPLICATION OF THE CISG TO SOFTWARE LICENSE AGREEMENTS

According to Article 1(1), the Convention only applies to *contracts of sale of goods."*[58] The threshold issue for software licenses under the CISG becomes whether or not software licenses are a *contract of "sale" of "goods."* This issue also exists under the UCC.[59] The analysis should first include a determination as to whether a contract that involves licensing of the underlying copyright rights of the software - e.g., right to distribute, right make copies, right to modify[60] - is a contract of *sale* of goods or is it merely a contract concerning intangible intellectual property rights, which would not be governed by the Convention.[61] Second, it must be determined whether or not software is a *good* as that term is defined in the CISG. Third, the issue of whether software licenses are *contracts of sale of goods* should be resolved in the broader context of sale of goods laws[62] to the extent that all modern sale of goods laws generally address the rights and obligations of parties to a *contract of sale of goods.*[63] For example, in the United States the courts have disputed whether software licenses should be treated as sale of goods. Over time, however, the courts have dispensed with the literal definition of goods, which requires that there be a tangible, movable item. Instead the trend in the United States has been to treat software licenses as a sale of software transaction.[64]

A. *The Definition of "Sale"*

The first threshold issue is whether a transaction is a *sale* within the traditional definition of that term under sale of goods laws.[65] The Convention does not define the term *sale*. It would not be unreasonable, to presume that the term *sale* is substantially equivalent to the definition of *sale* under the UCC. The UCC defines "sale" as "in the passing of title from the seller to the buyer for a price."[66] According to Article 4(b), the Convention explicitly excludes issues concerning passing of property. The Convention in Article 41, however, implicitly recognizes the concept of passing of title to property as an inherent characteristic of a *sale*.[67] According to Article 41 "[t]he seller must deliver goods which are free from any right or claim of a third party, . . ."

The point of confusion is due to the fact that *sale* of software also includes grant of the underlying copyright rights to the buyer.[68] A buyer would be a licensee in the context of grant of copyright rights under the Copyright Act. For example, when a person purchases a word-processing software that person has two roles: as a buyer within the meaning of sales laws and as a licensee within the meaning of the Copyright Act.[69] In order for the buyer to be able to use the software the seller must give up some of its copyright rights - e.g., to make copies for archival or backup purposes. Under the first sale doctrine, which is embodied in Section 109(a) of the Copyright Act, a buyer of software obtains title to that copy of the software and as such the purchaser automatically has the right to transfer to another person that copy of the software.[70] Also implicit in a sale would be the buyer's right to use the software. Therefore, a buyer is granted certain rights both automatically[71] and contractually.

Matters get more complicated, as software owners try to avoid granting any intellectual property rights by operation of law upon a sale - i.e., the right to transfer under the first sale doctrine.[72] Therefore, a typical license agreement explicitly disclaims that the transaction is a *sale*

but that it is merely a *license*.[73] Such agreements, however, expressly grant the licensee the right to use the software as well as the right to make unlimited copies for archival purposes and in some instances even the right to transfer if certain conditions have been met.[74] Therefore, theoretically because the purchaser does not obtain title to the copy of the software, the transaction cannot be deemed a *sale*, which would be outside the scope of either the CISG or the UCC.

The key principle here, however, should be substance over form. There are two aspects to the issue of whether a software license is a sale. Contracts involving software can be broken down in two general categories, "pure" and "commercial."[75] A "pure" license agreement only grants permission from one party to another and generally involves no further relationship between the parties.[76] On the other hand, a "commercial" license agreement contains additional elements such as customization of the software, installation and maintenance.[77] In a "commercial" license agreement there is an ongoing relationship between the parties aside from the goal of the contract to sale or to license the software. A "commercial" software license agreement involves provision of services in addition to goods, which makes its classification as a *sale* more difficult under sale of goods laws.

In addressing "pure" licenses, it should be noted that what remains unchanged in a "pure" license agreement is the sales aspect of the agreement - i.e., that the licensee or the buyer is getting a product. There are two situations under a "pure" license agreement. The first situation is when the agreement comprises both a sale of a copy of the software and the licensing of copyright rights. Such a transaction could represent sale of mass-marketed, pre-packaged software, where the buyer obtains title to the physical copy of a software, for example a word-processing software. Typically a diskette or a CD-ROM contains a copy of the software. This can easily be construed as a *sale* of *goods* because title to the copy of the *software as the good* passes to the buyer, which would be a *sale* within the traditional meaning of that term.

The second situation is when the agreement explicitly provides that the transaction is not a sale, in order to avoid the effect of the first sale doctrine under Section 109(a) of the Copyright Act.[78] Such a transaction could also represent sale of mass-marketed, pre-packaged software. Here the analysis must rely on the fact that a transaction that involves software is a sale regardless of passage of title. Such an analysis is supported under the Convention by reference to the commentary of Article 4, which provides that it was not necessary for the CISG to expressly address the issue of passing of title because other provisions are provided to handle any situations that would be related to the passage of title - i.e., warranty of title. To the extent that passage of title is not the controlling concept for application of the CISG, it is immaterial whether or not the agreement provides that "this is not a sale but a license of the software."[79] Therefore, a "pure" license agreement also can be construed as a *sale* under sale of goods law.

In addition, the sales aspects of a "pure" software license agreement overshadows the intellectual property aspects of the agreement, compelling the conclusion that the transaction ought to be governed by sale of goods laws. Historically, the term license has given the licensee the right or privilege to do something - e.g., in case of software the right to make copies of the software or the right to modify or the right to rent[80] the software. While this theory can put a

license agreement outside of the scope of the convention, there is more to the issue. As mentioned before, there are two aspects to the license agreement, (1) the intellectual property rights and (2) the seller's or licensor's promise that the software will operate on the computer as represented by the seller or licensor. Typically the intellectual property rights constitute only one clause in the entire agreement, the remaining clauses deal with the goods aspects of the software - e.g., promises that software works according to specifications, delivery of software and curing defects - which are all part of the broader purpose of having a sale of goods law.

In essence the licensee is getting a tangible good, namely the software, that it will use to execute on its computer to produce certain results. It is the promise to produce certain results - i.e., a warranty - that puts the agreement squarely within the scope of any sale of goods laws. The promise that any good will do as the seller says it will is the principal promise in any agreement. Without such a promise by the seller there would not be a market for seller's goods and hence no need for sale of good laws. As a result this aspect of any "pure" software license agreement clearly overshadows the intellectual property aspects of the license agreement such that a "pure" license agreement regardless of whether it is called a sale or a license is in essence a *sale of goods.*

B. *The Definition of "Goods"*

The second threshold question is whether software is a *good.* There is a strong argument that software constitutes a *good* within the scope of the Convention. The Convention does not define the term *goods* whereas the UCC expressly defines goods in Section 2-105. The Convention and the UCC both govern contracts of sale of goods. Therefore, it would not be unreasonable to presume that the term *goods* is substantially equivalent to the definition of *goods* under the UCC.[81] The UCC defines goods as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale."[82]

To the extent that software is a product, which is embodied in a tangible movable object within the traditional definition of that term, the sale of software should be governed by applicable sale of goods laws - e.g., the CISG or the UCC.[83] This is the basic approach taken by many U.S. courts where in essence sale of software by itself constitutes sale of a tangible movable object without any particular requirement that some material object - e.g., disks, tapes, or chips - be transferred.[84] A "computer program" can be defined as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result."[85] In essence a computer program or software, very much like any other product, such as a television, must operate according to its specification. The key concept here is that the software must operate according to its specification, which could be word-processing capability or customer-billing. For example, a television must operate according to its specifications, which can be displaying images in color. Therefore, the software must do something and it is this aspect of the software that makes it a product. There are other aspects to the software, such as the intangible characteristics of the software. For example, software can simply be viewed as information upon which a computer acts. In the context of a television, software would be analogous to the electronic signals that the television uses to display images on its screen.

In a software license agreement, however, the parties are primarily concerned with the product aspects of the software - i.e., what does the software do or what is it that the seller has agreed to sell.[86] The product aspects of the software raise a range of questions as to the promises made by the parties and the rights of the parties under a software license agreement, which are specifically addressed by the Convention. Therefore, to the extent that a computer program or software has the general characteristics of a product, software should be considered as a *good* within the scope of the sale of goods laws.[87]

"Commercial" license agreements make matters even more complex. A "commercial" software license agreement involves provision of services in addition to goods, which makes its classification more difficult under sale of goods laws. The threshold issue becomes whether a mixed goods and services agreement constitutes a service agreement or a *sale of goods* agreement. Neither the Convention nor the UCC govern contracts for the supply of services,[88] such as ordinary software development, consulting, customization or maintenance agreements. These contracts at their core involve supply of labor and not goods. Unlike the UCC, however, the Convention in Article 3(2) specifically addresses mixed goods and services agreements.[89] Article 3(2) applies the "preponderance" test, which provides that the CISG does not apply to contracts in which the preponderant part of the obligations of the party who finishes the goods consists in the supply of labor or other services.[90]

On the other hand, in United States there are two judge-made tests for determining whether a mixed goods-services contract is a service contract or a sale of goods contract: (1) the "predominant purpose" test or (2) the "gravamen of the action" or "what is the plaintiff complaining about test."[91] In the United States, the majority of jurisdictions use the predominant purpose test,[92] which is similar to the Convention's preponderance test. The issue becomes what factors are likely to render a mixed goods-services agreement involving software to be governed by the CISG. The United States courts look at two factors to determine whether the software provided or the services provided constitute the predominant part of the contract: (1) the price structure of the contract; and (2) the characteristics of the goods.

For price structure, the United States courts look at the following: (1) whether the compensation structure is on a time and material basis, which would strongly indicate a contract for the supply of labor; (2) whether the contract provides for payment of a fixed lump sum or a royalty based payment; and (3) by comparing the value of the labor supplied to the value of the software or other goods.[93] For the characteristics of the goods, in case of computer related goods, the United States courts look at the following: (1) whether a completed system was delivered - i.e., a turnkey system. A turnkey system would include, software, hardware and the supply of labor for installation, integration and customization; (2) whether the software is furnished as part of an integrated computer system; and (3) whether the purchaser or licensee is paying the seller or licensor to develop the software substantially from scratch.[94]

Of course the ultimate issue is whose rules or guiding factors a foreign court or even a United States court would apply to the extent that the Convention does not provide any guidance as how to determine the "preponderant" part of a contract. The answer may lie in Article 7 of the Convention, which in the case of issues outside the scope of the convention requires the

application of the general principles underlying the Convention and if necessary the application of domestic law as determined by conflicts of laws rules. Another option for resolving any doubts may be for the parties to expressly agree to have the convention apply to their contract.[95]

IV. A COMPARISON OF THE CISG AND THE UCC AS APPLIED TO SOFTWARE LICENSES

For the most part, the differences between the CISG and the UCC are not based on differing principles of law but rather differing approaches to address issues that typically arise in contracts of sale of goods. For example, the principles of freedom of contract and the role of the contract in light of the commercial practice and usage underlie both the CISG and the UCC.[96] Many of the differences may have little practical effect in "commercial" software licenses, especially in the area of contract formation because the results under both systems are similar. On the other hand, differences that concern the ongoing relationship between the parties or performance issues, such as warranties, acceptance and delivery, may be of importance to the parties in a "commercial" software license agreement. Of course, as evidenced by the movement to draft a new Article 2B governing licenses, the UCC itself is not very helpful when dealing with such issues.[97]

The 1978 Official Commentary to the Draft of the convention as prepared by the Secretariat,[98] and the Department of State's legal analysis that accompanied the CISG to the Senate hearings,[99] including the new draft proposed Article 2B of the UCC on licenses[100] may be used as sources of guidance in comparing the Convention with the UCC as they are applied to software licenses.[101] Of course case law interpretation of the Convention should provide the most persuasive authority, especially in light of Article 7. Article 7 provides that "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application . . ."

