

Chapter 1

INTRODUCTION

A. CONTRACTS IN A GLOBALIZED ECONOMY

A few generations ago, many U.S. lawyers took as their basic frame of reference the law of the state in which their firm (and, perhaps, most of their clients) were located. Such a perspective is no longer practical. Given the constant movement of persons, goods and services across state boundaries, lawyers must take into account laws of states other than their own, as well as the body of federal law which has grown since the New Deal. One obvious result of the transition of the U.S. economy into a truly interstate, national market was the emergence and adoption of the Uniform Commercial Code (UCC)—state-based commercial legislation that has encouraged uniform or harmonized approaches to legal issues involving contracts for the sale of goods.

The national economy has continued to be dynamic, however, and the growing movement of persons, goods and services across *national* boundaries in an increasingly *global* economy requires lawyers to be aware of the laws of other nations and of emerging international sources of law. This development has immense practical consequences. Think about the products and services that you purchased in, say, the six months prior to your arrival at law school. How many of these came from outside the United States? (And how many of the goods and services made in the United States are also sold outside the United States?)

If there is a contract dispute between the purchaser and seller of any of these goods or services, could the lawyers representing them provide competent advice without being familiar with the *Convention on Contracts for the International Sale of Goods*

(CISG)?¹ Could the lawyers for a small U.S. company selling goods in Europe provide competent representation if they are unfamiliar with applicable contracts and commercial law in the European Union? If there is a dispute involving these goods or services, can the lawyers represent their clients adequately if they are unfamiliar with the available remedies in the non-U.S. jurisdictions in which the goods or services have been marketed?

Similar questions arise in other basic areas of the law that comprise the typical first-year law school curriculum. In a world in which the economy is increasingly global, future lawyers must think globally—and they should begin by being taught to understand a global frame of reference.

Globalizing the Contracts course involves a different situation from most other subject matter areas in a law school core curriculum. The corpus of U.S. contract law *already* includes basic, globalizing federal law, *i.e.*, the CISG, negotiated by the United Nations Commission for International Trade Law (UNCITRAL). It was ratified by the United States in 1986 and entered into force as to the United States in 1988. As one writer has described the situation, “The United States has two laws of contracts: a state law of contracts, represented by the UCC, and a ‘federal’ law of contracts, the CISG.”² As we shall see in *Asante Technologies*, the CISG is automatically applicable to contracts for the sale of goods between parties located in two CISG states unless the parties agree otherwise. Because the CISG might well intrude in a contract through inadvertence or ignorance of counsel, minimum knowledge of the convention’s potential applicability becomes an issue of basic professional competence.³ Hence, the basic question is not *whether* globalized issues should be included in a Contracts course, but *to what extent* should they be explored.

Beyond the CISG, which is binding U.S. law for the transnational contracts to which it applies, contract law rules of individual jurisdictions other than the U.S. states may be useful sources of comparative study and analysis. In this regard, potential sources of pertinent contract law principles in the comparative context include the PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, a product of the Institute for the Unification of Private Law (commonly known

1. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/CONF.97/18 (codified at 15 U.S.C. App.), *reprinted in* 19 INT’L LEG. MATERIALS 668 (1980).

2. Larry A. DiMatteo, *The CISG and the Presumption of Enforceability*, 22 YALE J. INT’L L. 111, 156 (1997).

3. See, e.g., Ronald A. Brand, *Professional Responsibility in a Transnational Transactions Practice*, 17 J.L. & COM. 301, 336 (1998) (“If . . . the lawyer determines that the [CISG] applies to the transaction, he or she then has a duty to understand fully the rules of the Convention and the application of those rules to the transaction in question”).

by its French acronym UNIDROIT), and the PRINCIPLES OF EUROPEAN CONTRACT LAW prepared by the Commission on European Contract Law. These sources will be examined in subsequent chapters of this book.

