

1985

## Aircraft and International Sales Conventions

Peter Winship

*Southern Methodist University, Dedman School of Law, pwinship@smu.edu*

Follow this and additional works at: <https://scholar.smu.edu/jalc>

---

### Recommended Citation

Peter Winship, *Aircraft and International Sales Conventions*, 50 J. AIR L. & COM. 1053 (1985)  
<https://scholar.smu.edu/jalc/vol50/iss4/19>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

## AIRCRAFT AND INTERNATIONAL SALES CONVENTIONS

PETER WINSHIP\*

WHEN MANUFACTURER in California and Airline in Texas agree to the sale and purchase of an airplane their rights and obligations as parties to a contract for the sale of "goods" will undoubtedly be governed by Article 2 of the Uniform Commercial Code.<sup>1</sup> Federal legislation may supplement these contract obligations — Manufacturer, for example, will have to deliver an airplane which complies with federal safety standards and the parties will have to record the sale in order to make the transfer of title effective as to third parties — but, in general, the U.C.C. as adopted by some states in the United States will be applicable.<sup>2</sup>

---

\* B.A., LL.B. Harvard; LL.M. London. Associate Professor of Law, Southern Methodist University. Corresponding Collaborator, International Institute for the Unification of Private Law (UNIDROIT); Member, U.S. Department of State Study Group on the Law Applicable to International Sales.

<sup>1</sup> U.C.C. § 2-105(1)(1977). Article 2 of the Uniform Commercial Code defines *goods* as follows: "'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale . . . ." *Id.* This definition includes aircraft. Indeed, the very first case reported in the U.C.C. Reporting Service applies the Code to a dispute involving the secured sale of an airplane. *Skinner v. Tober Foreign Motors, Inc.*, 345 Mass. 429, 197 N.E.2d 669, 1 U.C.C. Rep. Serv. (Callaghan) 1, 4 (1963) ("Section 2-102 makes this article applicable to 'transactions in goods' and there can be no doubt that the transactions here belong to this class. See § 2-105.") It should be noted that the parties may vary the effect of the Code's provisions, subject to limitations on disclaiming obligations of good faith, diligence, reasonableness and care. U.C.C. § 1-102(3) (1977). In other words, the Code's rules supplement the parties' contract and I use the phrase "governed by the [U.C.C.]" subject to this qualification.

<sup>2</sup> The relevant Code section on the territorial application of the Code is section 1-105, subsection (1) of which provides:

When Manufacturer proposes to sell an airplane to Aerolineas in Argentina, however, it will not be as clear what law governs the parties' contract obligations. Manufacturer and Aerolineas, of course, may resolve most doubts not only by incorporating great detail in their contract documents, but also by agreeing on a choice-of-law clause. Bilateral or multilateral treaties undoubtedly will also affect the parties' obligations, as will national export-import legislation. But if Manufacturer and Aerolineas fail to spell out their obligations or fail to agree on the applicable law, it becomes important to know which nation's laws will be applicable to their contract of sale.

Assume, for the sake of argument, that Manufacturer and Aerolineas agree to the sale and purchase of the airplane but are unable to agree on a choice-of-law clause. What law is applicable when a dispute arises later? For more than fifty years several international organizations — the Hague Conference on Private International Law,<sup>3</sup> the International Institute for the Unification of Private Law (UNIDROIT),<sup>4</sup> and, more recently, the U.N. Commission on International Trade (UNCITRAL)<sup>5</sup> — have sought to resolve this question.<sup>6</sup>

---

(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

U.C.C. § 1-105(1) (1977). For a general introduction to this section, see Nordstrom & Ramerman, *The Uniform Commercial Code and the Choice of Law*, 1969 DUKE L. J. 623.

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

<sup>4</sup> For an introduction to the International Institute for the Unification of Private International Law, see Matteucci, *UNIDROIT, The First Fifty Years*, 1 New Directions in International Trade Law xvii (1976).