The Convention is compared with the UCC by first comparing the articles dealing with formation of contract followed by a comparison of the articles dealing with the rights and obligations of the parties to a sale of goods contract.

A. *Formation and Modification of Contract*

Some of the differences in contract formation can be viewed as codification of the various exceptions to the corresponding rule under the UCC or simply the majority view or trend on the specific issue.[102] Under ordinary circumstances such issues may very well have similar outcomes under either the CISG or the UCC.

1. The Lack of a Writing Requirement

Article 11 expressly eliminates any writing requirements and states that a contract may be proved by *any means*, including *witness testimony*. The Convention's policy of eliminating the writing requirement is consistent with Article 7's emphasis on creating a uniform international sale of goods law. What may appear at first to be a dramatic departure from UCC's statute of frauds writing requirement,[103] in essence is nothing more than a final extension of the major qualifications

to the statute of frauds. Such exceptions include the merchant's written confirmation, cases involving specially manufactured goods, admission by the party against whom enforcement is sought, performance or part performance, and the common law doctrine of promissory estoppel.[104] In light of the exceptions, even in the United States the defense of statute of frauds is a weak defense against enforceability of a contract. The parties should never assume that having no writing will get them out of contractual obligations.

Contracting States, however, have the option to exclude Article 11 under Article 96.[105] The Untied States did not make such a declaration to exclude Article 11.[106] Therefore, United States buyers and sellers should be on notice that they may only be able to rely on written evidence to show existence of a contract if a relevant Contracting State has chosen to exclude Article 11. A declaration under Article 96 does not necessarily ensure that the formal or the writing requirements of the declaring Contracting State would apply to transactions involving its buyer and sellers.[107] Such applicability depends on whether conflict of laws rules point to the law of the declaring Contracting State, which in practice creates more uncertainties as far as preserving the writing requirements of the declaring Contracting State.[108]

Considering that "commercial" license agreements involve an ongoing business relationship it is unrealistic to expect that the parties would consummate a contract without a writing. As a result the effect of Article 11 has limited importance in the context of software licenses.

2. Modification

Conversely, the Convention's liberal policy towards the writing requirement, emphasizes the importance of modification and amendment clauses, especially when the parties have a master agreement with incoming work orders or schedules from time to time.[109] In a typical commercial software license agreement the attached schedules contain some of the most important terms such as deliverables and delivery dates, acceptance test procedures and payment.

Article 29(1) provides that a "contract may be modified by the mere agreement of the parties." By providing that the parties may modify their contract by *mere* agreement, this provision modifies the strict common law requirement of "consideration" in order for a modification to an agreement to be effective.[110] The UCC also displaces the common law doctrine of "consideration" by expressly providing that "[a]n agreement modifying a contract within this Article need no consideration to be binding."[111]

Article 29(2) provides that "[a] contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement." Under Article 29(2) the parties are free to contractually require any modifications to be in writing or perhaps require any other formalities such as signature of authorized persons.[112] United States buyers or sellers can contractually achieve the same effect as the UCC's §2-209(3).

The effect of Article 29(2), however, is broader than it first appears, at least when compared to UCC's §2-209. This is because Article 29(2) provides that if the parties have agreed to a no-oral-modifications clause, their agreement cannot be modified orally unless a party is "precluded by his conduct form asserting such a [clause] to the extent that the other party has relied on that conduct," i.e., estoppel. Section 2-209(4) of the UCC utilizes the concept of waiver for rendering ineffective such clauses, which arguably is more liberal and provides a lower standard than the common law doctrine of estoppel. To the extent that there is a difference between waiver and estoppel, under the UCC a party may be able to rely on both a waiver as well as the common law doctrine of estoppel to render a no-oral-modification clause ineffective.[113] Thus, the effectiveness of no-oral-modification clauses under the Convention are more certain.

This is very important for companies that for policy reasons wish to adhere only to written modifications performed by authorized managers or officers of the company. Moreover, while in the United States, many middle managers may have the authority to modify contracts on behalf of their company, depending on the corporate culture of foreign countries, a foreign company may be reluctant to trust its middle managers to orally modify agreements on behalf of the company. Therefore, the strictness of the Article 29(2) by requiring both a conduct and reliance helps such companies to reduce the risk of unwanted, adverse modifications or waiver of protections provided in their contract. The Convention should be beneficial to the United States buyers and sellers that welcome the strictness of Article 29(2).

3. Offer and Acceptance

Generally, for a contract to be formed the parties must reach an agreement to which they mutually assent. Traditionally, mutual assent is reached through an *offer* and an *acceptance*. Accordingly, both the Convention and UCC rely on an *offer* and an *acceptance* to determine whether a contract has been formed.[114] The issue often becomes what constitutes an offer and an acceptance. Article 14(1) provides that "a proposal for concluding a contract . . . constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance." Article 14(1) further provides that a proposal is sufficiently definite if it contains three items: (1) indicates the goods, (2) expressly or implicitly fixes or makes provision for determining the quantity; and (3) expressly or implicitly fixes or makes provision for determining the price.[115] The UCC's §2-204(1) and (3) operate to achieve the same result as the Convention. The UCC §2-204(3) does not spell out what terms must be provided in the offer, but it provides that "even though one or more terms are left out a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." The Comment to §2-204 states that the more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement. Naturally, if the parties have not specified the required terms of Article 14(1) - i.e., identify the goods, specify the quantity and the price - it is likely that the parties did not intend to conclude a binding agreement. There is also another problem where the latter two terms are not provided. If the quantity term or the price term cannot be determined, under UCC's §2-204(3) there would be "no reasonably certain basis for giving an appropriate remedy.

Even assuming that lack of a price term may prevent the finding of a contract for indefiniteness under Article 14(1), while under the UCC the price will be filled to reflect a reasonable price,[116] this difference in the context of "commercial" software licenses will be insignificant. This is because, under the UCC the materiality of the price and the difficulty in determining reasonableness would make a court reluctant to fill in the price.[117]

With respect to acceptance of an offer, both the Convention and the UCC also provide that a contract for sale of good may be made in any manner sufficient to show agreement.[118] For example, Article 18(3) provides that an "offeree may indicate assent by performing an act." Therefore, the Convention achieves the same result as the UCC for the purpose of resolving the threshold question of whether a valid contract has been formed.

a. *The Receipt Principle v. The Mailbox Rule*

The treatment of effectiveness of an acceptance and giving of notice during contract formation is a notable difference between the United States law and the CISG. In practice, there are two ways to accept an offer, either by communicating the acceptance to the offeror or by performance. With respect to the former, under the common law "mailbox" rule, acceptance of an offer is effective or using the CISG's terminology, "reaches" the addressee, when sent or put in the mailbox and not upon receipt by the addressee.[119] The UCC is silent on the issue, but relying on the common law by way of §1-103, the text and the comments of §2-206 seem to take the "mailbox" rule for granted.[120]

Unlike the common law "mailbox" rule, the CISG generally applies the "receipt" principle.[121] Article 24 provides that an offer, acceptance or any other indication of intention "reaches" the addressee when such communication is delivered to the addressee or its place of business and not when such communication is dispatched, even where some time may pass before the addressee is aware of the delivery when acceptance is delivered to the place of business.[122] Accordingly, oral communications are effective immediately. Delivery also includes delivery to authorized agents of the party.[123] The Convention, however, does not address the question as to who would be an authorized agent having legal authority.[124]

Under the "receipt" principle, an offer, whether revocable or irrevocable can be *withdrawn* if the withdrawal reaches the other party before or at the same time as the offer which is being withdrawn.[125] Similarly, an acceptance can be *withdrawn* if the withdrawal reaches the other party before or at the same time as the acceptance which is being withdrawn. Further, Article 16(1) provides that an offer can be *revoked* if the revocation reaches the offeree before acceptance has been dispatched. The distinction between *withdrawal* and *revocation* should be noted, because Article 16(2) provides that an offer cannot be revoked if it indicates that it is irrevocable, or if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer. Thus, if notice of withdrawal reaches the offeree after the offer has reached the offeree, the withdrawal is considered a *revocation* and if the offer is irrevocable then the revocation is ineffective.[126] If the offer is revocable, then under Article 16(1) the revocation will be effective so long as the offeree has not dispatched the acceptance. Article 16(2) is similar to

UCC's §2-205 firm offers by merchants, although without the requirement of a special signed writing and without a statutory time limit.

Acceptance by performance can be made under both the Convention - Article 18 - and the UCC §2-206. The only significant difference is that under the CISG, acceptance by performance may be made in light of trade usage or authorized by the offer without giving notice to the offeror and the acceptance is effective at the moment the act is performed.[127] Conversely, the UCC requires that the offeror be notified of acceptance within a reasonable time.[128]

Acceptance of offer, must be distinguished from the concept of "acceptance of goods" under UCC §2-606. There is no corresponding concept of "acceptance of goods" under the Convention. For example, while use of software may constitute acceptance of the software under the UCC, which triggers certain rights of the licensor and limits the right of the licensee to refuse the software for minor or reasonably discoverable non-conformities, such usage of software under the Convention only satisfies the licensee's obligation to take delivery without triggering any other rights.[129] Thus, if licensee's use of software can be interpreted in light of trade usage as an indication of assent to an offer, then such use under the Convention would be considered acceptance of an offer for purposes of formation of a contract.[130]

Of course, because of the CISG's gap filling role, the above rules concerning revocability of offer and acceptance become important if the contract is silent about directions as to the methods of communications used during the formation process.[131]

b. *No Parol Evidence Rule*

Once a contract has been formed, the issue often becomes how it should be interpreted. The common law and the UCC protect the express terms of the agreement by the "parol evidence rule."[132] The "parol evidence rule" provides that a writing intended by the parties to be a final expression of their agreement may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement.[133] The Convention does not have a "parol evidence rule." The Convention more or less overrides the parol evidence rule in Article 8, which addresses the interpretation of the conduct of the parties and the interpretation of the contract.[134] For example, Article 8(3) authorizes "due consideration . . . [of] all relevant circumstances of the case including the negotiations" in determining the intent of a party. Express integration clauses, however, will be effective based on Article 6. The parties are allowed to agree that any prior or contemporaneous agreement shall not be effective and are overridden by the current agreement, but they must do so expressly or the Convention's more permissive rules - e.g., Articles 8 and 11 - will permit introduction of alleged oral terms or understandings such as marketing pamphlets or other materials used during the negotiations phase. If United States licensors and licensee wish to protect the express terms of their agreement, they should insert a integration clause in their agreements.

4. The Battle of the Forms

The Convention and the UCC differ on the "battle of forms" issue. The Convention adopts the common law "mirror image" rule, while the §2-207 of the UCC eliminates the common law "mirror image" rule. Under Article 19, an acceptance must match the offer unless the additional or different terms do not *materially* alter the terms of the offer. Paragraph 3 of Article 19, defines *material* terms to encompass, among other things, the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes, which virtually cover all of the salient terms of a typical contract.[135] Therefore, under most circumstances a contract will not be formed if the terms of the offer and acceptance do not match or are different.