Notes

1–1. *Identifying the “Law of Contracts.”* We are used to finding the law of contracts in reported case decisions and in statutes like the Uniform Commercial Code. Another source, not directly binding on courts,⁴ is of course the RESTATEMENT OF THE LAW OF CONTRACTS (2d), approved in 1981 by the American Law Institute, a scholarly organization of practitioners, judges, and professors. In its attempt to summarize or “restate” the U.S. common law of contracts, for the most part the Restatement follows the specific rules endorsed by the common law of the majority of states within the United States, and occasionally in a minority jurisdiction if a particular minority rule seems better on the merits, or more logical or consistent with other rules. It tends to be very influential as a short-hand expression of current trends in common law, and courts and commentators regularly refer to it for insights as to the state of the law.⁵ In international commercial practice, another important source of law is the CISG.

1–2. *Contrasting the Restatement and the CISG.* As of 1 January 1988, the CISG applies in many situations to the sale of goods between a U.S. national and a national of any other nation state that is a signatory of the CISG. Unlike the Restatement, however, the CISG is *binding federal law* applicable to international transactions that fall within its scope.⁶ As one commentator has emphasized, “the [CISG] is not merely a form of restatement of (international) contract law, nor is it simply a ‘model law’ which would be subject to modification by contracting states to address local concerns; rather . . . CISG applies of its own force to all proposed contractual relationships that satisfy its ‘internationality’ requirements.”⁷ The CISG does not simply “reflect” or “restate” contract law; it is *part of the contract law* of every state in the United States.

1–3. *Comparing the Restatement and the UNIDROIT PRINCIPLES.* An international equivalent of the Restatement is actually the UNI-

4. See, e.g., *Brewer v. Erwin*, 287 Or. 435, 600 P.2d 398, 410 n.12 (1979) (comparing statutes and restatement provisions as authority).

5. For discussion and analysis of the RESTATEMENT (2d), see *Symposium*, 81 COLUM. L. REV. 1 (1981); 67 CORNELL L. REV. 631 (1982).

6. CISG, art. 1, para. (1). For a useful discussion of the alternative bases

for applicability of the CISG, see Louis F. Del Duca and Patrick Del Duca, *Selected Topics Under the Convention on International Sale of Goods*, 106 DICK. L. REV. 205, 207–218 (2001).

7. Michael P. Van Alstine, *Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law*, 37 VA. J. INT’L L. 1, 9 (1996) (footnotes omitted).

DROIT PRINCIPLES,⁸ first issued in 1994 and republished with slight revisions in 2004.⁹ Like the Restatement, the UNIDROIT PRINCIPLES are not legally binding; rather, they reflect commonly accepted rules of contract law. Unlike the Restatement, however, the PRINCIPLES do *not* draw on a single body of contract law—like, for example, the generally accepted rules of U.S. common law of contracts—but are derived from a wide range of sources, sometimes antithetical, and attempt to construct a single, unified body of principles.¹⁰ Hence, there is a certain abstracted or generalized quality to the PRINCIPLES that is not characteristic of either the Restatement or the CISG.¹¹

B. STATUS AND SCOPE OF THE CISG

Under Article I of the CISG, two basic jurisdictional questions arise: (i) an “internationality” requirement that the parties to the contract are located in different nation states that are parties to the convention; and, (ii) the substantive requirement that the contract involve a sale of “goods.” The following case focuses on the internationality requirement. The substantive requirement will be examined in some of the notes following this case.

ASANTE TECHNOLOGIES, INC. v. PMC-SIERRA, INC.

164 F.Supp.2d 1142 (N.D.Cal. 2001).

WARE, DISTRICT JUDGE.

[Asante, a manufacturer of computer-network switchers, sued PMS-Sierra, a supplier of application-specific integrated circuits (“ASICs”), in state court, alleging breach of contract and express

8. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2004).

9. For discussion of the 1994 version of the UNIDROIT PRINCIPLES, see M. BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW (2d ed. 1997); Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 *FORDHAM L. REV.* 281 (1994); *Symposium*, 69 *TULANE L. REV.* 1121 (1995). For discussion of the current version of the UNIDROIT PRINCIPLES, see M. BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW (3d ed. 2004) (hereinafter “BONELL 2004”).