<sup>5</sup> For an introduction to the U.N. Commission on International Trade Law, see Herrmann, *The Contribution of UNCITRAL to the Development of International Trade Law*, in *Transnational Law of International Commercial Transactions* 35 (N. Horn & C. Schmitthoff eds. 1982).

<sup>6</sup> An attempt to assess the work of UNCITRAL, UNIDROIT and the Hague

Of the several possible solutions, two in particular have had some, if limited, success. The first envisions a uniform sales law in force in all countries — an international U.C.C. Article 2, so to speak. Adoption of the uniform rules might be implemented in several different ways,<sup>7</sup> but no matter how they are adopted each country would apply the same uniform rules to any sales-related disputes between Manufacturer and Aerolneas. In other words, a forum hearing the dispute would not have to go through a choice-of-law analysis before applying the uniform substantive rules. The second solution, in contrast, urges all countries to agree on uniform choice-of-law rules rather than uniform substantive rules. If this solution is universally adopted, every forum should apply the same country's sales law to a dispute between Manufacturer and Aerolneas. A forum will know *which* country's sales law to apply by virtue of its initial analysis of the uniform choice-of-law rules.

These two solutions have been implemented in several international sales conventions now in force or under study. For Manufacturer and Aerolneas, however, most of these conventions will provide little help because they exclude contracts for the sale of aircraft from their coverage.

At present, for example, all the conventions which propose uniform sales rules expressly exclude the sale of aircraft. The 1964 uniform sales laws, inspired by drafts prepared under the auspices of UNIDROIT, state that their provisions "shall not apply to sales . . . of any . . .

---

Conference may be found in Dolzer, *International Agencies for the Formulation of Transnational Economic Law*, in *id.* at 61.

<sup>7</sup> The uniform sales rules discussed in the text of this comment would become applicable in any particular nation when that nation becomes a party to an international treaty or convention embodying the uniform rules. The use of an international convention, however, is not the only method for effectuating uniform rules, as the U.S. experience with uniform and model laws illustrates. U.S. delegates have only been moderately successful when urging the use of methods other than conventions. See Nadelman & Reese, *The American Proposal at the Hague Conference on Private International Law to Use the Method of Uniform Laws*, 7 AM. J. COMP. L. 239 (1958).

aircraft, which [are] or will be subject to registration."<sup>8</sup> Two later conventions, adopted on the basis of drafts prepared by UNCITRAL, also exclude contracts for the sale of aircraft, but they omit any reference to registration.<sup>9</sup> To avoid all doubt, these later conventions also exclude contracts for the sale of hovercraft.<sup>10</sup>

The most elaborate justification for the exclusion of contracts for the sale of aircraft appears in an unofficial commentary to the 1978 draft UNCITRAL text which was the basis for the 1980 U.N. Convention on Contracts for the International Sale of Goods. The commentary states:

This subparagraph excludes from the scope of the Con-

---

<sup>8</sup> Uniform Law on the International Sale of Goods, Art. 5(1)(b), and Uniform Law on the Formation of Contracts for the International Sale of Goods, Art. 1(6)(b). A diplomatic conference held at The Hague in 1964 adopted the texts of these uniform laws and annexed them to two separate international conventions. A nation which becomes a party to the conventions undertakes to enact the uniform laws as domestic legislation governing international sales contracts. The conventions came into force in 1972. The official texts appear in 834 U.N.T.S. 107 (1972) and 834 U.N.T.S. 169 (1972); see also I Hague Conference Records & Documents 333-354 (1966). The following nations are parties to the conventions: Belgium, The Gambia, Federal Republic of Germany, Israel, Italy, the Netherlands, San Marino, and the United Kingdom. Luxembourg also appears on some lists. For a bibliography of writings on the 1984 uniform laws, see 27 AM. J. COMP. L. 345-350 (1979).