Conversely, under UCC §2-207, even material alterations in an acceptance may not prevent creation of a contract.[136] To this extent, it would be advisable that U.S. licensors and licensees avoid exchanging conflicting forms as a way of creating binding contracts. Foreign courts are likely to construe Article 19 strictly, because the majority view is more like the common law "mirror image" rule.[137] In software licenses, the "battle of forms" issue may become of importance where the parties have a master license agreement with attached work orders.[138] Otherwise, in case of "commercial" software licenses, it is likely that the parties do not operate off of conflicting forms, but that the parties use a single master form as their software license agreement. Because the "battle of forms" issue is about one form never being reduced to a single document, Article 19 should have a minimal impact where "commercial" software license agreements are involved.

In summary, because "commercial" software licenses are often complex in nature, the parties will likely require that all the legal terms and conditions to be set forth in detail before concluding a contract. As a result many of the differences between the Convention and the UCC on formation of contracts will be avoided by addressing such issues in the contract to obviate application of the CISG under its gap filling approach.

B. *Performance of Contract*

Part III of the Convention governs the rights and obligations of the seller and the buyer or performance issues.[139] United States software licensors and licensee should confirm whether or not a Contracting State has opted out of Part III under Article 92.[140]

In the context of "commercial" software licenses and "contract performance," certain issues rather than differences should be considered. The issues broken down according to the sections of the Convention in Part III are as follows: (1) avoidance of contract and the concept of fundamental breach; (2) obligations of the seller and the buyer's remedies for breach of contract; (3) obligations of the buyer and the seller's remedies for breach of contract; and (4) remedies in general.[141]

1. Fundamental Breach

Article 25 defines "fundamental breach" as follows:

> A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

It is important for the U.S. parties to determine and compare with the UCC the scope and the application of "fundamental breach," because under the Convention "fundamental breach" is linked to the remedies of the buyer and seller.[142] The Convention also ties "fundamental breach" to other remedies of the buyer and the seller besides damages.[143] For example, while breach of a software license by the licensor ordinarily gives the licensee a right to recover damages, "fundamental breach" also addresses the licensee's right to specific performance[144] or possibly the right to cancel the contract.[145]

In place of "fundamental breach," the UCC sets forth certain rights of the buyers that are triggered upon an event or condition such as the buyer's right of "rejection" and "revocation of acceptance."[146] Unlike the Convention, however, such rights are dependent upon two separate standards. Section 2-608 applies the "substantially impairs" standard after acceptance of the goods, which closely resembles the concept of "fundamental breach."[147] Section 2-601 applies the "perfect tender" standard before acceptance of the goods, which permits the buyer to reject the goods where the goods or the tender of delivery fail in any respect to conform to the contract.

Even though it appears that the UCC's "perfect tender" rule permits a buyer to cancel the contract for every breach, including minor non-conformities, a party cannot avoid the contract for every breach under both the CISG and the UCC.[148] When a buyer *accepts* goods that turn out to be defective, Sections 2-608 and 612 of the UCC permit the buyer to revoke its acceptance only if the non-conformance "substantially impairs" the value of the goods to the buyer. The concept of "substantially impairs" closely resembles the Convention's concept of "fundamental breach", with the caveat that the CISG defines "fundamental breach," while the UCC does not define "substantially impairs."[149]

Moreover, the "perfect tender" rule is subject to some exceptions. The most pertinent exception is that §2-601 does not apply to contracts that involve multiple deliveries or installment contracts. Many "commercial" software license agreements arguably fall under this exception to the extent that they involve multiple deliverables such as development, installation, and integration. Under §2-612 any non-conformity must at least "substantially impair" the value of a given installment or the whole contract before there is a breach with respect to an installment or the whole contract. Furthermore, a buyer may have the right to cure the defect and many courts have refused to apply the "perfect tender" rule strictly.[150]

The determination of fundamental breach or whether a breach of contract substantially deprives an aggrieved party of what she is entitled to expect under the contract must be made in the light of the circumstances of each case, e.g., the monetary value of the contract, the monetary

harm caused by the breach, or the extent to which the breach interferes with other activities of the injured party.[151] A claim of fundamental breach may be defeated if the breaching party can show both that she did not foresee and that she had no reason to foresee the result that has occurred.[152] Arguably, both the CISG and the UCC achieve the same result with respect to breach of contract due to non-conformities, because each uses the non-breaching party's subjective state of mind for determining whether a breach is "fundamental" or "substantially impairs" the value of the contract to the non-breaching party.

a. *Fundamental Breach and Conformity of the Goods (Warranties)*

Software licenses give rise to many disputes that turn on the conformity of the software to the functional requirements of the licensee and the issue of whether or not any nonconformity constitutes such a breach that would permit the licensee to cancel the contract. A "Commercial" software license typically defines "acceptance" by providing detail acceptance test procedures such that the licensee can determine whether or not the software conforms to the specifications in the contract. In practice under the UCC, it is rare that a software licensee would "accept" the software and then attempt to revoke his acceptance under the UCC §§2-608 and 612. It is more likely that the licensee wishes to reject the software during software acceptance phase before "acceptance." Thus, in "commercial" software licenses it is more likely that the UCC's harsh "perfect tender" rule is implicated, for which a licensor potentially must rely on some exception to defeat the licensee's rejection of the software for minor non-conformities.

Under both the Convention and the United States law, the issue of rejection of goods turns on the non-conformity of the goods and whether the nonconformity constitutes a breach that calls for avoidance of contract.[153] The Convention's concept of "fundamental breach"[154] resembles the common law "material breach" concept. The UCC utilizes the concept of "perfect tender rule."[155] Naturally, under the UCC, a software licensee would insist on the strict application of the "perfect tender" rule, under which the licensee can theoretically reject the software for *any* nonconformity.[156] In reality, however, it is virtually impossible for a software licensor to promise that its software is completely "bug" free. The standard of conformity should be substantial compliance with the specifications in the contract. The "perfect tender" rule puts software licensors in a disadvantageous position, even though the rule may be limited by the UCC's good faith and trade usage provisions. Therefore, the Convention's "fundamental breach" standard of conformity is more advantageous to United States licensors than the UCC's "perfect tender" standard. Interestingly, the proposed UCC Article 2B on licenses has tentatively adopted the concept of substantial performance or material breach.[157]

In practice the United States software licensors contractually protect themselves by providing in their software acceptance plans that minor bugs or errors that do not effect the functionality of the software do not constitute a material breach and that such minor defect do not trigger the licensee's right to cancel. Nevertheless, to the extent that "fundamental breach" is a subjective standard being determined by a foreign court, it becomes extremely important for the U.S. software licensors to clearly set forth acceptance test procedures and to the extent possible to clearly state that minor defects or "bugs" shall not give rise to the licensee's right to cancel the contract but will be fixed by the licensor within a set period of time.[158]

b. *Giving of Notice During the Performance of the Contract*

During the performance of the contract, Article 27 puts the risk of delay and error of any communications between the parties on the addressee.[159] Unlike the "receipt" principle used by the Convention during the formation of contract phase, under Article 27 a declaration of avoidance or notice of breach of contract sent by a non-breaching party to the breaching party will be effective when dispatched to the other party.[160] In a number of situations, however, the Convention instead uses the "receipt" principle.[161] The Convention uses the "receipt" principle during contract performance where it is more appropriate for a communication to become effective when it is received by the other party.[162] For example, under Article 47(2) a licensee must receive a notice by the licensor that she will not perform within the additional period set by the licensee before the licensee can resort to other remedies.[163]

The UCC in §§2-602, 607(3), and 1-201(26) also puts the risk of delay and error on the addressee. The UCC, provides that one "notifies" another "by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it."[164] The Convention, also provides exceptions to this general rule.[165] Therefore, under both the UCC and the CISG, the issues of giving of notice during the performance of the contract are treated the same. United States licensors or licensees who wish to avoid the risk of delay for such notices, should provide in their contracts notice mechanism that clearly establish when a communication becomes effective.

2. Obligations of the Seller

The seller's obligations and related issues fall into three categories: (a) the seller's duty for time and place of delivery of the goods; (b) the quality of the goods; and (c) the buyer's basic remedies when the seller fails to perform its duties under the contract.[166]

The seller's general obligation under the Convention, as is under the UCC, is to deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and the CISG.[167] The time of delivery of the goods, if not fixed or determinable for the contract, is a reasonable time.[168] It should be noted, however, that the application of the default rules that depend on reasonableness is likely to depend on the forum's interpretation of reasonableness in light of trade usage, which may not be consistent with the expectations of the U.S. buyers or sellers.[169]

a. *Delivery*

In "commercial" software licenses, the concept of delivery as understood under the UCC or the Convention in relation with the buyer's obligations may not be appropriate. Delivery of software typically involves an ongoing relationship and part of the software acceptance plan where the licensee has the opportunity to inspect the software and determine whether the software conforms to the functional requirements set out in the contract. Moreover, it is likely that delivery is performed in phases over a period of time with software acceptance at each phase,

which resembles the concept of "installment contracts" under the CISG or the UCC.[170] Therefore, under the UCC in case of software licenses, tender of performance and subsequent rejection or acceptance are significant issues because they involve an ongoing relationship, drawn out over a certain period of time, while in typical sale of goods these steps may involve a short transaction having limited importance. Under the Convention such issues are all encompassed in the concept of "fundamental breach." As mentioned above under the heading *fundamental breach,* with some caveat, both the UCC and the Convention essentially achieve the same results.

The United States licensors and licensees should take the same position as the drafters of the new proposed Article 2B on licenses have taken: that there is too much variety in software licenses for the parties to rely on default rules in the area of delivery. The parties should clearly define the delivery term, especially in relation to the payment obligations of the licensee.[171]

b. *Warranties*

i. Conformity of Goods

Under both the CISG and the United States law, another notable obligation of the seller is to deliver conforming goods.[172] The Convention's concept of delivery of conforming goods is equivalent to the warranties that the seller gives under the UCC.[173]

In general, as under the UCC, the obligations of the parties under the Convention are determined against any practices established between the parties, any applicable trade usages and the contract itself.[174] Unlike the UCC, the Convention does not expressly break down warranties into specific categories of express and implied warranties. Article 35, however, embodies the concepts of all these warranties. Article 35(1) is equivalent to the UCC's §2-313 express warranty by providing that the seller must deliver goods which are of the quantity, quality and the description required by the contract. Article 35(2)(a) is the equivalent to the UCC's §2-314 implied warranty of merchantibility and Article 35(2)(b) is the equivalent to the UCC's §2-315 implied warranty of fitness for a particular purpose. Article 35 must be read in light of Article 8, which concerns the interpretation of the conduct of the parties, and Article 9 for determining what promises the seller made and the buyer expected under their contract with respect to quality of the goods.[175]

Unlike the UCC in §2-316, the Convention does not expressly address the issue of exclusion or modification of warranties. Article 35(2), however, does begin with the language "[e]xcept where the parties have agreed otherwise, . . ." In light of Article 6's freedom of contract principle, Article 35(2) leaves room for the parties to limit or modify or disclaim the default warranties of the Convention.[176] For United States licensors and licensee's, such an analysis of Article 35(2) raises a complicated issue, which is outside the scope of this paper. The issue is that under the UCC certain exclusions of warranties may lead to unenforceability of the contract, which creates a validity issue under the Convention. Article 4 expressly provides that validity issues are not governed by the CISG. The issue becomes whether such exclusion are valid even though the United States law says they are not.[177]

To the extent that the Convention governs a "commercial" software license, a United States licensor should be aware of the application of implied warranties of fitness for a ordinary purpose - i.e., merchantibility - and fitness for a particular purpose.[178] The commentaries to the proposed draft of Article 2B on licenses highlight many of the problematic issues that arise in the area of warranties and software, which may be relied upon only as a source of information and for an understanding of the issues and not a source of authority.[179] For example, ordinarily no implied warranty of merchantibility is applied to service contracts because service contracts typically involve exercise of judgment by the service provider.[180] Under such circumstances, it is unreasonable to contemplate that the service provider will produce an exact result.[181] Thus in commercial practice, implied warranty of merchantibility in service contracts is equated to a warranty that workmanship will be done according to industry standards with the focus on the performance of the contract rather than the end product or the quality of the product itself.[182]

A "commercial" software license falls somewhere in between a pure goods contract and a pure services contract. Therefore, the concept of warranty of fitness for ordinary use does not fit "commercial" software licenses. Most United States licensors expressly disclaim any warranty of merchantibility and substitute a warranty of substantial conformance to documentation, which in essence becomes a express warranty.[183] This is because in "commercial" software licenses, the software is often unique such that there are no other like products, such that a warranty of fitness for ordinary use becomes an unrealistic standard or an extremely broad warranty. In other words the parties have defined the ordinary purpose of the software. Therefore, under both the default rules of the Convention and the UCC, United States software licensors should avoid application of warranty of fitness for ordinary use by disclaiming such a warranty.