10. UNIDROIT PRINCIPLES 2004, *supra* at xv (“For the most part the UNI-

DROIT PRINCIPLES reflect concepts to be found in many, if not all, legal systems. . . . [T]hey also embody what are perceived to be the best solutions, even if still not yet generally adopted.”).

11. *Cf.* COMMISSION ON EUROPEAN CONTRACT LAW, THE PRINCIPLES OF EUROPEAN CONTRACT LAW (2003) (setting forth general contract rules to be applied within European Union). For comparative analysis of the UNIDROIT PRINCIPLES and the European PRINCIPLES, see BONELL 2004 at 335–359. For an insightful comparison of the UCC and the European PRINCIPLES, see Ole Lando, *Salient Features of The Principles of European Contract Law: A Comparison with the UCC*, 13 *PACE INT’L L. REV.* 339 (2001).

warranties. PMS–Sierra removed the action to federal court.^a On Asante’s motion to remand to state court, the District Court had to consider whether the CISG applied to the contract, thus raising a federal question that would keep the case in federal court.]

Plaintiff is a Delaware corporation having its primary place of business in Santa Clara County, California. . . . Plaintiff purchases [ASICs], which are considered the control center of its network switchers, from Defendant.

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

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

. . . Defendant asserts that . . . documents upon which Plaintiff relies emanated from Defendant’s office in British Columbia. . . . It is furthermore undisputed that the Prototype Product Limited Warranty Agreements relating to some or all of Plaintiff’s purchases were executed with Defendant’s British Columbia facility. . . .

Defendant does not deny that Plaintiff maintained extensive contacts with Defendant’s facilities in Portland Oregon during the

a. A defendant is permitted to remove to federal court any civil action brought in a state court that originally could have been filed in federal court. 28 U.S.C. § 1441(a). When a case originally

filed in state court contains separate and independent federal and state law claims, as PMC–Sierra claimed in this case, the entire case may be removed to federal court. *Id.* § 1441(c).—Eds.

“development and engineering” of the ASICs. . . . These contacts included daily email and telephone correspondence and frequent in-person collaborations between Plaintiff’s engineers and Defendant’s engineers in Portland. . . .

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

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

A. FEDERAL JURISDICTION ATTACHES TO CLAIMS GOVERNED BY THE CISG

Although the general federal question statute, 28 U.S.C. § 1331(a), gives district courts original jurisdiction over every civil action that “arises under the . . . treaties of the United States,” an individual may only enforce a treaty’s provisions when the treaty is self-executing, that is, when it expressly or impliedly creates a private right of action. The parties do not dispute that the CISG properly creates a private right of action. *See Delchi Carrier v. Rotorex Corp.*, 71 F.3d 1024, 1027–28 (2d Cir.1995); *Filanto, S.p.A. v. Chilewich Int’l Corp.*, 789 F.Supp. 1229, 1237 (S.D.N.Y.1992). . . .

Therefore, if the CISG properly applies to this action, federal jurisdiction exists.¹²

B. THE CONTRACT IN QUESTION IS BETWEEN PARTIES
FROM TWO DIFFERENT CONTRACTING STATES

The CISG only applies when a contract is “between parties whose places of business are in different States.”¹³ 15 U.S.C.App., Art. 1(1)(a). If this requirement is not satisfied, Defendant cannot claim jurisdiction under the CISG. It is undisputed that Plaintiff’s place of business is Santa Clara County, California, U.S.A. It is further undisputed that during the relevant time period, Defendant’s corporate headquarters, inside sales and marketing office, public relations department, principal warehouse, and most of its design and engineering functions were located in Burnaby, British Columbia, Canada. However, Plaintiff contends that, pursuant to Article 10 of the CISG, Defendant’s “place of business” having the closest relationship to the contract at issue is the United States.¹⁴

The Complaint asserts *inter alia* two claims for breach of contract and a claim for breach of express warranty based on the failure of the delivered ASICs to conform to the agreed upon technical specifications. In support of these claims, Plaintiff relies on multiple representations allegedly made by Defendant regarding the technical specifications of the ASICS products at issue. . . . It appears undisputed that each of these alleged representations regarding the technical specifications of the product was issued from Defendant’s headquarters in British Columbia, Canada. . . .