<sup>9</sup> Convention on the Limitation Period in the International Sale of Goods (1974), Art. 4(e), as amended by 1980 Protocol, Art. II(2) [hereinafter cited as "Limitation Convention"]; United Nations Convention on Contracts for the International Sale of Goods (1980), Art. 2(e) [hereinafter cited as "U.N. Sales Convention"]. Neither convention is in force. The official texts may be found in the official records of the conferences which adopted the conventions: U.N. Docs. A/CONF.63/16 (1976) and A/CONF.97/19 (1981) [hereinafter cited as "Official Records"]. The Protocol to the Limitation Convention appears in the official records of the 1980 convention. For analysis of the Limitation Convention, see Smit, *The Convention on the Limitation Period in the International Sale of Goods: UNCITRAL's First-Born*, 23 AM. J. COMP. L. 337 (1975); Sono, *Unification of Limitation Period in the International Sale of Goods*, 35 LA. L. REV. 1127 (1975). Published commentary on the 1980 convention is far more extensive. See J. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* (1982); INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (N. Galston & H. Smit eds. 1984); Winship, *New Rules for International Sales*, 68 A.B.A.J. 1230 (1982). For a bibliography of writings on 1980 convention, see Winship, *Bibliography: International Sale of Goods*, 18 INT'L LAW. 53 (1984).

<sup>10</sup> Limitation Convention, Art. 4(e), as amended by the 1980 Protocol; U.N. Sales Convention, Art. 2(e).

vention all sales of ships, vessels and aircraft. In some legal systems the sale[s] of ships, vessels and aircraft are sales of "goods" while in other legal systems some sales of ships, vessels and aircraft are assimilated to sales of immovables. Furthermore, in most legal systems at least some ships, vessels and aircraft are subject to special registration requirements. The rules specifying which ones must be registered differ widely. In order not to raise questions of interpretation as to which ships, vessels or aircraft were subject to this Convention, especially in view of the fact that the relevant place of registration, and, therefore the law which would govern the registration, might not be known at the time of the sale, the sale of all ships, vessels and aircraft was excluded from the application of this Convention.<sup>11</sup>

Similar explanations are given for the provisions in the 1964 uniform laws<sup>12</sup> and the 1974 Convention on the Limitation Period in the International Sale of Goods.<sup>13</sup>

---

<sup>11</sup> U.N. Sales Convention Commentary [Art. 2], para. 9 (A/CONF.97/5) (14 March 1979), *reprinted in* Official Records at 16 (A/CONF.97/19) (1981). For a brief note on the status of the commentary, see Winship, *A Note on the Commentary of the 1980 Vienna Convention*, 18 INT'L LAW. 37 (1984). For a report of the debates on Article 2(e) at the 1980 conference, see Official Records at 240-241.

<sup>12</sup> The semi-official commentary on the 1964 uniform laws prepared by Professor Andre Tunc states: "What is here in question are goods which are or will be subject to a special system of rules which, moreover, frequently resembles that for immovables." I Hague Conference Records & Documents 369 (1966). *See also* Report of the Special Commission, II *id.* at 29 ("[B]ecause these different means of transport are in all countries subjected to rules of registration and enrollment which, in the matter of transfer of property assimilate them to immovables and deprive them of the character of true chattels"). The exclusion and the justifications given can be traced back to the earliest draft of the text which ultimately became the 1964 uniform laws. *See* Art. 1(b) of the 1935 draft, *Projet d'une loi internationale sur la vente* (S.D.N. 1935 — U.D.P. — Projet I) (sales of aircraft excluded "for the reason that in various national laws and several international agreements these are governed by special rules to which regard must be had").