Additionally, United States software licensors should avoid making an implied warranty of fitness for a particular purpose under Article 35(2)(b). This warranty, which is similar to the UCC's §2-315 warranty, may easily be implied because in "commercial" software licenses, the licensee very often relies on the expertise of the licensor.[184] Considering that warranties will be interpreted in light of trade usage,[185] the uncertainties associated with a given forum's interpretation of trade usage, especially in case of software licenses, make it imperative for United States licensors to explicitly spell out any warranties given or limited in their contract.

ii. Warranty Against Infringement

Article 42 addresses the seller's duty to "deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, . . ." A licensor's duty under Article 42 is much narrower in comparison with a licensor's duty under UCC's §2-312(3). Unless the parties have agreed otherwise, a licensor's liability under §2-312(3) of the UCC is analogous to strict liability. On the other hand, the Convention's default provision on third party claims based on intellectual property claims is much gentler on licensors. Article 42 provides at least three limitations on the licensor's potential liability that the UCC does not provide. As a first limitation, Article 42 is triggered if a claim or right of a third party based on intellectual property is one which the licensor at the time of conclusion of the contract knew or could not have been unaware. Additionally, there is the issue of which intellectual property laws are relevant for determining whether the licensor has breached its duty to supply software that is

free from intellectual property claims of a third party.[186] Finally, the licensor's liability is limited if the buyer at the time of the conclusion of the contract knew or could not have been unaware of the third party's right or claims.[187] Both the UCC and the Convention limit the licensor's liability in situations where the right or claim by the third party results from the licensor's compliance with the licensee's specifications.

A licensor under the Convention has more defenses against the licensee for potential losses arising out of third-party claims based on intellectual property. Of course Article 42 is a default provision and the parties under Article 6 are always free to contractually allocate such risk of loss by agreement.

c. *The Buyer's Remedies in Case of the Seller's Breach*

Delivery of software gives rise to many disputes. Typically, the licensee believes that the licensor's software does not conform to the contract.[188] Another area of tension is the associated remedies available to the licensee for the licensor's alleged breach.

Article 45(1) lists the general remedies available to a buyer, that the buyer may (a) exercise the rights provided in Articles 46-52; or (b) claim damages as provided in Articles 74-77. Article 45(2) provides for the general proposition that the buyer will not lose any other rights it may have for claiming damages by exercising its rights to other remedies.

A general overview of the issues helps in understanding the available remedies associated with the issues. Under the UCC, a "commercial" software licensor may be in breach by (1) not delivering the software on time; (2) delivering on time, however, the licensee believes that the software does not conform to the contract; (3) and delivering late and the licensee believes that the software does not conform to the contract. The sub-issues are (1) what constitutes delivery of software, especially when many license agreements provide for a software-acceptance-plan period; and (2) what is considered acceptance for determining whether the licensee's claim of software non-conformance is after acceptance or during inspection but before acceptance - i.e., rejection.

The Convention incorporates the above UCC issues in one concept in Article 25: "fundamental breach."[189] The Convention follows the common law principles of minor and material breach and their relationship to available remedies. See the discussion on "fundamental breach" in Part III B (1) above. The buyer's available remedies depend on the degree of breach by the licensor. The most notable remedy is avoidance of the contract or cancellation of the contract. This remedy is only available if the seller or software licensor has committed a "fundamental breach." If the seller's breach is not "fundamental," the buyer must resort to other remedies.

Under Article 45(1) if the licensor has breached the contract, the licensee may exercise the following rights: Article 46 (the right to require the licensor to do some type of cure), Article 47 (the right to fix an additional time for the licensor to perform), Article 49 (the right to cancel the contract in case of "fundamental breach") and Article 50 (the right to reduce the price). Under

both the CISG and the UCC the scope and the number of remedies available to the licensee depend on the scope of the licensor's right to cure.[190] The licensee may also resort to claim damages under Article 74-77.

i. Article 46 - Specific Performance

If the licensor does not deliver on time or if the delivery is non-conforming, Article 46 provides that the licensee has the right to require the licensor to perform the contract. Additionally, under Article 46(2), the licensee in case of a "fundamental breach" by the licensor has the right to require the licensor to deliver substitute goods if the requirements for giving notice to the licensor are observed. Furthermore, under Article 46(3), the licensee may require the licensor to repair the goods if reasonable and upon giving of notice. While the UCC also provides for specific performance, the licensee must meet a high standard, such as a showing that the goods are unique or that the circumstances make such a remedy proper.[191] Moreover, the UCC does not directly provide for the type of relief available, but broadly addresses the types of relief available by providing that "[t]he decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just."[192]

The CISG recognizes possible differences between countries on availability of specific performance remedy and as a result it provides that it is expected for the forum to order such performance when requested by the buyer and to enforce that order by means available to it under its procedural law.[193] The right of specific performance, however, is limited by Article 26, which provides that if a court could not give a judgment for specific performance under its own law in respect of similar contract of sale not governed by the Convention, it is not required to enter such a judgment in a case arising under the Convention.[194] As a practical matter, it is unclear how effective or realistic the remedy of specific performance can be in software licenses. For example, it is unlikely that a licensor will be able to provide a substitute software because typically "commercial" software are the result of years of development and the software licensor cannot simply at a whim substitute a new software. It would be reasonable, however, to require the licensor to fix the software, which is also consistent with Articles 48 and 47 which allow the licensor to cure non-conformities within a fixed additional time.[195]

ii. Article 47 - Seller's Right to Remedy Failure to Perform or to Cure

Under the Convention, the licensor's right to cure any failure to perform depends on whether the licensor's breach constitutes a "fundamental breach."[196] The licensor's right to cure delivery (i.e., late delivery) must be distinguished from the licensor's right to cure non-conforming goods after the delivery. A licensor loses the right to cure delivery if the delay in delivery amounts to a fundamental breach.[197] Otherwise, the licensor can deliver late and cure the delay in delivery before the delay amounts to a fundamental breach. The licensor may cure non-conforming software after delivery, however, even if the nonconformity amounts to a fundamental breach, unless the licensee chooses to cancel the contract based on the fundamental breach.[198]

Subject to the licensee's right to cancel the contract if appropriate, Article 48(1) permits the licensor to remedy any failure to perform its obligations (e.g., failure to deliver on time, failure to deliver conforming goods) after the date of delivery subject to three conditions: (1) the seller must be able to perform without such delay as will amount to a fundamental breach of contract; (2) the seller must be able to perform without causing the buyer unreasonable inconvenience or unreasonable uncertainty of reimbursement by the seller of expenses advanced by the buyer; and (3) the seller must exercise his right to remedy his failure to perform prior to the time the buyer has declared the contract avoided.[199]

The Convention also addresses the issue of minor non-conformities and minor delays in performance, where the licensor has a much broader right to remedy his failure. The only limitations on the licensor are (1) that he cannot remedy the failure if doing so would cause unreasonable inconvenience to the buyer; or (2) uncertainty of reimbursement by the licensor of expenses advanced by the buyer. This is consistent with the CISG's policy that the licensee cannot cancel the contract based on minor breaches.[200] Essentially, when there is a minor breach the licensor is likely to be permitted to cure any failure within an additional period of time.

A United States licensor should be aware of Article 49(1)(b) and (2) in case of a licensor's failure to cure within a set additional time period. Article 49 provides that if the licensor does not remedy its failure to perform during any additional period set, then the licensee has the right to cancel the contract. It should be noted that either the licensor or the licensee can set a specific cure period, but Article 49 does not make a distinction as far as the licensee's right to avoid the contract.[201] It is more advantageous for the licensor to propose and for the licensee to accept, the additional period of time.

It should be noted that Article 48(2) presumes that the licensor will notify the licensee by requesting from the licensee to notify the licensor as to whether or not the licensee will accept the licensor's cure.[202] Accordingly, it is also presumed that the licensor will inquire whether the buyer intends to exercise other remedies such as avoiding the contract, if possible, or reducing the price.[203] The licensor's request must clearly set a specific time period or else the licensor cannot derive any rights under Article 48(2) from a failure by the licensee to respond.[204]

The UCC in §2-508(1) indirectly addresses the issue of cure by the seller by permitting the seller to cure any non-conformity of the goods after the buyer's rejection (but before acceptance) if the time for performance has not expired. If the time for performance has expired but if the seller had reasonable grounds to believe that the goods would be acceptable, then he may have further time to cure the non-conformity.[205] The UCC's indirect approach is because the UCC makes a distinction between the buyer's rights before and after "acceptance."[206] Generally the UCC favors the licensee prior to the acceptance of the software because of the perfect tender rule in §2-601. Conversely, once the licensee has accepted the software, the licensee has to meet the higher standard of "substantially impairs" in UCC §2-608 to revoke its acceptance.

The UCC achieves almost the same result as the Convention by limiting in §2-508 the seller's right to cure to non-conformity of the goods and not to delayed delivery. Under Article 48, the seller does not have the right to cure if there is a delay in delivery that amounts to

fundamental breach. The UCC in §2-601 gives the buyer the right to reject "if the *goods* or *tender of delivery*" fail in any respect to conform to the contract.

As mentioned already, the Convention uses the general principle of "fundamental breach." Interestingly, the Convention's approach of "fundamental breach" better fits the commercial practice in "commercial" software licenses.[207] For example, usually a "commercial" software license avoids the "perfect tender" rule by conditioning acceptance of the software by the licensee upon *substantial* compliance of the software with the specifications. In other words, the licensee cannot *reject* the software unless the software does not substantially conform to the specifications. It is reasonable to assume that lack of substantial performance amounts to "fundamental breach" under the Convention. Furthermore, the agreement usually gives the licensor the right to cure any defects if the licensee gives notice to the licensor of the defects. Note that requirement of acceptance based on substantial compliance prevents the licensee from requesting a cure based on small defects. If no timely notice is given as to any material defects or if the defects are small, the licensee will be deemed to have accepted the software, under which the licensee has to meet a higher burden to revoke its acceptance and such acceptance trigger's the licensor's right to payment.[208] If the licensor does not cure the defects within the time period specified in the contract, then the licensee can cancel the contract (that is prior to acceptance) under the perfect tender rule.[209] Of course such failure probably amounts to a "fundamental breach" under the Convention.

While there is such a term as "substantial compliance," there is not a term such as substantial timeliness. In other words, the licensor's ability to extend its delivery date is probably very limited and a late delivery is a breach of contract. To the extend that late delivery can cause great harm to a licensee, is should not be surprising that such a delay can easily amounts to a "fundamental breach" under the subjective standard of the Convention. The same is true under the UCC because of the perfect tender rule, which includes non-conforming tender of delivery as a basis for rejection. Therefore, the Convention achieves the same result that the parties to a commercial software license wish to achieve contractually; which the UCC does not, and hence the new proposed Article 2B.