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

Plaintiff has failed to persuade the Court that Unique acted as the agent of Defendant. Plaintiff provides no legal support for this

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

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

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

For the purposes of this Convention:

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

proposition. To the contrary, a distributor of goods for resale is normally not treated as an agent of the manufacturer. Restatement of the Law of Agency, 2d § 14J (1957) (“One who receives goods from another for resale to a third person is not thereby the other’s agent in the transaction.”) . . . Plaintiff’s dealings with Unique do not establish Defendant’s place of business in the United States.

Plaintiff’s claims concern breaches of representations made by Defendant from Canada. Moreover, the products in question are manufactured in Canada, and Plaintiff knew that Defendant was Canadian, having sent one purchase order directly to Defendant in Canada by fax . . . Moreover, Plaintiff directly corresponded with Defendant at Defendant’s Canadian address . . . In contrast, Plaintiff has not identified any specific representation or correspondence emanating from Defendant’s Oregon branch. For these reasons, the Court finds that Defendant’s place of business that has the closest relationship to the contract and its performance is British Columbia, Canada. Consequently, the contract at issue in this litigation is between parties from two different Contracting States, Canada and the United States. This contract therefore implicates the CISG.

C. THE EFFECT OF THE CHOICE OF LAW CLAUSES

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

Although selection of a particular choice of law, such as “the California Commercial Code” or the “Uniform Commercial Code” *could* amount to implied exclusion of the CISG, the choice of law clauses at issue here do not evince a clear intent to opt out of the CISG. For example, Defendant’s choice of applicable law adopts the

¹⁵ Plaintiff’s Terms and Conditions provides “APPLICABLE LAW. The validity [and] performance of this [purchase] order shall be governed by the laws of the state shown on Buyer’s address on this order.” . . . The buyer’s address as shown on each of the Purchase Orders is San Jose, California . . .

Defendant’s Terms and Conditions provides “APPLICABLE LAW: The con-

tract between the parties is made, governed by, and shall be construed in accordance with the laws of the Province of British Columbia and the laws of Canada applicable therein, which shall be deemed to be the proper law hereof. . . . ” . . . It is undisputed that British Columbia has adopted the CISG.

law of British Columbia, and it is undisputed that the CISG *is* the law of British Columbia. (International Sale of Goods Act ch. 236, 1996 S.B.C. 1 *et seq.* (B.C.)) Furthermore, even Plaintiff's choice of applicable law generally adopts the "laws of" the State of California, and California is bound by the Supremacy Clause to the treaties of the United States. U.S. Const. art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.") Thus, under general California law, the CISG is applicable to contracts where the contracting parties are from different countries that have adopted the CISG. In the absence of clear language indicating that both contracting parties intended to opt out of the CISG, and in view of Defendant's Terms and Conditions which would apply the CISG, the Court rejects Plaintiff's contention that the choice of law provisions preclude the applicability of the CISG.

D. FEDERAL JURISDICTION BASED UPON THE CISG DOES
NOT VIOLATE THE WELL-PLEADED COMPLAINT RULE

[The court also rejected Asante's argument that removal was improper because of the "well-pleaded complaint" rule. This rule states that a cause of action arises under federal law only if a plaintiff's well-pleaded complaint raised issues of federal law. While the complaint did not refer to the CISG, PMC-Sierra argued that the preemptive force of the CISG converted the state breach of contract claim into a federal claim. The court concluded that "the expressly stated goal of developing uniform international contract law to promote international trade indicates the intent of the parties to the treaty to have the treaty preempt state law causes of action."]

Notes

1-4. If both Asante and PMC-Sierra are Delaware corporations, how could the "internationality" requirement of CISG Article I have been satisfied?

1-5. Compare CISG Article 10 (quoted in *Asante*) with the following provision from the UCC:

§ 1-105. Territorial Application of the Act; Parties' Power to Choose Applicable Law.

(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. . . .

Would it have made any difference to the outcome in *Asante* if the court had applied UCC § 1-105 instead of CISG Article 10?