<sup>13</sup> Limitation Convention Commentary [Art. 4], para. 6 (A/CONF.63/17) (27 June 1978), *reprinted in* [1979] X Y.B. UNCITRAL 145-173. The commentary was prepared by Professor Kazuaki Sono at the request of the 1974 conference and therefore has greater authority than the unofficial UNCITRAL Secretariat Commentary on the 1978 draft text which served as the basis of the 1980 U.N. Sales Convention. The debates within UNCITRAL and at the 1974 conference on the exclusion of aircraft sales illustrate the diversity of opinion on the subject. Official Records at 170-171 (A/CONF.63/16) (1975). *See also* [1972] III Y.B. UNCITRAL (Supp.) at 43-50 (UNCITRAL debates on draft text).

Exclusion of contracts for the sale of aircraft from the scope of these sales conventions did not go unchallenged. Indeed, at the 1977 annual meeting of UNCITRAL the delegates actually voted by a narrow majority to delete the exclusion, only to reverse this decision after the Japanese delegate pointed out that deletion would be inconsistent with the 1974 Limitation Convention and several other delegates urged that a slight majority should not overturn years of work.<sup>14</sup> These appeals to uniformity and tradition, in other words, have as much to do with the final text as policy considerations expressed in the unofficial commentary.

Leaving aside these appeals urged at the 1977 UNCITRAL meeting, the justifications for exclusion are not persuasive.<sup>15</sup> That some domestic legal systems assimilate aircraft to immovables does not justify exclusion because it is the very function of a uniform sales convention to provide uniform treatment of identical transactions no matter where in the world they occur. Indeed, if anything, the need to include aircraft within the scope of the uniform convention is even greater when an aircraft is sold by or to a party in a country which classifies aircraft as an immovable because different forums may resolve in different ways the question of what law is applicable depending on whether the aircraft is characterized as real or personal property. Nor should anyone in such a country who buys or sells aircraft across national boundaries claim surprise that a uniform sales convention is applicable given the need in any event to consult international treaties.

As for special registration requirements for aircraft, even a cursory reading of national legislation and multi-

---

<sup>14</sup> SR.2, Committee I, 10th Session of UNCITRAL (1977).

<sup>15</sup> For a general comment on items excluded by Article 2 of the convention, see Winship, *The Scope of the Vienna Convention on International Sales Contracts* § 1.02[3][c], in *INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* at 1-25 (N. Galston & H. Smit eds. 1984) ("[t]he ultimate explanation for the excluded items may be inertia — most were excluded in the earliest drafts — and the Vienna conference's desire to limit further exclusions").

lateral treaties providing for registration will show that registration rules do not address such important issues as when, where, and how a seller is to deliver or a buyer is to pay — issues which *are* covered by the sales conventions. That it might be difficult to determine whether an aircraft should be registered supports the inclusion of all contracts for the sale of aircraft just as much as it supports their exclusion.<sup>16</sup>

Finally, it should be noted that the failure to define *aircraft* raises the inevitable question of whether sales of spare parts, engines and propellers are also excluded.<sup>17</sup> A contract for the sale of an airplane may cover some or all of these items, and if they are considered as separate goods one has the anomalous situation where the sales convention may govern part of the contract while some unspecified national law may govern another part.<sup>18</sup>

---

<sup>16</sup> It should be noted in passing that both the 1974 Limitation Convention, as amended, and the 1980 U.N. Sales Convention exclude sales to consumers: "The Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use." Limitation Convention, Art. 2(a), as amended by the 1980 Protocol; U.N. Sales Convention, Art. 2(a).

<sup>17</sup> Cf. the definition of *aircraft* in Article XVI of the Geneva Convention: "For the purposes of this Convention the term 'aircraft' shall include the airframe, engines, propellers, radio apparatus, and all other articles intended for use in the aircraft whether installed therein or temporarily separated therefrom." Convention on the International Recognition of Rights in Aircraft, June 19, 1948, 4 U.S.T.S. 1832, T.I.A.S. No. 2847, 310 U.N.T.S. 151.