Nevertheless, United States licensors should clearly define the conditions for acceptance of software as it relates to showing or negating a showing of "fundamental breach" by the licensor.

iii. Article 51 - Partial Non-performance

Article 51 is of special importance in software licenses. Article 51 concerns the licensee's remedies when the licensor fails to perform only a part of its obligations. Considering that during the software acceptance plan a number of deliveries are contemplated in stages, arguably Article 51 permits the licensee to cancel part of the contract if criteria for avoidance are met as to that part.[210] A licensee may cancel the whole contract, however, only if the licensor's breach amounts to a "fundamental breach."[211]

iv. Article 49 - Buyer's Right to Cancel

Article 49 describes the buyer's right to cancel the contract. As a general principle, the buyer under the CISG cannot cancel the contract unless there is a fundamental breach by the seller.[212] Both the seller's failure to deliver within an additional period of time and the seller's declaration that it will not deliver within an additional period of time automatically amount to a fundamental breach.[213] Under the CISG, a declaration of avoidance must be made expressly by giving notice to the seller declaring the contract avoided.[214] The UCC in §§2-602 and 2-608 also requires a buyer to notify the seller in order for either a rejection or revocation of acceptance to be effective. The required form of a declaration of avoidance must be distinguished from a parties' right to avoid the contract. If there has been a fundamental breach of contract, the buyer has an immediate right to declare the contract avoided and the buyer is under no obligation to give the seller any prior notice of the *intention* to declare the contract avoided or any opportunity to remedy the breach under Article 48 (seller's cure period).[215]

v. Article 50 - Reduction of the Price

Article 50 gives the licensee the right to reduce the price if the goods do not conform with the contract. The licensee, however, cannot reduce the price if the licensor cures such failures during the additional period fixed by the licensor according to Article 48 or if the licensee refuses to accept performance by the licensor within an additional period of time. It should be noted that presumably this remedy is not available to the licensee if the licensee has fixed an additional time under Article 47.[216] Also this remedy should be distinguished from claim of damages, even though at times the same result may be achieved under either remedy.[217] The UCC §2-717 also provides a buyer with the remedy of reduction of price.

3. Obligations of the Buyer

The buyer's obligations and the related issues fall into three categories: (a) the buyer's obligation for payment of price; (b) the buyer's obligation to take delivery of the goods; (c) and the seller's basic remedies when the buyer fails to perform its duties under the contract.[218]

a. *Buyer's Obligation for Payment of Price*

Under Article 53, the buyer must pay the price for the goods and take delivery of the goods as required by the contract and the Convention. The UCC puts a similar duty on the buyer.[219] In case of software licenses, ordinarily the licensee does not make a complete payment until after inspecting the software. Article 58 governs the time for the buyer's payment in relation to performance by the seller. The buyer has the right under Article 58(3) to inspect the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with the buyer having an opportunity to inspect (e.g., the seller may make payment a condition for handing over the goods or documents regardless of whether the goods have arrived or not).[220]

In parallel to the buyer's right to inspect the goods, the buyer also under Article 39 of the CISG must give notice within a reasonable time to the seller of any nonconformity or else lose the

right to rely on a lack of conformity of the goods. Under Article 39(2) the buyer loses the right to rely on a lack of conformity of the goods if the right is not exercised within two years from the date of delivery unless the two year time-limit is inconsistent with a contractual period of guarantee. A contract provision limiting the time-period to 90 days, for example, would be considered inconsistent with the two-year time-limit and therefore overrides the two-year time-limit.[221] Accordingly a licensor should avoid the CISG's default time period and limit the time period of the licensee's right of inspection in the contract. A licensee, otherwise, could potentially have two years to reject the software based on nonconformity of the software, which interestingly may be a reasonable period of time for finding material defects in software.

The UCC, once again, makes a distinction between the period before and after acceptance concerning giving of notice. UCC §2-602(1) addresses the issue before acceptance and UCC §2-607(3) addresses the issue after acceptance.[222] In essence, however, the Convention's concept of notice is similar to the UCC's requirements that the buyer must notify the seller in order to effectively reject or revoke its acceptance.

b. *Buyer's Obligation to Take Delivery of the Goods*

Article 60 provides that the buyer's obligation to take delivery consists of "doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery" and "in taking over the goods." The UCC in §§2-507, and 2-503(1)(b) also requires a buyer to take delivery upon the seller's tender of delivery and to take reasonable measure to receive the goods.

c. *The Seller's Remedies in Case of the Buyer's Breach*

Generally, the seller's remedies mirror the buyer's remedies under the Convention. Article 61(1) lists the general remedies available to a seller, that the seller may (a) exercise the rights provided in Articles 62-65; or (b) claim damages as provided in Articles 74-77. Article 61(2) provides for the general proposition that the seller will not lose any other rights it may have for claiming damages by exercising its rights to other remedies.

The provisions on the seller's remedies are less complicated than the buyer's because the buyer has only two principal obligations: (1) to pay the price and (2) to take delivery.[223] Under Article 62, the seller can use the remedy of specific performance to require the buyer to either pay, take delivery or perform any other obligation. Unlike the UCC's action for price, there is no requirement that the seller first try to resell the goods.[224] The UCC provides that the seller may recover the price of the contract under two circumstances: (1) if the seller is unable to resell the goods or if such resale is impracticable and (2) where the buyer has accepted the goods.[225] Considering, that often the licensee does not completely pay until after the licensee has inspected and accepted the software, the seller's right to recover the price under both the UCC and the Convention are the same.

The CISG recognizes possible differences between countries on availability of specific performance remedy and as a result it provides that it is expected for the forum to order such performance when requested by the buyer and to enforce that order by means available to it under

its procedural law.[226] The right of specific performance, however, is limited by Article 26, which provides that if a court could not give a judgment for specific performance under its own law in respect of similar contract of sale not governed by the Convention, it is not required to enter such a judgment in a case arising under the Convention.[227]

4. Remedies in general

a. *Damages*

The Convention, the UCC and the United States common law, all treat damages similarly by attempting to make the non-breaching part whole. Articles 74-77 of the Convention set forth the rules for measuring damages.

Under both the CISG and the UCC, lost profits including any incidental and consequential damages are all allowed.[228] Article 78 of the CISG, however, provides for recovery of interest on sums in arrear, whereas the UCC does not provide for such a measure, leaving it to the local contract law of each state.

V. OPTING IN OR OUT OF THE CISG

The question of whether a United States licensor or licensee should choose to opt in or opt out of the Convention must be answered in light of the circumstances of the U.S. party. Factors such as the business risk tolerance of the party, whether the party is a licensor or licensee and the bargaining power of the parties all affect the decision of whether to opt in or opt out. There are, however, some general considerations that U.S. parties must take into account.

A United States party should be aware that the Convention does not address the issue of choice of forum. The Convention only resolves the issue of choice of law. It is also unclear how a court will resolve issues that are not directly addressed by the Convention. In the United States typically the court resorts to the common law, but given the breadth of the language in Article 7, it is unclear what rules a foreign court would apply. The Convention also does not address any of the underlying intellectual property issues involved in software licenses.[229] Therefore, the Convention does not completely resolve all issues of choice of law.

The Convention also does not have a "parol evidence" rule. If a United States licensor or licensee wishes to preserve the express terms of the contract, it must do so contractually through an integration clause. An express contractual clause would be necessary to assure that any prior or contemporaneous agreements will not be effective and are overridden by the current agreement. Such a clause would presumably also exclude any marketing pamphlets licensors use during the negotiations phase. The absence of a parol evidence rule under the Convention, however, should be alarm U.S. licensors because under the UCC and the U.S. common law the parole evidence rule is subject to exceptions, which makes its application uncertain. A U.S. licensor benefits by expressly defining the functional design and specifications of the software in the contract.

There are at least four advantages that a United States party should consider. First, the Convention can be used as a leveraging tool during the negotiation phase of the contract. Contrary to the most common advice that U.S. parties should insist on U.S. law and forum, in commercial practice often a customer has the negotiating power to insist on its own law and forum. To the extent that the Convention achieves the same results as the UCC and the United States common law, it is more advantageous to choose the Convention rather than the law of a foreign country. This should be true especially in light of Article 6's freedom of contract principles, which allows the parties to vary or derogate the effect of most of the CISG's provision. The parties should be able to minimize the application of the Convention by contractually addressing any issues not covered by the Convention. Thus, the Convention can be a viable compromise rather than agreeing to the domestic laws of the customer or a neutral foreign country, which may not be robust and very likely unfamiliar to most U.S. lawyers considering the language barriers. The Convention should be even more desirable if the customer insists on local forum because the local court would at least be applying a somewhat familiar law to U.S. lawyers.

Second, the Convention's lack of "perfect tender" rule should be more advantageous to "commercial" software licensors. Article 25's concept of "fundamental breach" encompasses what most United Software licensors wish to achieve contractually; that the licensee should not be able to cancel the contract based on minor defects in the software. The concept of "fundamental" breach also extends to the licensor's warranty or promise that the software will *substantially* conform to the specifications in the contract.

Third, the Convention should be more desirable for companies that wish to minimize the risk of informal modifications by middle managers or marketing personnel. If the parties have agreed to a no-oral-modification clause, Article 29 of the Convention leaves less room for a party to claim that the clause has been rendered ineffective. Unlike the UCC which uses the more liberal concept of waiver, Article 29 requires the more stringent elements of estoppel - i.e., conduct by a party and reliance upon that conduct by the other party.

Fourth, unless the parties have agreed otherwise, the default provision of the Convention on warranty against infringement is generally more lenient on licensors. Article 42 provides three additional limitations or defenses compared to the UCC. Unless otherwise agreed, the UCC only limits the licensor's liability when the licensee furnishes specifications that give rise to the third party claim of infringement.

Finally, the uncertainty surrounding the enforceability of choice of law provisions accounts for another advantage of the CISG. Generally, choice of law provisions are enforceable if (1) the clause is negotiated by the parties; (2) the chosen law is reasonable, for example, by having relationship to the parties or the transaction; and (3) application of the law will not be against the fundamental policy of the state whose law would have been chosen if it was not for the parties' choice of law clause.[230] This issue can be avoided, however, if the parties agree on the CISG as the governing law because the relevant courts of either Contracting State must necessarily apply the CISG.[231]

VI. CONCLUSION

The decision to opt in or opt out of the CISG is driven by a number of factors including: whether the U.S. party is a licensor or licensee; the relevant bargaining power of the U.S. party and whether the U.S. party for policy reasons wishes to minimize the risk of informal modifications or preserve the express terms of the contract.

[1] © Copyright 1996 by Mehdi Sheikerz, all rights reserved. B.S. Computer Science 1988, Virginia Polytechnic Institute and State University (Virginia Tech); J.D. and Master of Intellectual Property, Franklin Pierce Law Center, expected 1996. I would like to thank Professor Marcus Hurn, Franklin Pierce Law Center and H. Ward Classen, General Counsel of CSC Intelicom, Inc., Bethesda, Maryland, for their help in preparing this article.

[2] General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. parts 5, 6; 55 U.N.T.S. 187. On December 8, 1994, President Clinton signed into law the bill conforming United States law to the obligations assumed under the Uruguay Round of the GATT, Pub. L. No. 103-465; 108 Stat. 4809 (1994). The text of the various agreements for the GATT - Multilateral Trade Negotiations (the Uruguay Round) are found in the Final Act embodying the results of the Uruguay Round of trade negotiations, opened for signature April 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter the Uruguay Round]. The Uruguay Round agreements entered into force as of January 1, 1995.