1-6. It seems that both the UCC and the CISG would allow parties to agree as to the law to be applied to their contract. If *Asante* chose the law of California, and PMC-Sierra chose the law of British Columbia, why does *neither* choice remove the contract from the application of the CISG? See *BP Oil International, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333 (5th Cir. 2003) (holding that CISG applied to contract with clause choosing Ecuadorian law, because parties were located in signatory countries, contract did not explicitly opt out of CISG coverage, and CISG was Ecuadorian law). What would the contract have to say to remove it from the CISG?

1-7. By its own terms, UCC § 1-105 seems to apply to the contract and the resulting dispute. How is it possible that the court replaces otherwise applicable UCC provisions with the corresponding provisions of the CISG? As you may discuss at greater length in your Constitutional Law course, this is possible—indeed, legally required—by a principle known as federal preemption of state law. This is based on the U.S. Constitution, art. VI, cl. 2, which states that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all Treaties made, or which shall be made, under the Authority of the United States*, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” (Emphasis added.) Thus, because an applicable treaty is part of the “supreme law of the land,” state law has no legal effect contrary or inconsistent with the provisions of the treaty.¹⁶ In another portion of its opinion, *Asante* applies preemption as follows:

In the case of federal statutes, “[t]he question of whether a certain action is preempted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone.” *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987) (internal quotations and citations omitted). Transferring this analysis to the question of preemption by a treaty, the Court focuses on the intent of the treaty’s contracting parties. See *Husmann v. Trans World Airlines, Inc.*, 169 F.3d 1151, 1153 (8th Cir.1999) (finding Warsaw Convention preempts state law personal injury claim); *Jack v. Trans World Airlines, Inc.*, 820 F.Supp. 1218, 1220 (N.D.Cal.1993) (finding removal proper because Warsaw Convention preempts state law causes of action).

In the case of the CISG treaty, this intent can be discerned from the introductory text, which states that “the adoption of

¹⁶ For a thorough historical analysis of the preemption principle in the courts, see Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967 (2002).

uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.” 15 U.S.C.App. at 53. The CISG further recognizes the importance of “the development of international trade on the basis of equality and mutual benefit.” *Id.* These objectives are reiterated in the President’s Letter of Transmittal of the CISG to the Senate as well as the Secretary of State’s Letter of Submittal of the CISG to the President. *Id.* at 70–72. The Secretary of State, George P. Shultz, noted:

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

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

The availability of independent state contract law causes of action would frustrate the goals of uniformity and certainty embraced by the CISG. Allowing such avenues for potential liability would subject contracting parties to different states’ laws and the very same ambiguities regarding international contracts that the CISG was designed to avoid. As a consequence, parties to international contracts would be unable to predict the applicable law, and the fundamental purpose of the CISG would be undermined. Based on very similar rationale, courts have concluded that the Warsaw Convention preempts state law causes of action. . . . The conclusion that the CISG preempts state law also comports with the view of academic commentators on the subject. *See* William S. Dodge, *Teaching the CISG in Contracts*, 50 *J. Legal Educ.* 72, 72 (March 2000) (“As a treaty the CISG is federal law, which preempts state common law and the UCC.”); David Frisch, *Commercial Common Law, The United Nations Convention on the International Sale of Goods, and the Inertia of Habit*, 74 *Tul. L.Rev.* 495, 503–04 (1999) (“Since the CISG has the preemptive force of federal law, it will preempt article 2 when applicable.”).

Asante Technologies, Inc., 164 F.Supp.2d at 1150–1153.