The problem of what *aircraft* is interpreted to encompass is exacerbated by having six authentic texts of the 1980 convention: Arabic, Chinese, English, French, Russian, and Spanish. In addition, the German-speaking nations have agreed on an unofficial uniform translation. Thus, one must consider not only what *aircraft* means but also what nuances are included in *aeronef*, *aeronaves*, etc. The internationally accepted rule on interpreting treaties with more than one authentic text is set out in the Vienna Convention on the Law of Treaties, Art. 33 (A/CONF.39/27) (1969) ("the meaning which best reconciles the texts, having regard to the object and purpose of the treaty"). The drafters of the A.L.I. Restatement of Foreign Relations Law of the United States (Revised) have incorporated the language of Article 33 in their Comments. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 325 comment g. (Tent. Draft No. 6 — Vol. 2, 1985).

<sup>18</sup> A similar problem occurs in domestic U.S. law when a single contract of sale covers both personal and real property. See, e.g., *Dehahn v. Innes*, 356 A.2d 711 (Me. 1976) (U.C.C. statute of frauds applied to agreement for sale of both real



The general case in favor of adopting the 1980 U.N. Sales Convention also supports extending its provisions to sales of aircraft.<sup>19</sup> As has been argued elsewhere, the convention is modest in scope “[b]ut if traders cannot agree on the applicable law, the convention will be a readily available compromise which is an improvement on the uncertainty of conflict-of-laws rules and the difficulty of proving foreign law.”<sup>20</sup> Manufacturer and Aerolineas will probably find the convention’s rules more acceptable than the rules of many domestic sales laws, including the Uniform Commercial Code, because the convention has been drafted specifically for international sales transactions. Not that Manufacturer and Aerolineas would necessarily be locked into the convention: its rules are supplementary in nature and the parties have virtually unlimited freedom to contract out of some or all of the convention’s rules if they so choose.<sup>21</sup> Moreover, the provisions of other international agreements which deal more specifically with the sale of aircraft will take precedence over the convention.<sup>22</sup> Fear that the convention may resolve issues of particular concern to sellers and buyers of aircraft without consideration of the special problems of the aviation industry, such as encouragement of innovation, is allayed to some extent by the specific exclusion of certain issues. In particular, the Convention excludes claims of liability for death or personal injury caused by defects in the goods

---

and personal property where real estate sold represented only small percentage of total price). Query whether a court or arbitrator faced with this problem in a transnational sale would apply the U.N. Sales Convention either by analogy or in cases when the preponderant part of the property sold involves goods covered by the convention.

<sup>19</sup> For a collection of statements in support of the convention, see *Symposium on International Sale of Goods Convention*, 18 INT’L LAW. 1 (1984).

<sup>20</sup> Winship, *supra* note 15, § 1.04, at 1-50.

<sup>21</sup> Article 6 of the U.N. Sales Convention states: “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.” (Article 12 authorizes a state to declare that it will not be bound by the convention’s article rejecting the need for a sales contract to be in writing.) For an analysis of this article, see Winship, *supra* note 15, § 1.02[5], at 1-32.

<sup>22</sup> U.N. Sales Convention, Art. 90. For an analysis of this article, see Winship, *supra* note 15, § 1.03[3], at 1-41.

sold.<sup>23</sup>

Despite these arguments, existing uniform sales conventions do not cover contracts for the sale of aircraft. It becomes all the more desirable, therefore, to have uniform choice-of-law rules to determine what national law governs the rights and obligations of sellers and buyers of aircraft. Unfortunately, the principal relevant convention also excludes sales of aircraft from its coverage. The 1955 Convention on the Law Applicable to International Sales of Goods, prepared by the Hague Conference on Private International Law, provides that it "shall not apply to sales . . . of registered . . . aircraft."<sup>24</sup> In 1980, however, the Hague Conference appointed a Special Commission to prepare a revision of the convention to be submitted to a Special Session of the Conference in October, 1985.<sup>25</sup>