[3] *See* Annex IC - Agreement on Trade-Related Aspects of Intellectual Property Rights - of the Final Act embodying the results of the Uruguay Round of the trade negotiations, April 15, 1994, Uruguay Round, supra note 2, Annex IC, 33 I.L.M. at 1197 [hereinafter TRIPS]. The objective of the TRIPS is that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation while at the same time promoting the transfer and dissemination of technology to the mutual advantage of producers and users of technical knowledge in a manner conductive to social and economic welfare, and to a balance of rights and obligations, TRIPS, art. 7, 33 I.L.M. at 1200. On a related matter, the Uruguay Round also included the agreement establishing the World Trade Organization (WTO), Uruguay Round, supra note 2, 33 I.L.M at 1144. The WTO was created in January of 1995 to improve existing international trade regimes in goods and services by delegating to WTO the responsibility of implementing and administering the Uruguay Round agreements, Raymond Vernon, *The World Trade Organization: A New Stage in International Trade and Development*, 36 Harv. Int'l L.J. 329 (Spring 1995). *But see*, article 65 of TRIPS, transitional arrangements, which allows eligible signatory countries to delay the obligations of TRIPS for up to 5 years from the date of entry into force of the WTO agreement and for certain other countries for up to 10 years, TRIPS, art. 65, 33 I.L.M. at 1222.

[4] *See e.g.* visit the web sit: http://www.cyberltd.co.uk and see article from issue 143 of the Culpepper Letter, *Software Intelligence for Growth & Profits.*

[5] *Convention on Contracts for the International Sale of Goods*, approved by the United Nations General Assembly and opened for signature on April 11, 1980, Department of State Notice, 52 Fed. Reg. 6262 (1987) (the United States ratified the CISG in 1986 and it became effective between United States and other signatory states on January 1, 1988). The official text of the CISG can be found in the following sources: U.N.Doc. A/Conf. 97/18, 52 Fed. Reg. 6262-80 (1987), *reprinted in* 15 U.S.C.A. Appendix (West Supp. 1995) (the appendix is located at the end of the index volume of title 15 in the pocket part); 19 I.L.M. 668 [hereinafter CISG or Convention]. Unless indicated otherwise, all references to "Article(s)" refer to the CISG. For a good source of information on the CISG, which provides the text of the CISG, the 1978 Official Commentary to the CISG, the Department of State analysis of the CISG, copies of United States Senate legislative history documents, together with general analysis of the CISG *see* Business Law, Inc., *Guide to the International Sale of Goods Convention* (William A. Hancock, ed. 1994); *see also* Peter Winship, A Bibliography of Commentaries on the United Nations International Sales Convention, 21 Int'l Law. 585 (1987) and updated supplements for other sources of information.

[6] When the United States adopted the CISG on December 11, 1986, the CISG went into force on January 1, 1988 between the United States and only ten other countries, Department of State Notice, 52 Fed. Reg. 6262 (1987); 52 Fed. Reg. 7737 (1987). Since 1988, thirty-six more countries have formally adopted the CISG for a total of forty-seven countries including the United States, *see infra* part II B (Member States).

[7] Article 7.

[8] *Proposed United Nations Convention on Contracts for the International Sale of Goods: Hearings on Treaty Doc. 98-9 Before the Senate Committee on Foreign Relations*, 98th Cong., 2d Sess. 2, 5 (1984) [hereinafter *Hearings*] (S. Hrg. 98-837, statement of Peter H. Pfund). The CISG was drafted by a working group formed by the

United Nations Commission on International Trade Law (UNCITRAL). After approval by UNCITRAL, it was referred to the United Nations General Assembly and in 1980 it was unanimously approved by the sixty-two states that had gathered in Vienna to consider the convention.

[9] *Hearings, supra* note 8, pp. 2, 18 (statement of Prof. John Honnold). A legal analysis by the Department of State accompanied the CISG to the Senate for the hearings. The analysis relates the provisions of the CISG to the corresponding provisions of Article 2 of the U.C.C. The analysis can be found in: 22 I.LM. 1368-80 (1983) ; *reprinted in* 15 U.S.C.A. Appendix (West Supp. 1995) (the appendix is located at the end of the index volume of title 15 in the pocket part) [hereinafter Analysis].

[10] *See Hearings, supra* note 8, at 2, statement of Prof. Peter H. Pfund.

[11] *Secretariate Commentary on the Draft Convention on Contracts for the International Sale of Goods,* Article 1, paragraph 4, U.N. Doc A/CONF. 97/5 (14 March 1979) (text of the draft convention together with secretariate's commentary, the commentary is found on pages 35-210) [hereinafter *Commentary*], *reprinted in* United Nations Conference on Contracts for the International Sale of Goods - Official Records 14-66 (1981). Note that there is not always a direct correlation in the article numbers between the draft and the final version of the CISG. Therefore, in a subsequent citing to the *Commentary* the Article number corresponding to the final or 1980 version of the CISG will be noted in a parenthetical - e.g., *Commentary*, Article 1, para. 4 (Article 1). The text of the commentary may be obtained at any of the U.N. depository libraries - e.g., in Massachusetts: Boston Public Library, Harvard College Library - and for a list of other depository libraries call 212.963.1457 (the U.N. librarian's desk; you may also be able to make arrangements to obtain a copy directly from the librarian), *see supra* note 5 and accompanying text. *See* U.C.C. § 1-102(2) (Purposes).

[12] *Hearings, supra* note 8, at 5, prepared statement of Prof. Peter H. Pfund; *see* Article 4, Analysis, *supra* note 9, analysis of Article 4.

[13] *See* Articles 4 and 5. An example of a validity issue is domestic laws that prohibit the sale of products that are illegal under domestic laws and accordingly invalidate contracts for sale of illegal products, such as contracts to sale illegal drugs, alcohol or firearms.

[14] *Hearings, supra* note 8, at 3-4, statement of Prof. Peter H. Pfund.

[15] *See supra* note 5 and accompanying text.

[16] *See supra* note 5 and accompanying text. For the most current information about countries that have ratified or acceded to the CISG including any declarations or reservations of the adopting countries, write or phone the United Nations, which was designated as the depository for the CISG: Treaty Section, Office of Legal Affairs, United Nations, New York, NY 10017 (212) 963-3918; *see also infra* part II D (Member States).

[17] Analysis, *supra* note 9, analysis of Article 1.

[18] *E.g.*, Delchi Carrier SpA v. Rotorex Corporation, 71 F.3d 1024, 1027 (2d Cir. 1995); *Filanto, S.p.A. v. Chilewich International Corp.* 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992), *appeal dismissed*; *Hearings, supra* note 8, at 36 (statement of Frank A. Orban III).

[19] In fact unlike the UCC, the CISG does not contain a definitions section.

[20] *See* U.C.C. §2-105 (definition of "Goods").

[21] *Commentary, supra* note 11, Article 2, para. 2 (Article 2).

[22] Analysis, *supra* note 9, analysis of Article 2. The UCC does not exclude consumers from being covered nor does the UCC contain any consumer provisions. Therefore, the courts have generally interpreted the various provisions of the code to apply to consumers, based on the policies underlying the code, in addition to any other rules applicable to consumers, *see e.g.*, U.C.C. §§2-102 (which provides that this article applies to transactions in goods which is a broad term including commercial as well as consumer transactions in goods), 1-102; Raymond T. Nimmer, 25 Wm. & Mary L. Rev. 1337, 1378 (1994), Murphy v. Mallard Coach Company, 582 N.Y.S.2d 528, 531 (1992).

[23] *Commentary, supra* note 11, Article 2, paras. 3, 5, 6, 7, 9, and 10 (Article 2); *see also* U.C.C. §2-102 (the code does not impair or repeal any statute regulating sales to consumer, farmers or other specified classes of buyers).

[24] Analysis, *supra* note 9, analysis of Article 3.

[25] *Commentary, supra* note 11, Article 1, para. 11 (Article 1), Article 9, para. 6 (Article 10).

[26] *Commentary, supra* note 11, Article 9, para. 6 (Article 10).

[27] *Commentary, supra* note 11, Article 9, paras. 7, 8 (Article 10).

[28] Unless otherwise indicated, for the purpose of this article the terms licensor and licensee are used interchangeably with seller and buyer respectively.

[29] *Commentary, supra* note 11, Article 9, paras. 7 (Article 10).

[30] *Filanto, S.p.A. v. Chilewich International Corp.* 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992), *appeal dismissed*; *Commentary, supra* note 11, Article 9, para. 3 (Article 10).

[31] It should be noted that it is not completely clear whether the parties can opt in to the Convention if the Convention does not govern otherwise, *see* John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, §§ 56, 78-81 (1991) [hereinafter Honnold].

[32] *Hearings, supra* note 8, at 25, statement of Mark R. Joelson.

[33] Analysis, *supra* note 9, analysis of Article 1.

[34] *See supra* note 16.

[35] *See* Articles 12, 92, 93, 94, 95, 96 and 101.

[36] Articles 1, 95; Department of State Notice 52 Fed. Reg. 6262 (1987); *Hearings, supra* note 8, at 24, statement of Mark R. Joelson, American Bar Association; Analysis, supra note 9, analysis of Article 1.

[37] Analysis, *supra* note 9 (analysis of Article 1 provides than an American court would apply the CISG *only* to sales with an international character between parties in whose countries the CISG is in force - e.g., the United States and another country that has adopted the CISG).

[38] *Hearings, supra* note 8, at 25, statement of Mark R. Joelson.

[39] *Commentary, supra* note 11, Article 1, para. 9 (Article 1).

[40] *See* L. Scott Primak, 11 Computer/L.J. 197, 204 (1991); Ronald E. Myrick, Penelope Smith Wilson, *Licensing Rights to Software, in Technology Licensing and Litigation* 1993 at 131 (PLI Patent, Copyright, Licensing, Trademarks and Literary Property Course Handbook Series No. G4-3897) (an example of a disclaimer of UN Convention on Sale of Goods: PURSUANT TO ARTICLE 6 OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (UN CONVENTION), THE PARTIES AGREE THAT THE UN CONVENTION SHALL NOT APPLY TO THIS AGREEMENT.)

[41] *Commentary, supra* note 11, Article 1, para. 4 (Article 1).

[42] *Hearings, supra* note 8, pp. 3, 21, statements of Prof. Peter H. Pfund and Prof. John Honnold. Even the structure of the CISG somewhat resembles the UCC's structure: *compare* Part I (Articles 1-13) *with* U.C.C. Article 1; Part II (Articles 14-24) *with* U.C.C. Article 2, Part 2; *compare generally* Part III (Articles 25-88) *with* U.C.C. Article 2, Parts 3, 5, 6, and 7.

[43] *See supra* Part II(C)(4); *Compare* U.C.C. §1-102(3) and Comment 2 *with* Article 6; *see* Analysis, *supra* note 9, analysis of Article 6, *Hearings, supra* note 8, at 25, statement of Mark R. Joelson. But notice that under the UCC, obligations of good-faith, diligence, reasonableness and care may not be disclaimed by agreement.

[44] *Compare* U.C.C. §§2- 305 (price), 2-308 (place of delivery), 2-309 (time of delivery), 2-310 (time of payment) *with* Articles 55 (calculation of price, *but see* Article 12), 31 (place of delivery), 33 (time of delivery), 57 (place of payment), 58 (time of payment).

[45] *See* Article 12; Analysis, *supra* note 9, Analysis of Article 12.

[46] Analysis, *supra* note 9, analysis of Article 6 (the dominant theme of the Convention is the primacy of the contract).