1–8. The CISG applies to contracts for the sale of goods. Would it apply to a contract calling for delivery of goods and performance of services? Consider the following situation. Genpharm Inc., a Canadian pharmaceutical manufacturer, entered into a contract with Pliva–Lachema A.S., a Croatian supplier of warfarin sodium, under which Pliva–Lachema was to supply warfarin sodium to be used by Genpharm in an anticoagulant drug to be sold in United States. Genpharm was beginning the preliminary development work necessary to prepare and submit an Abbreviated New Drug Application (ANDA) to the Federal Drug Administration (FDA) for generic warfarin sodium tablets. As part of this effort, Genpharm needed a supplier to provide the drug and to assist it in obtaining ANDA approval from the FDA. (Among other things, Pliva–Lachema would provide information to the FDA about its equipment, manufacturing steps, raw materials, laboratory controls, and facilities and agreed to allow Genpharm to act as sole distributor of Pliva–Lachema warfarin in the United States, Canada, and other designated countries.) Is this a contract for the sale of goods for purposes of the CISG, or a goods-and-services agreement not covered by the convention? In *Genpharm Inc. v. Pliva–Lachema A.S.*, 361 F.Supp.2d 49 (E.D.N.Y. 2005), the district court held that it had subject matter jurisdiction under the CISG with respect to a contract dispute between the parties. In reaching this conclusion, the court relied on CISG Article 3, which states:

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

1–9. Would Genpharm have entered into a contract for the purchase of warfarin sodium from Pliva–Lachema if the seller had *not* also agreed to send a “Letter of Access” to the FDA, authorize the FDA to refer to its explanation of its operations and facilities in support of Genpharm’s FDA filing, and provide advance notice to both Genpharm and the FDA of any change in its manufacturing site? If not, does this mean that the Genpharm/Pliva–Lachema contract is *not* a contract for the sale of goods, but something else?

1–10. Being a contract for the sale of goods is essential for a contract to be covered by the CISG—as it is for coverage by the UCC. Consider how the *Genpharm* court uses the UCC in deciding whether the contract is covered by the CISG:

This result [holding that the contract was for goods under the CISG] would also be appropriate if analyzed under the UCC. The Second Circuit has recognized that “[c]aselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code (‘UCC’), may also inform a court where the language of the

relevant CISG provisions tracks that of the UCC. However, UCC caselaw ‘is not per se applicable.’” *Delchi Carrier*, 71 F.3d at 1028 (quoting *Orbisphere Corp. v. United States*, 726 F.Supp. 1344, 1355 (Ct. Int’l Trade 1989)).

Here, the Court finds that caselaw interpreting contract formation under Article 2 of the UCC is helpful. Courts look to the “essence” or main objective of the agreement when deciding whether an agreement is a contract for the sale of goods covered by the UCC. *Medinol Ltd. v. Boston Scientific Corp.*, 346 F.Supp.2d 575, 593 (S.D.N.Y.2004). “If the provision of services or rendition of other performance predominates and is not merely incidental or collateral to the sale of goods, then the contract will not be subject to” the UCC. *Dynamics Corp. of America v. International Harvester Co.*, 429 F.Supp. 341, 346 (S.D.N.Y.1977); see also *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737 (2d Cir.1979); *Cary Oil Co. v. MG Ref. & Mktg., Inc.*, 90 F.Supp.2d 401 (S.D.N.Y. 2000).

There can be no question that the instant dispute involves an agreement to supply goods. Indeed, it is clear that the only reason Genpharm and the Defendants had any relationship at all was for the international sale of warfarin, which is undeniably a “good.” In addition, it makes no difference whether the agreements may or may not contain price or quantity. The CISG expressly provides that it “governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such contract.” CISG, art 4. The applicability of the CISG is not restricted to contracts after formation or contracts containing definite prices or quantities. Therefore, this dispute falls within this Court’s treaty jurisdiction, and this Court’s subject matter jurisdiction. . . .

Genpharm Inc., 361 F.Supp.2d at 55.

1–11. In the course of its analysis, the *Genpharm* court referred to CISG art. 7(1)-(2), which states:

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

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

How does this provision compare with the following provision of the UCC?

§ 1–102. Purposes; Rules of Construction; Variation by Agreement.

- (1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
- (2) Underlying purposes and policies of this Act are
 - (a) to simplify, clarify and modernize the law governing commercial transactions;
 - (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
 - (c) to make uniform the law among the various jurisdictions.