The Hague Conference's Special Commission does not write on a clean slate, for the Hague Conference has already reconsidered the scope of the 1955 convention when in 1980 it approved special rules on the law applicable to consumer sales. These special rules omit a reference to contracts for the sale of aircraft in the exclusion clause, thereby intending to make the convention applicable to sales of aircraft.<sup>26</sup> The Explanatory Report for the 1980 rules calls attention to this change and notes that the change is intentional:

No persuasive reason was advanced for excluding contracts [for the sale of registered aircraft] from the Hague Articles. Accordingly, one buying a small boat or plane for a sporting use benefits from the choice-of-law rules

---

<sup>23</sup> U.N. Sales Convention, Arts. 4-5. For an analysis of these articles, see Winship, *supra* note 15, § 1.02[6], at 1-36.

<sup>24</sup> Convention on the Law Applicable to International Sales of Goods, Art. 1, para. 2, 510 U.N.T.S. 149 (1964). The convention came into force in 1964. The following states are parties: Belgium, Denmark, Finland, France, Italy, Niger, Norway, Sweden, and Switzerland. There has been little published commentary on the convention in the United States. See Nadelmann, *The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglia*, 74 YALE L.J. 449 (1965).

<sup>25</sup> Hague Conference on Private International Law, I (Actes et Documents de la Quatorzieme Session I-64 (1982)).

<sup>26</sup> *Id.* at II-178.

contained in the Articles. Suggestions that the Articles' applicability should turn on 'tonnage' or other criteria relating to size and the like were rejected as unduly complicated and unnecessary in view of the scope limitations that result from articles 2 and 3 [defining *consumer*].<sup>27</sup>

Despite this earlier official decision, the Special Commission divided at first on whether to include contracts for the sale of aircraft within the revised text of the 1955 convention.<sup>28</sup> The final draft to be presented to the 1985 conference, however, purports to include these sales within the scope of the convention by simply not mentioning aircraft in the exclusion clause.<sup>29</sup> The Report of the Special Commission provides a detailed statement of the Commission's consideration of this point:

In the preliminary draft, the provision that became article 2 included the following: "[sales of ships, boats, hovercraft and aircraft, [when they have been registered]]". The use of both brackets and internal brackets reflected the extent of the disagreement as to the proper solution. The November 1983 meeting accepted the Norwegian Delegation's proposal that the quoted language be deleted in its entirety. In support it was argued that sales contracts for small boats and pleasure craft are not regulated by special substantive rules and hence do not require a special choice of law regime. Nor do larger vessels — which are typically ultimately registered — attract special rules, at least as between the seller and buyer. (Registration was said to be largely significant for title and rights of third parties, matters which are beyond the Convention's scope.) The principal argument advanced in favour of the language was that of harmony with Article 2(e) of the Vienna Convention. (Had this argument been accepted, only the language in the internal brackets would have been deleted.)<sup>30</sup>

---

<sup>27</sup> *Id.* at II-192.

<sup>28</sup> Conclusions of the Special Commission of December, 1982, Art. C. para. 1 (Prel. Doc. No. 2, Feb. 1983) (the reference to sales of aircraft is bracketed in Article C). *See also, id.* at 21.

<sup>29</sup> Draft Convention on the Law Applicable to Contracts for the International Sale of Goods adopted by the Special Commission on 18 November 1983 at 11 (Prel. Doc. No. 4, Aug. 1984).

<sup>30</sup> *Id.* at 40, para. 27.