[47] Analysis, *supra* note 9, analysis of Article 4 (the analysis points out that Article 4(b) does not affect the buyer's right against the seller to receive good title as the CISG is solely concerned with the rights and obligations of the seller and the buyer arising from the sales contract); *see also supra* text accompanying note 13.

[48] Article 7(2); Analysis, *supra* note 9, analysis of Article 7.

[49] *see also* Eva Diederichsen, *Recent Development: CISG*, 14 J.L. & Com. 177, 181 (Spring 1995) (referring to the Argentinean court and its analysis of the applicable interest rate under Article 78).

[50] *But see* Article 1; Analysis, *supra* note 9, analysis of Article 7; *see also* James J. Callaghan, *U.N. Convention on Contracts for the International Sale of Goods: Examining the Gap-Filling Role of CISG in Two French Decisions*, 14 J.L. & Com. 183, 198 (1995).

[51] U.C.C. §1-103.

[52] *See generally* Eva Diderichsen, *Recent Deveopment: CISG*, 14 J.L. & Com. 177 (Spring 1995).

[53] *See Delchi Carrier SpA v. Rotorex Corporation*, 71 F.3d 1024, 1028 (2d Cir. 1995); Article 7(2), *but see* Article 7(1).

[54] *See Advent Systems Limited v. Unisys Corporation*, 925 F.2d 670, 676 (3rd Cir. 1991).

[55] A. Lowenfeld, *International Private Trade*, 1 International Economic Law 104-05 (2ed. 1981).

[56] Based on Article 4, the convention only applies to the rights and obligations of buyers and sellers to a contract of sale of goods and does not apply to procedural issues such as jurisdiction to bring suit. *See* Honnold, *supra* note 31, §332.

[57] *See Delchi Carrier SpA v. Rotorex Corporation*, 71 F.3d 1024, 1028 (2d Cir. 1995); Analysis, *supra* note 9, analysis of Article 7; *see also* U.C.C. §1-102(2).

[58] *See* Article 3(2) which excludes contracts for provision of services such as consulting agreements.

[59] *See Advent Systems Limited v. Unisys Corporation*, 925 F.2d 670, 675-676 (3rd Cir. 1991); *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737, 743 (2d Cir. 1979), *aff'g* 457 F.Supp. 765, 769 (E.D.N.Y. 1978).

[60] *See* 17 U.S.C. §106.

[61] For example, it is generally viewed that the core purpose of a patent license agreement is nothing more than a promise by the licensor not to sue the licensee for infringement and thus generally outside the scope of sale of goods laws, *see e.g., Eastern Electric, Inc. v. Seeburg Corp.*, 427 F.2d 23, 25-26 (2d Cir. 1970).

[62] *See* Article 7(2), which calls for resolution of matters that are not expressly governed by the Convention in conformity with the general principles on which the Convention is based upon; Analysis, *supra note* 9, analysis of Article 7; U.C.C. §1-102(1). It should be noted, however, that the issue of what are the general principles referred to in Article 7(2) is outside of the scope of this paper.

[63] *See* Honnold, *supra note* 31, §3 (The Convention deals with the two basic aspects of the sales transaction, the formation of contract and the obligations of the parties under the contract); *Hearings, supra* note 8, at 57, State Department's answers to additional questions submitted for the record, answer to question 2.

[64] *See Advent Systems Limited v. Unisys Corporation*, 925 F.2d 670, 675-676 (3rd Cir. 1991) (applying Pennsylvania law); *see also* the articles cited by the court that review the case law on this issue: Boss & Woodward, Scope of the Uniform Commercial Code; Survey of Computer Contracting Cases, 43 Bus.Law. 1513 (1988); Owen, The Application of Article 2 of the Uniform Commercial Code To Computer Contracts, 14 N. Kentucky L.Rev. 277 (1987); Rodau, Computer Software: Does Article 2 of the Uniform Commercial Code Apply, 35 Emory L.J. 853 (1986); Holmes, Application of Article Two of the Uniform Commercial Code to Computer System Acquisitions, 9 Rutgers Computer & Technology L.J. 1 (1982); Note, Computer Software As A Good Under the Uniform Commercial Code: Taking a Byte Out of the Intangibility Myth, 65 B.U.L.Rev. 129 (1985); Note, Computer Programs as Goods Under the U.C.C., 77 Mich.L.Rev. 1149 (1979).

[65] *See* U.C.C. §2-106(1).

[66] *Id.*

[67] Article 41; Analysis, *supra* note 9, analysis of Article 41; Article 7; *Commentary*, *supra* note 11, Article 6, (Article 7).

[68] A typical agreement involving software includes the following clause: "XYZ Corporation grants the customer a license to use the product subject to the following conditions: . . ."

[69] If, for example, a buyer (or licensee) makes copies of the software it has purchased and distributes these copies without permission from the seller (or licensor), the buyer would be violating the seller's (or licensor's) copyright right unless the seller (or licensor) has expressly granted the buyer (or licensee) the right to reproduce and distribute the software. The cause of action would be a copyright violation, which would be governed by the Copyright Act and outside the scope of the CISG or the UCC, *see Synergistic Technologies, Inc. v. IDB Mobile Communications, Inc.*, 871 F. Supp. 24 (D.D.C. 1994).

[70] 17 U.S.C. §109(a).

[71] However, 17 U.S.C. §109(b)(1)(A) limits the scope of the first sale doctrine by prohibiting the copy owner from renting or leasing its copy without the permission of the owners of the copyright. Therefore, with respect to software, under 17 U.S.C. §109(a), the only right that is automatically granted to the buyer is the right to transfer the copy of the software.

[72] *See Synergistic Technologies, Inc. v. IDB Mobile Communications, Inc.*, 871 F. Supp. 24 (DDC 1994) (the court held that because the parties had not agreed otherwise under U.C.C. §2-401, title to the copy of the software passed to IDB, who was entitled to copy and adapt the program in the manner described in 17 U.S.C. §117 of the Copyright Act).

[73] A typical off-the shelf software package includes the following clause in its accompanying license agreement: This Software is licensed, not sold to you by XYZ corporation, owner of the product, for use only under the terms of this License, and XYZ reserves any rights not expressly granted to you.

[74] *E.g.*, "You may transfer the License to another party if the other party agrees to the terms and conditions of this Agreement and completes and returns to XYZ a Registration Card available from XYZ. If you transfer the License, you must also transfer or destroy all copies of the Software in any form, including the original and backup copies. You have no right to sublicense or loan the software."

[75] The National Conference of Commissioners on Uniform State Laws is currently in the process of considering draft proposals of Article 2B, titled Licenses, in order to accommodate those aspects of the agreements involving software that are not adequately addressed by Article 2 Sales. Copies of the draft proposed Article 2B, February 1996, may be found on the internet at the Chicago-Kent College of Law web site: http://www.kentlaw.edu [hereinafter Proposed Article 2B]; *see* Proposed Article 2B, which recognizes and treats differently various type of licensing contexts, i.e., pure, commercial, mass-market licenses - e.g., §§2B-102, 2B-403 and the reporter's notes. IT SHOULD BE NOTED that the draft of proposed legislation Article 2B has not been passed upon by the National Conference of Commissioners on Uniform State Laws and its reference here is only for the purpose of understanding of the issues and not as a source of authority.

[76] *Id.*

[77] *Id.*.

[78] *E.g.*, "This Software is licensed, not sold to you by X Corporation, owner of the product, for use only under the terms of this license and X Corporation reserves any rights not expressly granted to you."

[79] Such a statement, however, may trump the application of the first sale doctrine under 17 U.S.C. §109(a) but its enforceability is outside the scope of this paper.

[80] *See* 17 U.S.C. §§109(b)(1)(A) and 106.

[81] *See* Honnold, *supra* note 31, §§48, 56; *see* U.C.C. §§2-102, 106.

[82] U.C.C. §2-105.

[83] Black's Law Dictionary 1209 (6th ed. 1990); *see Triangle Underwriters, Inc. v. Honeywell, Inc.*, 457 F.Supp. 765, 769 (E.D.N.Y. 1978), *aff'd in part, rev'd in part and remanded on other grounds*, 604 F.2d 737, 743 (2d Cir. 1979) (the court, however, considered software to be an intangible product).

[84] *See The Colonial Life Insurance Company of America v. Electronic Data Systems Corporation,* 817 F.Supp. 235, 239 (D.N.H. 1993); *Advent Systems Limited v. Unisys Corporation,* 925 F.2d 670, 675 (3rd Cir. 1991) (the court cites a number of commentaries on the issue); *Communications Groups, Inc. v. Warner Communications Inc.,* 527 N.Y.S.2d 341, 344 (1988) (the court also cites a number of other cases).

[85] 17 U.S.C. §101.

[86] *See* Article 35; Analysis, *supra* note 9, analysis of Article 35; *Commentary, supra* note 11, Article 33, para. 4, (Article 35); U.C.C. §2-313 Comment 4.

[87] *See* Eva Diederichsen, *Appendix Survey of Previous Decisions by German Courts Applying the CISG: Selected Passages*, 14 J.L. & Com. 225 (1995) (part XIII excerpt from a German case where the German court stated that "goods" calls for broad definition under the CISG. It comprises all items that can be the subject matter of a commercial sales transaction, including computer software. *See also* Article 7(1). *See The Colonial Life Insurance Company of America v. Electronic Data Systems Corporation,* 817 F.Supp. 235, 239 (D.N.H. 1993).

[88] Article 3; *see* U.C.C. §2-106.

[89] *See* Analysis, *supra* note 9, analysis of Article 3.

[90] The CISG's Article 3 "preponderance test" is similar to United States' "predominately" goods test under common law. The difference is that the UCC is silent on the issue while the CISG addresses the issue directly.

[91] Raymond T. Nimmer, *The Law of Computer Technology* ¶6.02 (1995).

[92] 5 A.L.R.4th 501 (1981). On the other hand, the draft proposed revised Article 2B on Licenses has tentatively adopted the gravamen of the action test, Proposed Article 2B, supra note 75, §2B-103(b), (c).

[93] *See Synergistic Technologies, Inc. v. IDB Mobile Communications, Inc.*, 871 F. Supp. 24 (DDC 1994); *Advent Systems Limited v. Unisys Corporation*, 925 F.2d 670, 675 (3rd Cir. 1991); *Triangle,* 604 F.2d at 743.

[94] *Micro-Mangers, Inc. v. Gregory*, 434 N.W.2d 97 (Wis. Ct. App. 1988).

[95] *See* Honnold, *supra* note 31, §§56, 78, 81.

[96] *See* John Honnold, *Uniform Law for International Sales under the 1980 Untied Nations Convention*, §§ 2, 74 (1991); Articles 6, 7; U.C.C. §§1-102(1), (3).

[97] *See* Proposed Article 2B, *supra* note 75.

[98] *Commentary, supra* note 11.

[99] Analysis, *supra* note 9.

[100] Proposed Article 2B, *supra* note 75.

[101] *See* Honnold, *supra* note 31, §§86-93.

[102] Analysis, *supra* note 9, analysis of Article 11.

[103] U.C.C. §2-201.

[104] U.C.C. §§2-201(2), (3)(a)-(c); 2-207(3); *see* U.C.C. §1-103.

[105] Article 96 authorizes a Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing to make a declaration that Article 11 does not apply where any party has its place of business in that State.

[106] Analysis, *supra* note 9, analysis of Article 12.

[107] Analysis, *supra* note 9, analysis of Article 12.

[108] *Id.*

[109] Under Article 29, the parties can require modifications to be in writing only; *see also Commentary, supra* note 11, Article 11, para. 2 (Article 12).

[110] *See* Honnold, *supra* note 31, §§200-201.

[111] *See also* U.C.C. §1-103.