Could the court have decided that the Genpharm/Pliva–Lachema agreement was governed by the UCC? Would it make any difference to your answer if the agreement had contained a provision stating that “[t]he parties agree that this contract shall be subject to the UCC”? If Genpharm and Pliva–Lachema had been *U.S.* companies and entered into the agreement described in note 1–8, *supra*, would the UCC have applied to the agreement? What if these two *U.S.* companies had agreed “that this agreement shall be subject to the laws of Canada”?

1–12. Articles 1–3 of the CISG provide:

Article 1

- (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
 - (a) when the States are Contracting States; or
 - (b) when the rules of private international law lead to the application of the law of a Contracting State.
- (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.
- (3) Neither the nationality of the parties or the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Article 2

This 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;
- (b) by auction;
- (c) on execution or otherwise by authority of law;

- (d) of stocks, shares, investment securities, negotiable instruments or money;
- (e) of ships, vessels, hovercraft or aircraft;
- (f) of electricity.

Article 3

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

What if Genpharm were a U.S. company and Pliva-Lachema were a French company? (Both France and the United States are signatories to the CISG.) Could the court have decided that the Genpharm/Pliva-Lachema agreement was governed by the UCC? Would it make any difference to your answer if the agreement had contained a provision stating that “[t]he parties agree that this contract shall be subject to the UCC”?

1–13. For a case with similar facts reaching the same conclusion as the *Genpharm* case, see *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*, 201 F.Supp.2d 236, 281 (S.D.N.Y.2002), *rev'd on other grounds*, 386 F.3d 485, 489 (2d Cir.2004) (involving contract for sale of clathrate, raw material used in production of warfarin). In *Geneva Pharms.*, the plaintiff alleged that a contract existed because it purchased research and development quantities of clathrate, invested a substantial amount of money in developing warfarin based on the defendants' raw material, and relied on a reference letter provided by the defendant-supplier in connection with the ANDA that it submitted to the FDA. The court not only applied the CISG but also determined that an implied contract existed between the parties. *Geneva Pharms.*, 201 F.Supp. 2d at 284.

1–14. Is the CISG a jurisdictional device, or a source of substantive law of the contract? The excerpts from *Asante*—and the *Genpharm* case as well—focus on the jurisdictional implications, but as the materials in the following chapters will demonstrate, the CISG also has application as the substantive law of the contract. In confronting CISG issues, however, U.S. courts sometimes seem to waffle on the issue of subject matter jurisdiction under the CISG. One such case is *Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB*, 23 F.Supp.2d 915 (N.D.Ill. 1998). In that case, Mitchell Aircraft brought suit against European Aircraft (EAS), a foreign seller of aircraft parts, for breach of contract and breach of warranty. As a preliminary matter, the court considered whether it had jurisdiction, based either on the diversity of the parties (a U.S. national and a Swedish national), or on federal question jurisdiction based on the applicability of the CISG. The court

seemed to become confused over the interplay of the parties' choice of applicable law and subject matter jurisdiction. The court determined that it had diversity jurisdiction under 28 U.S.C. § 1332(a)(2). If it was a diversity case, then was the substantive law governing the contract the law of Sweden, Illinois, or the CISG? However, as *Asante* suggests, if the CISG applies, does that mean that the court has *federal question* jurisdiction over the case under 28 U.S.C. § 1331? The court in effect ducked the issue in the following terms:

... [I]t is clear that this court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332. Thus, this court has jurisdiction over the case regardless of whether the CISG provides an independent basis for subject matter jurisdiction. The court's opinion would not change in any way if it found that its jurisdiction were based on the CISG. Thus, the court need not reach the issue of whether the CISG provides an independent basis for subject matter jurisdiction.

... [T]he CISG governs most of the issues in this case because the United States, where Mitchell has its place of business, and Sweden, where EAS has its place of business, are both States Party to the CISG. CISG art. I. . . .

Mitchell Aircraft Spares, Inc., 23 F.Supp.2d at 918. If the court is right in concluding that it has diversity jurisdiction over the case, why does it say that "the CISG governs most of the issues" in the case? In negotiating the contract, if Mitchell Aircraft had wanted its agreement to be subject to the Illinois version of the UCC, could it have done so?