Although the Special Commission's intention is clear, it is not so clear that the Commission's objective is realized by merely omitting a reference to aircraft in the exclusion clause. As was noted above, some jurisdictions have difficulty characterizing ships and aircraft. If a forum characterizes them as immovables, then the revised convention, which applies only to movable personal property, would not apply to the immovables in any case brought before that forum. Recognizing this difficulty, the U.S. Observations on the Draft Convention recommends the addition of a specific provision stating that the convention includes "ships, boats, hovercraft, and aircraft."<sup>31</sup>

If it is determined that the proposed revision of the 1955 Convention does cover contracts for the sale of aircraft then the law applicable to a contract of sale, in the absence of a valid choice of law by the parties, will usually be "the law of the State where the seller has his place of business at the time of conclusion of the contract."<sup>32</sup> This basic rule is derived from the notion current in European contract choice-of-law thinking that the applicable law should be determined by looking to the domicile of the

---

<sup>31</sup> U.S. Observations on the Draft Convention on the Law Applicable to Contracts for the International Sale of Goods, para. 9 (May, 1985).

<sup>32</sup> *Id.*, Art. 8. The text of this article provides:

(1) To the extent that the law applicable to a contract of sale has not been chosen in accordance with Article 7, the contract is governed by the law of the State where the seller has his place of business at the time of conclusion of the contract.

(2) However, the contract of sale is governed by the law of the State where the buyer at the time of conclusion of the contract has his place of business, if —

a) the seller or his representative was in that State conducting the main part of the negotiations, and the buyer there took the steps necessary on his part for the conclusion of the contract; or

b) the contract was concluded on terms determined mainly by the buyer and in response to an invitation directed by the buyer to persons invited to bid (a call for tenders).

(3) Where, in the light of the circumstances as a whole, for instance any business relations between parties, the contract is manifestly more closely connected with a law which is not the law which would otherwise be applicable to the contract under this Article, the contract is governed by that other law.

*See also* Article 3 of the 1955 convention.

party obliged to carry out the "characteristic performance" of the contract.<sup>33</sup> In the case of the contract of sale, performance by the seller is the distinguishing characteristic and therefore the law of the State where the seller has his place of business is the applicable law. An exception to this basic rule is provided where the contract is "manifestly more closely connected" with the law of another State, in which case that State's law is then the applicable law.<sup>34</sup> The proposed exception is a concession to Anglo-American doctrine: i.e., the English concept of "the proper law" of a contract and the U.S. concepts of "closest connection" or "interest analysis".

If the 1985 Special Session of the Hague Conference adopts the proposed revision of the 1955 convention and numerous nations subsequently become parties to the new convention, we would have an answer to our original question: California law, including U.C.C. Article 2 as adopted in California, will govern most issues<sup>35</sup> Manufacturer or Aerolneas might raise in connection with the

---

<sup>33</sup> For an excellent review of current European and Anglo-American contract choice-of-law doctrine, see Pelichet, Report on the Law Applicable to International Sales of Goods 93-159 (Prel. Doc. No. 1, Sept. 1982). (The concept is now embodied in Article 4(2) of the E.E.C. Convention on the Law Applicable to Contractual Obligations, *opened for signature* June 19, 1980, 23 O.J. EVR. COMM. (No. L 266) 1 (1980)). (*Official Journal* No. L266, Oct. 9, 1980).

<sup>34</sup> See *supra* note 32 and accompanying text.

<sup>35</sup> The proposed revision, *supra* note 29, includes the following list of issues which would be governed by the law applicable under the convention:

Article 12

The law applicable to a contract of sale by virtue of Articles 7, 8 or 9 governs in particular —

- a) interpretation of the contract;
- b) the obligations of the parties and performance of the contract;
- c) the time at which the buyer becomes entitled to the products, fruits, and income deriving from the goods;
- d) the time from which the buyer bears the risk with respect to the goods;
- e) the validity and effect as between the parties of clauses reserving title to the goods;
- f) [the consequences of non-performance of the contract, including the categories of loss for which compensation may be recovered and the assessment of damages; however, a court is not bound to enter a judgment for specific performance [or punitive damages] unless it would do so under its own law in a similar case, or to apply the law

sales transaction.<sup>36</sup> But the likelihood that the revised convention will be widely accepted in the near future is not high. Few nations have rushed to adopt existing private international law conventions dealing with general commercial transactions.<sup>37</sup> Perhaps if the 1980 U.N. sales convention is as successful as its proponents hope,<sup>38</sup> other sales-related conventions will become more popular.<sup>39</sup>

- 
- applicable to the contract to the assessment of damages to the extent that a question forms part of its procedural law;]
  - g) the various ways of extinguishing obligations, as well as prescription and limitation of actions;
  - h) the consequences of nullity of the contract.