[112] *See* Honnold, *supra* note 31, §202.

[113] Under the U.C.C., the common law doctrine of estoppel would apply by way of §1-103. *See Wisconsin Knife Works v. National Metal Crafters,* 781 F.2d 1280 (7th Cir. 1986).

[114] Article 14, 18; U.C.C. §§2-204, 206.

[115] Article 14(1), *Commentary, supra* note 11, Article 12, para. 8 (Article 14).

[116] Article 14(1); U.C.C. §2-305. *But see* Article 55 and *Commentary, supra* note 11, Article 51, para. 2 (Article 55).

[117] Indeed U.C.C. §2-305 conditions finding of a contract based on the intention of the parties, UCC §2-305 comment 2. It would be rare that a licensor or licensee conclude a contract leaving out the royalty terms to be determined at a later time.

[118] Article 18; U.C.C. §§2-204(1), 206.

[119] *See* Restatement (Second) of Contracts §63(a) (1981).

[120] U.C.C. §2-206(1)(b) and Comment 2.

[121] Article 24.

[122] *Commentary, supra* note 11, Article 22, paras. 1, 3 (Article 24).

[123] *Commentary, supra* note 11, Article 22, para. 6 (Article 24).

[124] This is a good example of the scope of application of the CISG under Article 4. The CISG does not address agency law issues, which means that such an issue must be resolved by the applicable domestic laws by way of application of conflict of laws rules for determining whose domestic law will be applicable. *Commentary, supra* note 11, Article 22, para. 6 (Article 24).

[125] *Commentary, supra* note 11, Article 22, para. 2 (Article 24); Article 15.

[126] *Commentary, supra* note 11, Article 13, paras. 3,4 (Article 15).

[127] Article 18(3) and 8(3); *Commentary, supra* note 11, Article 16, paras. 10-12 (Article 18).

[128] U.C.C. §2-206(2), *but see* §2-206(1)(b).

[129] Article 60; U.C.C. §§2-606, 607 and 2-608 (requiring a higher standard for rejection of the goods after they have been accepted as opposed to rejection of the goods under the perfect tender rule of §2-601 before acceptance).

[130] *See* Article 18(3).

[131] *See Commentary, supra* note 11, Article 13, para. 2 (Article 15).

[132] *See* Honnold, *supra* note 31, §110; U.C.C. §2-202.

[133] U.C.C. §2-202.

[134] *See Commentary, supra* note 11, Article 7, para. 2 (Article 8); Honnold, *supra* note 31, §110; U.C.C. §2-202.

[135] Analysis, *supra* note 9, analysis of Article 19.

[136] *Id.*

[137] *See* Honnold, *supra* note 31, §§166-167; *see also* U.C.C. §2-207.

[138] *See e.g., Filanto, S.p.A. v. Chilewich International Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992).

[139] Analysis, *supra* note 9, analysis of Part III, Chapter I of the CISG.

[140] *See commentary, supra* note 11, Article 51, para. 2 (Article 55).

[141] *See* Articles 25-29, 30-52, 53-65, and 74-78 respectively.

[142] *Commentary, supra* note 11, Article 23, paras. 1 and 2 (Article 25); Analysis, *supra* note 9 (analysis of Article 25).

[143] Analysis, *supra* note 9, analysis of Article 25.

[144] Article 46(2); *Commentary, supra* note 11, Article 42, paras. 2-5 (Article 46).

[145] *See generally* Article 49(1)(a).

[146] U.C.C. §2-601 and §2-608.

[147] Analysis, *supra* note 9, analysis of Article 25.

[148] *Id.*

[149] *Id.*; U.C.C §§2-608, 2-612.

[150] *See* U.C.C. §2-508; White and Summers, *Handbook of the Law Under the Uniform Commercial Code* p. 356 (3rd Ed. 1988 - West Publishing).

[151] *Commentary, supra* note 11, Article 23, para. 3 (Article 25).

[152] *Commentary, supra* note 11, Article 23, para. 4 (Article 25).

[153] Analysis, *supra* note 9 (analysis of Article 25).

[154] Article 25.

[155] U.C.C. §2-601.

[156] *Id.*

[157] *See* Proposed Article 2B, *supra* note 75, §2B-601.

[158] Of course there still remains the issue of whether the licensor's failure of fixing such minor conformities within a reasonable period of time amounts to fundamental or material breach.

[159] *Commentary, supra* note 11, Article 25, para. 1 (Article 27).

[160] *Commentary, supra* note 11, Article 45, para. 3 (Article 49), Article 60, para. 3 (Article 64); Article 39, 43,

[161] *Commentary, supra* note 11, Article 25, para. 4 (Article 27); analysis, *supra* note 9 (analysis of Article 27).

[162] Articles 47(2), 48(4), 63(2), 65(1) & (2) and 79(4).

[163] Analysis, *supra* note 9, analysis of Article 27.

[164] U.C.C. §1-201(26).

[165] *E.g.*, UCC §2-616; *see* U.C.C. §1-201(26) for definition of "receives."

[166] Articles 31-34, 35-44, and 45-52 respectively.

[167] Article 30; U.C.C. §2-301; *see also* Articles 31, 32 and 34.

[168] Article 33.

[169] Analysis, *supra* note 9, analysis of Article 35; Article 9.

[170] Article 73; U.C.C. §2-612.

[171] *Commentary*, *supra* note 11, Article 54, paras. 2, 3 (Article 58).

[172] Articles 35; U.C.C. §§1-205, 2-313, 2-314, 2-315, and 2-316.

[173] Analysis, *supra* note 9, analysis of Article 35; *Commentary, supra* note 11, Article 33, para. 4 (Article 35).

[174] Analysis, *supra* note 9, analysis of Article 35; *Commentary, supra* note 11, Article 33, para. 4 (Article 35); *see* U.C.C. §§1-205, 2-313(2); Article 9.

[175] *See* Honnold, *supra* note 31, §§223-229.

[176] *Commentary*, *supra* note 11, Article 5, paras. 1 and 2 (Article 6); Analysis, *supra* note 9, analysis of Article 6.

[177] *See* Honnold, *supra* note 31, §§230-235.

[178] Article 35(2)(a), (b); *Commentary*, *supra* note 11, Article 33, paras. 7, 8, 9, and 10 (Article 35); U.C.C. §§2-314, 2-315.

[179] *See* Proposed Article 2B, *supra* note 75, §2B-400.

[180] *See* Proposed Article 2B, *supra* note 75, §2B-403 and the reporter's notes.

[181] *Id.*.

[182] *Id.*

[183] *Id.*

[184] *See* U.C.C. §2-315; *USM Corp. v. Arthur Little Systems, Inc.*, 546 N.E.2d 888 (1989) (a custom contract treated as sales of good may create implied warranties of fitness pursuant to UCC §2-315 if the vendor's expertise is relied on by the vendee).

[185] Analysis, *supra* note 9, analysis of Article 35; Article 9.

[186] Article 42(1)(a), (b); *see Commentary*, *supra* note 11, Article 40, paras. 5, 6 and 9 (Article 42).

[187] Article 42(2)(a), (b); *see Commentary*, *supra* note 11, Article 40, para. 10 (Article 42).

[188] Article 35 (the source of the disputes is rooted in the concepts of conformity of the goods, which corresponds to the UCC's concept of warranties, and the related principle of determining the contractual obligations of the parties from the practices established by the parties and applicable trade usages); *see* Analysis, *supra* note 9, analysis of Article 35.

[189] Analysis, *supra* note 9, analysis of Article 25.

[190] Article 48; U.C.C. §2-508.

[191] U.C.C. §2-716 (Buyer's Right to Specific Performance or Replevin).

[192] *Id.*

[193] *Commentary*, *supra* note 11, Article 42, para. 8 (Article 46).

[194] Article 26; *Commentary*, *supra* note 11, Article 42, para. 9 (Article 46).

[195] It is important for the licensor to be aware that the licensee, under Article 47, may claim any damages he may have suffered because of delay in performance or late delivery and that such damages may arise even though the licensor has performed his obligations within the additional period of time fixed by the buyer; *Commentary*, *supra* note 11, Article 43, para. 10 (Article 47); *see* Article 47(2). Presumably this would also be true under Article 48; *see* Article 48(1) last sentence.

[196] *Commentary*, *supra* note 11, Article 44, para. 3 (Article 48).

[197] *Id.* Note that if the licensor's delay in delivery is a fundamental breach, the licensor cannot meet the first requirement of Article 48(1) that the licensor cure her obligations if she can do so without *unreasonable* delay.

[198] *Id.*

[199] *Commentary, supra* note 11, Article 44, para. 2 (Article 48).

[200] *Commentary*, *supra* note 11, Article 44, para. 8 (Article 48); *see* Article 49.

[201] Articles 47 (buyer may fix an additional period of time), 48 (seller may fix an additional period of time).

[202] Article 48 (2); *Commentary, supra* note 11, Article 44, paras. 13, 14 (Article 48).

[203] Article 48(3).

[204] *Commentary*, *supra* note 11, Article 44, para. 14 (Article 48).

[205] U.C.C. §2-508(2).

[206] U.C.C. §2-606.

[207] *See supra,* Part IV(B)(1).

[208] U.C.C. §§2-607, 2-608, 2-301; Article 58.

[209] U.C.C. §2-601.

[210] *Commentary, supra* note 11, Article 47, para. 2 (Article 51); *see* U.C.C. §2-608(1).

[211] Article 51(2).

[212] Article 25; *see* Analysis, *supra* note 9, analysis of Article 25.

[213] Article 49(1)(b); *Commentary, supra* note 11, Article 45, para. 8 (Article 49).

[214] Article 26 (a declaration of avoidance of the contract is effective only if made by notice to the other party); *see also* Article 27.

[215] *Commentary*, *supra* note 11, Article 24, paras. 2-4 (Article 26); *commentary*, *supra* note 11, Article 45, paras. 4, 5 (Article 49).

[216] *Commentary, supra* note 11, Article 46, para. 14 (Article 50); *see also* Article 47(2).

[217] *Commentary, supra* note 11, Article 46, para. 3 (Article 50).

[218] Articles 53-59, 60, 61-65.

[219] Article 53; U.C.C. §§2-301, 2-507.

[220] *Commentary, supra* note 11, Article 54, para. 8 (Article 58) (essentially the buyer loses the right to examine the goods only if the procedures for payment or delivery agreed upon by the parties are inconsistent with such right.) The CISG also does not stipulate what procedures would be considered as inconsistent, but the commentary does provide on example, *Id.*

[221] *Commentary, supra* note 11, Article 37, para. 7 (Article 39).

[222] *See also* Article 49 and Article 26 regarding avoidance of contract and the requirement of a declaration as they relate to the UCC's concept of rejection and its notice requirement in UCC §§2-601 and 2-602.

[223] *Commentary, supra* note 20, Article 57, 1978 draft (paragraph 2 of commentary) (Article 61).

[224] *Commentary, supra* note 20, Article 58, 1978 draft (paragraph 4 of commentary) (Article 62).

[225] U.C.C. §2-709.

[226] *Commentary, supra* note 11, Article 58, para. 5 (Article 62).

[227] Article 26, *Commentary, supra* note 11, Article 58, para. 6 (Article 62).

[228] Article 74; U.C.C. §§2-706, 2-708, 2-710, 2-714, and 2-715

[229] In case of software, there may be some certainty as far as copyright laws are concerned if the foreign country has adhered to an international copyright treaty, for example, the Berne Convention.

[230] Restatement (Second) of Conflict of Laws §187; *see also* Article 6 (which permits the parties to international sale of goods contract to choose freely some other law than the Convention).

[231] Article 1.