The text also authorizes a nation to make a reservation with respect to subparagraph g. *Id.* at Art. 19(1)(d).

<sup>36</sup> The latest proposed text, *supra* note 29, includes the following bracketed provision applicable when a federal system is involved:

Article 17

[For the purpose of identifying the law applicable under this Convention, where a State comprises several territorial units each of which has its own rules of law in respect of contracts of sale —

- a) any reference to the law of that State is to be construed as referring to the law in force in such a territorial unit; and
- b) any reference to the law of the State where a party has his place of business is to be construed as referring to the law in force in the territorial unit where the party has his place of business.]

The brackets indicate that the Special Commission could not agree on the text.

Compare the result under the proposed revision of the 1955 Convention with the result under section 1-105 of the Uniform Commercial Code. *See supra* note 2. Both the convention and the Code will usually give effect to the parties' choice of the applicable law. When there is no choice by the parties, however, the language of section 1-105(1) appears to require a U.S. forum to apply the Code if the transaction has an "appropriate relation" to the forum. This language is now usually read, at least for domestic U.S. transactions, as requiring the forum to apply the law of the jurisdiction which has the preponderance of contacts with the transaction. *See Dore, Choice of Law Under the International Sales Convention: A U.S. Perspective*, 77 AM. J. INT'L L. 521, 527-29 (1983); RESTATEMENT (SECOND) OF CONFLICTS OF LAW §§ 6, 186-88, 191 (1969) (§ 191 refers to the law of the state where the seller is to deliver in absence of valid choice of applicable law unless another state has a more significant relation). In the hypothetical Manufacturer-Aerolines case, presumably California law would be applicable.

<sup>37</sup> For lists of the limited number of countries which have become parties to the 1964 uniform sales laws and the 1955 choice-of-law convention, see *supra* notes 8 & 24.

<sup>38</sup> For a review of the present status of the 1980 U.N. Sales Convention, see Winship, *The Present Status of the 1980 U.N. Sales Convention*, (in WORLD TRADE AND TRADE FINANCE ch. 10 (J. Norton ed. 1984)).

<sup>39</sup> In addition to the international sales conventions already mentioned in this comment, one should mention the 1983 Convention on Agency in the International Sale of Goods, drafts of which were prepared under the auspices of

For sellers and buyers of aircraft, of course, the 1980 convention provides no solution, but if the convention stimulates interest in international treaties then related conventions which do cover sales of aircraft may be successful.

One might argue, of course, that it matters very little to transnational sellers and buyers of aircraft whether these international conventions are successful. Manufacturer and Aerolneas are sophisticated parties. Given the value of an airplane and the detailed governmental regulation of aircraft operations, the parties will have considerable incentive to have detailed contract documents. Drafting a choice-of-law clause will not be difficult because these clauses have become boilerplate. One has to remember, however, that not all transnational sales of aircraft involve sophisticated parties or expensive, technically-advanced equipment. If world trade continues to grow, resulting in more sales transactions between less sophisticated sellers and buyers, widely-adopted international sales conventions, whether these conventions embody uniform sales rules or merely choice-of-law rules, will be of increasing value in the resolution of sales disputes.

---

UNIDROIT. The Acts and Proceedings of the Conference are published in I-II UNIFORM L. REV. 1-431 (1983). For commentary, see Bonell, *The 1983 Geneva Convention on Agency in the International Sale of Goods*, 32 AM. J. COMP. L. 717 (1984).